



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**MISC APPLICATION NO. 200 OF 2013**

**MANDALA & CO. ADVOCATES ----- APPLICANT**

**VERSUS**

**PIUS ABABU NAMWAMBA-----RESPONDENT**

**RULING**

1. Pursuant to the provisions of Section 51(2) of The Advocates Act, this Court on 10<sup>th</sup> December 2014 entered judgment for Mandala & Co. Advocates (**The Advocates**) against Hon. Pius Ababu Namwamba (**the Client**) in the sum of Kshs. 6,216,780/- (Kenya Shillings six million, two hundred and sixteen thousand seven hundred and eighty Shillings) being taxed costs. By a Notice of Motion of 21<sup>st</sup> December 2015, The Client prays for the following substantive prayers:-

**4) That the Ex-parte Judgment and Decree entered herein be set aside ab initio and the original Applicant-Mandala & Co. Advocates be condemned by an order of costs arising herein personally.**

**5) That the Honourable Court do issue an Order to the effect that there was no Advocate-Client relationship between the parties herein.**

2. In support of that Application are Grounds on the face of it and an Affidavit of The Client sworn on even date. The Client is the current Member of Parliament for Budalangi Constituency. His Election to that position was challenged in Busia H.C. Election Petition No. 2 of 2013 (**The Petition**) in which he was named as the 3<sup>rd</sup> Petitioner.

3. It is averred by the Client that he instructed the Firm of Katwa Kigen & Co. Advocates to act for him in that Petition. At some point in the proceedings, the Advocates herein held brief for the firm of Katwa & Co. That said, The Client never instructed them directly to act for him. An argument by The Client is that any fees due to the Advocates should be claimed from the firm of Katwa Kigen & Co. Advocates and not him.

4. The Client further avers that the Advocates having demanded the sum of Kshs. 500,000/- and the same having been settled earlier, the fees cannot be re-taxed. He says that he was therefore taken aback on being served with Warrants of Attachment and Sale issued against him by Fautasy Auctioneers. He complains that no Notice of Entry of Judgment was served upon him. He further assails the Certificate of Taxation as being signed by the Deputy Registrar in Nairobi and not Busia where the matter was filed and taxed.

5. The Advocates replied to the Application through a Replying Affidavit sworn by Isaiah Mandala Mudambi on 12<sup>th</sup> January 2016. In it he gives a narration on how The Client instructed The Advocate and the work undertaken by the firm. As will be apparent from my Decision nothing much is gained by this Court reciting this narration.

6. The Advocates aver that upon conclusion of the matter, several requests for fees were made to The Client but all in vain. That necessitated the filing of the Bill of Costs. After several false starts, the Taxing Master scheduled the matter for mention on 25<sup>th</sup> April 2014 for receiving of written submissions and fixing of a Ruling Date. That on that day, The Client failed to attend Court notwithstanding being served and the Court gave a ruling date for 11<sup>th</sup> June 2014. Ruling was not delivered on that day and was deferred to 25<sup>th</sup> June 2014 when it was duly delivered and a Certificate of Taxation issued. The Advocate asked this Court to note that although there was a typographical error in the Certificate as being issued at Nairobi, the same was corrected by hand and duly stamped with the stamp of the High Court of Kenya at Busia and issued under the Hand of the Deputy Registrar at Busia.

7. The Advocates then notified The Client of the taxation by serving the Certificate of Taxation upon him by way of Registered post on 8<sup>th</sup> July 2014. But frustrated that The Client did not make payment, the Advocates filed an Application before the Judge for adoption of the Taxed costs as a Judgment of Court. The Advocate averred that the Judge entered judgment as prayed on 10<sup>th</sup> December 2014 when The Client did not attend Court and upon being satisfied with service. Thereafter The Advocate gave due Notice of the Judgment to The Client but that he refused to comply, hence the execution proceedings.

8. On the issue of payment of Kshs. 500,000/- as full and final payment, The Advocates state that The Client approached Mr. Mandala with a request for an amicable settlement and requested the Auctioneer to call off attachment by issuing a cheque of Kshs. 500,000/- and requested the Court to release that sum of Kshs. 500,000/- deposited as Security of costs in Court to the Advocates. This would be in addition to the payment by cheque. The request to the Court fell through as the Deputy Registrar, for reasons stated in her letter of 19<sup>th</sup> March 2015, declined to oblige. It is the position of the Advocates that the amount received was only part payment and not full payment of the fees.

9. As I turn to determine the Application, I need to make some preliminary observations. First, although all disputes arising out of a Taxation of a Bill should generally be dealt with by the Taxing Officer, the Application before Court seeks to set aside a judgment entered by the Judge pursuant to the provisions of Section 51(2) of the Advocates Act which provides as follows:-

**(2) 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 costs covered thereby, and the Court may make such order in relation thereto as it things fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.**

The Application seeks to set aside the order made by the Judge and this Court is therefore properly seized of it.

10. Secondly, although arguments were made by both sides as to whether or not the Taxation proceedings before the Taxing Officer should be set aside, those arguments are unnecessary and profitless. This Court has keenly read the Application and Affidavit in its support. Neither in the Body of the Application nor in the Affidavit does The Client Specifically seek that the taxation of the Taxing Officer be set aside. The prayer on setting aside is in respect to the Judgment of the High Court entered pursuant to Section 51(2) of the Advocates Act and the subsequent Decree.

11. As to whether or not this Court should make an order declaring that no Advocate-Client relationship exists between the parties, I take the view that this is a matter that should have been taken up in prefatory before the Taxing Officer. And the opportunity is now gone because The Client does not seek to set aside the Taxation itself. But if I were to give my view of the matter! The letter from the Client dated 4<sup>th</sup> March 2015 to the Deputy Registrar of this Court closes any arguments as to whether there existed an Advocate-Client relationship between Mandala & Co. Advocate and Hon. Pius Ababu Namwaba. This is a short letter and is reproduced below:-

**Hon. Ababu Namwamba, EGH, MP**

**Chairman, Public accounts Committee (PAC)**

**Kenya National Audit Commissioner**

**4<sup>th</sup> March 2015**

**The Deputy Registrar**

**Busia High Court**

**BUSIA**

**Dear Si/Madam**

**RE: MISC APPLICATION NO. 200 OF 2013 MANDALA & CO. ADVOCATES VS HON. PIUS ABABU NAMWAMBA – EMANATING FROM ELECTION PETITION NO. 2 OF 2013**

**I refer to the above matter and the taxed costs awarded to the said firm. Kindly release Kshs. 500,000/- deposited as Security by the Petitioner, Costs having been awarded to me.**

**Payment should be made to the firm of MANDALA & CO. ADVOCATES.**

**Yours Faithfully,**

**Hon. Ababu Namwamba, EGH, MP**

The contents of the letter are very telling. It acknowledges, without question, that taxed costs have been awarded to the firm of Mandala Advocates. It acknowledges that the person to pay the Costs is Hon. Namwamba. That is an admission that an Advocate-Client relationship existed. Taxation of costs was a consequence of that relationship and the costs needed to be settled. This is a position from which, I am afraid, The Client cannot extricate himself.

12. Back to the heart of the matter. Are there good reasons why this Court should set aside its Judgment of 10<sup>th</sup> December 2014? The Advocates argue that the Client was well aware of the Section 51(2) proceedings but chose to keep away. When the Application came up for hearing on 10<sup>th</sup> December 2014, Mr. Juma Advocate held brief for Mr. Mandala. The Client was absent and was not represented. An Affidavit of Service sworn by one Jonah Mwaura Kabere on 5<sup>th</sup> December 2014 shows that the Process Server personally served The Client with a Hearing Notice in the Offices of the Client Situated in Room 523 of Continental House. The contents of that Affidavit have not been

challenged by the Client. I have to agree with the Advocates that the Client was well aware of the hearing date and the Court was entitled to proceed to hearing them in the absence of The Client.

13. The judgment, as earlier stated was entered on 10<sup>th</sup> December 2014. On 4<sup>th</sup> March 2015, the Client makes a request that the deposit paid by the Petitioner in the Election matter be released to the Advocate towards the taxed costs. This is a manifest demonstration that the Client was well aware that an order of Taxation had been made against him and perhaps judgment entered. If The Client was unhappy about the order for payment of costs or of the amount then why did he not complain as early as 4<sup>th</sup> March 2015? Why did he have to wait 5 months later, on 21<sup>st</sup> December 2015, to bring this Application? This Court finds and holds that the Client was well aware of the hearing date of the Application of 21<sup>st</sup> July 2014 and the outcome of those proceedings.

14. Was the Judgment entered on the basis of a patently erroneous Certificate of Taxation? This Court has looked at the original Certificate of Taxation in the Court file. The place of issue is named as Nairobi and not Busia. Although the Advocates claim that the copy of Certificate of Taxation issued to them was corrected by hand to indicate the place of issue as Busia, this apparent correction was not effected on the Court copy. Would that error make the Certificate incurably defective and incapable of founding the entry of a Judgment?

15. A Certificate of Taxation is the formal extract of the outcome of a Taxation by the Taxing Officer. This Court has looked at the entire impugned Certificate of Taxation and pays heed to the substance therein and whether, save for the place of issue, it truly reflect the outcome of the Taxation proceedings herein. This Court notes as follows:-

- i. The Certificate of Taxation is signed by Hon. Margaret Wambani.
- ii. Hon. Margaret Wambani is the Taxing Officer who taxed the bill herein.
- iii. The Date when the Bill was lodged being 18<sup>th</sup> November 2013 is correctly captured.
- iv. The firm of Advocates which lodged the bill being Mandala & Co. is correctly named.
- v. The date of the decision of Taxation being 25<sup>th</sup> June 2014 is accurately captured.
- vi. The amount taxed as Kshs. 6,216,780/- is correctly reflected.

Clearly, the Certificate is substantially a true and accurate reflection of the outcome of the Taxation proceedings. The effect of the only error, being the place of issue, is somewhat diminished because the stamp of the High Court of Kenya at Busia is affixed on the Order. It is my finding that, in the circumstances of this case, the error is not of such significance as to tarnish the Certificate beyond redemption. It was a Certificate upon which Judgment could be entered pursuant of the provisions of Section 51(2) of the Advocates Act.

16. The Result of my determination would now be obvious. I cannot find any reason to set aside the Judgment of the Court and the Decree that followed.

17. One other issue. Some energy was expended by parties as to whether payments already made by the Client should be treated as full and final settlement hereof. The resolution of that issue does not and cannot take away the fact that there was a Judgment properly entered by this Court on 10<sup>th</sup> December 2014. Whether the conduct of the Parties herein amounted to a compromise of that Judgment was never the subject of the Application before Court and is a different matter .

18. The result, I dismiss the Notice of Motion of 21<sup>st</sup> December 2015 with costs.

Dated, signed and delivered at Busia this 2<sup>nd</sup> day of **March** 2016.

F. TUIYOTT

J U D G E

In the presence of:-

Orwasa - Court Assistant

Juma - for Mandala Advocate

Otanga for Okutta -for the Client