**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 237 OF 2016**

**CLEOPHAS MALALAH .....APPLICANT**

**VERSUS**

**KAKAMEGA COUNTY GOVERNMENT**

**AJABU EAST AFRICA**

**ISINDU SHIHUNDAHUNDI .....RESPONDENTS**

**RULING**

The application is dated 17th February 2020 and is brought under Order 42 Rule 6 91 and order 22 Rule 25 of the Civil Procedure seeking the following orders:-

1. That the application herein be certified as urgent and be heard ex-parte in the first instance.

2. That the honourable court be pleased to issue an order of stay of execution against M/s. Z.J. Atulo & Company Advocates barring execution on the decree issued on 16th February, 2019 against the applicant pending the hearing and determination of this application challenging the taxed bill of costs dated 20th April, 2017 and taxed on 30th August, 2017 and the certificate of costs issued thereon dated 17th April, 2018.

3. That this honourable court be pleased to grant the applicant herein leave to file a reference out of time regarding the bill of costs dated the 20th of April, 2017 and taxed on the 30th of August, 2017.

4. That the honourable court do issue an order to the deputy registrar of the Kakamega High court directing the deputy registrar to provide the applicant with the reason (s) for taxing the bill of costs as has been challenged in the Notice of Objection/reference dated 20th April, 2018 and filed and received in court on 23rd April, 2018.

5. Any other orders that this honourable court may deem just and fit to grant.

6. That costs be provided for.

It is based on the annexed affidavit of one Cleophas Malalah and grounds that on the 23rd of April, 2018, the appellant herein after learning of the taxed bill of costs against him filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order seeking an explanation as to why the taxing master had taxed the 3rd respondents bill of costs as they had. Unfortunately, the taxing master has never to date responded to the same. That there was no inordinate delay in filing the response as the same was filed as soon as the applicant herein learnt about the proceedings against him. The applicant had not up to this point been served with any court documents, significantly the Notice to Show Cause which should have been served on the applicant. That the bill of costs dated 20th April, 2017 is defective on its face and in substance as the same fails to indicate under what order in the Advocates Remuneration Order it was filed and whether the bills is an Advocate-Client Bill of Costs or a Party and Party Bill of costs. This failure and confusion is fatal to the bill of costs and the same ought to have been struck out before taxation. That the application for execution filed in court on 4th December, 2019 is defective in the sense that the advocate was not sure whom the decree was supposed to be executed against. The advocate rightly went after his clients but only as an afterthought changed it to the applicant. This is evidenced by the cancellation on the application for execution dated 4th December, 2019. This is compounded by the fact that all these court documents filed as late as 4th December, 2019 were never served on the advocate on record.

That the taxing master knowing very well that the 2nd and 3rd respondents were represented by the same advocate went ahead and taxed two

bills in his favour. This amounts to duplicity as has been upheld by court in numerous authorities. The advocate herein filed the same pleadings for both parties, represented both defendants at the same time in court in the same exact matter in the same exact set of circumstances and as such once bill of costs would suffice. That while awaiting a response from the taxing master on the objection/reference, the applicant herein was approached by Auctioneers instructed by M/s. Z.J. Atulo & Company Advocate to execute the bill against him. That on the 12th February, 2020 the parties herein entered a consent to settle the 2nd defendant's undisputed bill of costs of Ksh. 269,815/=. What remains is the disputed bill of a similar amount of Kshs. 269,815/- awarded to the advocate for representing the 3rd respondent in the same matter in the same suit on similar circumstances and pleadings. That it is prudent that any further execution on the disputed bill of costs be stayed pending the hearing and determination of this objection/reference.

The 3rd respondent submitted that on or about 16th November, 2016 the applicant together with Alex Khamasi and Jeremiah Wabuti the plaintiffs herein instituted and filed this case being Kakamega H.C.E.L.C. No. 237 of 2016 against Kakamega County Government, Ajabu East Africa and Isindu Shihundahundi, defendants herein. That on or about 18th November, 2016 he duly instructed the firm of M/s. Z.J. Atulo & Co. Adv. to represent him. That during the proceedings herein, he discovered that his lawyer had been instructed separately by the 2nd respondent/defendant to represent them. That the 2nd defendant and 3rd defendant engaged the advocate's knowledge, skill and experience to defend and represent us separately and they were sued in their individual names and different capacities. That on 16th February, 2017 when this matter came up for hearing and determination, this case was withdrawn with costs to the defendants by the applicants/plaintiffs. That consequently and as a result from the foregoing and from the court record, the firm of M/s. Z.J. Atulo and Co. Advo. filed and served the 2nd and 3rd defendants bill of costs dated 20th April, 2017 to the applicant's advocate herein. That on the 31st August, 2017, the court determined by its ruling, the 2nd and 3rd defendant's costs and awarded Ksh. 269,815/= (Kenya Shillings Two Hundred and Sixty-Nine Thousand Eight Hundred and Fifteen) each for 2nd and 3rd respondent respectively.

This court has considered the application and the submissions therein. The respondent in their submissions raised a preliminary point of law that the firm of M/s Malala and Company Advocates is improperly before the court as they are in contravention of order 9 rule 9 of the Civil Procedure Rules. In the case of **Ngome vs Plantex Company Limited (1984) KLR 792**, the Court of Appeal held that a judgment is a judicial determination or decision of a court on the main question or questions in a proceeding. This means that there must be a consideration of, and determination on the issues before the court, before judgment is entered with regard to the said issues or questions. I find that a withdrawal of a suit is not a determination of any questions or issues before the court. This case was withdrawn and in a withdrawal the parties terminate the suit before they can be heard and determined on merit. Order 25 Rules 1 and 2 of the Civil Procedure Rules states that:

> ***"1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.***
>
> ***2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.***
>
> ***(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just."***

In light of this finding I find that Order 9 Rule 9 of the Civil Procedure Rules is not applicable in the circumstances of this case, as no judgment has been passed. Order 9 Rule 9 provides as follows:

> ***"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and***
>
> ***the proposed incoming advocate or party intending to act in person as the case may be"***

It is on record and that on 20th April 2018 the firm of M/s Malala and Company Advocates did file a notice of change of Advocates. I therefore find that the Plaintiff's Advocates are properly on record as they have complied with the applicable rule in the circumstances of this case namely Order 9 Rule 7 of the Civil Procedure Rules which provides that:

> ***"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."***

The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:

> ***"(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.***

***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 applicant submitted that on the 23rd of April, 2018, the applicant herein after learning of the taxed bill of costs against him filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order seeking an explanation as to why the taxing master had taxed the 3rd respondents bill of costs as they had. Unfortunately, the taxing master has never to date responded to the same. Be that as it may, the principles of varying or setting aside a Taxing Master's decision as set out in the cases of **First American Bank of Kenya vs Shah and Others (2002) EA 64** and **Joreth Ltd vs Kigano and Associates (2002) 1 EA 92,** that the Taxing Master's judicial discretion can only be interfered with when it is established that the there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law.

In **First American Bank of Kenya vs Shah and Others (2002) E.A.L.R 6**4 the court held that;

***"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle".***

These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002)** eKLR, where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

The applicant in the instant application contends that the taxing master knowing very well that the 2nd and 3rd respondents were represented by the same advocate went ahead and taxed two bills in his favour. This amounts to duplicity as has been upheld by court in numerous authorities.

In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna (2006) eKLR Ojwang, J** (as he then was) expressed himself as follows:

***"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"***

I have perused the court record and find that indeed the applicant herein filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order seeking an explanation as to why the taxing master had taxed the 3rd respondents bill of costs as they had. To date the reasons have never been given. I also find that the taxing master did not indicate the Rules and Schedule of the Advocates Remuneration Order that he relied upon, and that guided his decision to tax the bills was a material error of principle. For these reasons I find that the application is merited and I grant the following orders;

1. The Taxing Master's decision of taxed bill of costs dated 20th April, 2017 and taxed on 30th August, 2017 and the certificate of costs issued thereon dated 17th April, 2018 and all consequential orders be and are hereby set aside.

2. The bill of costs dated 20th April, 2017 and taxed on 30th August, 2017shall be remitted to another Taxing Master for taxation.

3. Each party shall meet their respective costs of this application.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26TH OCTOBER 2020.**

**N.A. MATHEKA**

**JUDGE**