



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO. 52 OF 2017
IN THE MATTER OF: THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA
AND
IN THE MATTER OF: A REFERENCE AS UNDER REGULATION 11 (2)
OF THE ADVOCATES RENUMERATION ORDER 2009 FROM THE
PARTY & PARTY BILL OF COSTS DATED 25TH MAY 2016
BETWEEN
SAMUEL VARGHESE.....APPLICANT/OBJECTOR
VERSUS
AMELI INYANGU & PARTNERS ADVOCATES.....RESPONDENT
RULING

The Application

1. By an application dated 20th September, 2017 brought under Article 46, 47, 159 of the Constitution of Kenya, Section 51 of the Advocates Act and Regulation 11(1) (2) & (4) of the Advocates Remuneration Order, the Applicant seeks the following orders:

- a) THAT this Honourable court be pleased to extend time of filing this Reference and that the same be deemed as proper on record.
- b) THAT pending the inter-parties hearing of prayer (b) and (c) there be a stay of proceedings in High Court Msa Misc. Application No. 224 of 2017.
- c) THAT this Honourable Court do uphold the Applicant's objection.
- d) THAT this Honourable Court do review by setting aside the ruling on the taxation of the 1st Respondent's costs delivered on 20th July, 2017 by the Taxing Master together with the Certificate of Costs dated 25th August, 2017 and be pleased to award such amounts as it deems just, reasonable and sustainable as per the Applicant's/Objector's submissions dated 27th November 2013.
- d) THAT in the alternative this Honourable Court remit the Respondent's bill of costs dated 21st June 2013 for taxation before another taxing master.

This application is supported by the affidavit of **SAMUEL VARGHESE** sworn on 20th September, 2017.

2. The Applicant alleges that a ruling on taxation was delivered on 20th July, 2017 and he filed a Notice of Objection on 3rd August, 2017 seeking the taxing master's reason for the decision.

3. The Applicant claims that on 12th September, 2017 his advocate, Mr. Anaya, inquired at the registry on the status of the notice of objection and he was given a copy of a handwritten note on the notice of objection indicating that the Taxing Master on 25th August, 2017 gave her reasons for the taxation which are contained in the certified ruling delivered on 20th August, 2017.

4. The Applicant further alleges that from 25th August, 2017 when the Taxing Master gave her reasons, the file could not be traced at the registry despite several follow ups. Due to this, it is the Applicant's contention that there has been a delay in lodging the Reference which was not occasioned by the Applicant.

5. The Applicant claims that he is aggrieved by the decision of the Taxing Master of taxing the instruction fees at Kshs. 2,000,000/= which is beyond the amount prescribed by the Advocates Remuneration Order 2009 as the suit was not complex and further that the Taxing Master's decision does not show whether the submissions dated 27th November 2013 were considered in relation to other taxed items. The Applicant also contends that he paid Kshs.900, 000/= to the Respondent during the execution proceedings which sum has not been deducted from the taxed costs.

6. It is the Applicant's case that the Respondent will not be prejudiced if the time to file the reference is extended as opposed to the Applicant who will be prejudiced if the time is not extended as the Respondent has already filed a Notice of Motion dated 6th September 2017 seeking judgment in his favour for the taxed costs amounting to Kshs. 3,600, 418.02/=.

Response

7. The Respondent responded to the application by way of a Replying Affidavit sworn by **FRED ADHOCH** on 11th October, 2017.

8. The Respondent states that the Applicant is way out of time prescribed by Paragraph 11(i) of the Advocates Remuneration Order for filing the Notice of Objection and even though he has the right to file the said notice out of time, the applicant has not given a satisfactory explanation for the delay.

9. The Respondent claims that the taxing master clearly gave reasons as to how she arrived at the taxed bill of costs and that she even stated that she considered the written submissions of both parties.

10. It is the Respondent's contention that the Applicant has not proved that the file was unavailable, misplaced or mislaid as claimed.

11. The Respondent states that the taxing master's decision to tax the instruction fees at 2,000,000/= was correct as the taxing master exercised her discretion and considered the subject matter of the suit which was valued at Kshs. 74,000,000, the nature of the case and the time taken to conclude the case.

12. In response to the allegation that the Respondent only taxed the bill of costs as against one plaintiff while there were two plaintiffs in the matter, the Respondent states that the reliefs sought are in favour of the plaintiffs jointly and severally and the Plaintiff/applicant herein derived benefit from the legal expertise offered and there is nothing wrong with taxing the bill against one plaintiff.

13. It is the Respondent's case that the taxing master properly exercised her discretion in taxing the bill at Kshs. 3,600,418.02 and there is no justification for setting it aside or reviewing it. Further the Respondent claims that his firm was only paid a sum of Kshs.200, 000/= by the Applicant and not Kshs. 900,000/=.

Hearing and Submissions

14. The application came up for hearing on 12th October, 2017. Mr. Anaya appeared for the Applicant while Mr. Nyongesa appeared for the Respondent. Parties agreed to dispense with the application by way of written submissions.

15. The Applicant filed his submissions on 31st October, 2017 while the Respondent filed its submissions on 30th October, 2017. Mr. Anaya, learned Counsel for the Applicant submitted that the Applicant seeks extension of time not as an indolent litigant but rather as one who has demonstrated his efforts to follow up on this matter and comply within the prescribed timelines. Counsel stated that the Taxing Master's reasons for the taxed bill of costs were not conveyed on time noting that even by the 5th September, 2017 when a letter was delivered to the registry inquiring on the status of the notice of objection no reason had been received from the taxing master.

16. Mr. Anaya submitted that Rule 11(4) of the Remuneration Order 2009 gives the High Court the discretion to enlarge time fixed with leave from the judge. Counsel further stated that Articles 50 and 159 of the Constitution guarantee access to justice without undue regard to procedural technicalities. To support his assertion Counsel cited the case of **Labh Singh Harman Singh Ltd versus Attorney General & 2 others [2016] eKLR** where Justice Muriithi stated:

“In exercising its discretion in this regard, the Court notes, contrary to the submission by the respondent, that there has been no inexcusable delay in presenting this application. The applicant has been diligent in seeking to have the dispute on the taxation costs herein determined expeditiously. The applicant did attempt to set aside the taxing officer's certificate of taxation of 10th June 2015 by an application of 18th June 2015 which was dismissed by the Deputy Registrar for lack of jurisdiction on 17th September 2015, where upon the applicant filed the present application.”

17. Mr. Anaya stated that the applicant received reasons for the taxation on 12th September 2017 and filed this application on 20th September, 2017 without any undue delay.

18. In relation to stay of execution proceedings in High Court Msa Misc. Application No. 224 of 2017, Mr. Anaya submitted that if the proceedings are not stayed the Respondent will extract a decree thus rendering the reference nugatory. Counsel submitted that the reference had a high chance of succeeding and that the costs awarded to the Respondent are of a colossal sum and if executed against the applicant he may suffer irreparable damage, yet no prejudice will be occasioned on the Respondent if the stay is granted.

19. Mr. Anaya submitted that the decision of the taxing master should be set aside, reviewed or the bill of costs referred to another taxing master as the taxing master erred in enhancing the fees without any justifiable reasons as the matter was not complex and did not even proceed to full hearing and also taxing master entertained the bill of costs despite it being drawn against one plaintiff yet there were two plaintiffs in the matter.

20. Mr. Adhoch learned Counsel for the Respondent submitted that the taxing master did not err on principle as she did not over emphasize the difficulties, importance or complexity of the suit. Counsel cited the case of **Anthony Thuo Kanai versus John Ngigi Ng'ang'a [2014] eKLR** where the court referred to the case of **Joreth Limited versus Kigano & Another [2002] E.A.92** and stated as follows:

“the court set out various factors that are to be considered in determining the instruction fee namely; the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.”

Counsel submitted that in the instant suit, the suit took four years to conclude, the subject matter was valued at Kshs. 74,000,000/= and there were various applications under certificate of urgency.

21. Mr. Adhoch submitted that Section 11(1) of the Advocates Remuneration Order provides for 14 days to file a reference once the taxing officer has given reasons for taxation. Counsel stated that after receiving the notice of objection dated 3rd August, 2017, the taxing master through a note dated 5th August, 2017 indicated that she would be relying on her Ruling for her reasons. Counsel cited the case of **Kipkorir Toto & Kiara Advocates versus Deposits Protection Fund [2005] eKLR** where the court found as follows:

“It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance.”

Mr. Adhoch contended that this court cannot exercise discretion and extend time where there are no proper reasons as is in this case.

22. Mr. Adhoch submitted that the applicant's only contention with the taxation is on Items 1 and 66 of the bill of costs. With regards to Item 1 Counsel stated that the taxing officer gave reasons for the amount being interlocutory applications, voluminous documentations and the value of the subject matter. Further, Counsel submitted that the taxing officer stated that she relied on the parties submissions in coming up with her ruling thus the Applicant cannot contend that his submissions were not considered.

23. As to the allegation that the bill was taxed on only one plaintiff yet there were two plaintiffs in the suit (**MSA HCC No. 95 of 2012- Samuel Varghese & Anor v. Eco-Bank Kenya Ltd & Anor**), Mr. Adhoch submitted that the applicant who was the 1st Plaintiff in the suit was the director of the 2nd Plaintiff, Donal International Company and all dealings were done through him as he was trading as the said company.

Determination

24. I have carefully considered the application and the submissions therein. The issue that arises for determination is whether the Applicant did delay in filing the reference.

25. The Applicant alleges that a taxation ruling was delivered on 20th July, 2017. The taxation emanated from a bill of costs for services rendered in **Mombasa HCC No. 95 of 2012- Samuel Varghese & Anor versus Eco Bank Kenya Ltd & Anor**. The Applicant then filed a notice of Objection on 3rd August, 2017 and sought reasons for the taxing master's decision. The Applicant then claims that on inquiry at the registry on 12th September, 2017 on the notice of objection, he was given a handwritten note which was the said notice of objection indicating that the taxing master had on 25th August, 2017 given her reasons for taxation which is contained in her certified ruling delivered on 20th July, 2017. The Applicant contends that from 25th August, 2017 the file could not be traced at the registry hence the delay in lodging this Reference.

26. The Respondent on the other hand claims that the Applicant has not satisfactorily explained the delay. Specifically, the Respondent argues that the Applicant has failed to prove the unavailability of the court file.

27. Rule 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 for his objection.

(3) 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.

(4) The High Court shall have power in its discretion by order to enlarge time fixed by subparagraph (1) or (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 may be so made notwithstanding that the time sought to be enlarged may have already expired."

28. A copy of the taxation ruling is attached to the affidavit of **SAMUEL VARGHESE** sworn on 20th September, 2017 and marked as SV-1. It indicates that the ruling was delivered on 20th July, 2017. A copy of a Notice of Objection is also attached to the aforementioned affidavit and marked SV-2. The notice of objection was filed on 3rd August, 2017 within the fourteen days prescribed by the Advocates Remuneration Order.

29. In the said notice of objection the Applicant requested for reasons for the decision. By a copy of a letter dated 4th September, 2017 (attached to the affidavit of **SAMUEL VARGHESE** sworn on 20th September, 2017 and marked as SV-3) the Applicant wrote to the Deputy Registrar requesting for a response to their objection dated 3rd August, 2017. There is also a copy of another notice of objection marked as SV-4 with handwritten writings on it indicating that the reasons are in the ruling of the court of 20th July, 2017. I believe this to be what the Applicant claims he was given at the registry on 12th September, 2017.

30. The Applicant states that from 25th August, 2017, the file could not be traced at the registry. However, the Applicant has not proved that he made attempts to trace the file but the same could not be found. I, therefore find this allegation to be unsubstantiated. That notwithstanding, I do not find any inordinate delay by the Applicant in filing the Reference since after his inquiry on the status of the objection on 12th September, 2017 he filed this application eight days later being 20th September, 2017.

31. The Applicant has also claimed that vide a Notice of Motion dated 6th September, 2017, the Respondent has sought for judgment to be entered in his favour for the taxed amount of Kshs. 3,600,418.02 plus costs. The Applicant argued that if the Respondent is successful, it may begin the execution process and the Reference will thus be rendered nugatory hence the need to stay proceedings in High Court Msa Misc. Application No. 224 of 2017.

32. In the case of **Labh Singh Harman Singh Ltd versus Attorney General & 2 others [2016] eKLR**, Justice Murithii stated as follows:

"The position accords with the interests of justice that a party against whom substantial nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates Remuneration Order, which is the procedure for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time."

33. I do agree with the above sentiments. The learned Tax Master taxed the bill of costs at Kshs. 3, 600, 418. 02/=, this is a substantial sum which would occasion on the Applicant significant loss therefore it would be in the interest of justice to stay proceedings in High Court Msa Misc. Application No. 224 of 2017.

34. For the foregoing reasons, the application dated 20th September, 2017 is allowed and Orders issued as follows:

a) Time is hereby extended for filing a Reference from the Certificate of Taxation dated 25th August, 2017. The Applicant has fourteen days (14) from the date hereof to file the said Reference.

b) A stay of execution be and is hereby issued of the proceedings in High Court Msa Misc. Application No. 224 of 2017 pending the hearing and determination of the Reference to be filed.

c) Costs in the cause.

Dated, Signed and Delivered in Mombasa this 8th Day of February, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Anaya for Objector

Mr. Nyongesa holding brief for Adhoc for Respondent

