



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. E145 OF 2019**

**RACHUONYO & RACHUONYO ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....CLIENT/APPLICANT**

**RULING**

1. Vide an application dated **14<sup>th</sup>** December 2020, the National Bank of Kenya Limited (the client/applicant) seeks to set aside the Taxation Ruling delivered on **7<sup>th</sup>** October 2020 allowing the Advocate-Client Bill of Costs dated **30<sup>th</sup>** October 2020 in the sum of **Kshs. 2,587,999.30** as against the client. It prays that the Bill of Costs be remitted for taxation afresh. Also, it prays for costs of the application.
2. A key ground cited by the applicant is that the Taxing Master taxed a non-existent Bill of Costs. To me, this is a dispositive ground warranting early resolution because its outcome certainly impacts on the outcome of the application.
3. The applicant argues that the Advocate's/Client's Bill of Costs dated **30<sup>th</sup>** April 2019 was amended on **26<sup>th</sup>** May 2020 and upon being amended, the said Bill of Costs ceased to exist. The correctness of this statement is beyond argument. The applicant states that in the impugned ruling, the Taxing Master stated that the Ruling was in respect of the Advocates Client's Bill of Costs dated **30<sup>th</sup>** April 2020 which had been amended. Here lies the problem. The applicant's position is that the Taxing Master taxed a non-existent Bill of Costs.
4. The Respondent's position is that at no point in the taxation did the client raise any issue regarding the relevant Bill of Costs, that there is no contest that the parties submitted at length on the Amended Bill, and that at no time did the parties submit on the original Bill of Costs dated **30<sup>th</sup>** April 2020, and none has been alluded to in the Reference.
5. For starters, the opening paragraph of the impugned ruling reads *"This ruling is in respect of the advocates client bill of cost dated **30<sup>th</sup>** April 2020."* The Certificate of Costs dated **23<sup>rd</sup>** November 2020 also reads *"I, S. Githongori, Deputy Registrar of the High Court of Kenya at Nairobi at Nairobi Commercial and Tax Division, DO HEREBY CERTIFY that the Bill of Cost dated the **30<sup>th</sup>** April 2020 lodged by Rachuonyo & Rachuonyo Advocates..."*
6. Clearly, the Ruling and the Certificate of Costs are explicit on which Bill was taxed. The parties had the option of seeking clarification from the Taxing Master to confirm whether or not the reference to the earlier Bill was a clerical error or mistake capable of being rectified under section **99** of the Civil Procedure Act. Despite taking diametrically opposed positions, the parties opted not to pursue the option of seeking clarification or correction from the Taxing Master.
7. It's not even clear whether the said date falls within the definition of a clerical error. One might think that a *"clerical error"* is a simple mistake like a typographical error. However, that is not always the case. A *clerical error* is an error which can be explained only by considering it as a *slip* or *mistake*. Thus, apart from correction of such errors as are popularly known as purely clerical, supply of omissions of consequential orders too may be permissible in certain cases if they are in the nature of clerical omissions; but certainly, such omissions as would demand judicial consideration or determination are beyond the scope of that term.
8. A *"clerical error"* occurs when the written document is **different** from what the judge ordered in court. In the instant case, I am not able to determine whether the date as shown is different from what the Taxing Master ordered in court. In determining the above question, I need to ask myself whether the Taxing Master had to apply legal or judicial reasoning when making the decision in court. Differently put, I need to determine which Bill was taxed.

9. The question is whether it can be said that the by stating the Bill of Costs the ruling related to was a mere accidental slip or omission which did not require a judicial determination by the Taxing Master at the time she passed the order. There were two Bill of Costs before her. One had been amended. One possibility is that she may have considered it and determined it carefully applying her legal mind to it believing it was the Bill before her. The effect here as I see it is that it would render such a taxation a nullity since the said bill was non-existent. The other possibility is that it could have been an obvious mistake by erroneously indicating the wrong date. The dilemma is, is a Certificate of Costs clearly stating the Bill of Costs which was taxed was issued. This to me clarifies the Bill of Costs which was taxed. The advocates advocate obtained the Certificate. He never complained about the date nor did the applicant's advocate raise the issue. This raises serious doubts as to whether it was a clerical mistake at all.

10. The problem is compounded by the fact that none of the parties moved the court under section 99 of the Civil Procedure Act to correct her error. In a way, both parties accepted the finality of the Certificate of Taxation. If the issue had been raised before the Taxing Master, the parties would have had an opportunity of pointing out to the court error and the court could have corrected it under the slip rule if at all it was an error.

11. The correction contemplated under section 99 of the Civil Procedure Act is essentially a matter for the issuing court, but not the High Court. It is not the function of this court to question the correctness or propriety of the said date. That is a matter which should have been agitated before the Taxing Master. In *Mohammad Jabir and Ors. v Narain Prasad Daruka and Ors*<sup>[1]</sup> it was held that it is not open to the executing court to go behind the order and inquire whether it contains a clerical or arithmetical nature. It would follow therefrom that it would be beyond the scope of the executing court to go into the question as to whether the date was of a clerical or arithmetical mistake having regard to Section 99 of the Civil Procedure Code. Such a question, no doubt, could have been raised by the parties before the Taxing Master.

12. Once the trial court has exercised its power in respect of the matter before it and passed an order or a decree, the decree stands as final and can only be disturbed by way of an appeal or in the case of a taxation before me, within the permissible grounds for setting aside a taxation. Now the Advocate wants me to find that it was the amended Bill which was taxed since it was the one the parties submitted on. Unfortunately, I decline the said invitation because I am not ordained by the law to correct clerical mistakes made by the lower court nor can I ascribe a meaning or interpretation to the ruling which is not supported by the language used in the ruling.

13. The role of this court in a taxation is to correct errors of law, misdirection or improper exercise of judicial discretion within but not to correct clerical or arithmetical mistakes. That is the function of the trial court. This court is only required to interpret the language used in the ruling and to ascribe a meaning to the language used. In this regard, I may profitably benefit from *Firestone South Africa (Pty) Ltd v Genticuro AG*<sup>[2]</sup> which made some observations about the rules for interpreting a court's judgment/ruling. It stated: -

*“...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it....”*

*It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment.”*

14. Guided by the nomenclature of the opening paragraph of the Ruling and the clear wording deployed in the Certificate of Taxation, it is my finding that the Taxing Master taxed the Bill dated **30<sup>th</sup> April 2020**. There is nothing to show the amended Bill of costs was taxed.

15. A client is entitled to taxation of his or her attorney's account. An untaxed bill of costs is not an absolute and present debt, for it is one the exact amount of which is still to be ascertained, as it depends on the decision of the Taxing Master. I therefore set aside the Taxation Ruling dated 7<sup>th</sup> October 2020 and the subsequent Certificate of Taxation dated 23<sup>rd</sup> November 2020 arising from the said Taxation. I order that the matter be and is hereby remitted to the Taxing Master to Tax the correct Bill of Costs.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIA E-MAIL DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY, 2021**

**John M. Mativo**

**Judge**

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[1] AIR 1960 Pat 126.

[2] 1977 (4) SA 298 (A) Trollop JA

