



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 1069 OF 2013

KITHI & COMPANY ADVOCATES.....APPLICANT

VERSUS

MENENGAI DOWNS LIMITED.....RESPONDENT

J U D G M E N T

1. Before me is the Applicant's Notice of Motion dated 17th July, 2014. It is expressed to be brought under Section 51 (1) and (2) of the Advocates Act Cap 16 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks the following orders:-
 - i. That this court be pleased to enter judgment in favour of the Applicant herein for the sum of Kenya Shillings Five Million One Hundred and Sixty Three Thousand Six Hundred and Ninety One (5,163,691/00) only being the sum of costs taxed by the taxing officer.
 - ii. That this honourable court be pleased to order that the sum of Kenya Shillings Five Million One Hundred and Sixty Three Thousand Six hundred and Ninety one only above said do attract interest at court rate from the date of taxation until payment in full.
 - iii. That the costs of this application be provided for.
2. The motion is premised on the grounds on the body of the application and the supporting affidavit of George Kithi sworn on 17th July, 2014. He averred that he filed an Advocate-Client Bill of Costs which was taxed at KShs. 5,163,693/00 and a certificate of taxation was issued for the said sum. That the Respondent has not paid the said amount and requests for judgment for the entire sum.
3. The application is opposed by the Replying Affidavit of Mureithi Ndirangu sworn on 26th January, 2015 and grounds of opposition dated 22nd January, 2015. It was deponed that the Respondent objected to the ruling of the taxing officer by giving notice vide a letter dated 16th June, 2014. That despite the objection, there has been no communication from the taxing officer. He deponed that it is untrue that the certificate of costs has not been challenged and stated that it is only upon receipt of the taxing officer's reasons for his decisions on the objected items that the Respondent will apply to court setting out its grounds of objection. He further deponed that the Applicant has never served the Respondent with the certificate of taxation and that the Applicant has failed to disclose to court that it had received some money from the Respondent.
4. In the grounds of opposition, the Respondent contented that; the application was filed on 5th August, 2014 and served on the Respondent's advocates on 16th January, 2015; the Respondent filed the objection on 17th June, 2014 to some items on the Bill of Costs but the court has not to date communicated to the Respondent on its ruling to the said objection under Rule 11 of the Advocates (Remuneration) Order; the application is misconceived and bad in law; the application has no legal basis; the Applicant has never served the Respondent with the certificate of taxation; the Applicant was paid some money by the Respondent towards their fees prior to the filing of the Bill of Costs which money was not disclosed to the court and that there is no provision for interest

on the amount taxed as no decree has been issued.

5. Submissions to this application were made orally in court on 3rd February, 2015. Mr. Busiega learned counsel for the Applicant submitted that the certificate of costs has not been set aside, altered or stayed. He argued that a certificate of costs cannot be set aside through a replying affidavit or grounds of opposition. He cited **Muema Kitulu & Co. Advocates v. Obadiah Kuvivya (2011) eKLR** where it was stated that a certificate of costs cannot be re-opened through a replying affidavit and he referred the court to Section 51 of the Advocates Act. Counsel also cited **Owino Okeyo & Co. Advocates v. Pelican Engineers & Construction Company Limited (2007) eKLR** and **Njonjo Okello & Associates v. Ketan Lalit Chandra Doshi & Another (2012) eKLR** and submitted that the Respondent had not taken any steps to pursue the objection.
6. Mr. Muriithi learned counsel for the Respondent submitted that the Respondent objected to the ruling by giving notice of the items under Rule 11 of the Advocates (Remuneration) Order therefore the certificate of costs was challenged. He argued that it is only after receiving reasons from the taxing officer that the Respondent could pursue a reference. He indicated that the Respondent has not been served with the certificate of taxation. That the Respondent adduced evidence that the Respondent had made part payment which was not taken into consideration. He stated that this application was dated 17th July, 2014, but was filed on 5th August, 2014 and served on the Respondent on 16th January, 2015
7. The provisions as to the time for filing of a reference are found in Rule 11 of the Advocates Remuneration Order. It provides:-

“(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 ”

8. The Courts’ power under paragraph 11 of the Advocates (Remuneration Order) is meant to be exercised to meet the ends of justice so that the objector is not barred from filing a reference in circumstances such as the one at hand. See the Court of Appeal’s decision in **Kipkorir, Titoo & Kiara Advocates v. Deposit Protection Fund Board [2005] 1KLR 528** where the implication of a Taxing Officer’s failure to record and/or furnish reason for his/ her decision was discussed 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.”

9. Under such circumstances, what is the time limit within which an objector should file a reference? There is no specific provision providing for time for filing a reference in the event the taxing master fails to give reasons. However, justice demands that matters should be dealt with expeditiously. Rule 11 (4) provides as follows:-

"the High Court shall have power in its discretion by order to enlarge the time fixed by sub paragraph 1 of sub paragraph(2) for the taking of any step, application for such an order may by chamber summons upon giving to every other interested party not less than three (3) clear days notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

10. In the case of **Musyoka & Wambua Advocates Vs Rustam Hira Advocate (2006) eKLR** held: -

“Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has a discretion to enter judgment on a

Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view, is a mode of recovery of taxed costs provided by law, in addition to filing of suit,

In the present case, there is no allegation that the Advocate had no instructions to act in the matter for the client.... so, there is not, and there cannot be, a dispute as to retainer. As it stands now the Certificate of Taxation has not been set aside or altered. It has been submitted that the client has taken steps to challenge the award on instruction fee. If that be the case, what the client should have done was to seek a stay of further proceedings until the challenge to the taxation is disposed off. There is no such application before the court. In the circumstances, I see no reason to deny the Advocate judgment as sought.”

11. In yet another case of **Njonjo Okello & Associates Vs Ketan Lalit Chindra Doshi & Another (2012) eKLR** Havelock J when faced with similar facts held: -

“However, since the filing of the Notice of objection on 29th February, 2012, what steps have Messrs Wandabwa Advocates taken to pursue the objection and to obtain reasons from the Deputy Registrars taxation Ruling? The answer would appear to be “none”. I find myself on all fours with the conclusion to the ruling of my learned brother Waweru J in the Musyoka & Wambua case (supra)”.

The court proceeded to grant judgment as prayed.

12. In the present case, there is a contention that the Respondent has disputed the Certificate of Taxation vide an objection filed on 17th June, 2014, that the court has to date not communicated to the Respondent on its Ruling to the said objection under rule 11 and that the Advocate has been paid other monies which had not been disclosed to the court. Cheques totalling Kshs. 800,000/- were exhibited. Further, interest was disputed on the ground that there was no decree on which interest could be awarded.
13. I will start with interest. There seems to be a misconception by legal practitioners on the award of interest on taxed costs. An Advocate is entitled to interest on the amount taxed on an Advocate/client Bill of Costs. The rate of interest awardable is 14% per Annum applicable from 30 days after the date of service of either the Block Fee Note or the Bills of Costs. This is clearly set out in Rule 7 of the Advocates Remuneration Order which provides: -

“ An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

14. In view of the foregoing, once a judgment is entered on a certificate of costs, the decretal amount is liable to attract interest of 14% per annum from 30 days after the service of the bill and not the date of taxation. For an Advocate to be able to recover this, there must be evidence on record on the date when the bill was served upon the client. In the instant case, the Advocate has claimed from the date of taxation of the Bill. If he succeeds to obtain his judgment, that would be the date when interest of 14% per annum will accrue.
15. The second issue is that there were other monies totalling Ksh.800,000/- which had been paid to the Advocates but not disclosed to the court. I think that is an issue which is to be decided by the taxing master. The court cannot go behind the certificate of costs to inquire if there are other monies that had been paid but not taken into account at the taxation. Section 51 of the Advocates Act presumes that by the time a Certificate of Costs is issued, all the necessary and a relevant matters must have been considered by the taxing master before arriving at the taxed amount and the Certificate of Costs arising therefrom. The court cannot make such inquiries except while dealing with a reference where the issue of the exercise of the taxing masters discretion is to be considered.
16. In this case, there is no reference before me to warrant an inquiry of the additional payments

alleged to have been made to the Advocate. It is expected and presumed that the issue was raised before the taxing master who considered it and made a decision thereon which can only be challenged by way of a reference. Taxation is about ascertaining costs of services rendered. It is at that stage that adjustments should be made. There being no reference before me, the argument fails.

17. As to the ground that no Certificate of Costs/taxation has been served upon the client, that cannot be a serious ground to challenge an application under Section 51 of the advocates Act. If the Respondent had not been served with the Certificate of Taxation, it must have received the same when the present application was served upon it. This is because, produced and annexed as “GK1” to the Affidavit in support is a copy of the Certificate of Taxation dated 19th June, 2014.
18. I now come to the main ground of opposition that the Certificate of Taxation had been objected to and that, therefore, no judgment can be entered. My understanding is that the only caveat put on Section 51 of the Act to an Advocate obtaining Judgment on a Certificate of Taxation is only, if there is a dispute as to retainer or the Certificate of Taxation has been set aside or altered. The Respondent contended that since it had written a letter of objection to the Deputy Registrar on 17th June, 2014, the present application was premature.
19. I have looked at the letter dated 17th June, 2014 that is relied on by the Respondent. The same was addressed to the Deputy Registrar of this court and reads on the relevant part:

“We refer to the above matter in which a Ruling was delivered on 5th June, 2014 whereby the Advocate – Client Bill of Costs dated 6th November, 2013 lodged by Kithi & Company Advocates was assessed at Kshs.5,163,691/-

Take Notice that the Client/Respondent intends to dispute the following items.”

20. To my mind, the letter did not satisfy the requirements of Rule 11 of the Advocates (Remuneration) Order. A reading of sub-rule 2 of the rule suggest that the objecting party should request for reasons for the decision on the items objected to. That is only when the taxing master can forward to the objector the reasons for his/her decision. To my mind notifying the Deputy Registrar of the Objections is not enough. No wonder there are no reasons that have ever been forwarded to the Respondent. I have perused the record and I have noted that there is a ruling of the Taxing master delivered on 5th June, 2014. The question that begs an answer is whether Respondent having not requested for reasons from the taxing master, Rule 11 had been complied with.
21. In any event, even if the Respondent had requested for reasons, an objection under Rule 11 is not a stay of proceedings by itself. That does not alter or set aside a Certificate of Taxation. There must be an application to stay the proceedings or probably the very least, a competent reference pending under Rule 11 sub-rule 2 of the Advocates (Remuneration) Order. On this score, I am with Waweru J, and Havelock J whom I have already quoted above. There is no evidence that the Certificate of Taxation dated 5th June, 2014 has been altered or set aside.
22. The upshot of it is that the application succeeds judgment is hereby entered for the advocate against the Respondent for Ksh.5,163,691/- together with interest at 14% per annum from the date of taxation (5th June, 2014) until payment in full. The Advocate will also have the costs of the application.

Dated, Signed and Delivered at Nairobi this 6th day of March, 2015.

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A MABEYA

JUDGE