REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

MISCELLANEOUS APPLICATION NO 43. OF 2017

IMARA STEELS MILLS LTD.....APPLICANT/RESPONDENT

VERSUS

HERITAGE INSURANCE COMPANY LTD..... RESPONDENT/APPLICANT

SILA NZIOKA & 47 OTHERS.....1ST INTERESTED PARTIES

RULING

1. Imara Steel Mills Limited, the applicant, took out a motion on notice dated 11th February 2019 and filed in court on 12th February 2019. The motion was premised under Article 159 (2) (d) of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act, and Order 51 rule 1 of the Civil Procedure Rules. It sought the following orders;

1. Spent

2. That the ruling delivered on 11th May 2018 on the applicant's bill of costs herein dated 17th October 2017 and/or certificate of taxation dated 15th May 2018 be set aside.

3. That the warrants of attachment and sale issued herein on 6th February 2019 be cancelled, recalled or revoked.

4. There be a stay of execution pending the hearing and determination of this application

5. That the costs of this application be provided for

2. The grounds in support of the motion are that; a ruling on the applicant's bill of costs dated 17th October 2017 was to be delivered on 14th February, 2018; that on 14th February 2018 the said ruling was not ready and the same was to be delivered on notice; that the applicant was never served with a notice for delivery of the said ruling either by the court or the respondent herein; that on 30th April 2018 the applicant received the respondent's letter dated 23rd April 2018 indicating that the said Bill of costs had been taxed at Kshs. 383,180 and that the respondent intended to challenge the said ruling by way of reference and that the applicant was never served with the reference or the reasons for the decision on taxation.

3. The applicant's other grounds are that the taxed amount was reviewed or changed from Kshs. 383,180 to Kshs. 1,448,180 through a process unknown in law and a certificate of costs issued and that the respondent never filed an application for entry of judgment on the taxed costs. In the circumstances the applicants contends that no decree was issued by the court and a certificate of costs is not a decree capable of being executed.

4. It is the applicant's case that the purported change or review of the taxed cost of Kshs. 383,180 to Kshs 1,448,280 was illegal, irregular and the same should be set aside ex dibitio justiciae and that the warrants of attachment and sale issued on 6th February 2019 should be cancelled, revoked or recalled.

5. The application is supported by an affidavit of Gibson Maina Kamau, the applicant's legal manager, sworn on 11th February 2019, reiterating the aforementioned grounds. He deposed that, on 8th November 2017 the applicant's advocates were served with the Bill of costs and notice of taxation; that the bill of costs came up for taxation on 29th November 2017 when parties agreed to dispose it of by way of written submissions and the matter was set for mention on 24th January 2018 to confirm filing of submissions.

6. He stated that on 24th January, 2018, the taxing officer reserved her ruling for 14th February 2018; that on the said date the ruling was not ready and they were advised that it would be delivered on notice. He further stated that the applicant's advocates never received notice for delivery of the ruling but on 30th April, 2018 they received a letter from the respondent's advocates indicating that their bill had been taxed at Kshs.383, 180 and that they were to challenge that decision by way of a reference.

7. The deponent deposed that the respondent never filed a reference but later discovered on perusing the court file that the party and party bill of costs earlier taxed at Kshs. 383,180 had been unprocedurally and illegally changed or reviewed upwards to Kshs. 1,448,180 on 11th May 2018 and a certificate of costs issued on 15th May 2018. There was still the other certificate of costs for Kshs. 383,180. He contended that they were unaware how the taxed costs had changed from Kshs.383, 180 to Kshs.1, 448,180 and warrants of attachment issued.

8. With regards to the proclamation and warrants of attachment, he stated that the applicant's property was proclaimed on 7th February 2019 auctioneers to recover costs of Kshs 1,450,630. He argued that the warrants of attachment and sale were issued illegally and un procedurally and the same should be recalled cancelled, or revoked.

9. Maina Njuguna opposed the application through a replying affidavit sworn on 11th February 2019. He deposed that judgment was entered in favour of the respondent on 28th September, 2016 with costs and that costs were ascertained after taxation. He further deposed that if the applicant was dissatisfied with the taxing officer's decision it should have requested for reasons and thereafter file a reference seeking review of that decision.

10. It was contended that the applicant slept on its rights for almost a year from the date the bill of costs was taxed and has not explained the long delay in challenging the decision. He argued that the applicant ought to have sought extension of time to file a reference to challenge the decision of the taxing officer.

11. On the issue of service of the notice for taxation it was contended that a notice of taxation was served on the applicant's Advocates; that the applicant has not shown efforts it made to follow up on the taxation and that it is not necessary for the respondent to get judgment on the certificate of taxation since judgment on costs had already been given.

12. Mr Njuguna also raised a preliminary objection dated 15th February, 2019. He argued that the application has no legal basis; is fatally defective, is bad in law and amounts to an abuse of court process. He argued that the applicant was indolent and guilty of laches for the inordinate delay in moving the court; is guilty of material non-disclosure and is undeserving of the order to set aside the impugned ruling. He contended that the applicant should have moved under rul 11(1) and (2) of the Advocates Remuneration Order by way of reference.

13. Mr Wambua, learned counsel for the applicant submitted highlighting their written submissions, that the respondent failed to serve a notice for the ruling or on taxation leading to the ruling dated 15th May 2018 and the subsequent certificate of taxation. He submitted that the issue raised in the application is the unprocedural manner the taxed costs were increased from Kshs. 383, 180 to Kshs. 1.448, 180.

14. With regard to the preliminary objection, he submitted that it is an admission by the respondent that there was taxation. He urged the court to set aside the certificate of costs issued on 15th May 2018

15. Ms Nyaga, learned counsel for the respondent, submitted also highlighting their written submissions that the respondent's bill of costs dated was taxed on 28th March 2018, allowed at Kshs. 383,180 and a certificate of taxation issued on 25th April 2018. She argued that by letter dated 23rd April 2018 and filed in court on 26th April 2018, the respondent objected to the decision of the taxing officer and sought reasons for the decision.

16. According to counsel, on receipt the letter, the taxing officer reviewed the earlier decision and taxed their bill of costs at Kshs.1, 448,180 and issued a certificate of taxation dated 15th May 2018. Counsel maintained that the applicant should have challenged the taxing officer's decision through a reference. She prayed that the application be dismissed with costs.

17. I have considered the application the response and submissions made on behalf of the parties. The application raises two fundamental issues. First, whether the taxing officer could review her earlier decision, and second; whether the taxing officer's decision should be interfered with through the present application.

18. The facts giving rise to this application are not in dispute. The respondent filed their party and party bill of costs which was taxed and allowed at kshs. 383,180. The respondent was dissatisfied with that decision and sought reasons to enable them file a reference to this court. On receipt of the letter, the taxing officer made another decision, this time taxing the bill of costs at kshs. 1,448,180 and issued another certificate dated 15th May 2018 to that effect. There are therefore two certificates of costs on record.

19. The respondent applied for execution and the court issued warrants of attachment prompting the present application. The applicant contends that the respondent did not notify them that the two rulings on the same bill of costs; that the respondent did not serve a copy of the certificate of costs and chose to ambush the applicant with execution using the latter certificate of costs.

20. According to the applicant, the ruling was not ready on 14th February 2018 and they were advised that it would be delivered on notice but no such notice was served. The applicant argues that it was also not served with a reference and they do not know how the taxed sum was increased from Kshs. 383,180 to Kshs. 1,448,180.

21. The respondent has dispelled the applicant's concerns arguing that the applicant has not shown what efforts it made to follow up with the court on the taxation. According to the respondent, the notice of taxation was issued on 8th November 2017 and the same was served on the

applicant's advocates. It denies any wrong doing either on its part or that of the court.

22. I have carefully considered this application and perused the court file. I note, as the applicant correctly states, that the respondent's bill of costs was taxed and allowed at kshs. 383, 180 on 28th March 2018. A certificate of costs was issued on 25th April 2018. The respondent was dissatisfied with that decision and wrote to the taxing officer seeking reasons for purposes of filing a reference. The letter is dated 23rd April 2018 and was received by the court on 26th April 2018 but no reasons are on record. The record further shows that on 11th May 2018, the taxing officer made the following remarks:

> **"I have seen 2 receipts dated 30/10/ 2015 and 29.9. 2015 which were produced as exhibits 3(b) and 3(c) respectively which were omitted in the taxed bill. The same is amounts to Kshs. 1,440,000. The bill herein is now taxed at Kshs. 1448,180."**

23. From the record, there is no indication that the applicant and respondent were represented. The record for that day is also not signed. It is plain that the taxing officer reviewed her earlier decision, increased the taxed costs upwards to kshs. 1,448,180 and issued another certificate of costs dated 15th May 2018. This was done without any application; in the absence of parties and their advocates and without any notice to them. This is the certificate of costs that the respondent moved to execute prompting the present application.

24. Taxation of costs is a matter that is guided by the Advocates Act and the Advocates Remuneration Order. Section 51(2) of the Advocates Act provides that:

> **"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."**

25. The taxing office's mandate is to ascertain costs upon taxing the bill of costs. Section 51(2) is also clear that the certificate of costs once issued by the Taxing officer is final unless set a side or altered by the court. The court may also make an order that judgment be entered in terms of the amount in the certificate of costs in the case of advocate client bill of costs.

26. Only the "court" envisaged under the Advocates Act can alter the amount in the certificate of costs or set it aside once it has been issued by the taxing officer. Section 2 of the Advocates Act defines **"Court"** to mean the "High Court." That means it is only the High Court that has jurisdiction to set aside or alter a certificate of costs, including the amount ascertained by the taxing officer and contained in that certificate of costs. The taxing officer's mandate ends after taxation and signing of the certificate of costs.

27. This is so because a party aggrieved by the decision of the taxing officer can only file a reference to this court. The party cannot even seek a review of that decision before the taxing officer. That can be discerned from rule 11 of the Advocates Remuneration Order which states:

> **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."**

28. The question then is; could the taxing officer review her decision and increase the taxed costs from Kshs 383,180 to Kshs.1, 448,180? The answer is plainly no. A taxing officer cannot review or set aside his or her decision after taxation. That is the mandate of this court on reference and this is clear from the reading of both section 51(2) of the Advocates Act and rule 11 of the Advocates Remuneration Order. The decision of the taxing officer of 11th May 2018 which gave rise to the certificate of costs dated 15th May 2018 was made without jurisdiction and is, therefore, null and of no effect.

29. That brings us to the second issue in this application; whether this court should allow the present application and set aside the decision made on 11th May 2019 and the certificate of costs dated 15th May 2018. The applicant has urged the court to do that while the respondent urges the court not to.

30. The respondent has argued both through a preliminary objection and affidavit that the application is unsustainable, is brought through a wrong procedure and is an abuse of the process of the court. In the respondent's view, the applicant should have filed a reference as required by rule 11 of the Advocates Remuneration Order. They contend that the application is fatally defective, is bad in law and should not be allowed.

31. The respondent has argued correctly that the applicant did not file a reference against the taxing officer's decision giving rise to the certificate of costs dated 15th May 2018. Ordinarily, the rule requires a party dissatisfied with a taxing officer's decision to apply for reasons for the decision and file a reference within 14 days of receiving reasons. **This Court has power and discretion to enlarge time for taking any of the steps required by rules 11 of the order.** It is on that basis that the respondent contends that the applicant's application should not succeed.

32. The application has been brought under Article 159(2) (d) of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. That is not the procedure contemplated by rule 11. Instead, the applicant has relied on the constitution to impugn the taxing officer's decision. Article 159(2) (d) requires that justice be administered without undue regard to

procedural technicalities.

33. First, the taxing officer acted outside her mandate and without jurisdiction when she attempted to review her own decision ***suo motto*** without giving parties an opportunity to address her. She condemned the applicant unheard. Second, she had before her a letter requesting treasons for her decision dated 28th March 2018 which was the only task she was required to address but not to review her decision. She also did not act as she was required to by the rule.

34. The decision of 11th May 2018 and the subsequent certificate of costs dated 15th May 2018 was not, as already found, taxation in terms of section 51 of the Advocates Act as read with rule 11 of the Advocates Remuneration order. Having taxed the respondent's party and party bill and issued a certificate dated 25th April 2018, the action that followed was an illegality and did not, in my respectful view, require the elaborate procedure for challenging it as decision of the taxing officer in the normal way as required by rule 11.

35. That being the case, the applicant was in order to invoke the court's inherent powers as he did to challenge that decision. In any case, if the respondent's argument was to hold, the applicant was not informed of the decision until the respondent moved to execute. That was many months after the period for seeking reasons and filing reference had lapsed. It is also surprising that the respondent abandoned their quest to file a reference now that a decision had been made in their favour, however wrong.

36. This Court is aware of the importance of procedure in litigation as was emphasized in **Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others** [2016] eKLR, that rules of procedure are important in the conduct of litigations and that in many cases, procedure is closely intertwined with the substance of a case.

37. It should however not be that the court should pay more attention to procedure to the extent of defeating justice. If the court were to pay so much attention in the manner it has been moved to challenge what is obviously a wrong decision, it would amount to running away from the constitutional edict that justice be administered without undue regard to procedural technicalities. That would result to injustice or delayed justice for that matter.

38. The court should also bear in mind the overriding objective in determining civil matters. In ***E. Muriu Kamau & Another v. National Bank of Kenya Ltd.,*** CA No. 258 of 2009 (UR180/2009), the court observed that:

> **"The courts… in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.** (Emphasis)

39. (See also ***Coast Development Authority v Adam Kazungu Mzamba & 49 others*** [2016] eKLR)

40. In the circumstances, I am satisfied that for the ends of justice the application was properly brought and the court has a duty to render justice devoid of technicalities.

41. Consequently and for the reasons already stated herein above, the decision of the taxing officer of 11th May 2018 and the subsequent certificate issued on 15th May 2018 are unsustainable. The decision dated 11th May 2018 is hereby set aside and the certificate of costs dated 15th May 2018 annulled. The warrants of attachment issued pursuant to that certificate of costs and dated 6th February 2019 are hereby recalled and cancelled. As the mistake was occasioned by the court, each party shall bear own costs of the application.

Dated Signed and Delivered at Kajiado this 11th Day of October 2019

E C MWITA

JUDGE