REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 678 of 2011

GACAU KARIUKI & CO. ADVOCATES.....ADVOCATE

VERSUS

ALLAN MBUGUA NG'ANG'A ….....CLIENT

R U L I N G

This ruling is the subject of two applications. The first application is the Notice of Motion dated 27th April 2012 filed on 7th May 2012 by the advocate seeking orders that judgement be entered for the advocate against the client in the sum of Kshs. 209,585/= plus interest at court rates from the date of taxation. The advocate also seeks costs of the said application.

The second application is the Chamber Summons dated 21st May 2012 filed the same day on behalf of the client seeking primarily orders that the court do extend time for filing a reference in the High Court against the decision of the taxing master dated the 29th September 2011 and that the costs of the application be in cause.

By consent of the parties it was agreed that both applications be heard and a ruling in respect thereof be delivered together since the hearing of one may dispose of the other. In other words, if the client's application seeking extension of time is allowed, the application by the advocate may be suspended.

It is therefore important to consider the application by the client before venturing into the issue whether a consideration of the application by the advocate is necessary.

The Client's application is supported by an affidavit sworn by **Allan Mbugua Ng'ang'a** on 21st May 2012. According to the client the advocate's bill of costs filed against him on 11th August 2011 seeking recovery of costs in respect of the advocate's representation of the client in CMCC No. 4420 of 2007 was not served on him. Similarly, the client contends that the notices of taxation were never served on him. Consequently, the advocate's costs were taxed *ex parte* in the sum of Kshs. 209,585/- and a certificate of costs issued on 4th October 2011. And it came to pass that judgement was entered on 9th November 2011, followed with a decree and Notice to Show Cause why the client could not be committed to jail. According to the client, it was only after this that he happened to meet the advocate's clerk in the streets of Nairobi that he was made aware of the foregoing. He accordingly made application to set aside the

judgement which was allowed but the Court declined to set aside the decision on taxation in absence of a reference. He deposes that he was unable to file the reference due to the fact that he was unaware of the proceedings that were taking place. He states that had he been aware of the same he would have defended the proceedings since, according to him, he had paid fees to the advocate. He concludes by stating that he has been advised that the Court has wide and unfettered discretion in these matters and that no prejudice will be occasioned to the advocate.

The advocate, **Edward Gacau Kariuki** has sworn an affidavit in response to the said application on 24th May 2012. According to him his firm acted for the client in 3 matters until 8th August 2011 when the client served him with a Notice to act in person in respect of one of the matters. Consequently, on 17th August 2011 he filed his bill of costs against his client which was duly taxed and allowed at Kshs. 209,585.00 after the client failed attend court despite being duly served. He then applied for judgement in terms of the certificate of costs and a decree was issued on 27th October 2011. He, on 30th September, 2011 demanded for the settlement of the said costs. On 19th December 2011 the firm of **Kinyua Mwaniki & Co. Advocates** served him with a Notice of Appointment of Advocates. Since the client has stated that he became aware of the matter on 16th December 2011, the advocate states that no reason has been given why this application was not filed then. According to the advocate, the client's application seeking similar orders was dismissed by this Court on 26th April 2012. As the client has sat on his rights, it is deposed, he is guilty of laches and has brought the present application with the intention of frustrating the advocate from enjoying the latter's fruits of judgement. However, the advocate deposes that should the court be inclined to grant the application, the client should deposit the taxed costs in court as security.

The application was argued by way of written submissions. In his submissions the client, apart from reiterating the contents of the supporting affidavits, states that he does not know **Peter Kisilu**, the person who allegedly served him with the court documents and that he was not at the advocate's office on the date of the alleged service and in any case the said clerk is not a licensed process server. On the delay, the same is refuted on the ground that the client was unaware of the proceedings and could not have filed the reference within the required 14 days period. As the client's position is that he has fully paid the advocate's fees an order to deposit the fees would be unjust and prejudicial. Relying on **First American Bank of Kenya Limited vs. Gulab P Shah & 2 Others [2002] 1 EA 65**, **Abraham K. Kiptanui vs. Delphis Bank Ltd & Another HCCC No. 1864 of 1999** and **Kenya Safari & Hotels vs. Tembo Tours & Safaris Ltd [1985] KLR 441,** it is submitted that this application ought to be allowed.

In his submission the advocate gives a brief history of this matter, submits that there is no reason why the client who admittedly became aware of the matter by latest 16th December 2011 did not immediately make this application. Accordingly, it is submitted that the client is guilty of laches. It is further submitted that the fact that the client did not file this application immediately on the delivery of the earlier ruling on 26th April 2012, is a confirmation the client's sole intention is to deny the advocate who acted for him his duly taxed costs. It is submitted that the prayers sought herein should have been sought in the earlier application and that the fact that the reference can only be filed after time is extended which is 5 months down the line coupled with the fact that the stay sought is only pending the hearing and determination of this application renders the orders sought of no meaningful purpose.

In my ruling in this matter dated 26th April 2012, I expressed myself as follows:

"When the application dated 11th October came before me on 27th October 2011, Mr. Kariuki for the applicant informed me that the respondent had been served. There was an affidavit of service sworn by Peter Kisilu on 26th October 2011 purporting that service was effected on the client herein on 12th October 2011 after having called him on his mobile. He does not disclose where he obtained the mobile phone number from. If he had obtained it from the advocate nothing would have been easier than for him to have stated so. Again he does not state how he knew that the person who turned up was the client. Was he acquainted with him before that day? We cannot tell. However, more telling is that there is an affidavit of service purportedly sworn by the same person on 13th September 2011. One does not need to be a handwriting expert to see that the two

signatures do not resemble. That they were made by the same person or not cannot be conclusively determined at this stage on affidavit evidence. However, the appearance of the discrepancy lends credence to the client's complaints. Similar fate befalls the mark purportedly made by the Commissioner for Oaths on the said documents…I am not therefore satisfied that the client was served before the order made on 27th October 2011 was made. Where service is unsatisfactory I agree that the order must be set aside ex debito justitiae. In those circumstances it would be unjust to order the applicant to deposit the amount into court as such an order would amount to condemning him un-heard".

The affidavit in question in the present affidavit is the affidavit sworn on 13th September 2011 referred to above. Having held that the contents of the said affidavit as juxtaposed with the affidavit sworn on 26th October 2011, left a lot to be desired, it would be a mockery of justice to now hold the said affidavit is satisfactory. Accordingly, I reiterate that I am not satisfied that service was duly effected on the client.

The advocate has, however, taken up the issue that the client is guilty of laches. As already stated, my ruling setting aside the judgement by declining to set aside the taxing officer's decision was made on 26th April 2012. It was not until 21st May 2012 that the client filed his application dated the same day. That was nearly one month shy of 5 days after the delivery of the said decision. The advocate on the other hand filed his application less than two weeks after the said decision on 7th May 2012. Again it is true that the client was aware of the taxation by latest on 16th December 2011. Yet the application seeking to set aside the judgement and taxation was not made till 13th February 2012.

No attempt has been made to explain the reason for the delay. I associate myself with **Omolo, JA** in **Mokua Otwori Alias Richard Meroka Monari vs. Mosota Otwori Civil Application No. Nai. 158 of 2007** that the position is now clear and well settled that where there is a delay, some explanation ought to be offered for it, otherwise there would be no reason for setting down timelines.

Where service is not satisfactory, however, the Court must set aside the orders *ex debito justitiae*. The Court must nevertheless take into account the conduct of the applicant. In this case the client's conduct has been deplorable to say the least. Accordingly, I allow the client's application and extend the time within which to file the reference.

I have agonized whether, in light of the foregoing findings, the Court should still proceed to determine the intended reference. In my view to do so would defeat the overriding objective. A court should not hear a matter simply because it is usual to do so. Where it comes clear that to order the parties to make an application would amount to going through the motions, that would defeat the provisions of Article 159(2)(d) of the Constitution which abhors the promotion of procedural technicalities at the expense of substantive justice. To delay what is inevitable simply for the sake of complying with procedures is, in my considered view, unacceptable. In this case, having held that the service of the notification leading to the very process of taxation was unsatisfactory, it would be a waste of precious judicial time to delay the matter further by entertaining an application in form of reference whose fate is for all intents and purposes sealed. In arriving at my decision I associate myself with the decision in Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009 in which it was held:

"Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow".

In the unique circumstances of this case and in the exercise of the powers conferred upon this Court by Article 165(6) as read with Article 159(2)(d) I set aside the taxing officer's decision made on 29th September 2011 together with all the subsequent orders and direct that the matter be remitted back for taxation by the taxing officer of the High Court. However, taking into account the client's conduct, a

conduct I take a dim view of, I order the costs of these proceedings assessed at Kshs. 20,000.00 to be paid by the client within the next 14 days, in default of which execution to issue.

Ruling read, signed and delivered in Court this 11th day of July 2012

G.V. ODUNGA
JUDGE
In the presence of:
Mr. Kariuki for the Advocate
No appearance for the Client