



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO. 308 OF 2011

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 AND IN THE MATTER OF TAXATION
OF COSTS BETWEEN ADVOCATE AND CLIENT**

LUMUMBA MUMMA & KALUMA

COMPANY, ADVOCATES.....ADVOCATES

V E R S U S

DANIEL KARIYU MUNGA.....CLIENT

R U L I N G

1. The **Advocates'** bill of costs herein dated 5th July 2011 against the Client was taxed on 5th December 2012 at KShs 1,340,666/52. The taxation was *ex parte*. Judgment for the taxed costs was sought under section 51(2) of the **Advocates Act, Cap 16** and was entered on 17th June 2013. The application for judgment was also heard *ex parte*.
2. The **Client** subsequently applied by **notice of motion dated 5th August 2013** for the main order that the taxation of 5th December 2012 and the judgment entered on 17th June 2013 be set aside. That application is the subject of this ruling.
3. The application is stated to be brought under **sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act, Cap 21** upon the following grounds, *inter alia*, stated on the face thereof –
 - (i) That failure to attend the taxation was not intentional but was due to an error on his part, that error being that he forget to diarize 21st November 2012.
 - (ii) That he was not served with any notice for 5th December 2012 when taxation actually took place.
 - (iii) That he had filed a notice of preliminary objection with the intention of contesting the entire bill of costs.
 - (iv) That he was not served with the application for judgment.
4. There is a supporting affidavit sworn by the Client. He has deponed, *inter alia* –

- i. That in the year 2004 or thereabouts he instructed the Advocates to act for him and pursuant to those instructions they filed **Nairobi HCCC No. 1224 of 2004**.
- ii. That they so acted for him until 2nd April 2004 when they informed him that they could not continue acting for him in the matter due to a conflict of interest.
- iii. That the Advocates proposed that the firm of **Thomas Otieno & Associates** do act for him in the matter as **Advocate Thomas Otieno** was previously an associate with the Advocates; and that because of the inconvenience they had caused him they waived the balance of their fees in the sum of KShs 484,875/00.
- iv. That indeed Advocate Thomas Otieno took over the matter and it was agreed between him and the Client that his fees would be KShs 182,000/00. He paid a deposit of KShs 45,000/00.
- v. That subsequently in 2009 Advocate Thomas Otieno moved back to the firm of the Advocates and filed a notice of change of advocates from his firm to the Advocates.
- vi. That this change of advocates was without the Client's knowledge or consent, and he became aware of it on 11th March 2009.
- vii. That since the Advocates had a conflict of interest anyway, he opted to act in person in the matter, upon which the Advocates made a demand for fees of KShs 886,000/00.
- viii. That he disputed that demand for fees since he had not instructed the Advocates to come on record.
- ix. That upon being served with the bill of costs he filed a preliminary objection and replying affidavit.
- x. That taxation was fixed by consent for 21st November 2012, but due to his busy schedule he forgot to note the date in his diary and he forgot the matter entirely.
- xi. That it was not until an auctioneer proclaimed his goods that the matter returned to his notice.
- xii. That the application for judgment was never served upon him but upon, as disclosed by the affidavit of service, one **Jane at Tusker House, 2nd Floor, Room 201** which is next to his office.
- xiii. That he does not have an employee called Jane and his office at Tusker House is Room **201(A)** on the 2nd Floor, where his employees are one **Alice Wangari Mwaura** and **John Nyagah**.
- xiv. That his postal address is **P.O. Box 75419-00200, Nairobi** and not **P.O. Box 95419-00200, Nairobi** as alleged by the process server.

5. Interim stay of execution was granted pending disposal of the application.

6. The Advocates opposed the application by two replying affidavits. The first one is sworn by **Advocate Thomas K'Bahati** while the second one is sworn by one **Crispine Olengo**, a process server. Grounds of opposition emerging from the two affidavits include –

- (i) That the application is defective, incompetent and unsustainable in that the court has no jurisdiction in the present application to set aside the taxation of 5th December 2010.
- (ii) That the Client is guilty of laches.
- (iii) That the Client was duly served with the application for judgment.

7. I have considered the submissions of the Client who acted in person as well as those of the counsel for the Advocates. No authorities were cited.

8. I will start with the application for judgment. The issue here is whether that application (by notice of motion dated 18th February 2013) was duly served upon the Client.

9. The affidavit of service sworn by the process server, **Crispine Olengo**, on 27th February 2013 and filed on 17th June 2013 simply says that he proceeded to Tusker House, 2nd Floor, Room 201 on 27th March 2013 and was there received by a lady named Jane to whom he introduced himself and explained the purpose of his visit; and that she accepted service but refused to sign his copy, though she promised to pass the documents to the Client “when he comes”.

10. Contrary to what the process server deponed in his replying affidavit sworn and filed on 14th August 2013, he does not state in the affidavit of service that he knew Jane as the Client’s employee, or that he had been to Room 201 many times before, or that on that occasion he had met the Client as he was leaving the building who directed him to leave the application with “a lady in the shop”. Why did the affidavit of service not have these details? Have the details been added perhaps just to answer the Client’s case on service of the application for judgment? That possibility cannot be excluded!

11. I am not satisfied, in these circumstances, that there was good service of the application for judgment. The service was tenuous at best. The Client must be accorded an opportunity to be heard on the application for judgment. I will therefore set aside the judgment entered on 17th June 2013.

12. As for the challenge upon the taxation, though the Client could have good grounds to challenge the taxation, these are not the right proceedings. Once taxation has taken place, even *ex parte*, the only way to challenge it is as provided for under **paragraph 11** of the **Advocates (Remuneration) Order**. Taxation of costs cannot be challenged under the **Civil Procedure Act and Rules**. I must therefore refuse the prayer to set aside the taxation.

13. As the Client has partly succeeded, each party will bear its own cost of the application. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MARCH 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF MARCH 2014