



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 100 B OF 2015

CHARLES K. ARAEBA & CO. ADVOCATES...APPLICANT/ RESPONDENT

VERSUS

FUAD ABDALLA BREK.....RESPONDENT/OBJECTOR

RULING.

1. Vide Chamber Summons application dated 6th December, 2017 the Respondent/Objector seeks for the following orders;

(a) Spent;

(b) that this Honourable Court be pleased to grant leave to extend time to object to ruling and order of taxing master delivered on 31st October, 2017;

(c) that this Honourable Court be pleased to set aside ruling and order of taxing master delivered on 31st October, 2017;

(d) spent;

(e) the costs of the suit be provided for.

2. The application is premised on the grounds on the face of it, supporting affidavit of the Applicant dated 6th December, 2016 and its further affidavit of 12th June, 2018 filed on the same date. The said grounds are:

(a) that the taxing master/Hon. Deputy Registrar had no jurisdiction to entertain the suit since there was no dispute in respect of a retainer.

(b) the fixing master failed to take into account the Respondent's written summons dated 31st May, 2017 and filed on 2nd June, 2017.

(c) the taxing master erred in law by failing to give reasons for her decision.

(d) the application has been brought without unreasonable delay and in the interest of justice.

3. The Respondent, in response filed a replying affidavit on 30th January, 2018 opposing the application that;

(a) the application is fatally defective and should be struck out on the same ground;

(b) the objector has brought the application as an afterthought and as a means of occasioning delay in the matter;

(c) the Respondent did not file their submissions and the Deputy Registrar properly had the matter proceed for ruling on 17th July, 2017 on this reason, which ruling is final and remains unchallenged;

(d) the Deputy Registrar in taxing the subject matter bill of costs complied with the relevant provisions of the law;

- (e) the objector did not properly request for reason for the taxation as provided for by the Remuneration Order;
- (f) that the objector made a consent to have the subject matter bill taxed before the Deputy Registrar and raising the objection in bad faith;
- (g) the objector ought to have raised any issue relating to jurisdiction if at all, at the earliest opportune time;
- (h) that the applicant's list of documents filed before court on 22nd May, 2017 sufficiently show that the objector was the Respondent's client in Mombasa CMCC. No. 2198 of 2013.

4. The matter came up for hearing on 26th November, 2018 whereby counsels for both parties, having agreed to dispose of the application by way of written submissions, confirmed that the same were ready and they would rely on them in their entirety.

OBJECTOR'S SUBMISSIONS

5. The objectors are may be gathered from the Chamber Summons application dated 5th December, 2017 as well as the supporting affidavit and further affidavit sworn by the Applicant FUAD ABDALLA BREK on 6th December, 2017 and 12th June, 2018, respectively.
6. The objector contends that Clause 11 of the Advocate's Remuneration Order, 2009 gives the court discretion to enlarge time for filing reference, notwithstanding the expiry of 14 days. The objector submitted that the taxing master delivered the ruling of taxation on 31st October, 2017 and on 2nd November, 2017, he wrote a letter to the Deputy Registrar requesting for reasons of the ruling. The said letter is annexed as "FAB 2". The objector avers that this letter was not responded to despite having been received. The objector submits that the reference has been brought in time, hence properly before court. And even if it is not, the court has discretion to extend time and deem the same properly before court.
7. The objector also submit that the Deputy Registrar having failed to give reasons for the ruling, rendered the same unsustainable. He then submitted that since there was a dispute in respect of retainer (relationship between Advocate and client), the Deputy Registrar lacked jurisdiction to entertain the Bill of Costs herein.
8. Further, the objector submitted that parties were directed by the Taxing master to file written submission within 14 days each and this to be confirmed on 17th July, 2017. The objector filed their submissions on 2nd June, 2017 but the same were not considered by the taxing master in deliberating on the bill of costs.

RESPONDENT'S SUBMISSIONS

9. The Respondent's case may largely be retrieved from the replying affidavit of Charles Areba sworn on 22nd January, 2018. The Respondent therefore prays that the Chamber Summons application dated 5th December, 2017 be dismissed. Be that as it may, the following issues arise for determination in this application:
- (a) Whether the Applicant has established a case for grant of leave to extend time to object to the ruling and order of taxing master delivered on 31st October, 2017.
 - (b) Whether the Applicant has proved a case for setting aside the ruling and orders of taxing master delivered on 31st October, 2017.
10. On the first issue, Clause 11 of the Advocates Remuneration Order, 2009 gives the court the discretion to enlarge time for filing reference notwithstanding the expiry of 14 days. Clause 11 Rule (1) requires that the party objecting to the taxing masters ruling gives a full list of interests being objected to.
- Clause 11 Rule (2) that requires the taxing master to give reasons for the taxation.
11. According to the objector, the taxing master delivered the ruling of taxation on 31st October, 2017 and on 2nd November, 2017, the Objector/Applicant advocate wrote a letter to the Deputy Registrar requesting for reasons of the said ruling ("FAB 2"). Their argument is that while the law does not provide for the time frame within which such letter should be replied to by the Deputy Registrar, the objector is meant to file his application or reference within 14 days of receipt of the reply. And this being the case, the reference herein is properly before court. The Respondent stated that the letter of the objector was vague and did not mention which of the items they were objecting to (See the decision in **NYAKUNDI & COMPANY ADVOCATES –VERSUS- KNHB (2005) eKLR.**)
12. I have looked at the said letter in consideration of the arguments by both parties and find that in the ruling by the taxing master, the reasons for taxation were given for each item and one need not look elsewhere to explain them. So that anyone contesting the same, should have filed an appeal to challenge the reasons given therein. The requirement for reasons would only have arisen if the bill of costs had been taxed as presented.
13. As for the issue of there being a dispute in respect of retainer (relationship between Advocate and client) hence the Deputy Registrar lacking jurisdiction to entertain the bill of costs, it is my finding that it is not an issue that is raised for the first time in submission. It is a contract and a party relying on it ought to avail the same to court for the taxing master to make a finding on it. Both parties were absent and the taxing master was not presented with such contract/agreement for retainer hence correctly exercised her jurisdiction and taxed the bill. It would be prejudicial to the successful litigant and frivolous, if any reliance is placed on a non-existent document.

14. On the issue of the taxing master failing to take into consideration the objector's submissions, this is not a valid ground to warrant setting aside of a taxation order in that submissions are just a guide and a taxing master is not obliged to rely on them in her handling of taxation matters.

15. In view of the facts and the law presented before me, I find no good reason has been advanced by the objector/applicant to support the application dated 5th December, 2017 and proceed to dismiss them same with costs.

Ruling delivered, dated & signed this 12th day of February, 2019.

D. CHEPKWONY

JUDGE.

In the presence of:

M/s Wambani, counsel for the objector

Mr Atancha, counsel for the Respondent

Court assistant; Beja