



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION NO. 91 OF 2013
IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA
AND
IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER
BETWEEN
WAMBUA AND MASENO ADVOCATES.....ADVOCATE/APPLICANT
VERSUS
AFRITRACK INVESTMENTS (E.A) LIMITEDRESPONDENT
RULING

The Application

This ruling is on an application by way of a Notice of Motion dated 20th March 2014 brought by the Respondent herein, pursuant to the provisions of Rule 11 of the Advocates Remuneration Order, sections 1A and 3A of the Civil Procedure Act, and Order 45 and 51 of the Civil Procedure Rules. The Respondent is seeking orders that this Court reviews and sets aside the ruling and order issued on the 27th of January 2014, and all the items taxed in the said ruling and order pending the investigations of the report made vide O.B Number 37/15/03/14. Further, that this Court in exercise of its inherent jurisdiction orders that the bill be taxed again/or issue such orders as it shall deem fit.

The application arises from the taxation of the Bill of Costs by the Applicant herein, dated 4th October 2013, on which a ruling was given by the Taxing Master on 27th February 2014. The main ground for seeking to set aside the said taxation and ruling by the taxing master are stated in the Respondent's application and supporting affidavit sworn on 26th March 2014 by Sabena Yohannes, one of the Respondent's Directors. These in summary are as follows:

1. That the advocate previously on record for the Respondent did not inform them of the ruling delivered on 27th February 2014 until the 12th March 2014.
2. That the Applicant submitted agreements for sale that were forged in support of her Bill of Costs, and the taxing Master gave its ruling on the basis of forged documents. Further, that the said documents are the subject of investigation by the police after the Respondent reported the matter at the Central Police Station by way of O.B 37/15/03/14
3. That the Applicant had billed for work she had not done and in a sale transaction where she acted for both parties.

4. That the taxing officer was misled and misdirected in that although the above facts were supplied to the Respondent's previous advocate on record, they were not brought to the attention of the court.

The Respondent's Advocates filed submissions dated 2nd May 2014 wherein he stated that the Respondent and Applicant herein had an advocate/client relationship, and that disagreements arose between them culminating in the Applicant herein filing a bill of costs on 4th October 2013. However, that the advocate then on record for the Respondent only filed written submissions in response to the bill of costs and did not file any defence thereto, and that his negligence should not be visited on the Respondent. The Respondent relied on the decision in **Thomas Ratemo Ongeru vs Zachariah Isaboke Nyaata, Kisii ELC No. 95 of 2004** in this regard.

The Respondent's Advocate further submitted that this Court had jurisdiction to interfere with the taxing master's ruling as what was being challenged were the principles applied in determining whether or not instructions were given. He relied on the decision in **First American Bank vs Shah & Others (2002) E.A. 64** in this regard, and submitted that the taxing master erred in applying the wrong principles as regards the amount of work done to determine whether instructions had been given. He in this regard also pointed out the items of the bill of costs where the Applicant acted for both parties.

Lastly, the Respondent's Advocate submitted that there were several agreements relied upon that were in question as having been forged, and in which no transactions took place, and he gave details of the said agreements. Further, that the same had been reported to the Central Police Station, Nairobi, and that the orders being sought herein are to give the police an opportunity to pursue their investigations.

The Response

The Applicant herein filed a Replying Affidavit sworn on 2nd April 2014 by Prisca Wambua, an Advocate in the Applicant firm of Advocates. The Applicant stated that the prayer for review of the decision by the taxing master is not available to the Respondent, who can only appeal against the said ruling, and that even if such a remedy for review were available, the conditions for its grant had not been met by the Respondent. Further, that the Respondent was duly represented during the taxation and did oppose the Applicants' Bill of Costs, and cannot be said to purport to introduce fresh evidence in these proceedings and at this late hour.

The deponent further stated that all the documents which the Respondent has annexed in the applications were within its custody and knowledge, and hence the same cannot be deemed as new and relevant evidence which could not be procured. Further, that copies of the documents herein were served upon the Respondent on 9th October 2013 who has all along known the contents of the agreements and only waited until after the Court's ruling on 15th March 2014 to report the alleged fraud. Therefore, that the Respondent's attempt to introduce a criminal element in these proceedings is intended to assist it evade payment of legal fees.

The Applicant also averred that it is inconceivable how the agreement can be said to be forged yet the Respondent has had the interest in the land transferred into its favour following execution of the said agreements. Further, that whatever payments have been made as alleged by the Respondent, related to a separate agency agreement between the Respondent and deponent in her individual capacity, and were payments for sourcing for prospective purchaser of various properties owned by the Respondent. The deponent annexed copies of the said agreement and invoice.

The Applicant's Advocate on record, E. K. Mutua & Co Advocates filed written submissions dated 9th May 2014, wherein they reiterated the facts in the foregoing, and stated that under Rule 11(1) of the Advocates (Remuneration) Order the only avenue that is in law available to the Respondent is to file an objection to the taxing master's decision within 14 days, and that there is no jurisdiction to review the decision by a taxing master. Further, that even if the jurisdiction exists, the conditions precedent for review had not been satisfied and that there is no justification for the court to allow the Respondent to

adduce evidence at this point in time

The Issues and Determination

I have considered the arguments made by the parties, and find that there are two issues for determination. The first is whether the application by the Respondent is properly before this Court. Secondly, if the application herein is found to be competently filed, whether the Taxing Officer erred in principle in her taxation of the items in the Applicant's Bill of Costs.

The provisions as to the filing of references from decisions of taxing officers are found in 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 fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the 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.”

The material time for filing an application to this court as set out in rule 11(2) of the said Order is within 14 days of receipt from the taxing officer of the reasons for his or her decision. The Respondent herein claims that it wrote a letter dated 11th March 2014 requesting for reasons for the taxing officers decision. However, no evidence of such letter or of the taxing officer's response was provided by the Respondent even though it was stated to be attached. The competency of this application is therefore in doubt. Even if this Court were to resolve this doubt in favour of the Respondent and find that this application was competently filed, this Court is of the view that the application would still fail on the second issue.

This Court in this regard notes that the orders sought by the Respondent are based on alleged misconduct and negligence of its previous Advocates, and on the alleged fraud on the part of the Applicant. However, these are not grounds for a reference from a taxing officer's decision as contemplated by Rule 11 of the Advocates Remuneration Order, as taxation is guided by items that are clearly indicated in the various schedules of the order, and can only thus be set aside if such items are incorrectly or unreasonably applied. In addition distinctly separate and different legal procedures apply to the grounds alleged by the Respondent, who should pursue the relevant disciplinary and criminal proceedings in this regard.

It suffices to state for the purpose of this application that the taxing master did not err in principle in taxing the Applicant's Bill of Costs, as her taxation was based on allowable items, and had a reasonable basis including sale agreements in which the Applicant was stated to be the Advocate for the Respondent and which were executed by the said Respondent. No credible grounds have been shown to review or set aside the said taxation, since the said sale agreements and other evidence provided by the Applicant are still on the court record and have not been struck off and/or found to be fraudulent.

The prayers in the Respondent's Notice of Motion dated 20th March 2014 are therefore denied, and the Respondent shall bear the costs of the said Notice of Motion.

Dated, signed and delivered in open court at Nairobi this ____1st____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE