



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 47 OF 2013**

BERNARD OYUGI OMBUTI T/A

OYUGI OMBUI & CO. ADVOCATES.....APPLICANT

-VERSUS-

BURETI GROWERS SAVINGS & CREDIT LTD.....RESPONDENT

**RULING**

**Bureti Tea Growers Savings and Credit Cooperative Society Ltd**, hereinafter referred to as the Respondent/Applicant took out the Motion dated 7th April 2014 in which it sought for the following orders:

- a. **THAT** this Application be certified as urgent and the same be heard ex-parte in the first instance.
- b. **THAT** pending hearing and determination of this Application inter-parties, there be stay of execution for recovery of Kshs.3,840,900 awarded to the applicant/Respondent herein by the Taxing Officer of this Honourable Court.
- c. **THAT** pending hearing and determination of this Application, the Respondent/Applicant's motor vehicle Registration number KBW 608Z Toyota Double Cabin Pick-up truck be released unconditionally.
- d. **THAT** the decision of the Taxing Officer made on 11th February 2014 and all subsequent orders be set aside.
- e. **THAT** necessary directions be made.
- f. **THAT** costs of this application be provided for.

Bernard Oyugi Ombui T/a M/s Oyugi Ombui & Co. Advocates, hereinafter referred to as the Applicant/Respondent filed a Replying Affidavit he swore and a Notice of Preliminary Objection to oppose the Motion.

When the aforesaid Motion came up for interpartes hearing, the Applicant/Respondent's Notice of Preliminary Objection had to be disposed first. The background of this dispute appear to be short and straightforward. There is no denial that the Respondent/Applicant had hired the legal services of the Applicant/Respondent to *inter-alia* issue demand notices and collect outstanding money and or loans from the Respondent/Applicant's debtors. The service contract between the parties was terminated prompting the Applicant/Respondent to demand for his fees. The learned advocate was prompted to tax

his fees when the client failed to honour his demands. The Advocate/Client Bill of Costs was taxed on 11th February 2014 at Kshs.3,840,900. On 24th February 2014, a certificate of cost was issued. The Applicant/Respondent issued a notice of entry of judgment dated 5th March 2014 and caused it to be served upon the Respondent/Applicant. Execution process by attachment commenced and this must have prompted the client to take out the Motion, the subject matter of this ruling.

The main ground argued in support of the Notice of Preliminary Objection is to the effect that this court has no jurisdiction to hear and determine the Motion. The learned advocate argued that the procedure laid down in paragraph 11 of the Advocates (Remuneration) order was not complied with. Mr. Ombui raised the following points in support of the Preliminary Objection: **First**, it is his argument that the Respondent/Applicant should have approached this court by way of Chamber Summons instead of a Motion. Mrs. Bett, learned advocate for the Applicant/Respondent did address her mind to this ground. I think the Objection in my view is purely that of want of form. Courts have always overlooked such lapses for the broad interest of justice and in line with the provisions of **Order 51 Rule 10(2)** which clearly states that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. Mr. Ombui has not shown what prejudice he would suffer if the matter proceeded in the form it is. If this court rules in favour of the Applicant/Respondent on this ground, the court will have breached the provisions of **Article 159(2) (d)** of the **Constitution** which clearly directs courts not to decide disputes before it on procedural technicalities. Mrs. Bett has tersely stated that the Respondent/Applicant could not have strictly followed the provisions of paragraph 11 of the Advocates (Remuneration) Orders because it was not served with processes. I will revisit issue before concluding the matter.

The second ground is that the Motion does have notice of Objection served upon the taxing officer. It is a requirement under Paragraph 11 that a party who intends to object to the decision of the taxing officer to give notice in writing to the taxing officer of the items of taxation to which he objects. This will enable the taxing officer to provide reasons for his decision. It is the submission of Mrs. Bett that such a notice could not have been served when in the first instance the Respondent/Applicant contends that it had not been served. With respect, I agree with Mrs. Bett and that is the more reason why I expressed the view at the outset that the Preliminary Objection should have been argued as a ground during the interpartes hearing of the Motion. The question as to whether or not service was effected is a matter of fact which can only be determined after examining the evidence of service. Mr. Ombui further argued that the Motion did not set out the grounds of objection. I think this ground is fully answered by Mrs. Bett's submissions in response to the second ground herein above. The court of appeal dealt with near similar issues in **East African Power Management Ltd =Vs= Stephen Kithi Ngombo T/a Steve Kithi & Co.Advocates C.A.No.56 of 2008 (2012) e K.L.R** where it held inter-alia:

*..... we find this case was different because the appellant was not aware of the taxation. It follows, therefore, that the appellant could not have followed the procedure provided for under the above Remuneration order. The appellant followed the procedure of setting aside orders that is provided for under the Civil Procedure Rules and thus invoked the inherent powers given to a court to make such orders as may be necessary for ends of justice or to prevent abuse of the court process.*

It is clear in my mind that the Preliminary Objection cannot be upheld. The same is without merit, it is ordered dismissed with costs abiding the outcome of the Substantive Motion dated 7th April, 2014.

**Dated, Signed and delivered in open court this 4th day of July, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

Mrs. Bett for Respondent/Applicant

Mr. Ombui for Applicant/Respondent