



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL CASE NO. 154 OF 2012

(Being an appeal from the original judgment and decree of the Deputy Registrar Kisii MISC. APPL. No. 27 OF 2011- L. Kaityany delivered on 27th day of July, 2012)

SOTIK TEA COMPANYAPPELLANT

VERSUS

NYAMWEYA OSORO & NYAMWEYA ADVOCATERESPONDENT

JUDGMENT

1. Before me is an appeal arising out of the ruling and order of the Deputy Registrar delivered on 27th July 2012 in which the appellant's application dated 29th March 2012 was dismissed. The appellant seeks, inter alia orders to set aside the court's ruling dated 27th July 2012, and an order allowing the application dated 29th March 2012 in which the appellant had sought the following orders:

- a) This Honourable court be pleased to join Mr. Hon. George Nyamweya as a third party/respondent to these proceedings.**
- b) The parties herein be at liberty to amend their pleadings to effect addition of the proposed third party/respondent.**
- c) Costs of the application be provided for.**

2. Prior to the filing of the said application, whose ruling is the subject of this appeal, the respondents herein had filed several miscellaneous Applications in which they sought to tax their advocate-client bill of costs arising from various matters in which they had acted for the appellant, being HC Misc. Application Nos. 27, 33, 34, 40, 41 and 51 of 2011 which applications were later consolidated into Misc. Application No. 27 of 2011 from which the instant appeal arises. The application was supported by the affidavit of Doreen Kituku, the appellant's legal and Administrative Officer, sworn on 29th March 2012 in which she stated that one Hon. George Nyamweya was intricately involved in the transactions that were the subject matter of the proceedings before the court and specifically in respect to monies that the respondent was claiming as its costs, which monies she stated, had already been paid to the said Hon. George Nyamweya.

3. The respondent opposed the said application through the replying affidavit of Kennedy Bosire Gichana advocate dated 1^{9th} April 2012 in which he stated that the matter before the court was the taxation of the advocate-client bill of costs and therefore the purported payment of money, if any, to the intended third

party was not relevant at that stage of the taxation of bills. Mr. Bosire added that the said third party sought to be enjoined in the case was a total stranger to their law firm having been struck off the roll of advocates at the time the respondent law firm handled the appellant's cases and therefore any agreement struck between the said Nyamweya and the appellant was not an enforceable agreement. The respondent sought the dismissal of the application so that the taxing officer could proceed with the taxation of the bills of costs.

4. Parties presented their respective arguments on the application to the Deputy Registrar who on 27th July 2012 dismissed the appellant's said application thereby giving rise to the instant appeal in which the appellant has set down the following grounds of appeal in the memorandum of appeal.

1. That the Learned Deputy Registrar erred in law and fact in not appreciating that Mr. Hon. George Nyamweya having been a partner in the Respondent firm of advocates, and having been intricately involved in the transactions which form the subject matter of the taxation proceedings in that that the moneys claimed by the Respondent (the firm of Nyamweya Osoro & Nyamweya Advocates) were paid to and receipt thereof acknowledged by the said Mr. Hon. George Nyamweya and as such Mr. Hon. George Nyamweya was a necessary party to the proceedings.

2. That the learned Deputy Registrar erred in law in misapprehending the proper application of the provisions of Order 1 Rule 3, 10 (2) and (4) of the Civil Procedure Rules and the relevant provisions of the law as regards joinder of parties in a suit.

3. That the learned Deputy Registrar completely misdirected herself on the issues before her and thereby wrongly refusing to allow the Application dated 29th March 2012.

4. The learned Deputy Registrar erred in law by holding as conclusive proof the averments, which were not supported by any evidence, by the Respondent to the effect that Mr. Hon. George Nyamweya was struck off the roll of advocates.

5. The learned Deputy Registrar erred in law by completely ignoring the affidavit evidence filed by the Appellant in the proceedings.

6. The learned Deputy Registrar failed to appreciate that the submissions made by the Counsel for the Respondent were not evidence before the Court.

7. The learned Deputy Registrar took into account extraneous and irrelevant consideration in arriving at her decision on the Application dated 29th March 2012.

8. The decision by the learned Deputy Registrar in effect has determined the taxation proceedings thereby occasioning great prejudice to the Appellant.

5. The appeal was admitted for hearing on 21st July 2014 and when it later came up for hearing on 5th December 2016, advocates for both parties informed the court that they were ready to highlight their written submissions.

Appellant's submissions

6. Mr. Ngeno advocate for the appellant submitted that the legal fees due to the respondent was paid to one George Nyamweya, then a partner in the Respondent's law firm, and thus there was a need to enjoin the said George Nyamweya as a necessary party to the suit in line with the provisions of **Order 1 Rule 10 of the Civil Procedure Rules**. The appellant outlined the criteria for enjoining a party to a suit as was stated in a number of authorities which were cited including the case of **Kingori vs Chege & 3 others [2002] 2 KLR 243**.

7. The appellant also cited the case of **Housing Finance Company of Kenya Ltd vs Faith Kimeria & Another, Civil Appeal no. 214 of 1996 [1996] KLR 6504** in which it was stated that:

“Order 1 Rule 10 of the Civil Procedure Rules provides for the addition of a party to a suit so that his presence before the court may enable the court to effectually and completely adjudicate and settle all questions involved in the suit, or to enable the court to determine the real matters in dispute.”

8. The appellant faulted the Deputy Registrar for failing to consider and appreciate the fact that the presence of George Nyamweya to the suit could have effectually assisted the court in determining the issue at hand. It was the appellant's case that the Deputy Registrar took into account extraneous and irrelevant considerations in dismissing the application dated 29th March 2012 and in effect determining the taxation proceedings prematurely thereby causing great injustice to the appellant.

Respondent's submissions

9. Mr. Bosire for Respondent submitted that he was the only person capable of entering into an agreement for fees on behalf of the respondent law firm since Mr. George Nyamweya, had at the time, been struck off the roll of advocates. He stated that taxation of an advocate/client Bill of costs is not a suit that would warrant the enjoining of a new party and therefore, that the application to enjoin a party did not lie. The respondent further stated that any party aggrieved by the decision of a Deputy Registrar ought to file a Notice of objection to the High Court and not an appeal as had been done by the appellant in the instant case.

10. According to the respondent, taxation *per se* is not a suit since a substantive suit to claim the amount awarded as taxed costs can only be filed after such taxation is done in line with the provisions of **Section 47 and 48 of the Advocates' Act**.

11. The respondent contended that the application and the instant appeal were side shows intended to delay the taxation proceedings.

Analysis and determination

12. I have considered the record of appeal, the parties respective written submissions together with the authorities cited. I discern the issues for determination to be as follows:

a) Whether an appeal lies from the decision/ruling of a taxing master.

b) Whether the Deputy Registrar in her capacity as a taxing and had the jurisdiction to determine the issue of joinder or non-joinder of a party to the proceedings.

13. On the first issue, paragraph 11 of the Advocates Remuneration Order stipulates as follows:

“11. Objection to decision on taxation and appeal to Court of Appeal.

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the

Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), for the taking of any step; application for such an order may be made by chamber summons upon giving to every interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may already have expired."

14. The above provisions are clear that any person aggrieved by the decision of a taxing officer 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 if not satisfied with the reasons given file a reference to this court by way of a chamber summons application to be served upon all the concerned parties.

15. In the present case, the appellant filed an application to enjoin a third party to the proceedings taxation which application was dismissed thereby precipitating the instant appeal and this brings to fore the question of whether an appeal can lie from the decision of a taxing officer. In the case of **Machira and Co. Advocates vs Magugu [2002] 2 EA 428 at page 433**: Ringera J. (as he then was) held as follows:

"First, the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer and indeed Order XLII of the Civil Procedure Rules is clear that appeals lie either as of right or with leave from orders made under the Civil Procedure Rules. No mention is made of order made under the Advocates Remuneration Order. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, 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 the Judge in accordance with paragraph 11 of the Advocates Remuneration Order."

16. Similarly, **Donholm Rahisi Stores (suing as a Firm) vs East Africa Portland Cement Limited [2005] eKLR**, Waweru J held at page 2 of his ruling as follows:

"Taxation of costs, whether those costs be between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocates (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself."

17. Going by the dictum in the above cited authorities, it is clear that no appeal lies to the High Court from the decision of the deputy registrar acting in his capacity as a taxing officer. I further find that when assessing an advocate-client bill of costs, the taxing officer exercises the jurisdiction conferred upon him or her under the Advocates (Remuneration) Order and not in his or her capacity as the deputy registrar under the Civil Procedure Rules. To my mind, the jurisdiction under the Advocates (Remuneration) Order is distinct and separate from jurisdiction of the deputy registrar under the Civil Procedure Act and therefore the procedure adopted in one cannot be substituted in the other. In this case, I find that the procedure adopted by the appellant in seeking to enjoin a third party to the taxation of a bill of costs filed under the Advocates (Remuneration Order), by invoking the procedure and provisions of the Civil Procedure Rules was an abuse of the procedure and the process of the court. I wish to reiterate the appellant's application before the taxing officer, which is the subject of this appeal was expressed to have been filed under Order 1 Rule 3, 10(2) and (4) of the Civil Procedure Rules and not under any provisions of the Advocates (Remuneration) Order.

18. My findings on the procedure adopted by the appellant in filing the impugned application would have

been sufficient to determine this appeal but I am still minded to address the issue of whether the application to enjoin a third party to the taxation proceedings ought to have been filed before the taxing officer in the first place even assuming, for arguments sake, that the correct procedure had been adopted by the appellant. Paragraph 12 of the Advocates Remuneration Order provides as follows:

“12.(1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.

(2) The procedure for such reference shall follow that of a case stated but shall be to a judge in chambers.”

19. A reading of the above provisions of the law shows that the taxing officer has the discretion to refer any matters in dispute arising out of the taxation of a bill of costs to this court for its opinion. Waweru J. had the following to say when faced with a similar question in the case of **Khan & Katiku Advocate vs Central Electrical International Ltd (2005) eKLR**;

“But in my view that power and discretion must relate to the core business of the taxing officer and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation. It is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a situation may arise such as the present one, where the advocate’s instructions are only partly disputed. Here it is contended by the Client that the Advocates had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate’s instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds.”

20. Similarly, in the case of **Mugambi & Co Advocates v John Okal Ogwayo & another [2013] eKLR** it was held *inter alia* that:

“The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2, 10 and 13 of the remuneration order. Where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer that issue ought first to be determined by the Court. “Court” is defined in section 2 of the Advocates Act, Cap 16 as the High Court. “Court” is thus not the taxing officer or a deputy registrar of the court.”

21. I am convinced that the above cited decisions set out good law regarding the jurisdiction of the taxing officer and procedure to be adopted in dealing with substantive issues that arise in the course of or during the taxation of bill of costs whether it is between party and party or advocate and client.

22. **Going by the reasoning of the courts on the law in the above decisions I hold that** the issue of whether or not fees had been paid to a third party and further, whether the said third party should have been enjoined in the taxation proceedings are, in my humble view, substantive issues which ought to have been referred to this court for determination or better still, need to be canvassed in a separate suit in which the appellant will be at liberty to make out its claim against the said third party or the respondent law firm for that matter.

23. Having found that no appeal lies to this court from the decision of taxing officer made under the Advocates (Remuneration) Order and that the taxing officer had no jurisdiction to hear and determine the question of joinder of a party to the taxation proceedings, and further, having found that the procedure adopted by the appellant in filing the initial application before the taxing officer was wanting, it is my finding that the instant appeal is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered in open court this 8th day of February, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Oguttu for the Appellant

Mr. Bosire for the Respondent

Omwoyo: court clerk