REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 197 OF 2018

MARTIN TINDI & CO. ADVOCATES ……..APPLICANT

VERSUS

BIMBITA MGALLA DZUMBA & 46 OTHERS…….……RESPONDENTS

R U L I N G

1. By an application dated 13/08/2020 and later amended on the 26/08/2020, the client/Applicant seeks an order that the decree issued herein on the 9/8/2019 be set aside and in the alternative that the certificate of costs arising from the decree and consequential orders be set aside *ex-debito justitiae*.

2. The grounds set out to ground the application were that even though the advocate did act for the client with other in a representative suit at the Environment and Land Court as well as at the Court of Appeal, there was no agreement by the current applicant to personally pay the legal fees being that the clients were squatters with no income and would only pay the legal fees after pooling their resources together and that in the course of being represented a sum of Kshs.475,200 was paid to the advocate. The applicant then asserts that the law does not anticipate that where a counsel acts for a client in a representative suit he can only pursue the representative for his fees and that the balance of fees sought by the advocate ought to be recovered from the other parties to the suit and not one of them. It was then contended that there was failure to disclose to the taxing master that ELC Suit No. 154/2012 was withdrawn without proper instructions. The Affidavit in support then exhibits the receipts issued by the Advocate for fees paid.

3. It is obvious that the application is by one Bimbita Mgalla Dzumba acting on own interests and not on behalf of all the clients as named in the matter, it is also clear that the purpose of the application is to forestall sale of a property known as Kwale Kirindini/536.

4. The application was opposed by the Advocate/Applicant who filed a Replying Affidavit on 21/8/2020. In that Affidavit, the fact of representation is affirmed together with the fact that he was instructed to withdraw the ELC suit and that there was never an agreement on fees at Kshs. 250,000/= as alleged by the applicant

5. On part payment of fees, the Advocate asserts that he did apportion such fees in the sum of Kshs. 295,000/= for the suit at ELC and 161,000/= for the appeal to the Court of Appeal and that in the bill taxed herein the sums were duly acknowledged. He then asserted that there was due service of the bill as well as the application yielding the judgment and the decree and that the applicant was filed to demonstrate lack of service.

6. The application was directed to be canvassed by way of written submissions on which the parties requested the court to make its determination.

7. I have had the benefit of reading the submission by both. In his submissions, the client applicant takes the position that an advocate has no liberty to choose a representative in a representative suit and pursue him alone for the recovery of his fees; that an advocates cannot demand fees in a matter he was unilaterally withdrawn and lastly that a properly belonging to a third party cannot be attended to settle an advocates fees if such party was not a party to the suit. Counsel then cited **Lapas Ole Sese vs Salatia Ole Narok, Civil Appeal No. 292 of 2001** on the purpose of Order 1 Rule 8 as targeting litigating common causes together to obviate multiplicity of suits.

8. On entitlement to fees on a withdrawn suit, counsel cited **Monica Atieno and others vs Jaramogi Oginga Odinga University of Science and Technology (2018)eKLR** where an order for withdrawal of the suit was set aside on the basis that counsel had no instructions to so withdraw.

9. On the attachment of the land, counsel submitted that a contract only binds its parties and cited to court **AFC vs Lagetia Ltd (1985) KLR 705** upholding the general rule of Law of Contract that a contract only affects parties to it and not third parties. In those submission the question of service of the bill and the application for judgment have been denied prominence with the right of the advocate to claim fees and

attach the immovable property taking all the limelight. In fact, there is a very meek statement regarding service it being merely said that he did not actually participate at the taxation and proceedings giving rise to the judgment due to lack of proper service and total communication breakdown between him and his counsel. That statement makes no serious contestation about the fact of service deponed to in the Affidavits of service but confirms that the application for judgment was indeed served and an advocate appointed.

10. For the client the submissions filed on 25/09/2020 clarifies that advocate/client bill of costs dated 9/8/2018 was taxed and a certificate of taxation cited 22/03/2019 issued in the sum of Kshs. 989,937 after which an application pursuant to Section 51(2) of the Advocates Act was filed and a judgment was obtained before execution ensued. He then addressed the three issues after observing that the grounds of opposition filed had not been given regard by the client.

11. On the question of a representative in a class suit being liable in person to pay costs, counsel submitted that where liability is adjudged against two or more persons, all become jointly and severally liable and the winning party may choose who to pursue for recovery of costs. He cited to court the decision in **Oasis Park Self Help Group vs Joinvein Investments Ltd [2016] eKLR** on the proposition. The decision in **Evans M. Gakuru vs National Bank [2013] eKLR** was cited for the proposition of the law that it is the taxing officer to apportion the costs without disturbing the award.

12. On the charge of unilateral withdrawal of the suit, counsel pointed out that the two Affidavits filed show that the suit was withdrawn after the plaintiffs sought to act in person by filing notices to Act in person and after the current applicant directed him to have the suit withdrawn it being underscored that since the withdrawal of the matter no challenge had been made against the decision by filing a motion to reinstate the suit.

13. The decision in **Joseph Kipngetich Korir vs Litein Tea Factory (2018)eKLR** was cited for the proposition that it is for the client to demonstrate that the withdrawal was propelled by fraud or collusion by way of an application.

14. On the question of contract only binding parties to its parties, counsel urged the court to find that there is no third party here as the applicant was a client and the attached land belong to him and that if a third party property be attached in civil litigation then the prayer invocation is Order 22 Rule 51**. Afc Vs Lengetia (Supra**) was once again cited for the position of the law that an objection would fail where there exists a decree against the judgment debtor and no third party is named to claim the property attached.

15. Counsel delved into the issues in the grounds of opposition and pointed out that an injunction cannot issue *in vacuo* pending nothing because the matter here is concluded; that there is no jurisdiction in the court to deal with the application in the absence of an appeal and lastly that the application offends the provision of the Advocates Act, at Rule 11 which limits the period within which to object to a decision by the taxing officer. It was then submitted that the application was in the nature of review and that the threshold for review had not been met.

16. Having reviewed the papers filed it is clear to me that what is before me is a challenge to the certificate of taxation and the judgment of the court founded upon it. To accede to the application, the court must be satisfied that the judgment or record was not deserved; that the warrant taken out were improperly so taken for reasons that the applicant was merely a representative and had no contract with the advocate.

17. It remains the law that where a statute provides a procedure for handling a dispute that procedure must be adhered to very strictly [1]because the law is not in vain but for compliance so that the legislative intent and purpose, as the peoples' delegate is met. Here the dispute resolution is provided by the Advocates Act which I consider to a complete code on matter of dispute between advocate and his client on matters of remuneration and taxation in particular[2].

18. The only avenue to challenge a certificate of taxation is by way of a reference pursuant to Rule 11, Advocate Remuneration Order. Paragraph 1 & 2 of that provision states: -

> **"11**
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> **(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.**

19. In this matter the taxation was conducted on the 10.09.2018, ruling on taxation delivered on 22.11.2018 and the certificate of taxation extracted on the 22.03.2029 yet the application was never brought till the 13.08.2020. When brought, it was never brought under the Advocates Act, but under the civil procedure Act, and in utter disregard of its dictates. I find and hold that in so proceeding as he chose to do, the applicant/client chose his way not the way provided by the law and a court of law cannot countenance such. In the case of **Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR** the Court of Appeal had this to observe and held: -

> **"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."**

20. On the basis that the challenge on taxation is being pursued contrary or just outside of the law, the challenge is incompetent and unable to succeed.

21. In the application argued as filed, one sees no ground to upset a decision by the taxing master but some ambivalence between challenge to attachment and setting aside of the extracted decree by the deputy Registrar on the 09.08.2019. I find the prayer incapable of being granted for a number of reasons. The first reason is that there is no decree in the file dated 09.08.2019. the decree that I have seen is one dated 30.07.2019, the same day the judgment was entered. The second reason is that setting aside a decree and not the judgment giving rise to it, is both inefficacious and amount to nothing more than asking the court to act in vain. Act in vain in that the judgment would remain undisturbed and a new decree would then be extracted. The third reason is that a court order can only be set aside *ex debito justitiae* when it is plainly and obviously on its face untenable for being contra legality or the known notions of justice and fairness. In this matter, nothing glaringly wrong, has been demonstrated to vitiate the process of taxation and the consequent certificate of taxation and the judgment, to call for setting aside as of right.

22. Being unable to upset the taxation and the judgment, I now ask whether there exists any merit in the contention that there is no right to execute against the applicant for having been a representative with no privity of contract with the advocate. In his affidavit on oath, the applicant is unequivocal that he and others instructed the advocate to act for them. That to this court creates a contract upon which the advocate is entitled to seek and recover fees. One cannot after that deposition on oath deny privity and I find no basis on that accusation just like I find that there is no merit on the allegation that the applicant was a mere representative. Instead I do find that even in a representative action, a person named as a plaintiff bring the action on own behalf and on behalf of the others named. The plaintiff in this matter was thus a plaintiff on own rights and thereby acquired rights and incurred obligations associated with the litigation to the full and not subject to any exceptions.

23. The upshot is that I find no iota of merit in the application and I order it dismissed with costs.

Dated, signed and delivered at **Mombasa** this **2nd day** of **October 2020**

P J O Otieno

Judge

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[1] Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR

[2] **V. Chokaa & Co. Advocates v County Government of Mombasa as a Successor of Municipal Council of Mombasa [2017] eKLR,** *Machira & Co. Advocates vs Arithur Magugu & Another NBI,* **Milimani HC Misc. Appl. No. 358 of 2001 [unreported]**