



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO.269 OF 2017

THOMAS K'BAHATI

T/A K'BAHATI & CO. ADVOCATES...ADVOCATE/RESPONDENT

-VS-

JANENDRA RAICHAND SHAH.....CLIENT/APPLICANT

RULING

1. The Application under consideration is the Chamber Summons dated 19th July 2017 in which the Applicant is seeking the following orders:

- a) That this Honourable Court be pleased to set aside the Certificate of Taxation issued on 5th May, 2017 and all its consequential orders.
- b) That this Honourable Court be pleased to order that there be a stay of execution of the Certificate of Taxation arising from the Deputy Registrar's ruling on taxation delivered on 28th April, 2017.
- c) That the decision of the learned Deputy Registrar delivered on January (sic) 28th April, 2017 with respect to all the items listed in the Respondent's Advocate – Client Bill of Costs dated 26th January, 2017 be set aside and taxed afresh by this Honourable Court.

2. The Application is supported by the affidavit of Janendra Raichand Shah sworn on 17th July 2017 and is based on the following grounds.

- a) That as at 14th June 2005, K'Bahati and Company Advocates was yet to be formed and the firm handling the suit pursuant to which the Bill of Costs was filed was Lumumba Mumma and Kaluma Advocates and not the Applicant as alleged in item 1 of the Bill of Costs dated 28th January, 2017.
- b) The instruction fees alleged in item 1 were not properly justified as even the court attendances which purportedly informed the bill and nature of instructions and when they were received were not disclosed.
- c) The Applicant herein categorically stated that he never instructed K'Bahati and Company to act on his behalf as at the time of filing suit, the said Thomas K'Bahati had just been admitted to the bar, considering that he became an Advocate of the High Court of Kenya 2004 and was working for Lumumba, Mumma and Kaluma and could not have received instructions of K'Bahati and Company Advocates as the firm was yet to begin operation at the time.
- d) That the Bill was not taxed as per scale especially considering that the suit pursuant to which the Bill has been filed is a 2001 suit and therefore the colossal sum awarded is unjustified.
- e) That the Applicant in the Bill of Costs dated 26/1/17 was unjustifiably taxed at Kshs.2,212,333.00 yet the Respondent was never instructed by the Applicant herein to handle the matter but only got to know of it by virtue of his association with Lumumba, Mumma and Kaluma Advocates.
- f) That the Respondent was allowed to unjustifiably reap where he had not sowed.

g) That it is in the interest of justice that the Application herein be allowed.

3. The Respondent opposed the Application and filed grounds of opposition dated 13th January 2017 as follows:

i. The application is incompetent and defective

ii. The court lacks jurisdiction to entertain the application.

iii. Clause II of the Advocates Remuneration Order 2009 invoked in the Application does not grant the court powers or jurisdiction to stay execution of an Advocates/Client Certificate of Costs.

iv. There is no proper reference known in law before the Court.

v. The Application is frivolous, scandalous, and vexatious and abuse of court process and is meant to delay.

vi. The Application has no merit or substance.

vii. The Application is an afterthought, is made after undue delay.

viii. The Application is incompetent, defective, unknown in law, vexatious, frivolous and scandalous.

ix. The Application is an abuse of court process as the same is simply purposed to delay, scuttle, prejudice and bring hardship to the Advocates/respondent's entitlement and enjoyment of the fruits of the costs.

4. The application is brought under the provisions of Rule 11 (2) of the Advocates Remuneration Order, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure and all other enabling provisions of the Law. The Applicant deposes that he is dissatisfied with the decision of the taxing master rendered on 28th April 2017 and is appealing against that decision. That he filed an objection to taxation on 11th May 2017 calling on the taxing master to give and/or provide reason for the ruling.

5. In his written submissions, the Applicant submitted, reiterating what was contained in the Application and the Affidavits on record. The Applicant submitted that by awarding the Respondent the sum of Kshs.2,213,330.00, the Court allowed the Respondent to reap where he did not sow as the Respondent firm was not in existence at the time the suit that led to the filing of the Bill of Costs was filed. The Applicant urged the Court to set aside the Certificate of Taxation and direct the Bill of Costs to be taxed afresh.

6. I have carefully considered the Application herein which invoked the provisions of paragraph 11 (2) of the Advocates Remuneration Order. In my view, the main issues for determination are:

i. Whether the Application herein which is in the nature of a reference is competent or not.

ii. Whether the taxation as well as the certificate of taxation should be set aside.

7. The application before me seeks for two significant orders, to wit; (1) that the Certificate of Taxation issued on 5th May, 2017 and all its consequential orders be set aside and taxed afresh by this Honourable Court for the reason that fees was not properly earned and (2) that there be a stay of execution of the certificate of taxation arising from the taxing masters decision delivered on 28th April, 2017. These prayers portend a challenge to the decision of the Taxing Officer. These are matters that ought to be urged in a Reference under paragraph 11 of the Advocates Remuneration Order. These issues will be gauged against the decision of the Taxing Officer and the applicable law.

8. Paragraph 11 of the Advocates Remuneration Order provides:

11. Appeals to decision on taxation and appeal to court of Appeal.

(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 which he objects.

(2). The Taxing Officer shall forthwith record and forward to the objector 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.

9. In the case of Machira & Co Advocates – v- Magugu (2002) 2 EA 428, Ringera, J (as he then was) stated:

“As I understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order ”

In the case of Gacau Kariuki & Co. Advocates –v- Allan Mbugua Ng'ang'a (2012)eKLR Odunga, J expressed himself as follows:

“I must make it very clear that what is before me is not a reference from taxation but an application seeking to set aside the orders made on 29th day of September 2011 and 27th day of October 2011. The orders which were made on 29th day of September 2011 were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision? In my view the only available recourse to a person aggrieved by a decision of a Taxing Officer is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein, paragraph 11 (4) of the Advocates Remuneration Order empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance, that procedure should be strictly complied with.”

10. There are certain requirements on time for filing a Reference under paragraph 11 of the Advocates Remuneration Order which must be adhered to, or in default, may be extended by the Court on application by a party in that behalf. Of course there are the defined considerations that the court will have to take into account in enlarging the time for filing a reference. Under paragraph 11(2) of the Advocates Remuneration Order, the Applicant was required to file a reference to this court to challenge the decision of the taxing officer within 14 days from the date of his receipt of the taxing master’s decision. In this case, the decision of the taxing officer was made on 28th April, 2017. The notice of objection to the decision on taxation was filed on 11th May 2017, while the present application was filed on 19th July, 2017. It is apparent that the Application herein was filed outside the time prescribed by paragraph 11 of the Advocates Remuneration Order. There is no evidence that the applicant applied for extension of time within which to file the reference. There is no request for enlargement of time which the court can competently consider. There is no doubt that the application was filed outside the time prescribed and without leave of the court. From the above enunciation, I am inclined to find that the application herein is incurably incompetent, not for want of form but statutorily as the Applicant has deliberately overlooked the established procedure under the Advocates Remuneration Order for challenging decisions of the Taxing Officer.

11. Accordingly, the Application dated 19th July, 2017 is not meritorious and is dismissed with costs to the Respondent.

Delivered, signed and dated at Mombasa this 17th September, 2018.

C. YANO

JUDGE