



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC APPLICATION NO. 808 OF 2014

JOE N. MWANTHI & COMPANY ADVOCATES.....RESPONDENT

VERSUS

DAVID KIHONO WAWERU.....CLIENT

RULING

The respondent herein is an advocate of the High Court of Kenya while the applicant is said to have been his client which position he now contests. The applicant filed an application by way of Notice of Motion under Section 1 A, 1B and 3A of the Civil Procedure Act Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules for orders that there be a stay of execution of an order issued in favour of the respondent relating to costs due and payable to the respondent pending the hearing and determination of a reference filed before this court relating thereto.

The application is based on grounds set out on the face of the application alongside an affidavit sworn by the applicant. The application is opposed and there is a replying affidavit sworn by the respondent advocate. In addition the respondent filed two Notices of Preliminary objection which by the direction of the court were argued together with the application both parties have filed submissions to address the issues raised in the application and the two notices of preliminary objection. Some authorities have also been cited which I have read.

The first observation is that the applicant did not attend the taxation of the bill of costs despite evidence of service upon him. On the day the bill of costs came up for hearing the record reads as follows,

“Mwanthi

We served and filed the return of service. Coming up is a b/c dated 19/11/2014.

The bill is drawn to scale and we urge the court to tax it as drawn.

Court

The respondents have not objected to the bill of costs though duly served. The bill of costs is drawn to scale and taxed as drawn.

Signed

1/7//15.”

On 4th December, 2015 the applicant filed an application by way of Chamber Summons under Order 49 Rule 1 of the Civil Procedure Act, Sections 1A, 1B and 3A of the Civil procedure Rules, Section 50 of the Advocates Act and Rule 11 of the Advocates Remuneration Order to set aside the Order of the taxing master ordering payment of the costs to the respondent.

The reasons set out include the following; the Deputy Registrar never had an opportunity to determine the issue of whether the applicant was a client of the respondent and the respondent never proved that he had instructions to act for the applicant; the Registrar in failing to indicate her finding and reasoning in the ruling on taxation led to prejudice on the part of the applicant; there was abuse of court process as a result of the registrar taxing the bill against the applicant who is a third party a position not supported by any provision of law.

It was alleged that there was no relationship between the applicant and respondent and no services were rendered in the capacity of advocate/client. The transaction involved several parties yet the bill was taxed against the applicant alone. The foregoing grounds form the basis of the current application for stay.

Whether or not the counsel who appeared for the applicant and filed the respective applications was on record, is a technicality that has now been outlawed not only by the Constitution but also the rules of procedure. This is because the application belongs to the party not the advocate. In any case, no prejudice has been shown to have been visited upon any party on record.

The applicant has not given any reasons as to why despite service he did not attend the taxation before the taxing master. That notwithstanding, I agree that the statement by the taxing master that the bill is taxed as drawn is devoid of reasons and the applicant therefore may have some ground to stand on in the revision application.

I do not deem it necessary to delve any deeper in this matter because of the reasons I am about to give. Whether or not there was non-disclosure of material facts is a contentious issue, and also whether or not the respondent had no instructions or that he taxed the bill against only one person is also an issue for determination.

Therefore, both the reference and application for stay succeed. The order following the taxation is hereby set aside in its entirety and the bill shall now be placed before another taxing master of competent jurisdiction to go over the process. As there is evidence that the applicant had been served with the Notice of Taxation and elected not to attend, he shall pay the costs incurred by the respondent to defend both the reference and this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st Day of February, 2017

A.MBOGHOLI MSAGHA

JUDGE