REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 63 0F 2017

AMELI INYANGU & PARTNERS ADVOCATES.....APPELLANT

VERSUS

1. ABDULGADER SHARRIF SALEH

2. JAMAL SHARIFF SWALEH t/a

JINGO TOURS & SAFARIS….....RESPONDENTS

R U L I N G

1. On the 23/02/2018 the respondents/clients filed the Chamber Summons dated the same date seeking in the main that the court be pleased to set aside the taxing master's orders of 30th August 2017 pending the hearing and determination of HCC No. 165 of 2010. I see this as the only substantive prayer because all other prayers are sought in the interim to await the hearing and determination of this application. In so far I did hear the application and now render my decision those prayers have become moot and overtaken by events.

2. The grounds disclosed to ground the application are that the taxing master proceeded and taxed an advocate/clients bill of costs in the sum of Kshs.3,890,794.22 on the 3/3/2017 and a certificate of costs was issued on the 5/9/2017. It was equally urged that the Advocate/Respondent acted for the client/Applicant in **HCCC No. 165 of 2010** without instruction and have now threatened to execute a judgment emanating for the impugned taxation. The foundation of the client/Applicants request for sitting aside is that the Advocate/Respondent having acted for him knew their physical and other addresses but chose to serve an advocate who was not on record for them in a fresh matter. It was then added that even if the advocate in the suit giving rise to the taxation was to be taken to be the advocate in the resultant taxation file, **George Igunza Advocate** was not their advocate at the time because they had on 9/1/2017 instructed **Ms.Ibrahim Sankoh & Co. Advocates** to take over the conduct of the suit from Mr. Igunza.

3. For the Advocates/Respondent, the application was opposed on the basis of the Replying Affidavit sworn and filed by Mr. Fred O Adhoch. That affidavit opposes the application for setting aside on both fronts of competence and merits. On the competence of the application, the Advocate/Respondent takes the position that the application does not lie because being in the nature of an objection to taxation it was time barred and equally incompetent having not followed the procedure set out under Rule 11 of the Advocate Remuneration Order 2009. It is then asserted that the client/Applicant was served with a certificate of taxation as well as Notice of taxation way back on 13/9/2017 but took no steps by writing to the taxing officer objecting to taxation and thus must be deemed to have slept on their rights and thus became indolent thus not deserving any favours from equity.

4. On prayer for stay of proceedings pending determination of the court in HCC No. 165 of 2010, the advocate took the view that such a prayer cannot be justly granted owing to the fact that they no longer act in the matter, cannot control its pace and are entitled to payment for the work done while on record.

5. On the merits the counsel submitted that the client was duly served through his represented and counsel, Mr. George Egunza and therefore could not genuinely contest the service of the Bill of costs. It was then conceded that even though the Advocates knew the physical address of the clients but an attempt at personal service proved futile because they had moved from the known location to an unknown location.

6. On the competence of Mr. George Egunza Advocate, it was deponed that the decision relied on to prove incompetence to represent the client was made in 2015 and there was nothing to prove that the said advocate remain unqualified and further that Mr. Egunza did make representation that he was retained to act for the client. It was then added that after taxation, a certificate of taxation and notice were served upon the client by way of registered post and a certificate thereof was intended to be annexed as FOA 1 & 2 but no such annextures were ever exhibited in the Affidavit filed on the 28/3/2018. The Advocate then delved into the question of whether or not he had been retained and asserted that the client actually did sign documents in the advocate's offices. Counsel therefore took the position that the application to set aside was nothing but an attempt to delay the conclusion of the matter because the client was duly served with the bill of costs as shown

in the Affidavit of Patrick Muema.

7. Having filed those papers, counsel then attended court to offer oral submissions in arguing the application. When the matter was initially called out for time allocation, Mr. Olendi appeared as holding brief for Mr. Bundi who was said to have been bereaved but when the adjournment was declined, Mr. Olendi opted not to attend at the allocated time hence the matter proceeded with Mr. Adhoch offering sole submissions in opposition to the Application.

8. Having read the record of the application and the submissions offered by Mr. Adhoch, I have formed the opinion that even though it had been directed that parties consider arguing the client's application as an opposition to the Advocate's application or the two be heard together, there was no agreement reached on the 5/6/2018 when the matter proceeded to hearing. I have now relooked the applications and come to the conclusion that the clients application seeking to set aside the taxation need to be dealt with first and only if it fails should the court then consider the Advocates Application for judgment on costs which in any event remain unopposed as no responses were filed thereto.

9. With that roadmap on the way forward, I do consider that there are only two issues for determination by the court to dispose the clients' application. The two issues are:-

a) Is the Application incompetent for being time barred having been brought without regard to Rule 11 Advocate's Remuneration Order, 2009?

b) Has the client laid a basis to merit being entitled to setting aside orders made or taxation on the basis of lack of service?

Competence of the application

10. The advocate takes the position that an order made on taxation can only be validly challenged by a reference and that there is no reference before the court because the same was filed outside the time and manner subscribed by Rule 11 of the Advocates Remuneration Order.

11. Rule 11 of the Advocates Remuneration Order provides:-

i. 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.

ii. 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.

iii. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

iv. The High Court shall have power in its discretion by order to enlarge the time fixed by subsection (1) or subsection (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired".

12. That Rule indeed sets the only procedure to challenge an order made on taxation. However, that rule to me does not stand on its own. It must be read together with other rules providing for preparation of the bill, lodgement of same and service before the taxing master can be engaged in taxation.

13. To this court, taxation of a bill of costs is a dispute capable of resolution by the application of law and therefore every person to be affected by such determination is by law entitled to a fair hearing in terms of Article 50(1) of the constitutional. That to this court is the codification of the age old principle of the right to be heard under the tenets of principles of natural justice. The right to be heard commands that a party is notified of the claim, complaint or accusation, against him and he is afforded an opportunity to offer an answer. That opportunity to be heard then determines whether or not there shall then follow or has followed a due process and fair hearing.

14. It then follows that before the procedural rules on how to attack a decision made upon taxation can be delved into a court is duty bound, by virtue of its own nature and purpose, to inquire whether or not the substance and thresholds of a fair hearing were set and met. I would thus hold that the operations and application of Rule 11 of the Advocates Remuneration Order only comes to be when it is established that the fundamental requirement of a fair hearing were met before the orders on taxation were made.

15. It cannot be taken to be just that once you obtain any order on taxation, even if it be based upon fraud or deceit, the court's hands remain tied with rule 11 of the Remuneration Order. If that was to happen the court would lose its character and purpose to do justice. It would see an injustice and hold its hands at the back helpless because the rule says there must be a request for reasons for taxation within the limited period of 14 days and the taxing officer must give his reasons before a party moves to protect his rights. I hold the view that it is in such situations that the court must resort to and invoke its reserve powers otherwise called inherent powers to do justice and avoid an injustice or an abuse of the court process.

16. For the purposes of this case, the clients assert that they were denied a right to be heard before the bill could be taxed because the Advocate chose to serve an advocate they had not instructed. That begs the very fundamental question whether a fair hearing was ever

accorded to the client. I consider that a fundamental question the court must not be shielded from investigating purely on account of limitation or barrier erected by Rule 11. That Rule must remain what it is-A rule of procedure designed, intended and meant to be hand maid of justice not its master. But even if the Rule was to be uplifted to the position of being a master to the administration of justice, which it can never be, the rule is a subsidiary legislation and must not override the substantive provisions of the law including the constitutional dictates like the right to a fair hearing.

17. I do find that in so far as the application alleges lack of service as a design to deny the client the right to be heard it is properly before the court and the court cannot shut its eyes to it without appearing to negate on the right to be heard.

Should the orders made on taxation be set aside?

18. The object and purpose of setting aside an order made on default is to make right what has gone wrong on account of inadvertence, error, mistake or just impropriety. Where there was effective service and notice on the person seeking to set aside, the court has discretion to be convinced that the failure to act in time was justifiable or excusable[1]. However where there was never service at all or effective service then the court has no discretion to set aside but must set aside a default Order as of right[2]. These principles merely emphasise that the right to be given an opportunity to be heard is the cornerstone of administration of justice and must be respected at all times.

How do those principles apply to the matter before me?

19. By law, the taxation of costs between an advocate and client must be instituted by filing a bill of costs in a miscellaneous application unlike party and party costs where the bill of costs is filed in the file in which the matter was litigated. That prescription qualifies a bill of costs to be a suit in terms of the provisions of Section 2 Civil Procedure Act which defines a suit as a proceeding commenced or instituted in any manner prescribed. Accordingly, an advocate-client bill of costs is a fresh suit, separate from that on which costs were incurred, and not bound to be handled on behalf of the client by the advocate who acted for him in the litigation giving rise to the taxation. It thus follows that the Respondent in such proceedings must be served in person unless there be disclosed a situation completed by Order 5 Rule 8 as read with order 9 Rule 1, Civil Procedure Rules.

20. However, for a bill of costs, the governing provision is Rule 72 of the Advocate Remuneration Order. The Rules provide:-

> **"When a bill of costs has been lodged for taxation as aforesaid, the registrar shall, upon payment of the prescribed fee, issue to the party lodging the bill a notice of the date and time (being not less than five days after the issue of such notice, unless a shorter time is specially allowed by the registrar) fixed for taxation thereof and shall also issue a copy of such notice, accompanied by a copy of the bill, to each advocate and other person whose name is endorsed on the bill as entitled to receive notice of the taxation thereof:**
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> **Provided that where any person so entitled to receive notice cannot be found at his last known address for service the taxing officer may in his discretion by order in writing dispense with service of notice upon such person".** (*Emphasis provided*)

21. The use of the phrase *'person whose name is endorsed on the bill as entitled to receive a notice of taxation"* ought to be understood in the context of Rules 70 of the Advocate Remuneration Rules which mandates that a bill of cost be endorsed with the name of the advocate by whom it is lodged and also the advocate for whom is he is agent as well as the name and address of any advocate or other person entitled to receive a notice of taxation. I understand the provision to say that the person against whom a bill of costs is presented must have his name endorsed thereon and must be served. He must be served so that a decision imposing financial obligations upon him is not made behind his back. The Supreme Court of India, whose decisions have been followed by Kenyan courts, forcefully underlined the importance of the right to be heard as follows in ***Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:***

> ***"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."***

22. In the bill taxed by the Registrar, there was no endorsement as required by Rule 70 nor was there an endorsement of the name of anybody to be served with that bill. That alone may lend credence to the accusation by the client that there was a design and an intention to deny them audience. But that is not all. That situation even if deemed a technicality by the rules, which I do not think it is, could have been remedied by there being an attempt to serve the Respondents in person it being asserted and conceded that having acting for the client the advocate knew their physical address. It needs no citation of a precedent that best service is personal service and only where one cannot be found is service on others permissible[3] . The only evidence of service upon the client in this matter is the Affidavit of PATRICK MWEMA.

23. That Affidavit says at the relevant paragraphs:-

> **"Paragraph 2: THAT on 7th April 2017 I received a bill of costs and Notice of Taxation from the firm of AMELI INYANGU & PARTNERS ADVOCATES with instructions to effect service on the Respondents.**
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> **Paragraph 3: THAT on the same day at about 10.00am guided by information that Mr. George Egunza Advocate acts on behalf of the Respondents in other matters I visited the Mombasa Law Courts and met Mr. George Egunza Advocate and inquired from him the whereabouts of the Respondents and the reason I was looking up for them and he informed me he has express authority to receive court documents on behalf of the Respondents. I therefore served him with the bill of costs and Notice of Taxation and he acknowledged receipt thereof by signing at the back of my copy of Notice of taxation which I**

return herewith duly served".

24. That affidavit does not allege any attempt at personal service. Despite having instruction to serve the Respondents in person, the process server made no attempts to go to their known physical address instead opting to explore the corridors of the court and while there, meeting Mr Egunza from whom he enquired as to the whereabouts of the Respondents. One would wonder why the process server acted as he did. In fact, even if he was to serve the counsel, why on the court corridors and not chambers? In totality I do find that there was no service upon the Respondents in this case.

25. I say no service because there is nothing to show that Mr. Egunza was retained by the respondent to accept process on their behalf. It is not an excuse that he had acted for them in the suit giving rise to the taxation. That was not enough. There ought to have been some evidence that Mr. Egunza was retained to accept service of process. None was availed before me.

26. It has been urged by the advocate that Mr. Egunza had acted or was on record for the client in the matter giving rise to the taxation. I have said that was not enough because even the advocate/Respondent had also been engaged in the same suit. That would not have entitled them to serve themselves. That, however, is beside the point. The point illustrated by the Notice of Change of advocates dated 9/1/2017 and annexed to the Affidavit in support of the application is that by that date both Mr. Egunza and the current Respondent were sacked and replaced by Ms. Ibrahim Sankoh & Co. Advocates.

27. That tells me that from that date henceforth Ms. IBRAHIM SANKOH & CO. ADVOCATES were the advocates for the client in the matter and not Mr. Egunza. It is of note to the court that in his very exhaustive Replying Affidavit and even submissions offered in the absence of the client representative, Mr. Adhoch steered clear of making any comments on that document. I make the inference that it was not contestable.

28. The upshot is that I do find that the client was never served with the Bill of costs and his right to be heard was thus affronted and nothing done pursuant to that affront can be left to stand but must be set aside. I do set it aside with costs to the client/Applicant and direct that the bill and a notice thereof be properly served upon the Clients/Respondents to enable the taxation be conducted in the usual and proper way. I direct that costs be in the cause

Dated and delivered at **Mombasa** this **8th** day of **March 2019**.

P.J.O. OTIENO

JUDGE

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[1] In **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede (1982-1988) KAR page 1036,** the Court of Appeal while dealing with an appeal against refusal to set aside ex-parte judgment in default stated:

"... where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue".

[2] In ***Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010***, the Court expressed itself thus:

"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

[3] Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR