**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPL. NO. 410 OF 2017**

**B.M. MUNGATA & CO. ADVOCATES.....APPLICANT**

***VERSUS***

**PETER MWANGI WANJOHI.....RESPONDENT**

**RULING**

1. This ruling related to two applications that shall be addressed chronologically. BY a notice of motion dated 9.7.2018, brought under Section 51 (2) of the Advocates Act Cap 16 Laws of Kenya, Section 1A and 1B of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules all other enabling provisions of the law the Applicant, B.M. Mungata and Co. Advocates (hereinafter referred to as the Advocate) sought for orders:-

> **1.** ***THAT Judgment be entered for the applicant and decree do issue for taxed costs of Kshs 132,168/- with interest from the date of taxation***
>
> ***2. THAT the costs of this Application be borne by the Respondent***

2. The motion is premised on the grounds set out in the application and supported by the affidavit of Stanley Nthiwa Advocate for the applicant who deponed on 9.7.2018 to which is annexed the certificate of taxation dated 26.4.2018 marked ***SNA – 1.***

3. In reply to the application was an affidavit deponed by Peter Mwangi Wanjohi (hereinafter referred to as the client) on 25.10.2019. The client did not deny instructing the advocate to act for him in the Criminal Case 506 of 2016 but maintains that the same was withdrawn under Section 87(a) of the Criminal Procedure Code and other charges preferred against him in Criminal Case No 1054, 1055 and1056 of 2016 which were also withdrawn under Section 87(a) of the Criminal Procedure Code. It was averred that the client was later charged with other charges in Criminal Case 139, 140 and 141 of 2016 that were equally withdrawn under Section 87(a) of the Criminal Procedure Code. It was averred that the cases had never proceeded to hearing. The deponent averred that he was never served with any bill of costs dated 21.11.2017 or any notice of taxation that led to the certificate of costs dated 26.4.2018. The deponent averred that he had filed an application under Section 51(2) of the Advocates Act to have the certificate of Costs dated 26.4.2018 set aside. It was averred that the deponent was not given an opportunity to defend himself during the taxation process and he had been condemned to pay taxed costs yet he had paid the agreed fees to the advocate. A copy of receipts was attached to the affidavit and marked B. It was averred that the deponent got to learn of the instant matter when he was served with the instant application that was coming for hearing on 18.6.2019 and he was not aware that the costs had been taxed or that a certificate of taxation had been issued.

4. Under Certificate of Urgency by a notice of motion dated 20.9.2019, and filed on even date brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Orders 10 Rule 11 and Order 45 Rule 1 of the Civil Procedure Rules and other enabling provisions of the Law, Peter Mwangi Wanjohi (hereinafter referred to as the client) sought for several orders and what remains for determination are the orders to set aside, review and or vary the certificate of taxation issued on 26.4.2018 by Hon K. Kenei; orders that the advocate be ordered to serve the client with the bill of costs dated 21.12.2018 for inter-parties hearing.

5. The application is based on eight grounds on the face of the application and supported by the affidavit of Peter Mwangi Wanjohi. According to the client he instructed the advocate to act for him in the Criminal Case 506 of 2016 but that the same was withdrawn under Section 87(a) of the Criminal Procedure Code and other charges preferred against him in Criminal Case No 1054, 1055 and1056 of 2016 which were also withdrawn under Section 87(a) of the Criminal Procedure Code. It was averred that the client was later charged with other charges in Criminal Case 139, 140 and 141 of 2016 that were equally withdrawn under Section 87(a) of the Criminal Procedure Code. It was averred that the cases had never proceeded to hearing. The deponent averred that upon instructing the advocate to act for him in the matters (referenced as 506 of 2016), he paid a total of Kshs 372,000/- as legal fees as evidenced by the copies of receipts marked “B”. The deponent averred that he was never served with any bill of costs dated 21.11.2017 or any notice of taxation that led to the certificate of costs dated 26.4.2018. He averred that upon attending court on 18.6.2019 and learning that there were proceedings in the instant matter, he applied for proceedings through a letter dated 6.6.2019 to the Deputy Registrar requesting for proceedings in the instant matter. The same was annexed and marked “C”. He averred that the certificate of taxation that was issued on 26.4.2018 was issued with material non-disclosure of the legal

fees that he had paid. It was averred upon advice from his advocate on record that the process server who alleged to have served him ought to be cross examined and that the advocate would suffer no prejudice if the certificate of taxation dated 26.4.2018 is set aside and the bill of costs dated 21.12.2017 is heard inter-partes.

6. In opposing the application, the advocate filed a replying affidavit sworn on 15.10.2019. According to the advocate, the application was frivolous, vexatious and abuse of court process and an academic exercise. The advocate averred that the client instructed him to represent him in Criminal Case 1055 of 2016 and that the issue of retainer was not disputed. It was averred that the client was also facing different charges and who instructed the advocate to represent him and charged independently being **Machakos Criminal Case 506 of 2016, 1054 of 2016** and **1056 of 2016.** It was averred that the advocate-client relationship broke down before the issue of fees could be agreed and as such there was no fee note in the instant matter. It was averred that the client did not pay any cent towards the professional fees in the instant matter and that whatever amount was paid was only with respect to Criminal Case 506 of 2016. It was averred that the client stopped giving instructions and absconded court for uncommunicated reasons and that the advocate was discharged from acting for him due to want of instructions and also due to various complaints to the LSK and the A.G. It was averred that the fees for each case was to be charged separately and was to be paid differently. It was averred that all the bills were taxed as follows **Misc 410 of 2017** at Kshs 132,168/; **Misc 411 of 2017** at Kshs 136,168/-; **Misc 412 of 2017** at Kshs 132,168/- and **Misc 413 of 2017** at Kshs 171,122/- bringing the total to Kshs 571,626/- less the amount paid of Kshs 245,000/- in **Criminal 506 of 2016** hence leaving a balance of Kshs 326,626/-. It was averred that the application was fatally defective as the client did not follow the procedure for challenging a taxation by way of filing a reference and in the absence of the said reference, then the instant application was incompetent and ought to be struck out. It was averred that the client instructed the advocate on different dates and it was not possible to agree on the fees for all the matters even before he could be charged and this could be ascertained from the proceedings in the trial court that were to the effect that- In Criminal Case 506/2016 the client was charged on 11.5.2016 and the 1st appearance was by Advocate Musya on the same date; In criminal case 1054 of 2016, the client was charged on 11.11.2016 and the 1st appearance by Ombega Advocate was on 29.11.2016 being the date of instruction; In Criminal case 1055 of 2016 the client was charged on 11.11.2016 and the 1st appearance by Nthiwa Advocate was on 7.3.2017 being the date of instruction then in Criminal Case 1056 of 2016, the client was charged on 11.11.2016 and the 1st appearance by Nthiwa Advocate was on 29.11.2016 being the date of instruction. It was averred that the client was served with the bill of costs and notice of taxation on 7.2.2018 and the court was satisfied with the service.

7. By way of rejoinder, the client in his affidavit deponed on 14.11.2019 averred that the charges in all the matters was agreed upon the taking of plea in Cr 506 of 2016 and it was agreed that the client would pay a sum of Kshs 372,000/- to cater for the hearing and determination of the matter. It was averred that upon withdrawal of Cr 506 of 2016 and subsequent institution of Criminal case 1054, 1055 and 1056 of 2016 it was agreed between the parties that the previous amounts agreed and paid as legal fees would cater for the new files and that upon withdrawal of Criminal case 1054, 1055 and 1056 of 2016 before taking off and hearing and institution of **Criminal Cases 139, 140 and 141 of 2016** it was verbally agreed that the previous amounts agreed as legal fees would be sufficient for the new matters. The client denied absconding court and averred that he did not attend on 29.11.2016 and 16.12.2016 as he was unwell. The client averred that he reported the matter to LSK as the advocate stopped representing him from September 2017 and without good reason and yet he had fully paid instructions and/ or legal fees. The client reiterated that it was agreed that the legal fees paid during Cr.506 of 2016 would cater for the subsequent cases since all the matters did not proceed to hearing. It was averred by the client upon advice from his advocate that he was not able to file a reference since he was not aware that the bill of costs had been filed and he was not served with the same neither was he served with hearing notice nor was he aware that the certificate of taxation had been issued.

8. The applications were canvassed vide written submissions that the parties filed and exchanged. The advocate vide submissions dated 25.10.2019 framed four issues for determination being firstly whether the client was served with the bill of costs and dates for taxation; Secondly whether the taxation had been challenged properly; Thirdly how much was paid by the client and for what and finally whether the client is entitled to the orders sought. On the 1st issue, it was submitted that the client did not challenge the service that was effected on him by Alex Wambua Muthenya in his affidavit of service that was sworn on 8.2.2018. Learned counsel invited the Court to consider the case of **Alfred Ochieng Opiyo T/a Ochieng Opiyo & Co Advocates v Export Hydro Pump & Services (Africa) Ltd (2018) eKLR** that dealt with presumption of service in favour of the process server. On the 2nd issue, counsel in placing reliance on the provisions of Paragraph 11 of the Advocates Remuneration Order 2009 and the case of **Alfred Ochieng Opiyo T/a Ochieng Opiyo & Co Advocates v Export Hydro Pump & Services (Africa) Ltd (2018) eKLR** submitted that the application was incompetent. On the 3rd issue, counsel submitted that in this application, the bill of costs came from instructions in Criminal Case 1054 of 2016 and that the fees agreed in Criminal Case 506 of 2016 was Kshs 372,000/- however the client paid Kshs 245,000/-. It was counsel's argument that there was no agreement that the fees charged in Criminal Case 506 of 2016 would cover future criminal cases if the client was charged and therefore the bills were taxed as follows **Misc 410 of 2017** at Kshs 132,168/-; **Misc 411 of 2017** at Kshs 136,168/-; **Misc 412 of 2017** at Kshs 132,168/- and **Misc 413 of 2017** at Kshs 171,122/- bringing the total to Kshs 571,626/- less the amount paid of Kshs 245,000/- in **Criminal 506 of 2016** hence leaving a balance of **Kshs 326,626/-**.

9. Learned counsel for the client in submissions dated 14.11.2019 submitted on four issues being firstly whether the client was served with the bill of costs as well as the certificate of taxation; Secondly how much was paid by the client and whether the former legal fees for Cr 506/2015 were to cater for all files; Thirdly was the bill of costs dated 21st December, 2018 appropriately taxed and finally whether the application herein was incompetent. On the 1st issue, learned counsel submitted that the client was never served on 7th February, 2018 and that the service should be proved. On the 2nd issue, it was submitted that the client paid the full amount of Kshs 372,000/- as agreed legal fees and that whereas Kshs 295,000/- were paid and receipted, there were amounts of Kshs 77,000/- that were paid vide cash but were never receipted. On the 3rd issue, learned counsel submitted that the bills were not properly taxed. On the final issue, it was learned counsel's strong argument while placing reliance on the case of **Labh Singh Haman Singh Limited v A.G. & 2 Others (2016) eKLR** as well as Section 89 of the Civil Procedure Act that he came to learn of the case in 2019 and hence the court is mandated to issue the orders now being sought. Learned counsel in placing reliance on the case of **Kerongo & Co Advocates v African Assurance Merchang Ltd (2019) eKLR** submitted that the advocate's application ought not to be granted because the certificate of taxation was not served on him.

10. The issues to be addressed in the application dated 9.7.2018 filed by the Advocate are whether the judgment, based on the certificate of taxation of costs by the Taxing Officer, should be applied in the Miscellaneous Application case file 410 of 2017 and whether costs should be paid therefore.

11. The application was brought basically under Section 51(2) of the Advocates Act. An advocate armed with taxed or assessed costs and the relevant certificate of taxation should make a formal demand of the assessed amount from the client and whatever amount the client fails to pay, the advocate should proceed pursuant to Section 49 and Section 51 (2) of the Advocates Act and lodge an application as herein. Section 51 Sub-rule (2) provides that due notice of the date fixed for such taxation must be given to both parties and that both parties shall be entitled to attend and be heard. It states that

> ***"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."***

12. I have considered the affidavit in support of the application, the affidavit in reply to the application and submissions on record. In the case of ***Musyoka & Wambua Advocates Vs Rustam Hira Advocate (2006) eKLR*** it was held:-

> ***"Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the Court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit……***

13. In the present case, taxation of the bill of costs dated 21.12.2017 was reserved for hearing on 7.3.2018. On the said date, the advocate appeared before court for taxation while the client was absent. Since there was a return of service the matter proceeded and ruling was reserved for 26.4.2018 when the said ruling was delivered. The bill of costs was taxed at Kshs 132,168/-. A Certificate of Taxation dated 14.5.2018 was issued and as it stands now, the same has not been set aside or altered. I find that the first application dated 9.7.2018 falls under Section 51 (2) of the Act and be that as it may there is no reason to deny the Advocate the entry of Judgment as sought. However I will make a finding after considering the 2nd application herein below.

14. On the issue of interest, I have considered the provisions of Rule 7 of the Advocates Remuneration Order which provides:-

> ***"An Advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full"***

15. The final decision in respect of the application dated 9.7.2018 will depends on my resolution on the 2nd application that is dated 20.9.2018.

16. The issues for determination on the second application lodged by the client are whether the application is properly before the court and whether the court may allow the application and set aside the decision of the taxing master. It is the advocate's case that the client instructed him on a case by case basis and owed him the monies under the different cases and further that the retainer was never denied, whereas the client averred that it was agreed that the fees paid in Cr 506 of 2016 would cater for the subsequent cases that according to him were never heard but were withdrawn by the prosecution.

17. With regards to the 1st issue, the Advocate had challenged the client for failing to file a reference within 14 days. Paragraph 11 of the Advocates Remuneration Order is to the effect that:

> ***"Where a party is aggrieved by the decision of a taxing officer, he is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to this Court."***

18. Paragraph 11 of the Advocates' Remuneration Order goes on to provide as follows:

> ***"11. Objection to decision on taxation and appeal to Court of Appeal.***
>
> *(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 subparagraph (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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*

19. From the record there is no objection to the taxation that was filed by the Advocate. On the record is no reference that was filed by the client challenging the decision of the taxing officer.

20. From the record, the decision was made on 26.4.2018 and there was an affidavit of service. There is a certificate of taxation dated 14.5.2018 and a letter dated 6.6.2019 from the client seeking for certified copies of the ruling. The instant application was filed on 20.9.2019

that was over 14 days from the date of the decision. The reasons for the decision of the taxing master were not sought. However vide letter dated 6.6.2019, the applicant sought for copies of proceedings and it is not clear when he received the same and the court cannot make any assumptions. Be that as it may, there is a receipt dated 7.7.2019 indicating that the client paid fees for the proceedings. However there is indication that the applicant was present in court on 18.6.2019 in respect of the application dated 9.7.2018 hence it can be said that as of that date he was aware of the matter and could as well have taken immediate action. The instant application being filed on 20.9.2019 was well outside 14 days of the receipt of the decision hence the reference is not properly within the court and hence the challenge raised by the Advocate has merit. If indeed the Client had been aware of the taxation and the Advocate's application for entry of judgement then no reasons have been shown as to why he had to wait for a period of three months to challenge the taxation.

21. Under Paragraph *(4) of the* Advocates Remuneration Order, the court has powers to enlarge time. The applicant ought to have included it as one of the prayers in the instant application so that the application that is evidently out of time may be allowed. *See* **Njagi Wanjeru & CO Advocates v Ben Momanyi t/a Momanyi & Co Associates (2014) eKLR.** The client did absolutely nothing to approach the court all that time. Even if for argument's sake I were to consider the application, in view of my reasoning above, there is evidence of service and the taxing officer was satisfied with service. I place reliance on the case of **Alfred Ochieng Opiyo T/a Ochieng Opiyo & Co Advocates v Export Hydro Pump & Services (Africa) Ltd (2018) eKLR** that dealt with presumption of service in favour of the process server and therefore I find that there is no reason to set aside the Certificate of taxation dated 26.4.2018. I note that the application dated 20.9.2019 is too vague and is brought under incorrect provisions of the law. The client in his affidavit in support of the application made no attempt to explain away the delay, but insisted that he was never served with notice. However in the absence of a specific prayer to enlarge the time to file the application, I am commended to dismiss the application dated 20.9.2019 for being incompetently before court.

22. In light of my above analysis, it is needless to address the second issue. In these premises, the application is dismissed with no order as to costs.

23. The application dated 9.7.2018 is allowed and Judgment be entered for the applicant and a decree do issue for the taxed costs of Kshs 132,168/- with interest of 14% from the date of taxation. As the Advocate has admitted that the client had made payment vide the initial case in the sum of **Kshs 295,000/** the said sum must be taken into account and given to the credit of the client. There will be no order as to costs.

It is so ordered.

**Dated and delivered at Machakos this 6th day of May 2020.**

**D. K. Kemei**

**Judge**