



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL APPLICATION NO. 358 OF 2015

GEORGE MIYARE T/A MIYARE & CO ADVOCATES....APPLICANT

VERSUS

EVANS GOR SEMELANG'O T/A TALANTA

AFRICA MEDIA LIMITE.....RESPONDENT

RULING

1. In the Notice of Motion dated 6th March 2019, the applicant seeks two substantive orders. He seeks leave to file a reference out of time against the ruling on taxation delivered by the Deputy Registrar *Hon. Mukuyo* and that the court be pleased to set aside the same ruling and the certificate of taxation upon such terms as are just. The other prayers in the motion sought interim orders pending the hearing and determination of the application and are now spent.

2. The application is based on the grounds stated on its face which are replicated in the depositions made by the applicant in his supporting affidavit dated 6th March 2019. In the main, the applicant contends that he did not participate in the taxation proceedings and the respondent's Bill of Costs was thus taxed *ex parte* at KShs.615,023; that he is aggrieved by the Bill of Costs as taxed as the same was not drawn to scale and was exaggerated; that the time prescribed for filing a reference has already lapsed; that the intended reference has high probability of success and that it was in the interest of justice to allow the application.

3. The application is opposed through the replying affidavit sworn by the respondent's advocate *Ms Sheila Owino*. The gravamen of the respondent's opposition to the application is that the applicant was well aware of the taxation proceedings as he was served with the Bill of Costs and hearing notice but he chose not to participate in the proceedings; that he cannot now turn around and claim that he was not heard.

4. In addition, the respondents contended that the orders sought cannot be granted as this court is now *functus officio* having entered judgment for the decree holder on 9th March 2017 for the taxed amount; that the intended reference is against the decision of the taxing master which was made on 11th August 2016 about three years ago; that no reasonable explanation has been advanced for the delay; that the application is an afterthought meant to unjustly deprive the decree holder/respondent of the fruits of its judgment and amounts to a gross abuse of the court process.

On these grounds, the respondent urged the court to dismiss the application with costs.

5. By consent of the parties, the application was canvassed by way of written submissions. Those by the applicant were filed on 9th April 2019 while those by the respondent were filed on 2nd May 2019.

6. I have carefully considered the application, the affidavits on record as well as the parties' rival submissions and the authorities cited.

Having done so, I find that the outcome of this application is pegged on a resolution of the dominant issue of whether or not this court has jurisdiction to grant the applicant the orders sought particularly an order granting him leave to file a reference out of time.

7. I choose to deal with the issue challenging the court's jurisdiction first though there are other issues that arise from the parties' rival submissions such as the competence or otherwise of the application as drawn because jurisdiction is everything and without it, a court cannot take any further step: See - *Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Limited, (1989) KLR 1.*

8. The respondent in its submissions argued that this court lacks jurisdiction to grant the applicant leave to file a reference out of time as it is now *functus officio* having entered judgment in favour of the respondent against the applicant in respect of the taxed costs on 9th March

2017; that having pronounced final judgment on the quantum of costs payable to the respondent by the applicant and a decree to that effect having been issued, the dispute on costs was fully settled and cannot be re-opened in the manner proposed by the applicant.

9. In his riposte, the applicant contended that the court had jurisdiction to entertain his application as in his view, it was not *functus officio*. He advanced the view that the court had jurisdiction to grant the orders sought under *Order 22 Rule 22* of the *Civil Procedure Rules* and paragraph 11 (4) of the *Advocates Remuneration Order* of 2012.

10. The importance of the principle of *functus officio* cannot be gainsaid. In situations where it is applicable, it affects the jurisdiction of a court. The Supreme Court in *Raila Amolo Odinga & Another V Independent Electoral Boundaries Commission & 2 Others, [2013] eKLR* underscored this fact when it described the principle in the following terms:

*“On the principle of functus officio, we are guided by the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others* (supra) where the Supreme Court of Kenya rendered itself thus:*

“... Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

*This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:**

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].”

11. The above elucidation of the principle does not however mean that a court is absolutely barred from revisiting its decisions or judgments. There are exceptions to the general rule which are provided for by the law which includes circumstances where a court is allowed to review its orders or judgments. This is what the Supreme Court was alluding to in *Menginya Salim Murgani V Kenya Revenue Authority, [2014] eKLR* where it stated as follows:

“It is a general principle of law that a court after passing judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

12. In the application before me, it is not disputed that the respondent filed an advocate-client Bill of Costs dated 18th August 2015 which was taxed at KShs.615,023 on 10th February 2016. About six months later, a certificate of taxation was issued on 16th August 2016 and since the same was not challenged by the applicant, this court on application by the respondent entered judgment for the respondent against the applicant for the taxed costs as certified in the certificate of taxation pursuant to *Section 51 (2)* of the *Advocates Act*. This was done by *Hon. Thurairaja J* on 9th March 2017. A decree was subsequently issued whose execution prompted the filing of the instant application.

13. Given the above undisputed facts, I have no doubt in my mind and I fully agree with the respondent that this court lacks jurisdiction to grant the applicant leave to file a reference against the ruling on taxation since it is clearly *functus officio*. The court having entered final judgment for the respondent against the applicant on the strength of the certificate of taxation pronounced itself on the quantum of costs payable to the respondent by the applicant and conclusively settled the dispute of costs between the parties. The court cannot in the circumstances seek to re-open the dispute over two years later by granting the applicant leave to file a reference out of time.

14. I concur with the applicant’s submissions that this court is clothed with jurisdiction and discretion under *paragraph 11 (4)* of the *Advocates Remuneration Order* to enlarge the time prescribed for filing of references but in my view, that power can only be exercised by the court before a judgment on costs had been entered and a decree issued to that effect.

15. Once the court enters judgment on the quantum of costs payable to an advocate under the *Advocates Act*, the window of filing a reference to challenge the ruling on taxation or the certificate of taxation as envisaged in *Paragraph 11* of the *Advocates Remuneration Order* is tightly closed. Such a judgment can only be challenged on appeal to the Court of Appeal or in appropriate cases, the court can exercise its powers of review under *Section 80* of the *Civil Procedure Act* as read with *Order 45* of the *Civil Procedure Rules*. *Order 22 Rule 22* of the *Civil Procedure Rules* deals with stay of execution of decrees and is not applicable to the matter under consideration.

16. The foregoing finding on the court’s jurisdiction is sufficient to dispose of the instant application and in the premises, it is not necessary for me to deal with the other issues raised by the

17. parties. It is consequently my finding that the Notice of Motion dated 6th March 2019 is not merited and it is hereby dismissed with costs to the respondent.

18. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Olunga holding brief for Ms Adongo for the applicant

Ms Owino for the respondent

Mr. Salach: Court Assistant