



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL CASE NO. 173 OF 2016**

**DAVID WAIGANJO KIGWE.....CLIENT/APPLICANT**

**VERSUS**

**ESHUCHI & ASSOCIATES ADVOCATES....ADVOCATES/RESPONDENT**

**RULING**

1. The Applicant took out a Chamber Summons dated 20<sup>th</sup> April 2016 where it sought orders to wit:
  1. That leave be granted for the applicant/client to file his reference out of time
  2. That the honourable court be pleased to review and/or set aside the taxation passed by the Deputy Registrar Honourable F.R Wangila on the 19<sup>th</sup> November 2015 in relation to Misc. No.244 of 2015 and all sub sequential proceedings/orders arising thereafter.
  3. That the bill of costs dated 10<sup>th</sup> June 2015 be taxed afresh by a different taxing master.
  4. That the costs of this application be in the cause.
2. The reference is based on the following grounds:
  - a. That the Deputy Registrar misapplied principles of law in the taxation of the Bill of Costs.
  - b. That there is an error apparent on the face of the record in that bill of costs herein was taxed without due regard to the year of the Remuneration order used in each item.
  - c. That the Deputy Registrar had failed to consider that the disbursements had already been paid by the applicant to cater for filing of the suit which amount should have been considered.
  - d. That there existed mutual agreement between the parties wherein the Respondent was to be paid kshs.45,000/= after the matter had fully been concluded.
  - e. That the Deputy Registrar had failed to consider that the advocates had never attended court in the suit.

**f. That the Deputy Registrar had erred in law and facts in determining the amount taxed off as the suit had not been concluded.**

**g. That the time within which to file reference has lapsed.**

**h. That the Ruling was delivered in the absence of both parties and they only came to learn of the same when the time had lapsed, hence the necessity of seeking to file the reference out of time.**

**i. That the costs should be limited to proper remuneration for work done and they should not be awarded so as to give rise to unjust enrichments.**

3. The Applicant has relied on his supporting affidavit and supplementary affidavit. It is stated that the proceedings in the matter are yet to be concluded. That there was an agreement with the Respondent herein that the Applicant would pay him Ksh.45,000/= being the legal fees upon conclusion of the matter. He claimed that the Respondent despite the agreement went on to tax the bill of costs despite the fact that there was no court attendance and the suit is still pending in court. The Applicant further deponed that the bill of costs in contention herein contains items that ought to have been taxed under the Advocates Remuneration Order 2012 and therefore the bill of costs should not have been allowed as drawn. The Applicant has further asserted that he withdrew his files from the Respondent on 23<sup>rd</sup> September, 2014. That thereafter the bill of costs was filed and he instructed his current advocates to defend the same. That they also took time to negotiate the matter in an attempt to reach an out of court settlement before the ruling by the taxing master. It is further stated that both parties were not in court when the Ruling was delivered. That the Applicant came to learn of the ruling on taxation when the time within which to file a reference had already lapsed.

4. The reference was opposed as per the replying affidavit and further affidavit sworn on 13<sup>th</sup> June, 2016 by Eshuchi George. It is stated that the reference is an abuse of the process of the court and is fraught with misrepresentation of facts. It is denied that an agreement existed between the parties to the effect that the Respondent would be paid after the conclusion of the matter. The Respondent exhibited an acknowledgement note executed by the Applicant which *inter alia* allows the Respondent to file the bill of costs. It is further stated that the filing fees of Ksh.70,350/= paid by the Applicant did not amount to Advocates fees. It is further contended that it was the Applicant's choice not to attend the taxation as he had been served and appointed a counsel who attend court. On the issue of the applicable Remuneration order, the Respondent stated that since the matter was filed in 2015, then the applicable law was the 2014 Remuneration order. According to the Respondent, the Applicant has not given sufficient reasons to explain his delay in filing the reference.

5. The reference was canvassed before me by way of written submissions which I have duly considered.

6. On the issue of leave to file the reference out of time, the Applicant has explained to the court that he was not present in court when the Ruling was delivered by the taxing office hence the delay in filing the reference. Be as it may, in the interest of justice this court is inclined to exercise its discretion and grant the Applicant leave to file the reference out of time. The ruling on taxation which is exhibited herein shows that the same was delivered in the absence of both parties on 19<sup>th</sup> November, 2015. The proceedings for that date do not reflect whether the parties were notified of the date. None of the parties herein has exhibited any copy of notice for the delivery of the ruling. If the ruling date was given in the presence of the parties, then such information is not before the court.

7. It is not in dispute that the Respondent undertook legal services for the Applicant. It is also not in dispute that the Applicant withdrew the instructions from the Respondent. Indeed the Respondent has exhibited an acknowledgement note duly executed by the Applicant wherein the Applicant agreed that the Respondent could go ahead and file the bill of costs. Although the Applicant had also argued that the parties had agreed at the sum of Kshs.45,000/= as the Respondent's fees no such agreement has been exhibited herein. Following the withdrawal of the instructions, the Respondent was at liberty to tax his costs.

8. Under the provisions of paragraph 13(1) of the Advocates (Remuneration) Order, either the advocate or the client can apply for the taxation of the costs between the advocate and the client without any order for that purpose. As stated by Hon. Waweru, J in case of **Mugambi & Co Advocate v John Okal Ogwayo & another HCC Misc. Appl. 447/10:**

**“The Clients have not disowned this suit. What they did subsequently was to withdraw instructions from the Advocate. Thereupon the Advocate was entitled to tax his bill of costs against the Clients. And to do this he did not have to wait for the suit to be heard and determined first. Paragraph 62A of the Advocates (Remuneration) Order is not a bar to such an advocate/client bill of costs during pendency of a suit. That paragraph prohibits multiple party and party bills of costs where costs have been awarded in contentious matters. It does not bar an advocate whose instructions have been withdrawn in a contentious matter from taxing his advocate/client bill of costs before the matter is heard and finally decided.”**

9. On the issue whether the Deputy Registrar misapplied the law or whether there are errors apparent on the court record for example whether it was the Advocates ( Remuneration) Order 2014 applicable in respect of the entire bill of costs, it is noted that item No. 1-15 cover the period between 4<sup>th</sup> April, 2014 to 9<sup>th</sup> April, 2014. The Advocates ( Remuneration) Order 2014 came into effect on the 11<sup>th</sup> April, 2014. The Deputy Registrar ought to have taken into account the year of the Remuneration order for each of the items.

10. With the foregoing, the application is allowed costs in casuse.

Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of Feb., 2017

**B. THURANIRA JADEN**

**JUDGE**