



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 313 OF 2017

ROBERT MUTUKU MUSYOKI.....PLAINTIFF/RESPONDENT

VERSUS

CHINA ROAD & BRIDGE CORPORATION.....DEFENDANT/APPLICANT

RULING

1. The Applicant herein filed a Notice of Motion dated 23/10/2017 under Order 42 Rule 6, Order 112(1) of the Civil Procedure Rules and Section 3A of the Civil procedure Act seeking the following reliefs namely:-

(i) That this Honourable court be pleased to grant stay of execution pending the hearing and determination of the application and the appeal.

(ii) That the ruling of the trial magistrate together with the certificate of Taxation issued be set aside and the Respondent's Advocates Client Bill of costs dated 23/6/2017 be assessed or taxed afresh.

(iii) That this Honourable court be pleased to order that the execution of the certificate of costs be stayed pending the hearing and determination of the appeal.

(iv) That the costs of the application be provided for.

2. The Application is premised on the grounds on the face thereof and the supporting Affidavit of the Applicant's Advocate Susan Murage and which raises several issues *inter alia*: that the Applicant is dissatisfied with the ruling on taxation dated 11/10/2017; that the Applicant has lodged an appeal: that the Respondent might execute any time after the lapse of the stay period to the detriment and prejudice of the Applicant; that substantial loss will occasion to the Applicant if execution is not stayed: that the Applicant is ready and willing to provide such security as the court will order; that the Appeal will be rendered nugatory if the orders are not granted.

3. The Application was strenuously opposed by the Respondent who raised several grounds of objection *inter alia*: that the Application is incompetent, incurably defective bad in law and unprocedural; that the Applicant has failed to demonstrate that the decision of the Taxing Officer in awarding costs billed has not been supported by law and facts; that the ruling or decision of taxation sought to be challenged by the Applicant is in itself reasonable, fair and justified; that no plausible reason has been given or demonstrated by the Applicant to justify a need to fault the decision of the Taxing Officer: that the Applicant if indeed dissatisfied by the decisions of the Taxing Officer should have lodged a reference under Rule 11 of the Advocates (Remuneration) Order but not by way of a Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

4. The Application was canvassed by way of written submissions:-

Applicant's submissions:

5. It was submitted for the Applicant that the Applicant has already lodged an appeal against the ruling of the lower court as per the annexed copy of Memorandum of Appeal and that the Applicant has duly satisfied the requisite conditions under Order 42 Rule 6 of the Civil procedure Rules to merit an order of stay of execution pending the determination of the Appeal. On the aspect of substantial loss, it was submitted that the Applicant will suffer loss as the Respondent might not be able to refund the costs in the event the appeal succeeds. On the issue of whether the Application has been made timeously, it was submitted that the same was filed within two weeks from the delivery of the ruling. Finally on the issue of security, it was submitted that the Applicant is ready and willing to provide security for the due performance of the decree either in the form of deposit of the decretal sums into court, or the same being deposited into an interest earning account in the joint names of the parties Advocate or even furnishing a bank guarantee if ordered:

Respondent's Submissions

6. It was submitted for the Respondent that since the Applicant is challenging the party and party bill of costs then the proper procedure should have been by way of Reference filed vide a chamber summons under rule 11 of the Advocates (Remuneration order) and not in the manner herein and therefore the present application is not tenable in law as this court lacks the requisite jurisdiction to entertain and determine the same. Reliance was placed in the case of Nairobi High Court Misc. Civil Application No. 241 Of 2013 Odera Obar & Co. Advocates =Vs= Aly Enterprises Ltd. & 3 Others [2015] eKLR where the High court dismissed the Applicant's Application seeking to challenge the decision of the Taxing Officer for having been filed under the wrong provisions of the law instead of Rule 11 of the Advocates Remuneration)Order.

Again in the case of Speaker of the National Assembly =Vs= James Njenga Karume [1992] eKLR the court of Appeal observed that procedures provided for under statutory law must be strictly followed and/or adhered to.

7. It was further submitted that the Application should be struck out and or dismissed for failing to adhere to the clear provisions of order 11 of the Advocates (Remuneration) Order.

Determination

8. I have considered the Applicant's Application as well as the rival affidavits. I have also considered the submissions of learned Counsels. It is not in dispute that the Applicant herein is aggrieved by the decision of the Taxing Officer dated 11th October, 2017 in Mavoko SPMCC No. 471 of 2016 wherein the said Taxing Officer assessed the party and party Bill of Costs at Kshs.175,880/=. The issue for determination is whether the Applicant's Application is competently before this court.

9. To begin with, the procedure for challenging a decision of a Taxing Officer is provided for under Section 51 of the Advocate's Act and Rule 11 of the Advocates (Remuneration) Order. Rule 11 (2) thereof provides that a person who objects (Objector) to a decision of the Taxing Officer may within 14 days from the receipt of the reasons of the Taxing Officer (Ruling on taxation) apply to the Judge in chambers setting out the grounds of his objection. This is done by way of a Reference filed vide a chamber summons under Rule 11 of the Advocates (Remuneration) Order.

It is noted that the Applicant herein vide a letter dated 23/10/2017 wrote to the Executive Officer Mavoko Law Courts indicating its objection to taxation and sought to be supplied with a certificate of written reasons for the said ruling to enable it file a reference to that effect. However, the Applicant did not file the requisite reference as per the requirements of Rule 11 of the Advocates (Remuneration) Order and instead filed a Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act which is a clear departure from what is provided for under the said Rule of the Advocates (Remuneration) Order.

The Applicant and its counsel are deemed to have been aware of the fact that Rule 11 of the Advocates (Remuneration) Order expressly provided a specific procedure for addressing a grievance and ought therefore to have followed it. Having requested for the reasons from the Taxing Master in order to file a reference, no explanation has been given as to why the Applicant opted to use a totally different procedure. In the case of Speaker of the National Assembly =Vs= James Njenga Karume Court of Appeal at Nairobi Civil Application No. 92 of 1992 it was held as follows:-

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....."

Again in the case of Machira & Co. Advocates =Vs= Magugu [2000] 2 EA 428 Ringera J (as he then was) stated as follows:-

"As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.

A similar view was also held by Odunga J in Gacau Kariuki & Co. Advocates Vs Allan Mbugua Nganga Misc. Appl. No. 2011 as follows:-

"I must make it very clear that what is before is not a reference from taxation, but an Application seeking to set aside the orders made on the 29th day of September, 2011 and 27th day of October, 2011. The orders, which were made on 29th September, 2011 were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision; in my view the only available recourse to a person aggrieved by a decision of a Taxing Officer is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11(4) of the Advocates Remuneration Order empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with".

10. Guided by the above decisions, I am satisfied that the instant Application is in violation of the Provisions of Rule 11 of the Advocates (Remuneration) Order as the same is not a reference to this court. At best the Application is incurably defective, improper, unprocedural and an abuse of the court's due process.

11. In the result, it is the finding of this court that the Applicant's Application dated 23/10/2017 lacks merit. The same is ordered dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this 6th day of **November**, 2018

D. K. KEMEI

JUDGE