



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPLI. NO. 386 OF 2012

LUMUMBA MUMMA & KALUMA ADVOCATES.....ADVOCATE/APPLICANT

- V E R S U S -

ORIENTAL ASHA RAMADHAN.....1ST CLIENT/RESPONDENT

HALIMA NAWA.....2ND CLIENT/RESPONDENT

RULING

1. Pursuant to the provision of Section 51 of the Advocates Act, Rule 7 of the Advocates (Remuneration) Order, Section 1A, 1B and 3A of the Civil Procedure Act. Order 45 rule 1 of the Civil Procedure Rules, the respondents took out the motion dated 27th July 2016 in which they sought for the following orders:

- 1. THAT the certificate of taxation issued herein on 9th July 2013 be set aside, vacated and/or varied.***
- 2. THAT the proceedings herein be stayed pending the hearing and determination of this application.***
- 3. THAT this honourable court be pleased to give such further or other directives as it deems proper for the ends of justice to be met.***
- 4. THAT the firm of Lumumba Mumma and Kaluma advocates be ordered on oath to give particulars of all amounts they have received from the applicant/client.***
- 5. THAT the costs of the application be provided for.***

2. The motion is supported by the affidavit of Asha Ramadhan, the 1st respondent herein. When served, the advocate/applicant filed the replying affidavit of Thomas K'Bahati to oppose the motion. When the motion came up for hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and the replying affidavits. I have also taken into account the rival written submissions plus the authorities cited by learned counsels. Before considering the substance of the motion, it is important to first state the background of this dispute. The Advocates Bill of costs was taxed at ksh.464,719/= in favour of the advocate/applicant (respondent in the current motion) on 9th July 2013 before the taxing

officer in relation to the provision of legal services in Nairobi H.C.C.C. no. 85 of 2008. On 15.7.2013, the firm of Mwangi & Guandaru advocates for the applicants wrote to the advocate/respondent requesting to be given credit for the amount the client had paid the advocate to enable the law firm take further action. The advocate responded by denying receipt of any monies from the client. In response the firm of Mwangi and Guandaru wrote to the advocate clarifying that the clients were referring to the monies paid by Asha Ramadhan. It is the submission of the client/applicant that the plaintiff who is an illiterate old lady came across the receipts evidencing payment of legal fees to the tune of ksh.115,000/= to the law firm of Lumumba Mumma & Kaluma advocates. This discovery is said to have prompted the client/applicant take out the motion dated 27.7.2016, the subject matter of this ruling.

4. Having set out the brief history behind this dispute, let me now determine the substance of the aforesaid motion. It is not in dispute that the advocate filed its Bill of costs dated 11.7.2012 which was canvassed by way of written submissions. The Bill of Costs was eventually taxed at ksh.464,719/= on 9.7.2013. The advocates proceeded to extract the certificate of taxation which was finally issued on 31.7.2013. On the basis of the certificate of taxation the advocate filed the application dated 19.8.2013 seeking entry of judgement on the amount taxed. The clients filed their grounds of opposition dated 3.2.2014. The court gave directions to have the application dated 19.8.2013 disposed of by written submissions. The advocate filed its submissions but the clients instead opted to file the Notice of Motion dated 27.7.2016. I have already outlined the sort of orders the client is seeking. The following issues arose for the determination of this court:

i. Whether the application dated 27.7.2016 is competent.

ii. Whether the orders sought are merited.

iii. What orders should this honourable court make in the circumstances of this application.

5. On the first question as to whether the motion dated 27.7.2016 is competent? It is the submission of the client/respondent (applicant herein) that the motion dated 27.7.2016 is competently before this court. It is submitted that at the time of taxation, the client had misplaced receipts evidencing payment of legal fees made to the advocate/applicant hence the client could not move the court under Paragraph 11 of the Advocates (Remuneration) Order to apply for reference as alleged by the advocates because the proof of payments for the allegation was not available. The client further argued that the appropriate time to allege payment of legal fees is now and before the court becomes functus officio. The advocate is of the view that the motion is fatally incompetent. The provisions of paragraph 11(1) and (2) of the Advocates (Remuneration) Order, 2006 as amended by the Advocates (Remuneration) Order, 2009 were cited as clearly stating the mode of objecting to and seeking review of a decision of the taxing officer and the timelines involved. The advocate argued that the clients' application was filed in contravention of the aforesaid provisions. In other words it is argued that the client failed to serve a notice of objection to the Registrar and to request for reasons. Secondly, it is also argued that the client failed to approach the court in a proper manner and that the application was filed out of time without obtaining prior leave from court. A careful perusal of the provisions of Paragraph 11(1) and (2) of the Advocates (Remuneration) Order, will reveal that strict timelines is of essence in applications seeking to challenge the decisions of a taxing officer. The aforesaid provision shows that the objector has a maximum of 28 days to seek and obtain the reasons of the taxing officer and to file an application to impugn the taxing officer's decision. Where a party has not filed an application within time, the court has power under paragraph 11(4) of the Advocates (Remuneration) Order to extend time for the party to follow the correct procedure. In the case of **odera Obar & Co. Advocates =vs= Aly Enterprises Ltd and 3 others (2015) eKLR**, the court ruled that the jurisdiction of the court to deal with a reference which seeks orders to set aside the decision of the taxing officer will not accrue until the right procedure of institution of a reference under Paragraph 11 of the Advocates (Remuneration) Order has been adhered to. There is dispute that the client/applicant did not follow the procedure prescribed under Paragraph 11 of the Advocates (Remuneration) Order in filing the current motion. The application seeking to challenge the taxing officer's decision on taxation was filed three (3) years after the decision on taxation was delivered. It is therefore clear that there was an inordinate delay in bringing the aforesaid application. Secondly, it is also apparent on the face of record that the client did not obtain prior leave to extend time to file the motion. For the above reasons I have

come to the conclusion this court has no jurisdiction to entertain and determine the motion. I find the application to be incurably defective and incompetent.

6. The second question to be determined is whether or not the orders sought by the client should be granted? In prayer 1, the client has beseeched this court to set aside, vary and or vacate the certificate of taxation. It is the submission of the client that the provisions of section 51 (2) of the Advocates Act, does not make it mandatory for the court to enter judgment upon an application being made by the applicant but the court is left with a wide discretion. The client urged this court to grant the orders in broad interest of justice under Article 159(2) of the Constitution of Kenya, 2010. The client urged this court to issue an order remitting the file back to the taxing officer for purposes of only taking accounts as to what monies if any the client had paid the advocate towards the settlement of the legal fees. The advocate/applicant was of the view that the application herein does not seek to challenge the decision of the taxing officer. It was pointed out that the client has not attempted to discredit the decision of the taxing officer hence there is no cause for setting aside the certificate of taxation herein. I have considered the competing arguments over the question as to whether or not the certificate of taxation should be set aside. It is trite law that the certificate of taxation is final as to the amount of costs payable unless and until it is altered or set aside. With respect, I agree with the submissions of the advocate/applicant that the client/respondent has applied to have the decision on taxation impugned. I find no merit in the prayer.

7. The third and final issue to decide is the question as to what sort of orders this court should make in the circumstances of this matter? I have already expressed myself that the application does not appear to raise any serious objection on the manner the taxing officer determined the taxation, therefore the certificates of taxation remains valid. A critical look at the motion will reveal that the client is indirectly seeking to have the decision on taxation reviewed. There are completely no good grounds to support an application for review.

8. I am not convinced that the client who is alleged to be illiterate stumbled on some receipts which show the client had paid the advocate ksh.115,000/=. The amount quoted herein is a colossal sum which a litigant cannot easily forget. I can only infer that the client did not apply due diligence to discover the aforesaid payments early enough to enable the client raise it as an objection before the taxing officer. Consequently, the prayer for an order to compel the advocate to discover on oath cannot be granted in the circumstances. In short, the information the client is now saying she discovered late was actually within her knowledge and no objection was taken at the hearing of the taxation. **In Ufundi Coopeperative Savings Credit Society =vs= Njeri Onyango & Co. Advocates (2015) eKLR** this court stated inter alia as follows:

“The court was of the view that where the applicant raised no objection to an issue before the taxing officer, he is estopped from raising such objection before the judge in chambers.”

9. In this case, the client/respondent has not filed any reference but has purported to circumvent the court process by filing this application.

10. In the end, I find the motion dated 27.7.2016 to be without merit.

The appropriate order to make in the circumstances is to order which I hereby direct that the motion be dismissed with costs to the advocate/applicant. The motion dated 19.8.2013 filed by the advocate should be fixed for interpartes hearing on priority basis.

Dated, Signed and Delivered in open court this 16th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent