



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISCELLANEOUS CIVIL APPLICATION NO. 113 OF 2019**

**MUTHOGA GATURU & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**WANYIRI KIHORO.....RESPONDENT**

**RULING**

**Brief facts**

1. The applicant has brought this application dated 5<sup>th</sup> November 2019 under paragraph 11 of the Advocates (Remuneration) Order 1962 seeking review of the court's directions issued on 10<sup>th</sup> March 2015 for the taxation of the Bill of Costs dated 4<sup>th</sup> July 2014 and also sought orders to set aside the ruling of the Deputy Registrar dated 7<sup>th</sup> August 2015.

**The Applicant's case**

2. The applicant states that the respondent filed a Bill of Costs dated 4<sup>th</sup> July 2014 against the applicant which emanated from the respondent's expenses for the taxation of a Bill of Costs dated 25<sup>th</sup> February 2014, which the applicant had mistakenly filed but later withdrew. Notably, the respondent had notified the applicant that he no longer had instructions from his client to proceed following determination of Judicial Review No. 7 of 2012. All the same, the respondent proceeded to file his own bill of costs.

3. The applicant affirms that he filed ground of opposition and submissions on the bill of costs but the court ordered the bill be taxed which was done and a certificate of costs issued on 24<sup>th</sup> September 2015. The applicant adds that there was no court order directing costs to be recovered from the applicant and thus the respondent's bill of costs was unknown in law.

4. The applicant further states that upon receiving reasons for taxation on 22<sup>nd</sup> October 2019, the taxing officer failed to appreciate the nature of the respondent's bill of costs and to take into account the applicant's objection. As such, the applicants contends that the said bill being a nullity in law ought to have been struck out. The applicant prays that the taxation be set aside in its entirety.

5. Parties canvassed the application by way of written submissions.

**The Applicant's Submissions**

6. The applicant submit that the respondent's bill of costs is neither a party and party bill of costs nor an advocate client bill of costs which are the only two bill of costs contemplated by the Advocates Act and the Advocates Remuneration Order. According to the applicant, the said bill of costs is in the nature and form of an advocate-advocate bill of costs which is not provided for in law and as such, it is bad in law, incurably defective, incompetent and an abuse of the court process.

7. The applicant further submits that the respondent had already notified the applicant that upon the delivery of the ruling in the Judicial Review Cause his instructions had come to an end. Thus, the respondent was under no obligation to attend to the matter during the taxation of the mistaken bill of costs by the applicant.

8. The applicant further contends that there was no award of costs in the judicial review cause nor in the mistakenly filed and withdrawn bill of costs. The applicant relies on the case of **Wilfred N. Konosi t/a Konosi & Co. Advocates vs Flamco Limited [2017] eKLR** to support this contention. The applicant further argues that in any event the respondent already intimated and communicated that he no longer had instructions in the matter and therefore this ousted the jurisdiction of the taxing officer in taxing the respondent's bill of costs.

9. The applicant further submits that following the principles set out in the case of **Premchand Raichand & Another vs Quarry Services of East Africa Ltd & Another cited with approval in the case of KANU National Elections Board & 2 Others vs Hon Salah Yakub Farah [2018] eKLR** this honourable court must interfere with the assessment of costs because the principles were breached by the taxing officer. Notably, the exercise of discretion in the matter was wrongful and injudicious and thus the taxing officer misapprehended and misapplied the law on taxation and the principles therein.

10. Moreover, the taxing officer did not take into account the grounds of opposition and submissions in opposition to the respondent's bill of costs failing to adhere to the principle that a taxing officer ought to tax a bill of costs on its merits.

11. The applicant reiterates that the taxing officer did not have jurisdiction to tax the said bill of costs for the above discussed reasons and prays that this court grants the prayers sought in the instant reference.

#### **The Respondent's Submissions**

12. The respondent submits that although the matter had come to an end he still had instructions from his client to defend their interests from anything that was emanating from the said judicial review.

13. The respondent further submits that the applicant has no cause of action against him as he is entitled to the costs from the applicant and the Deputy Registrar was right in exercising her discretion in taxing the said bill of costs. As such, the respondent prays that the application be dismissed.

#### **Issues for determination**

14. After careful analysis, we humbly submit that the main issue for determination is:

- a) Whether the taxing officer had jurisdiction to tax the bill dated 4/7/2014.
- b) Whether the respondent's counsel had instructions to file the said bill of costs.
- c) Who meets the cost of this application.

#### **The Law**

##### **Whether the taxing officer had jurisdiction to tax the bill dated 4/7/2014**

15. The Advocates Act and the Advocates Remuneration Order provide for two types of bill of costs; between an advocate and client and between party and party. It is argued that the respondent's bill of costs is an advocate advocate bill of costs and as such, it is incurably defective because there is no such bill in law. On perusal of the bill of costs dated 4/7/2014, the heading of the bill of costs is Wanyiri Kihoro vs Muthoga Gaturu & Co. Advocates. Both parties were the advocates who presented the respective parties in Judicial Review No. 7 of 2012. Notably, the bill of costs emanated from the applicant's erroneous bill of costs dated 25<sup>th</sup> February 2014. As such the question is whether the taxing officer have jurisdiction to tax the said bill of costs.

16. A taxing officer while taxing a bill of costs must determine whether he/she has jurisdiction to tax a bill. Such jurisdiction is conferred by law. It is derived from the Advocates Act and the Advocates Remuneration Order. As such, jurisdiction cannot arise by implication nor can parties by consent confer it. Neither can inherent jurisdiction be invoked where adequate statutory provision exists. This principle was enunciated in **Taparn vs Roitei [1968] EA 618** where the court held that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. Case law relied on is **Wilfred N. Konosi t/a Konosi & Co. Advocates vs Flamco Limited [2017] eKLR.**

17. The Deputy Registry when called upon to give reasons for taxation stated the following:-

- i. The Deputy Registrar exercised his discretion
- ii. The Bill was drawn to scale
- iii. No objection to the items was raised

In his ruling delivered on 21/02/2014 by the honourable Judge in which he struck out the Judicial Review proceedings, he stated:-

“Since there is no existent personality known in law, I see the need to grant costs.”

18. It is therefore not in dispute that the court in its ruling in Judicial Review Case No. 7 of 2012 did not give costs to any of the parties. Section 27 of the Civil Procedure Act provides that in any case, costs shall follow the event. The “event” means the success of otherwise of the suit. The provision leaves the issue of awarding costs in the discretion of the court. It is trite law that unless costs are awarded by the court, no party should file a bill of costs. Even if it is filed erroneously, the Deputy Registrar has no jurisdiction to tax a bill of costs where no costs have been awarded.

19. The applicant filed a bill of costs for the Judicial Review proceedings on 12/03/2014. The respondent's advocate now the respondent herein filed a notice of objection to taxation on 01/04/2021 on grounds that the bill of taxation had no legal basis. He gave notice to seek for costs incurred on transport and of attending to the taxation. Despite sounding of this warning, the applicant filed the notice of withdrawal of the bill filed on 12/03/2014 almost six(6) months later.

20. True to his word, the counsel for the respondent filed the now disputed bill of costs on 17/04/2015. The respondent states that he raised objection to the taxation of the bill but no such document was traced in the court file. The letter sent by the applicant is the one dated 18/08/2015 to the Deputy Registrar requesting for reasons for taxation and which was noted upon by the registrar who forwarded the reasons.

21. On the issue whether the respondent herein was entitled to file a bill of costs for his own expenses as an advocate, reference must be made to the outcome of the Judicial Review proceedings. The ruling of the judge was clear that no costs were awarded. The respondent herein had already responded to the applicant's bill of costs erroneously filed on 12/03/2014 by writing promptly that he had no further instructions from his client after the Judicial Review proceedings were concluded. Where then, did he get instructions to file a bill of costs for his own expenses as an advocate? Was there an order of the court giving him costs? The answers to these questions are in the negative.

22. The bill of costs filed by the respondent was titled:

*Re: Wanyiri Kihoro –vs- Muthoga Gaturu & Co. Advocates*

It is correct to say that such a bill of advocate to advocate is not provided for by the Advocates Remuneration Order. In my considered view, the said bill was incompetent and misconceived for having no basis in law.

23. As I have said earlier herein, the applicant took time to withdraw the erroneously filed bill of costs. However, the respondent who had already declared he had no instructions and did not file and serve any fresh instructions had no basis of moving to file his own firm's bill of costs or even to defend the erroneous bill of the applicant without a court order. It was within his knowledge that no costs had been awarded and being an advocate, he ought to have known that filing of the said bill had no basis in law.

24. In my considered view any costs incurred by the applicant and the respondent in filing and defending the erroneous bills cannot be revisited on the parties in the Judicial Review proceedings or on any other person. The counsels, who were aware of the judge's ruling ought not to have made the said mistakes that they did.

25. In conclusion, I find that the Deputy Registrar erred in law and in fact in taxing costs which had not been granted by the court.

26. I find the applicant's application merited and hereby allow it in the following terms:-

- a) That the ruling of the Deputy Registrar delivered on 7<sup>th</sup> august 2015 is hereby set aside and the bill dated 4<sup>th</sup> July 2014 is stuck out.
- b) The Certificate of Costs dated 24<sup>th</sup> September 2015 is hereby set aside.
- c) That each party to meet its own costs of this application

27. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 22<sup>ND</sup> DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 22<sup>nd</sup> day of July, 2021**