



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO. 135 OF 2014**

**NYAMOGO & NYAMOGO ADVOCATES.....APPLICANT**

**VERSUS**

**PAN AFRICAN INSURANCE CO LTD**

**& APA INSURANCE CO LTD.....RESPONDENTS**

**RULING**

1. I have a number applications before me that are scheduled for ruling and as such I will address them chronologically

2. Under Certificate of Urgency by a notice of motion dated 31.1.2018, and filed on 01.2.2018 brought under Section 3(1), 3(2) & 3A of the Civil Procedure Act and all other enabling provisions of the law the Applicant sought for stay of execution of the Ruling entered against it on 8<sup>th</sup> November, 2017 pending the hearing and determination of the application and pending the hearing and determination of the intended reference.

3. The application is based on nine grounds on the face of the application and supported by the affidavit of David M Mereka. According to the applicant the taxation of the Party and Party Bill of Costs was done without any taxation notice or ruling notice and without giving a ruling on the grounds of opposition dated 24<sup>th</sup> August 2017 to the Party and Party Bill of Costs dated 12<sup>th</sup> May, 2017. That the applicant got to know of the taxation ruling 3 months after it was delivered vide a letter from the Respondent's advocates. That the applicant filed an objection to the taxation on 25<sup>th</sup> January, 2018 and also filed a reference dated 31<sup>st</sup> January, 2018, and filed on 1<sup>st</sup> February, 2018 that he feels has a high probability of success.

4. The said reference is brought by chamber summons dated 31<sup>st</sup> January, 2018, and filed on 1<sup>st</sup> February, 2018 under Rule 11 (2) of the Advocates Act Cap 16 Laws of Kenya and all other enabling provisions of the law. The Applicant prays for Orders:-

**1. THAT the decision of the taxing officer delivered on 8<sup>th</sup> November 2017 in so far as the same related to taxation of the entire Applicant's Bill of Costs herein be and is hereby set aside**

**2. THAT the Honorable Court be pleased to refer back the matter to the Taxing Officer for re-taxation of the entire Bill of Costs herein and with proper directions thereof**

**3. THAT in the alternative to prayer 2 above, the Honorable Court be pleased to re-tax the said Bill of Costs herein**

**4. THAT the costs of this Application be borne by the applicant.**

5. The application is based on four grounds on the face of the application.

**(i) That the taxing officer erred in law and principle by taxing the Bill of Costs dated 12<sup>th</sup> May 2017 without notice to the Parties to the said Bill of Costs.**

**(ii) That the taxing officer erred in law and principle by delivering a ruling ex-parte without notice to the Parties to the said Bill of Costs.**

**(iii) That the taxing officer failed to consider relevant factors including the nature of the matter, the interest of the parties, the general conduct of the proceedings and the directions of the Deputy Registrar.**

**(iv) That the taxing officer erred in law and principle in failing to take into consideration the Grounds of Opposition filed on behalf of the Defendants while taxing the Party and Party Bill of Costs.**

6. In opposing the application, the respondent Nyamogo and Nyamogo Advocates filed a replying affidavit sworn on 7<sup>th</sup> February, 2018. According to the Respondent the notice of motion and the annexures are incurably defective, not supported by any law or evidence, frivolous, incompetent, and the court has no jurisdiction to entertain it.

7. BY a chamber summons dated 1.2.18 and filed the same day, brought under Section 51(2) of the Advocates Act Cap 16 Laws of Kenya and Section 3A of the Civil Procedure Act and all other enabling provisions of the law the Applicant prays for Orders:-

**1. THAT the Honourable Court be pleased to enter Judgment for Kshs 73,515 against the Respondent in terms of the Certificate of Taxation issued by this Honorable Court on 31<sup>st</sup> January, 2018 together with interest at 14% p. a from 12.5.17 until payment in full**

**2. THAT the costs of this Application and the taxation cause be awarded to the Applicant**

8. The motion is premised on the grounds set out in the application and supported by the **undated** affidavit of Nyamodi Ochieng-Nyamogo, Advocate of the High Court of Kenya to which is annexed the certificate of taxation marked **NON – 1**.

9. There was no opposition by the Respondents Advocates to the application.

10. BY a chamber summons dated 9.2.18 and filed the same day, brought under paragraph 11(1) and (2) of the Advocates Remuneration Order the Applicant filed a reference and prays for Orders that the taxing officer taxed the bill of Costs dated 12.5.2017 without jurisdiction, undercalculated the costs and therefore the bill of costs should be allowed as presented and that he be awarded costs. The application is premised on the grounds set out in the application and supported by the affidavit of Nyamodi Ochieng-Nyamogo, Advocate of the High Court of Kenya to which is annexed the certificate of taxation marked **NON – 1, the objection to taxing officers decision** filed on 22<sup>nd</sup> January, 2018, and dated 17<sup>th</sup> January, 2018 **and the reasons**

11. In opposing the application for reference, the respondent Pan African Insurance Limited and APA Insurance Co Ltd filed a replying affidavit on 13<sup>th</sup> April, 2018 sworn on 11<sup>th</sup> February, 2018 by David Mukii Mereka. According to the Respondent the application is fatally defective, baseless, in violation of Rule 11(2) of the Remuneration Order, ambiguous, prayers in futility, should be dismissed with costs.

12. On 20<sup>th</sup> March, 2018 the parties appeared before me and I directed that the parties file submissions.

13. M/s Mereka and Co Advocates for the applicant submitted that there is sufficient cause for granting the relief sought in view of the fact that the court is clothed with powers to preserve the subject matter, and to prevent abuse of court process, thereby invoking the inherent jurisdiction of the Court. He argued that unless the order of stay of sought is granted, the main reference application that is also coming up for hearing will lead to a situation where the court will be faced with two parallel applications from the same party. He relied on the case of **Nguruman Limited Vs Shompole Group Ranch and Another (2014) eKLR.**

14. He submitted that his application will deal with the application for entry of judgment and or the opposition thereof.

15. M/s Nyamogo and Nyamogo Advocates for the plaintiff/respondent submitted that the applicant's application was brought under Section 3(1), 3(2) & 3A of the Civil Procedure Act, and the said Section 3(1) and 3(2) do not exist. He argued that these are irregularities being that the law quoted does not provide for the remedies sought, HE relied on the case of **HCCC358 OF 2001, Machira and Co Advocates v Magugu**. He submitted that the applicant is not entitled to the remedies sought, *to wit*, stay because the reference is likely to be rendered nugatory. He states that the reference does not constitute a reference for purposes of the law and further that the affidavit in support having being deponed by an advocate who has no knowledge of the matter means that in effect the affidavit is nugatory and there being no affidavit, the notice of motion cannot stand. He submitted that the notice of motion be dismissed.

16. M/s Nyamogo and Nyamogo Advocates on 9<sup>th</sup> May, 2018 filed submissions dated 7<sup>th</sup> May, 2018 in response to the application dated 1.2.18. wherein counsel submits that the application stands unopposed therefore is conceded to in entirety.

17. I have considered the applications before me, the grounds and the averments in the affidavit as well as the submissions. The issues for determination are whether this Court should grant the application for entry of judgment on taxed costs; whether the applicant has raised sufficient grounds to deny the judgment creditor the taxed costs; who is entitled to costs.

18. A reading of the Advocates Act provides for two (2) ways in which an applicant may recover its costs. These are under Section 48 and Section 51 (1) of the Advocates Act.

19. Section 51 comes after Sections 48 and 49 and was therefore inserted with Sections 48 and 49 in mind and though Section 51 mentions the nature of the orders the court may make in relation to the certificate of the Taxing Officer, it does not show the procedure to be followed by an advocate who wants to recover costs due to him as a result of his having obtained the relevant certificate of taxation. The same can be said about Rule 13 aforesaid. But as seen earlier Section 51 as read with Rule 13 are concerned with the filing of the bill of costs including the procedure thereof before the Taxing Officer. That makes the primary objective of Section 51 as read with Rule 13 to be different from the primary objective of Sections 45 and 48 as Section 45 deals with situations where there is an agreement between an advocate and his client about the remuneration to be paid while Section 48 deals with a situation where a suit based on an untaxed bill of costs is filed.

20. Therefore, an advocate armed with taxed or assessed costs and the relevant certificate of taxation should make a formal demand of the assessed amount from the client and whatever amount the client fails to pay, the advocate should proceed pursuant to Section 49 and Section 51 (2) of the Advocates Act.

21. As I understand the prayer, the applicant wants firstly an order for stay of execution of the Ruling entered against it on 8<sup>th</sup> November, 2017. The said order has not been extracted but is part of the record.

22. Paragraph 11 of the Advocates Remuneration Order provides that:

**“Where a party is aggrieved by the decision of a taxing officer, he is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to this Court.”**

23. From the record there is an objection to the taxation that was filed on 25<sup>th</sup> January, 2018 by the applicant. There is also an objection *the objection to taxing officer's decision* filed on 22<sup>nd</sup> January, 2018 by the respondent, that is dated 17<sup>th</sup> January, 2018.

24. On the record is a reference that was filed by the respondent on 9<sup>th</sup> February, 2018 alleging under-taxing and taxation that was done contrary to the law. The same is opposed for being baseless.

25. In the case of **Kipkorir Titoo & Kiara Advocates -V- Deposit Protection Fund C.A. No. 220/2004 U.R.**, the Court of Appeal held:

***“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in Schedule VI or fails to give due consideration to all relevant circumstances of the case.....that would be an error in principle. And if a judge on reference from the taxing officer finds that the taxing officer has committed an error of principle, the general practice is to remit the question of quantum for the decision of taxing officer. The judge has however, a discretion to deal with the matter himself if the justice of the case so requires.”***

26. On record is also reference that has been filed challenging the decision of the taxing officer and the applicant argued that there was no notice of the taxation, the applicant states that the taxation was done ex-parte. The respondent has not challenged this fact, and from the record, both parties were present on 12<sup>th</sup> September, 2017 when the matter came for hearing and were present when a ruling date was given as 25<sup>th</sup> October, 2017. It appears that the ruling was delivered in open court on 8<sup>th</sup> November 2017 and there is no evidence of a notice issued to the parties or evidence of service of any notice. It can therefore be concluded that the said ruling was delivered ex-parte

27. Section 51 Sub-rule (2) provides that due notice of the date fixed for such taxation must be given to both parties and that both parties shall be entitled to attend and be heard. It states 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.”**

28. Guidance can also be obtained from the Canadian case of *Reese v. Alberta*<sup>[9]</sup> McDonald J. sets out the **general principles** applicable to awarding costs, at page 44:-

***“While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. ....the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees ....plus reasonable disbursements....***

29. In the present case, taxation of the bill of costs dated 12<sup>th</sup> May, 2017 was reserved for taxation on 12<sup>th</sup> September, 2017 and notice was to issue. On the said date, both parties appeared before court for taxation and after considering the arguments of counsel, ruling was delivered on 8<sup>th</sup> November, 2017 in the absence of evidence of notice to the parties, wherein the bill of costs was taxed of at Kshs 73,515, however the Certificate of Taxation dated 31<sup>st</sup> January, 2018 was issued and as it stands now, the same has not been set aside or altered.

30. I find that the instant application falls under Section 51 (2) of the Act and be as it may there may be no reason to deny the Advocate, Judgment as sought.

31. In the case of **Musyoka & Wambua Advocates Vs Rustam Hira Advocate (2006) eKLR** it was held:-

**“Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the Court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit.....**

32. I have considered the affidavit and submissions on record as well as the court record and I find that there is reason to set aside the Certificate of taxation dated 31<sup>st</sup> January, 2018.

33. I do point out that Section 5 of the Oaths and Statutory Declarations Act provides that every commissioner for oaths before whom any

oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. From the instant application I find that the undated affidavit of the applicant being undated is null and void. I am guided by the case of **Mulusiah Land Consultants & another v Industrial Development Bank Ltd & 2 others [2005] eKLR**. It follows therefore that the application is unsupported by an affidavit hence in absence of grounds to support the application; it falls on all its limbs.

34. However, being guided by the overriding principles in the Constitution on non-payment of undue regard to technicalities I will consider the said affidavit but will not award costs to the advocate.

35. I have considered the provisions of Rule 7 of the Advocates Remuneration Order which provides:-

**“An Advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full”**

36. In view of the foregoing observations, I come to the following findings:-

**(i) The application dated 31/1/2018 is allowed in terms of prayers (1) and (2).**

**(ii) The application dated 1/2/2018 is found to have been overtaken by events as in (1) above and is thus dismissed with no order as to costs.**

**(iii) Each party shall bear their own costs.**

**Dated and delivered at Machakos this 7<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**