



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**MISC CIVIL CASE NO. 928 OF 2010**

**KYALO MBOBU T/A**

**M/S KYALO & ASSOCIATES ADVOCATES ::::::::::::::: PLAINTIFF**

**VERSUS**

**MR. SAMUEL BOSCO NGANGA MWERU ::::::::::::::: 1<sup>ST</sup> RESPONDENT**

**MR. JAMES KAMAU MUHORO ::::::::::::::: 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. This ruling is in respect of **Three Notice of Motion** application's as follows:
2. The first is a Notice of Motion dated 15<sup>th</sup> April 2015 filed by the Applicant herein pursuant to Order 51 R 11 of the Civil Procedure Rules, Section 51 (2) of the Advocates Act as Read together with Rule 7 of the Advocates (Remuneration Order, 2009). The Applicant seeks to secure the following orders:
  - i. *That judgment be entered for the Applicant against the Respondents jointly and severally for Kshs.370,166.84 together with interest at court rates with effect from 14.2.2012.*
  - ii. *That in any event, the costs of the application be awarded to the applicant.*
3. The application is premised on the grounds set out therein, and is supported by affidavit of **Mr. Kyalo Mbobu** sworn on 15<sup>th</sup> April 2015 with the annexures thereto. It is also supported by a Replying Affidavit sworn by the same person Mr. Kyalo Mbobu on 11<sup>th</sup> June 2015 in response to the 2<sup>nd</sup> application herein dated 8<sup>th</sup> June 2015. It is further supported by affidavit of the same person Mr. Kyalo Mbobu sworn on 13<sup>th</sup> November 2015 in response to the Third Application herein dated 21<sup>st</sup> September 2015.
4. The Applicant's case is that there is a certificate of taxation in his favour which has not been stayed. Upon the Respondent being presented with the Advocate/Client bill of costs the Respondents refused, failed or neglected to pay the same. The Applicant's case is that there is no dispute on the Advocate's retainer. The Advocate's states that they were instructed by the Respondent on 3.7.08 to act on their behalf in a transaction for the sale of all that residential property known as L. R. No. 12422/21, Nairobi for a consideration of Kshs.55 Million. Sometime in November, 2008 the Advocates presented their fell note to the Respondents, but the Respondents refused to settle the same causing the Advocate's to file a bill of costs for taxation, which was taxed on 14<sup>th</sup> February, 2012 at Kash.370,166.84. A copy of the certificate of taxation

is attached to the application as exhibit marked "A". The Applicant states that the bill of costs and the taxation notices were served upon the Respondents on 14<sup>th</sup> October 2011 in the Applicant's office where the respondents attended the Applicant's office for other matters which the Applicants office was handling on their behalf. There is an Affidavit of Service dated 5<sup>th</sup> November 2011 by Mr. Harrison Mwangela, the process server. Similarly there is an Affidavit of Service by the same process server dated and filed herein on 11<sup>th</sup> November 2011 in proof of service of taxation notices upon the Respondents. It is on the basis of the above that the Advocates/Applicant's herein now pray that judgment be entered for the amount taxed.

5. Both Respondents have opposed the application. The first Respondent in opposition to the application has filed the second application herein dated 8<sup>th</sup> June 2015, seeking the following orders:

- a. *That the instant matter be certified as urgent and heard ex-parte in the first instance.*
- b. *That the Applicant/Respondent be granted leave to file an objection to the taxation orders issued on 14<sup>th</sup> February 2012 out of time.*
- c. *That in an alternative, the Honourable court be pleased to set aside the taxation orders made on 14<sup>th</sup> February 2012 in respect of the Respondent's/Advocate's bill of costs dated 28<sup>th</sup> September 2010 and the said bill be taxed afresh inter-parties.*
- d. *That the Advocate/Respondent's application dated 15<sup>th</sup> April 2015 be stayed pending the hearing and final determination on prayers 2 and 3 hereinabove and/or any other orders of the court.*
- e. *That the Honourable court be at liberty to issue such other or further orders that it may deem fit and expedient to grant.*
- f. *That the costs of this application be provided for.*

6. The application is premised on the grounds set out therein, and is supported by affidavit of the 1<sup>st</sup> Respondent **Mr. Samuel Bosco Ng'ang'a Mweru** sworn on 8<sup>th</sup> June 2015. The 1<sup>st</sup> Respondent denies that they instructed the Applicant in relation to the transfer of property L. R. 12422/21 worth Kshs.55 Million. The 1<sup>st</sup> Respondent also denies receipt of Notices of bill of cost and taxation, and states that the affidavit of service sworn by the process server was a forgery, and on that basis the 1<sup>st</sup> Respondent seeks orders for leave to respond to the taxation, and an order nullifying the taxed bill of cost. The application is further supported by the 1<sup>st</sup> Respondent's supplementary Affidavit sworn on 30<sup>th</sup> June 2015 which expounds on the above grounds.

7. The second Respondent opposed the application through the Third Notice of Motion Application herein dated and filed on 21<sup>st</sup> September 2015. The application seeks to secure the following orders:

1. *That this matter be certified as urgent and be heard ex-parte in the first instance.*
2. *That this Honourable Court be pleased to set aside the ex-parte taxation orders made on the 14<sup>th</sup> February 2012 in respect of the Respondent/Advocates Bill of Costs dated 28<sup>th</sup> September 2010 and the Certificate of Taxation dated 20<sup>th</sup> September 2012 and the said Bill of Costs be taxed afresh interpartes.*
3. *That in the alternative, this Honourable Court be pleased to set aside the Certificate of Taxation dated 20<sup>th</sup> September 2012 and grant leave to the 2<sup>nd</sup> Respondent to file an objection to the ex-parte taxation orders issued on 14<sup>th</sup> February 2012, out of time.*
4. *That the costs of this application be awarded to the 2<sup>nd</sup> Respondent/Applicant.*

8. The application is premised on the grounds set out therein and is supported by the affidavit sworn by the second Respondent **Mr. James Kamau Muhoro** on 21<sup>st</sup> September 2015. It is also supported by a Replying affidavit of the said Mr. James Kamau Muhoro dated and filed herein on 2<sup>nd</sup> June 2015 in respect to the Applicant's application dated 15<sup>th</sup> August 2015. The 2<sup>nd</sup> Respondent's case is that he never gave instruction's to the Applicant in relation to alleged transfer of property L. R. No. 12422/21. He also denies receipt of notices of bills of taxation or the notice for actual taxation.

9. With the leave of the court, parties filed submissions and also orally submitted on the issues in court. I have carefully considered the three applications on record, and the submissions of the parties. In my view the following are the issues I raise for consideration:

- i. Whether there was service of the notices of bill of taxation, and of taxation.
- ii. Whether the Respondents instructed the Applicant to provide legal services in relation to sale and transfer of L. R. No. 12422/21 Nairobi city.
- iii. Whether the Certificates of taxation herein can be set aside.

10. To begin with the first issue, it is on record that on 14<sup>th</sup> October 2010, a process server Mr. Harrison Mwangela served upon the Respondents a bill of costs together with taxation notices. It is also on record that on 26<sup>th</sup> October 2011 the same process server served the 1<sup>st</sup> Respondent with a taxation notice from the firm of M/s Kyalo & Associate's Advocate's. The said process server has sworn these two affidavits of service. However, the Respondents claim that the alleged service never took place. In effect, the Respondent's case is that those affidavits of service are infact a forgery, and an illegality which this court should discard. In my view, however, a process server is an officer of this court. What he depones to in an affidavit constitutes truth. That truth can be doubted by either the court or any other party. A party who doubts a deponent to an affidavit has the right to call the deponent so that he or she is cross examined on the veracity of what he says. Both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have disparaged the said affidavits of service. However, none of them sought to cross examine the process server. The process server stated that he knew the two Respondents personally, and that he served them in the office of the Applicant. Nothing had stopped the Respondents from calling the process server to be cross examined on his affidavits. As for court, whom am I to believe? I have looked at the Replying Affidavit of Mr. Kyalo Mbobu sworn on 13<sup>th</sup> November 2015. At paragraph 3 thereof he states matters in which his firm had acted for the Respondents. As a consequence, he states at paragraph 4 that both the Respondents used to visit his chambers from time to time, either individually or both as directors of Neo Furniture Mart Ltd or the 2<sup>nd</sup> Respondent as a director of Clay City Developers Ltd. That the two Respondents were frequent visitors to the chambers of the Applicant has not been challenged. It is therefore possible that they were served by the process server upon one of such visits. I believe the testimony of the process server that the respondents were served with the notices of bill of taxation, and with the notice of taxation. That they refused or neglected to enter appearance and defend the taxation was their choice, the consequences of which they must shoulder.

11. The second issue I raised herein for determination is whether or not the Respondents had instructed the applicant to provide legal services in relation to sale of and transfer of L. R. No. 12422/21 Nairobi City. The Respondents have vehemently denied ever instructing the Applicant in relation to the above transaction. However their denial amounts to outright lies if this court considers the annexures "A" to "J" of Mr. Kyalo Mbobu's Replying affidavit aforesaid. Mr. Mbobu is not a rogue advocate to manufacture instructions or to allege what is not correct. Sample the following:

- i. Exhibit "A" is a draft of the sale agreement between the Respondent's on the one hand and a Mr. Daniel Kamita Gichuhi, on the other hand. The agreement is drawn by B. N. Kiptoo & Co. Advocate. Of course it is not executed since this was still in the negotiation stage.
- ii. Annexure "B" is a letter dated 3<sup>rd</sup> July 2008 addressed by the Applicant to the firm of B. N. Kiptoo & Co. Advocate. The subject matter is L. R. No. 12422/21, Nairobi.
- iii. So also is annexure "C".
- iv. Annexure "D" is a letter from Neo Furniture Mart Ltd, a company in which the 1<sup>st</sup> Respondent is a director. The letter is signed by the 1<sup>st</sup> Respondent himself. It is addressed to M/s Kyalo & Associates Advocates. The letter gives express instructions to the said advocates in the said sale transaction.
- v. If anybody is still in doubt annexures "F" to "J" re-affirm these instructions. It is therefore very difficult for this court to understand the submission by the Respondents that there could not have been a taxation since there were no instructions. It is the principle of equity that a party who seeks

equity should do equity. What comes across herein is that for over 7 years the Respondents engaged services from the Applicant, which services they have to date refused to pay for, and they still have the courage to come to this court and to ask that this court sets aside the certificate of taxation and give them the leave to defend these taxation!

12. Even if this court were to be magnanimous enough, and to consider granting the said orders requested, this court must still contend with the delay in bringing this application. Having established that the bill of taxation and Notice of taxation were served in the years 2010 and 2011, it is the duty of the Respondent's to convince me as to why they delayed filing this application. I am not satisfied that any reason has been given to explain the said delay.
13. There have also been allegations that the bill of costs was excessive. I have noted that the Bill of costs was drawn at Shs.409,911.93 and was taxed at Shs.370,166.84. That was the discretion of the Tax Master. However, it must also be noted that the bill of cost was not opposed. It is not the jurisdiction of this court to question the finding of a tax Master in a taxation process which is not opposed, and also which does not prima facie, raise an eye brow.
14. The last issue I raised above is whether the Certificate of Taxation herein can be set aside. For the foregoing reasons, issue number three must be answered in the negative. On this issue, it is to be noted that Rule 11 (1) of the Advocates Remuneration Order provides that an aggrieved party is allowed to move this court by firstly writing to the taxing officer giving a notice that he or she object to certain items in the taxation bill. That notice is a fourteen (14) days notice. That is the first process that moves this court under Rule 11. There is no evidence that the Respondent did that, and prima facie, their applications stand on faulty grounds.
15. I have carefully considered the three (3) applications before the court. Applications number 2 and 3 by the Respondents are not merited for the reasons that they are not grounded in law as provided under Rule 11 of the Advocates Remuneration Order. Secondly, they are informed of advertent lies or misdirection such that a court authorised to exercise its discretion under the said Rule 11 would shun away from granting them.
16. In the upshot the following are the orders given pursuant to the three applications before the court.
  - a. Judgment is hereby entered for the Applicant against the Respondents jointly and severally for Kshs.370,166.84 together with interests at court rates with effect from 14.2.2012 in the Applicant's application No. 1 herein dated 15th April 2015.
  - b. The applications number 2 and 3 herein filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and dated 8<sup>th</sup> June 2015 and 21<sup>st</sup> September 2015 are herewith dismissed with costs to the Applicant/Respondent.

Orders accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

M/s Ndungu hb Mbobu for Applicant

M/s Kirago for 1<sup>st</sup> Respondent

M/s Muigai for the 2<sup>nd</sup> Respondent

Teresia Court Clerk