



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 1964 OF 2001**

RAZA PROPERTIES LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

FRANCIS M. MUTUA T/A MUTUA MBOYA & NZISSI ADVOCATES.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 1st July, 2019 brought by the defendant/applicant under the provisions of Sections 3A and 80 of the Civil Procedure Act and Order 45, Rule 1 of the Civil Procedure Rules. The Motion is supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. The following are the orders sought in the Motion:

(i) THAT the Honourable Deputy Registrar be pleased to review and/or set aside her ruling delivered on 27th June, 2019 taxing the bill of costs dated 15th March, 2018 as drawn.

(ii) THAT the applicant's submissions filed in court on 23rd May, 2019 be considered in taxing the plaintiff's/respondent's bill of costs dated 15th March, 2018.

(iii) THAT costs of the application be provided for.

2. The applicant deponed that following the lodging of the Party and Party Bill of Costs dated 15th March, 2018 by the plaintiff/respondent, the parties appeared before the taxing master on 17th May, 2019 during which time the applicant was directed to file and serve his submissions in respect to the Bill of Costs, by the 24th day of May, 2019.

3. The applicant stated that on 23rd May, 2019 he instructed his office clerk to file the submissions in court, only for him to later come to learn that the submissions were never filed, as per the ruling delivered on the Bill of Costs on 27th June, 2019.

4. It was the applicant's contention that immediately thereafter, he followed up with his clerk on what could have gone wrong and was informed of the likelihood that the submissions had either been misfiled or misplaced.

5. In the circumstances, the applicant urges this court to review and/or set aside the aforementioned ruling delivered by the taxing master.

6. To oppose the Motion, the respondent put in Grounds of Opposition dated 21st August, 2019 premised on the following grounds:

(i) THAT the said application is fatally defective, incompetent, misconceived and has no merit whatsoever and is an abuse of the court process.

(ii) THAT the applicant has overlooked the established procedure under paragraph 11 of the Advocates (Remuneration) Order

2009 for challenging decisions of a taxing officer.

(iii) *THAT the only recourse the applicant has/had is by filing a reference to a judge in chambers.*

(iv) *THAT the application is merely a mischievous attempt to obstruct and/or delay the applicant's payment of the taxed costs as ordered by the court.*

7. This court on 19th September 2019 directed the parties to put in written submissions on the Motion. On his part, the applicant essentially restated the averments made in his supporting affidavit save to supplement that the taxing master's finding that the Bill of Costs was unopposed was made in error since the applicant's submissions were on record at the time of delivery of the ruling, hence the need to have the ruling on taxation set aside.

8. The respondent on its end argued in its submissions that the only available recourse for a party intending to challenge the decision of a taxing officer is to file a reference and not a Notice of Motion as the applicant has done. It was therefore the applicant's submission that the application currently before this court is incompetent. To buttress its position, the respondent quoted various authorities and I will only cite a few.

a) In the case of **Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation [2015] eKLR** the High Court held that the applicant was required to file a reference to challenge the decision of a taxing officer and not an application for review under the provisions of Order 45 of the Civil Procedure Rules.

b) The court in the case of **Odera Obar & Co. Advocates v Aly Enterprises Limited & 3 others [2016] eKLR** took into account the following rendition in a separate case of **Machira & Co. Advocates v Magugu [2002] 2 EA 428**:

“As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

9. In conclusion, it was the respondent's contention that the applicant neither sought for the taxing officer's reasons for her decision nor filed a reference within the stipulated timelines, thereby making his application fatally defective and unmerited.

10. I have taken into consideration the grounds and facts on which the Motion and its supporting affidavit are anchored, the Grounds of Opposition and the contending submissions coupled with the authorities relied on.

11. A brief background of the matter is that the respondent instituted a suit against the applicant seeking the sum of Kshs.1,502,300/ for rent arrears and other related costs. The claim was opposed by the applicant. The suit proceeded for hearing and at the close thereof, the court entered judgment on 24th November, 2017 in favour of the respondent in the sum of Kshs.1,316,300/ plus costs of the suit and interest thereon.

12. Subsequently, the respondent filed the Party and Party Bill of Costs dated 15th March, 2018 in which it sought for costs to be taxed at a sum of Kshs.288,288/. The taxing master in her ruling delivered on 27th June, 2019 taxed the Bill of Costs as drawn. It is this ruling that forms the subject of the application now before this court.

13. However, before I can consider the merits of the Motion, I must determine whether the said Motion is competent to begin with.

14. The procedure and timelines for challenging the decision of a taxing master on taxation are expressly set out under **Paragraph 11 of the Advocates (Remuneration) Order** which expresses thus:

“(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.”

15. It is clear that the applicant filed a Notice of Motion under Section 80 and Order 45 of the Civil Procedure Act and Rules respectively, both of which provide for review of a decision. Nonetheless, when it comes to taxation proceedings, these are regarded as special proceedings hence the Civil Procedure Act and Rules would not apply. The applicable law and procedure for challenging a ruling on taxation are clear as set out hereinabove.

16. Moreover, the procedure relating to taxation proceedings is mandatory which is to say that it ought to be strictly adhered to. In so saying, I associate myself fully with the view taken by the court in **Lawrence Mwangi & Co. Advocates v John Mathiaka Kimundu [2019] eKLR** in this manner:

“Our courts have, in various pronouncements, explained that this procedure for challenging a taxed bill is mandatory and is not a mere technicality. See, for example, Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR and Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co Advocates v Export Hydro Pump and Services (Africa) Limited [2018] eKLR.”

17. The respondent cited various authorities which restated the correct position on the procedure for challenging the decision of a taxing master, a few of which I quoted in this ruling.

18. From the foregoing, there is no doubt in my mind that the Motion is incompetent and fatally defective. There is no need for me to consider its merits.

19. Consequently, the Motion is hereby struck out with costs to the plaintiff/respondent.

Dated, signed and delivered at NAIROBI this 7TH day of MAY, 2020.

.....
L. NJUGUNA
JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant