



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANAEUS CIVIL APPLICATION NO. 284 OF 2016**

**IN THE MATTER OF TAXATION OF ADVOCATE/CLIENTS BILL OF COSTS ON TRANSFER OF PROPERTY No. DONYO SABUK/KOMAROCK BLOCK 1/48365**

**BETWEEN**

**CHRIS N MUTUKU (ADVOCATE).....APPLICANT**

**VERSUS**

**BENSON NJUI KARIGI.....RESPONDENT**

**IN THE MATTER OF OBJECTION PROCEEDINGS**

**BENSON NJUI KARIGI.....CLIENT/APPLICANT**

**VERSUS**

**CHRIS N MUTUKU.....ADVOCATE /RESPONDENT**

**RULING**

1. The applicant commenced the application dated 20<sup>th</sup> May, 2019 under Article 159 of the Constitution, Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Orders 5, 10, 45, 52 and 22 of the Civil Procedure Act, Order 11 of the Advocates Remuneration Order and Section 48 of the Advocates Act Cap 16 Laws of Kenya and other enabling provisions of the law for orders that the taxation proceedings filed by the Respondent be stayed, that the time to prosecute the review and reference be enlarged; that leave be granted to issue a notice to the deputy registrar out of time and that the notice be deemed as duly filed; that the applicant be granted leave to cross-examine the court process server; that the certificate of taxation dated 27<sup>th</sup> May, 2017 be set aside; that the ruling adopting the same be set aside; that the bill of costs dated 25<sup>th</sup> October, 2016 be struck out.

2. The grounds of the application were that the applicant entered into an agreement for sale and purchase of Donyo Sabuk/Komarock Block 1/48365 with the vendor and was introduced to the Respondent by the vendor and the respondent executed the said agreement and he paid various amounts of money. The applicant averred vide his supporting affidavit that the respondent acted for another purchaser in respect of the same property during the pendency of the executed agreement between him and the said respondent. He averred that the matter was reported to the Advocates disciplinary tribunal and that the respondent should not be paid for the work not rendered. The applicant averred that the respondent proceeded to irregularly tax an unserved bill of costs and that the work rendered by the advocate was unsatisfactory, incomplete. He further averred that he has never been served with a bill of costs or a fee note contrary to section 48 of the Advocates Act and in any event he was not personally served with the bill of costs and now seeks to summon the process server and cross-examine him. It was his averment that the respondent is not entitled to claim fees from him.

3. The Respondent opposed the application vide a preliminary objection stating that the said application is res judicata vide the ruling of 22<sup>nd</sup> May 2019; that the firm of Gatheru Gathemia & Co Advocates is not properly on record and that the application dated 20<sup>th</sup> May, 2019 is bad in law. The Respondent filed an affidavit in reply to the effect that that matters raised in the application dated 20<sup>th</sup> May, 2019 had been determined vide the ruling of 22<sup>nd</sup> May, 2019 and there is no appeal against the said ruling hence the application is res judicata. Secondly, he contends that he was given instructions to act for the applicant and the vendor and he prepared a sale agreement and sent it via email to the applicant who never paid instruction fees and also failed to pay the full purchase price and thus the respondent was instructed to terminate the sale agreement with the Applicant and the applicant has not denied receiving an email to that effect. Thirdly, he contends that he engaged another purchaser for the property and the transaction was completed and the owing amount being unpaid, he proceeded to tax his bill of costs and as such a certificate of taxation was issued by the Deputy Registrar and the same was served on the Respondent via email and that the applicant seeks enlargement of time in respect of a decision that was made in 2017, well over two years. He maintains that the delay is inordinate.

4. The parties were directed to file written submissions and only the advocate's written submissions are on record.

5. Learned counsel for the applicant/respondent submitted that the notice of appointment of advocates does not bear any court stamp. Further that there is no application on record to set aside or vary the orders that were made on 22<sup>nd</sup> May, 2019 and that the application dated 20<sup>th</sup> May, 2019 is res judicata. Learned counsel added that the instant application lacks merit because the client has not adduced any evidence to show what new or important material has been discovered since the taxation complained of. Counsel relied on the case of **Francis Njoroge v Stephen Maina Kamore (2018) eKLR**. Counsel added that there is no error apparent on the face of the record and that the Respondent in this matter has never given any notice of his objection to either the taxing officer or the court. According to counsel the court lacks jurisdiction to handle the instant matter because the order sought to be set aside was made by the deputy registrar and this cannot be a review. Further that there is no merit in setting aside the taxation by the deputy Registrar for doing so would be a waste of the court's time because the respondent has agreed that he entered into an agreement for sale of the land and the same was lawfully terminated.

6. I have carefully considered the pleadings and affidavits for and against the application as well as the submissions on record and the issues to be determined are Firstly, whether the application is res judicata; Secondly, whether the applicant is properly on record for the applicant and Thirdly, whether the applicant should be given time to prosecute a review, reference and setting aside of the proceedings herein that can be imputed as the taxation proceedings.

7. The Respondent has objected to the application and stated that it is res judicata. The import of Section 7 of the Civil Procedure Act is that the applicant in the application is trying to bring before the court, in another way and in the form of a new cause of action, a transaction which has already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. The doctrine relates not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. (See **Kamunye & others v The Pioneer General Assurance Society Limited (1971) EA 263**). The subject proceedings of the taxing officer as pointed out in my ruling dated 22<sup>nd</sup> May, 2019 showed that the learned registrar seemed to have been satisfied with service and gave her ruling on 23.3.2017. The applicant then filed an application and I delivered my ruling and the first ground of decision was that the certificate of taxation that was issued on 27.3.2017 had not been set aside. Secondly, the applicant had recourse under Paragraph 11 of the Advocates Remuneration Order. Lastly there was no objection to the taxation or a reference to challenge the decision of the taxing officer that had been brought to the attention of the court.

8. For the following reasons, I find the instant application is *res judicata* :

*i) The applicant has pleaded in both the application dated 16<sup>th</sup> November, 2017 and the instant application that he was not served with a fee note.*

*ii) The applicant had brought before the Court, in another way and in the form of a new cause of action (leave to issue a notice and an order to enlarge time to prosecute the review) an issue which has already been addressed by the court.*

*iii) The ruling and taxation certificate on which the application is founded has already been put before this court of competent jurisdiction and has been adjudicated upon.*

*iv) The points raised by the applicant in the instant application properly belonged to the subject of litigation which has already been adjudicated upon.*

*v) The applicant ought to have exercised reasonable diligence and should have brought forward his claims within reasonable time but now purports to bring the same claim clothed in another form after two years.*

9. The second issue is whether the applicant's advocate is properly on record. Order 9 Rule 9 is the operative section and I point out no registry stamp shows that the notice of appointment was received, however there is on record a receipt as evidence of payment for the same and the assessment indicates that the same was received for assessment on 20<sup>th</sup> May, 2019 therefore it was lodged in court and possibly the registry staff forgot to stamp it. The failure to stamp the document cannot be visited upon the applicant as that is an administrative issue to be addressed by the court.

10. In **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR**, Justice Korir observed that:

**“In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:**

**“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”**

11. I have considered the preliminary objection and the contents of the applicant's application and noted that there is no application or prayer by Gatheru Gathemia and Co Advocates or any allusion to the effect that the said advocate is to come on record, however the application was made on 20<sup>th</sup> May, 2019 before the ruling in respect of this matter was issued. Therefore I am inclined to disagree with the respondent that the application is incompetent and not properly before the court.

12. The third issue relates to time within which to file a review, reference and in light of my observation above, the applicant is not entitled to

the orders sought.

13. From the way the application has been presented requires me to make some observations. The application has been brought under Section 48 of the Advocates Act as well as Order 11 of the Advocates Remuneration Order.

Section 48 of the Advocates Act provides as follows:

***“1) “Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until after the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaintiff, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.*”**

***2) Subject to Subsection (1), a suit may be brought for the recovery of the costs due to an advocate in any court of competent jurisdiction.***

***3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.”***

Paragraph 11 of the Advocates’ Remuneration Order provides as follows:

**“11. Objection to decision on taxation and appeal to Court of Appeal.**

***(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.***

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

***(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for 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.”***

14. Under Section 48, an application by an Advocate for recovery of costs shall be brought by plaintiff and as an ordinary suit. (***Musyoka & Wambua Advocates Vs Rustam Hira Advocate (2006) eKLR***). In a suit for recovery of costs, the taxing officer has no jurisdiction in the matter. Secondly, taxation of a bill of costs by the taxing officer under section 48 (2) of the Advocates Act can only be taxed by an order of the court. The procedure for a taxing officer to tax the bill of costs without an order of the court is found under Rule 13 of the Advocates (Remuneration) Order that enables the taxing officer to tax costs as between Advocate and Client and without any order of the court for that purpose. Moreover the provision does not deal with recovery of costs but only with the taxation of costs the result of which may become the basis of a suit for recovery of costs.

15. Rule 13, 13A, 14 and 16 deals with the procedure of taxation of bills on the application of the client or the Advocate. Under Rule 13 the client may by notice in writing require the taxing officer to fix a date for the taxation of the bill. Under Rule 16, the court has discretionary power whether to order the Advocates bill presented to the client to be taxed.

16. From the foregoing, there are three case scenarios. Where an Advocate serves the party chargeable with a bill of costs under section 48 of the Advocates Act, the court may order that the bill of costs so served to be taxed. The second situation is where an Advocate serves a bill of costs on the party chargeable under Section 48(3) of the Advocates Act and the party chargeable upon whom the bill has been served gives notice as stipulated under the said rule for the taxation of the bill, the Registrar or taxing master may proceed to tax the bill without an order of the court to that effect. In such cases, a suit will not be filed. In the second scenario the Registrar has jurisdiction to tax the Advocate/party chargeable bill of costs without an order of the court. The third case scenario is where an Advocate or Client applies under regulation 13 of the Advocates (Remuneration) Order. In the third situation the Registrar has jurisdiction to tax the bill of costs without an order of the court. Before I conclude this matter, there are subtle differences in the use of the language under sections 48 of the Advocates Act and Rule 13 of the Advocates (Remuneration) Order. Sections 48 of the Act refer to "the costs due to the advocate". Regulation 13 on the other hand specifically deals with the costs as between the advocate and the client. The question that comes to mind is whether section 48 of the Act by using the term "costs due to the advocate" has cast the net wider than regulation 13. In other words "the costs due to the advocate" under the bill of costs may include other persons other than the client. Section 2 of the Advocates Act specifically defines the word "client". If section 48 of the Act with regard to the words "costs due to the advocate" were meant to apply exclusively to a client of an advocate, why would the legislature adopt the use of the words "costs due to an advocate" instead of using the defined word "Client"?

17. From the above authorities I have come to the only conclusion that the applicant imputes that there is a dispute between the advocate and

client as to whether costs or fees were due. Secondly it is alleged that the work was not completed and the sum is colossal. The learned Registrar reached a decision based on the evidence before her and the applicant had an opportunity to object as per Rule 11 as pointed out in my ruling dated 22<sup>nd</sup> May, 2019 and did not seek for enlargement of time.

18. It was not within the knowledge of the Registrar that there was contention as to whether fees were due as between the advocate and his client for had she known, then the matter would best be handled in a suit. I am curious as to why the applicant has opted to raise that issue at this stage and yet from the evidence on record, there is no objection, no reference to the high court or attempt to do so. Regulation 11 provides that the reference ought to be filed within 14 days from the date of the decision and grants discretion to enlarge time, however it is well over two years from the date of the decision and there is no explanation for the delay. There is also no draft reference annexed to the instant application. In *Soundd Entertainment Limited v. Antony Burungu and Co. Advocates* [2014] eKLR the court found that 60 days delay was inordinate and in light of the foregoing reasoning I am not persuaded that the applicant is aggrieved with the decision of the taxing master and this buttresses the refusal to grant the orders sought in the application.

19. In the final result I find that the application just like the one addressed vide ruling delivered on 22.5.2019 has been brought under the wrong provisions of Section 48 of the Advocates Act and the Civil Procedure Rules and that the same has not passed muster so as to warrant the orders being sought herein.

20. The upshot is that in view of what I have outlined above, I do hereby partially uphold the Preliminary Objection raised by counsel for the Respondent, and find that the application dated 20<sup>th</sup> May, 2019 lacks merit. The same is dismissed with costs.

It is so ordered.

**Dated and delivered at Machakos this 16<sup>th</sup> day of September, 2019.**

**D.K. Kemei**

**Judge**