



IN THE HIGH COURT OF KENYA

AT BUSIA

MISCELLANEOUS CIVIL APPLICATION NO. 163 OF 2019

BETWEEN

FRANCIS OMONDI P/A

OMONDI & COMPANY ADVOCATES..... APPLICANT/ADVOCATE /RESPONDENT

AND

EDWIN ODHIAMBO OBACHI..... RESPONDENT/CLIENT/APPLICANT

RULING

1. Edwin Odhiambo Obachi, the client/applicant herein moved the court by way of Notice of Motion dated 13th December 2019 under Article 159 (2) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. He is seeking the following orders:

- a) That this application be certified urgent and service thereof be dispensed with in the first instance. (Spent)
- b) That pending the hearing and determination of this application, this honourable court be pleased to grant stay of execution of the ruling of Hon. P. Kulecho, the Deputy Registrar, delivered on 11th December 2019 allowing the applicant/advocate's bill of costs dated 29th October 2019.(Spent)
- c) That this honourable court be pleased to set aside the ruling of Hon. P. Kulecho, the Deputy Registrar, delivered on 11th December 2019.
- d) That this honourable court be pleased to fix for hearing the respondent/client/applicant's Notice of Motion dated 2nd December 2019.
- e) That costs of this application be awarded to the respondent/client/applicant.

2. The application is premised on the following grounds:

- a) That on the 11th December 2019, the Bill of costs dated 29th day of October 2019 was coming for mention to confirm if parties had filed their written submissions.
- b) That on this date, the respondent/client/applicant's advocate instructed Mr. Makokha Advocate to hold his brief and ask the court to stay the Bill pending the hearing and determination of the respondent/client/applicant's Notice of Motion dated 2nd day of December 2019 in which the applicant is seeking to strike out and dismissed the Bill of Costs aforesaid.
- c) The Deputy The Deputy Registrar, aware of the existence of the Notice of Motion to strike out the Bill of Costs, nevertheless proceeded to allow the Bill of Cost as drawn.
- d) The application to strike out and dismiss the Bill of Costs was served to the applicant/advocate/respondent prior to the mention date in respect of the Bill of Costs.
- e) The Deputy Registrar was in error to issue an instant ruling yet the mention was to confirm whether parties had filed their written submissions.

f) That neither party had filed any written submissions.

g) The mention date of 11th day of 11th day of December 2019 was not meant for hearing/canvassing of the Bill by parties but for purposes of confirming the filing of written submissions

h) Even if the Deputy Registrar was inclined to proceed with assessing the bill of costs, justice and fairness demand that she ought to have given the respondent/client/applicant opportunity to oppose the Bill, and to consider the authorities which were filed by the respondent/client/applicant on the 20th day of November 2019.

i) Even though the Deputy Registrar, on delivering her ruling, directed that the respondent/client/applicant may fix his Notice of Motion for hearing before the Judge, it would be an exercise in futility because the ruling had the effect of rendering the said application spent.

j) The respondent/client/applicant's Notice of Motion dated 2nd day of December cannot be heard until the status quo ante is achieved by the setting aside of the ruling of the Deputy Registrar delivered on 11th December 2019.

k) The existence of an application to strike out a Bill of Costs should attract inevitable orders from the Deputy Registrar to stay the taxation/assessment thereof pending the hearing and determination of such application.

l) It is in the interest of justice that the ruling delivered by the Deputy registrar be set aside and the respondent/client/Applicant be heard in the application to strike out the Bill of Costs

3. The application was opposed by the respondent on the following grounds:

a) That the court lacks jurisdiction to entertain the said application in its present form.

b) That the application is not provided for in law, it is premature, misconceived, inept and an abuse of the court process.

4. It is abundantly clear that the respondent/client/applicant's Notice of Motion dated 13th December 2019 is challenging the bill of costs that was taxed on 2nd December 2019. Any party that is dissatisfied with the decision of the taxing master is obligated to comply to comply with paragraph 11 of the Advocates Remuneration Order which provides as follows:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

5. It was argued for the client when taxation is allowed summarily, a reference in the High Court ought to be allowed. The case of **Labh Singh Harman Singh Ltd v Attorney General & 2 others [2016] eKLR** was cited in support of this proposition. The ruling was attributed to Judge E. Ogola. However, I have noted that the said ruling was by Judge Edward Muriithi. The excerpts relied on are not in this ruling. Even if they were, that position can be distinguished from the current position where there is no reference.

6. The other issue that was raised was that of jurisdiction of the Deputy Registrar to tax the bill. That may have been a valid issue to raise but this in itself does not take away this matter out of the ambit of paragraph 11 of the Advocates Remuneration Order. The Court of Appeal in **Machira & Co. Advocates vs. Arthur K. Magugu & another** (infra) on this point said:

Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers.

The client was therefore under an obligation to follow the provisions of paragraph 11 of the Advocates Remuneration Order.

7. In the case of **Machira & Co. Advocates vs. Arthur K. Magugu & another Civil Suit Misc. Appl. No. 358 of 2001** Ringera J. (as he then was) while addressing a similar issue said:

First, the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal for any sort of decision by the taxing officer...

8. This was approved by the Court of Appeal in **Machira & Co. Advocates vs. Arthur K. Magugu & another [2012] eKLR**. The Court said:

9. The appellate jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to advocates' bills of costs, we agree with the decision of Ringera J (as he then was) in Machira vs Magugu[1] that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on advocates' bills of costs through references under Rule 11 to a judge in Chambers.

This therefore means that the application brought by way of Notice of Motion dated 13th December 2019 under Article 159 (2) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules is incurably defective.

10. The procedure for challenging the findings of a taxing master were not followed and the application by the client is therefore incurably defective for this reason as well.

11. From the foregoing, the application dated 13th December 2019 is struck out with costs.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE