



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CAUSE NO. 335 OF 2014

KEMBI-GITURA & COMPANY ADVOCATES.....APPLICANT

VERSUS

METRA INVESTMENTS LIMITED.....RESPONDENT

RULING

1. The applicant, **KEMBI-GITURA & COMPANY ADVOCATES**, filed an application pursuant to Section 51 (2) of the Advocates Act. The said application was for the grant of judgement against the respondent, **METRA INVESTMENTS LIMITED**, for the sum of Kshs. 899, 761.80.
2. The claim is based upon a Certificate of Taxation dated 12th October 2016.
3. Immediately after being served, the respondent raised a Preliminary Objection, which was in the following terms;
 - “1. That the Application cannot be filed in the same taxation file as the former should be before the Judge while the latter was before the Deputy Registrar.**
 - 2. That the Respondent has sought a letter dated 28th September, 2016 reasons for the taxation with a view to filing a Review & Stay of execution should be granted.**
 - 3. That dispute falls under Environmental and Land Division”.**
4. When canvassing the preliminary objection, Mr. Njeru advocate submitted that Judgement cannot be entered in the same case as that in which the costs were taxed.
5. In his considered view, the proceedings for enforcement should be fresh proceedings.
6. The respondent pointed out that the learned Taxing Officer was unable to give to the respondent, the reasons for the decision she made at the conclusion of the process of taxation.
7. On 21st September, 2016 the learned Taxing Officer, Ms Nancy Makau delivered her ruling on taxation.
8. On 7th October 2016, the respondent filed a letter in court, giving notice of its intention to file a reference to object to the entire Bill of Costs, together with the Ruling on taxation. The respondent asked

the Taxing Officer to provide it with the reasoning which led to the decision to award costs amounting to Kshs. 899,761.80.

9. In my understanding, there is no reason in law, or in fact which would preclude the Taxing Officer from providing the reasons for his/her decision, if there was an application for judgement. The fact that the Advocate whose Bill of Costs had asked the court to grant judgement in terms of the Certificate of Taxation, does not imply that the court file was permanently in the hands of the Judge who would hear that application.

10. The Certificate of Taxation in this case was the product of the taxation of an Advocate/Client Bill of Costs. Therefore, the said Certificate of Taxation was issued in a case which pits the applicant against the respondent.

11. By dint of the provisions of Section 51 (2) of the Advocates Act;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs”.

12. There is no suggestion in that section that after a Bill of Costs is taxed, the proceedings for the recovery of the taxed costs ought to be commenced by a separate suit.

13. Pursuant to Rule 11 of the Advocates (*Remuneration*) Order a party who has any objection to the decision of the Taxing Officer may, within 14 days of the decision, give notice in writing to the taxing officer, indicating the items of taxation which he is objecting to.

14. Upon receipt of the notice, the taxing officer is required to forthwith record and forward to the objector, the reasons for his decision.

15. The objector has 14 days from the date of receipt of the reasons, to file a reference to a Judge.

16. In all these processes, it should be borne in mind that, pursuant to Section 2 of the Advocates Act, “*Court*” means the High Court. Therefore, when the taxing officer was carrying out the exercise of taxation, he was carrying out a function assigned to him by the High Court.

17. Perhaps the better way of explaining the place of the taxing officer is by saying that his function is not that of a court which was subordinate to the High Court.

18. Therefore, no appeal lies to the High Court from a decision of the taxing officer. Instead, Rule 11 of the Advocates (*Remuneration*) Order provides a special procedure for challenging the decision of the taxing officer. The said procedure is commonly known as a reference.

19. The Judge determining a reference may uphold the ruling of the taxing officer or may reverse it either in part or wholly.

20. If the Certificate of Taxation was neither set aside nor altered, it constitutes the final determination on the quantum of costs payable.

21. In this case, the respondent has issued a notice of its intention to file a reference. The intimation of a desire to file a reference or even the existence of a reference does not give rise to an automatic bar to the enforcement proceedings based upon a Certificate of Taxation.

22. Therefore, the application before me cannot be stopped simply because the respondent had issued a notice of its intention to file a reference. If the respondent held the view that there were good reasons to

warrant stay of further proceedings, it would have to bring an appropriate application to court.

23. If the applicant herein were to oppose such an application, the Court would make a determination after according a hearing to both parties.

24. The respondent had submitted that this case was distinguishable from the authority cited by the applicant, namely **SINGH GITAU ADVOCATES Vs. CITY FINANCE BANK LIMITED, MISC. CASE No.698 of 2011.**

25. In the understanding of the respondent, the Judge, in the case of Singh Gitau Advocates, had already determined the challenge to the decision of the Taxing Officer.

26. Having carefully considered the judgement in that case, I note that it was premised on an application pursuant to Section 51 (2) of the Advocates Act. Nowhere in the judgement, is there any indication that there had been a separate determination by the Judge, on a reference from the decision of the taxing officer.

27. The main issue that arose is whether or not the client could legitimately seek to set-off the taxed costs which the advocate was claiming, against the client's substantial claim for the rents which the advocate owed to the client.

28. The learned Judge concluded that the only basis upon which an application for judgement, under Section 51 (2) of the Advocates Act was founded, was that there was a dispute as to retainer. This is what the learned Judge said;

“Whether or not a claim for rent by the client is plausible in my view, is not a matter to be adjudicated in a claim by an Advocate for his fees. The Client should institute a suit to recover the arrears in rent that is allegedly owed by the Advocate”.

29. As regards the contention that the dispute falls under the “*Environmental & Land Division*”, the court assumes that the respondent had abandoned it. I so find because the respondent opted to say nothing to support it.

30. In my considered view, when there is a Certificate of Taxation issued after the taxation of an Advocate/Client Bill of Costs, it is prudent for the advocate to proceed with enforcement proceedings in the same case.

31. Similarly, the client would, if he is so minded, file a reference in the same case.

32. By keeping all those inter-twined matters under the same umbrella, the parties would make it easier for the court to have a comprehensive perspective of the matters at play.

33. When the matters were handled in the same file, the possibility that the court may miss out on any aspect of the matters in issue, are reduced; and that therefore implies that the court was more likely than not to give a decision based on the comprehensive view of the issues involved.

34. In conclusion, I find no points of law that are a legitimate bar to the application before me.

35. The Preliminary Objection is thus overruled, and the respondent will pay to the applicant the costs for the same.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Wambui for the Applicant

Miss Ouma for Njeru for the Respondent

Collins Odhiambo – Court clerk.