



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC.CIVIL APP.NO. 35 OF 2019

BETWEEN

JOHNNAMASAKE FAMBA.....APPLICANT

VERSUS

AUTO SELECTION (K) LIMITED1STRESPONDENT

LYSBETH GATIRIA MBAE.....2ND RESPONDENT

JUSPER GITONGA KIUBUTHI.....3RD RESPONDENT

RULING

1. The Chamber Summons is dated the 17th May, 2019 and is brought under the provisions of Part II (2) and 79 of the Advocates Remuneration Order, and all the enabling provisions of the law; the applicant seeks the following orders;

- (i) That the ruling of the Taxing Master delivered on 3rd May, 2019 be set aside in its entirety;
- (ii) That this Honorable Court be pleased to adjust the figures and the costs due be re-assessed;
- (iii) That in the alternative the party and party bill of costs dated 23rd November, 2018 be referred to another Taxing Master for re-taxation;
- (iv) The cost of the reference be awarded to the applicant.

2. The application is premised on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **JOHN NAMASAKA FAMBA** who deponed that the party and party Bill of Costs which was allowed and taxed against the respondent in the total sum of KShs.65,000/- was erroneously awarded; and was contrary to the provisions of Schedule VI (a) of the Advocates (Remuneration) Order which prescribes a maximum fee of Kshs.154,721/-;

3. That the taxing master exercised her discretion unreasonably, unfairly, and injudiciously; and applied wrong principles by failing to apply Schedule VI to the rest of the items and thereby arrived at an erroneous conclusion on all the items taxed; that the taxed amount was too low and unreasonable;

4. The applicant applied to be furnished with reasons for the decision but the taxing master failed to furnish the applicant with the reasons supporting the decision within the stipulated time; the applicant nevertheless proceeded to file this instant reference;

5. The respondent was duly served with the application and did not file a response to the same and therefore the application was uncontested; at the hearing despite having been duly served with the Hearing Notice the respondent was also not in attendance to challenge the application; the application was therefore uncontested;

6. The applicant prayed that the decision of the Taxing Master delivered on 3rd May, 2019 be set aside in its entirety; the figures be adjusted the costs due be re-assessed; in the alternative the party and party bill of costs dated 23rd November, 2018 be referred to another Taxing Master for re-taxation;

ISSUES FOR DETERMINATION

7. After reading the supporting affidavit filed herein this court finds only one issue for determination which is whether the taxing master applied the wrong principles in arriving at the decision dated the 3/05/2019;

ANALYSIS

8. The undisputed facts are that the applicant and the respondents had engaged in litigation with the applicant being awarded costs; and the applicants main complaint is that the taxation was not taxed to scale and in particular the item relating to fees; the short-coming of the instant application is that the Supporting Affidavit does not have an annexure of the taxed bill; which would have reflected the amount taxed off and this also ought to have been accompanied by the ruling dated 3/05/2019 referred to herein severally by the applicant;

9. It is incumbent upon the applicant to have annexed the taxed Bill of Costs and the requisite orders that it seeks to set aside, vary or alter; in this instance this has not been done; the affidavit only makes reference to the same;

10. This court states that it is a court of record and reiterates that it can only exercise its discretion judiciously from the material placed before it and not for it to make assumptions; from the material placed before it this court is unable to make any determination;

11. Instead of striking out the application this court hereby grants the applicant leave to file a Supplementary Affidavit within seven (7) days from the date hereof to include the omitted annexures.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 8th day of May, 2020.

HON. A. MSHILA

JUDGE