



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
MISC. APPLICATION NO. 96 OF 2014

STEPHEN ONYANGO OCHOLA.....1ST PLAINTIFF

PAUL OBUYA MOLA.....2ND PLAINTIFF

VERSUS

EDWARD SULE HONGO.....1ST DEFENDANT

KISUMU MUNICIPAL COUNCIL.....2ND DEFENDANT

ROSELYNE ADHIAMBO ODHIAMBO.....3RD DEFENDANT

RULING

The 1st and 2nd Plaintiffs have by the Notice of Motion dated 22nd May 2014 sought orders as follows:-

- "1. That the honourable judge be pleased to set aside the Deputy Registrar's Ruling on assessment of Advocate's fees payable delivered on 30th May 2014.***
- 2. That the honourable court be pleased (sic) to refer the matter back to the Deputy Registrar with directions on proper manner of assessment of Advocate's fees.***
- 3. By way of an alternative, this honourable court be pleased to tax the cost in accordance with the law.***
- 4. Cost of the reference be awarded to the applicant."***

The grounds for the application are as follows:-

- 1a) The ruling of the deputy registrar has not basis in law in various items not taxed off and taxed off.***
- b) The Deputy Registrar made an error in principle in failing to appreciate the applicable law under which he ought to have based his assessment in view on the Advocates Remuneration Order of 1998 instead of 2007 Remuneration Order.***
- c) The Deputy Registrar failed to consider the submissions of the applicants counsel.***
- d) The Deputy Registrar having committed errors in principle, the honourable court has***

jurisdiction to interfere with her ruling on assessment of the advocates cost and

2a) The taxation is arbitrary

b) The Taxation was based on the wrong principle

c) The Deputy Registrar didn't give reasons

d) The Deputy Registrar misunderstood and misinterpreted the law

3. The Deputy Registrar allowed folios on item 2. The folios were very few.

4. The Honourable Deputy Registrar never took into account moneys already paid.

5. The Deputy Registrar erred in the instructions fees on new advocates remuneration order and not the old order as required by the law at 163,000/= and not on the instruction fees.

6. The entire handling of the bill was erroneous.

The Notice of Motion is supported by the affidavit of the 1st Plaintiff which affidavit reiterates the grounds aforesaid.

The Notice of Motion is opposed vide a replying affidavit sworn by the 1st Defendant on 25th June 2014.

The application was canvassed by way of written submissions. This ruling was to be delivered on 21st January 2016 but due to pressure of work it was not ready. The delay is regretted.

This matter concerns the taxation of costs. The Plaintiffs/Applicants are dissatisfied with the decision of the taxing officer who taxed the party and party

costs in Kisumu HCCC 244 of 1994. The certificate of costs annexed to the application indicates that the costs were taxed at Kshs.163,107/=. The gist of the application before me is that these costs are highly exaggerated and constitutes unjust enrichment. It is also argued that the taxing officer based his taxation on the wrong remuneration order as in this case he ought to have used the Advocates (Remuneration) (Amendment) Order, 1997.

I have considered the application and the rival submissions carefully. Whereas I do not ascribe to the submission that it is fatally defective for being brought by way of Notice of Motion instead of Chamber Summons as provided in the rules, I do agree that it is incompetent. Then whereas Section 51(2) of the Advocates Act recognizes that a certificate of costs may set aside rule 11 of the Advocates Remuneration Order sets down the procedure a party wishing to object to the taxation should follow thus:-

"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.

The rule requires the Objector to give notice of the items of taxation to which he objects but not to write a "general letter of protest" as was done here. Sub-rule (2) requires the taxing officer to give his reasons forthwith and once that is done the Objector may then file a reference within fourteen days. On page 2 of

their submissions the Plaintiffs/Applicants state "That have (sic) since filed a reference dated 22nd May 2014 and that the reference will be heard on the 25th September 2015." If indeed they filed a reference why file this application? They ought to await the hearing and determination of the reference.

Secondly there is a letter dated 7th May 2014 wherein the taxing officer states that the reasons are recorded in the ruling. However and this is what constitutes my second reason for finding the application is incompetent, that ruling was not attached to these proceedings. This Court is therefore not in a position to make a finding as to whether the taxing officer erred in principle or to determine any of the issues framed by the applicants.

As already stated the Plaintiffs/Applicants say they did file a reference which was due for hearing on 25th September 2014. They ought to await the determination of that reference and as this application is also incompetent for the reasons given it is struck out with costs to the respondent. It is so ordered.

Signed, dated and delivered at Kisumu this 11th day of February 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Plaintiffs/Applicants

Mr. Onsongo for the Defendants/Respondents (Holding Brief for Mr. S.M.Onyango)

CC: Felix Magutu