



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 197 OF 2005

RUSTAM HIRA ADVOCATE..... APPLICANT

VERSUS

ORIENT BANK formerly DELPHIS BANK.....RESPONDENT

RULING

1. The applicant; **Rustam Hira Advocate** took out the motion dated 13th April 2015 in which he sought for the following orders:
 1. ***THAT the judgment be entered in favour of the advocate/applicant in the sum of kshs 26,353,550/=.***
 2. ***THAT interest on the above sums be awarded to the applicant at the rate of 14% per annum from 7th February 2005 till payment in full .***
 3. ***THAT the costs of the application be paid by the client/respondent.***
2. The motion is supported by the affidavit of **Rustam Hira**. When served **Oriental Bank Limited**, the Respondent, filed a preliminary objection and a replying affidavit OF 22ND October 2015 to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the 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 together with the facts deponed in the affidavits filed for and against the motion and the preliminary objection. I have also taken into account the rival written submissions. Firstly, it is imperative to consider the preliminary objection before proceeding with the merits of the application.
4. The respondent raised a preliminary objection on the following grounds:
 1. ***THAT the application is brought contrary to the provisions of section 51(2) of the Advocates Act hence it ought to be struck out and dismissed;***
 2. ***THAT the application is prematurely brought prior to the conclusion of the reference;***
 3. ***THAT the application is time barred contrary to section 4(1) of the Limitations of Actions Act;***
 4. ***THAT the applicant is guilty of laches;***
 5. ***THAT there is no valid Certificate of Taxation as the taxation was carried out by Mr. Muya Martin, but the one exhibited is by Honourable F.R. Wangila;***
 6. ***THAT the suit herein ought to be stayed until the hearing of the High Court Civil Suit Number 489 of 2005, Oriental Commercial Bank Limited versus Rustam Hira t/a Rustam Hira advocate;***

7. ***THAT the application is incompetent misconceived and ought to be dismissed with costs.***

5. As stated earlier, the parties filed their respective submissions. On the issue of the P.O, the applicant counsel submitted that only grounds 1 and 3 are the matters of law while the rest are matters of fact and evidence that should not be considered. He argued that according to section 51(2) of the Advocates Act the court can only fail to enter judgment where a certificate has been set aside or altered by court. In this case he stated that the certificate has neither been altered nor set aside hence the court is bound under section 51(2) of the Advocates Act to enter judgment for the sum certified in the certificate of costs. He further added that the suit is not time barred; since 6 years had not lapsed since the date of taxation, given that the certificate of taxation was issued on 10th February 2014. The applicant further submitted on the substance of the application that the items were taxed as proposed by the respondent in his submissions. He added that the respondent has not made any effort since the last correspondence dated 7th April 2010 to follow the reasons he had requested. He submitted further that the respondent has not taken any step in a period of 5 years in the matter and that the taxing master completed his job contrary to the claims by the respondent that he failed to do so. He argued that the HCCC 489 of 2005 cannot be considered to stay the current suit and that no appeal has been preferred against the decision and no appeal can be heard through the back door.
6. The respondent on the other hand submitted on the P.O that; the certificate of taxation is a nullity since it is contrary to section 51(2) of the advocates Act, the certificate was issued by a different taxing officer, **Honorable F.R Wangila** instead of **Hon. M. Muya** who taxed the bill. The respondent further submitted that the application is premature given that the respondent's reference over the taxation has not been heard and determined by the court as provided for by Rule 11 of the Advocate's Remuneration Order despite appeals by the respondent to the taxing master to provide reasons for his decision. It averred that the delay to file a reference in the High Court is due to the delay exhibited by the taxing officer in giving its reasons for its decision. The respondent also argued that the taxing master failed to complete his duty when he stated in his ruling dated 30th June 2009, that the discrepancies of kshs 2,350,000/= can be sorted out by the parties or can be canvassed during the judgment costs. On the substance of the application, the respondent submitted that the application has been filed prematurely since it seeks to enforce a certificate of taxation which the respondent has communicated his intention to challenge. It concluded that the existence of taxation does not entitle the applicant to an automatic judgment under section 51 (2) of the advocates Act since there were issues of taxation which the taxing master did not finalize on.
7. Having considered the arguments of both parties. I wish to address the grounds raised in the P.O. Firstly, I note that only the 1st and 3rd grounds raised in the P.O are matters of law. The rest of the grounds are matters of fact. In the classic case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696**, in which Sir Charles Newbold P observed as follows:-

“ The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

It is clear that the issue raised by the respondent pertaining to the application being premature, applicant being guilty of laches, lack of valid certificate of taxation, staying of Suit Number 489 of 2005 and the application being incompetent would require evidence and in which case they cannot be entertained by way of Preliminary Objection as relations cannot be inferred and on that ground alone.

8. The respondent's argument in ground one is that the application is brought contrary to Section 51(2) of the advocates Act for the reason that the Taxing master was not the one who executed the certificate of taxation. I have looked at the certificate and read the provisions of section 51 (1) of the Advocates Act. Indeed, the certificate of taxation was executed by the current Deputy Registrar, **F.R wangila** since **Hon. Muya** is no longer stationed in this division. This provision does not limit other registrars from executing the certificate of taxation. It is evident that the ruling in the taxation was delivered by **Hon. Muya**. The fact that the certificate was issued by another Deputy Registrar does not nullify the decision as pronounced by the previous Registrar since the decision that is being certified is still in existence and the certificate only comes to be after the decision has been delivered.
9. On the second ground, the respondent claims that the application filed by the applicant is time barred contrary to section 4(1) of the Limitations Act. This ground has not been expounded on by the respondent. However, the section provides a limitation period of 6 years. The claim by respondent that the applicant is guilty of laches is not true. It is apparent that the ruling was delivered on 30th June 2009, certificate of taxation was thereafter issued on 10th February 2014. It is barely two years since the certificate of taxation was issued. Section 4(1) of the Limitations Act is categorical that the limitation period should be 6 years. Time to take out these proceedings had not lapsed.
10. In the premises I find that the P.O lacks merit and the same is hereby dismissed.
11. I now consider the merits of the Motion and the orders sought therein.

As it appears on the face of the motion, the Applicant is basically asking to be given two orders. First, is an order for judgment to be entered in favour of the applicant in the sum of kshs 26,353,550/= and secondly, to be granted interest that has accrued at the rate of 14% per annum from 7th February 2005 till payment in full. I have carefully considered the material placed before me. The parties are in agreement that the bill was taxed to the tune of kshs 26,353,550/=. The contention arose where the respondent aggrieved by the decision of the taxing matter sought to file a reference to the High Court. In its attempt to adhere to paragraph 11 of the Advocates (Remuneration) Order, it suffered a setback since the reasons for the taxing master's decision were not forthcoming. According to the respondent, it has on several occasions requested in vain for the reasons from the Taxing Officer. There are various correspondences dated 1st July 2009, 17th July 2009, 10th July 2009, 21st October 2009 and 10th February 2010 which are annexed that prove that the respondent has on a number of occasions requested for the reasons without success.

12. Looking at paragraph 11, it provides that:

13. The provision requires that a taxation appeal lies with the High Court,

which the objecting party files as a reference after acquiring reasons from the taxing master for his decision. Indeed the last correspondence requesting for reasons was done in February 2010 and there has been no further correspondence ever since. That was indolence on the part of the respondent, yet there are remedies available in Law to address a situation where a taxing officer fails to give reasons for his/her decision. In **Kipkorir, Titoo & Kiara Advocates v. Deposit Protection Fund Board [2005] 1KLR 528** the Court of Appeal expressed itself as follows:

“If a taxing officer totally fails to record any reasons and to forward them to the objector as required then, that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”

14. However, I am convinced that attempts were made to get the reasons and the taxing officer failed to avail them. Therefore I will not visit the mistakes of the court on the respondent. In the circumstance of this case, the application appears to be premature. There is need to give the

respondent a chance to pursue the available channels to file the reference as envisaged herein above.

15.I am further convinced that a fair order in the circumstances to issue, which I hereby do, is an order to stay further proceedings on the motion dated 13.4.2015 for a period of 90 days. The respondent to take advantage of the stay period to have the reference envisaged filed and determined. Each party to meet its own costs.

Dated, Signed and Delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant.

..... for the Respondent.