IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & KANTAI, JJ.A)

CIVIL APPEAL NO. 54 OF 2018

BETWEEN

JOE MWANTHI & CO. ADVOCATES…………………….……………APPELLANT

AND

DAVID KIHONO WAWERU…………………………..……………….RESPONDENT

(Being an appeal from the Ruling and Order of the High Court at Nairobi (Mbogholi Msagha J.,) given on 21st February, 2017

in

HCC MISC Cause No. 808 of 2014)

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JUDGMENT OF THE COURT

[1] The dispute in this appeal is over an advocate/client bill of costs that was taxed in favour of Joe Mwanthi & Co. Advocates (appellant) at a sum of Kshs.73,235 (taxed costs) as against David Kihono Waweru (respondent) on the 1st July, 2015. Aggrieved by the said order of taxation, the respondent filed a reference, by way of a chamber summons dated 3rd December, 2015 which was brought under various provisions of the Civil Procedure Act and Rules but it was principally under **Rule 11** of the **Advocates Remuneration Order**.

[2] Later, on the 18th February, 2016 the respondent filed a notice of motion dated 16th February, 2016 seeking stay of proceedings before the Chief Magistrate's court. The latter application seems to have been allowed on 4th March, 2016 in an extempore ruling where the learned Judge (**Mbogholi J**.,) posited as follows;

> ***"The respondent's counsel has notice of today's hearing. The return of service confirming this. I am told the lower court proceedings are slated for Monday, 7th March, 2016 while the reference to this court is yet to be determined. In view of the foregoing, I consider it just to order a stay of the lower court proceedings until the reference to the High court is determined. Costs in the cause."***

[3] In the reference, the respondent sought to set aside the order of the Deputy Registrar where he was ordered to pay the appellant the taxed costs. This was on the grounds that the Deputy Registrar never had an opportunity to determine the issue of whether the respondent was a client of the appellant; that the appellant never proved that he had instructions to act for the respondent and no evidence was tendered to show there existed an advocate/client relationship; that no professional services were rendered to the respondent by the appellant. The respondent contended that the services that were rendered by the appellant were obtained by Rafiki Microfinance Bank Ltd, who financed the buyer of **LR No KJD/Kaputiei/North 69488;** that the respondent co-owned the said land with Peter Kabugu Gicheru; they agreed to sell it to Morris Kirimi Nyamu and drafted the agreement themselves but the bank instructed the appellant to create a charge over the plot therefore the appellant was paid by the said bank.

[4] The application was opposed by the appellant who in addition to filing a replying affidavit filed two notices of preliminary objection that were all argued together. In a nutshell the respondent argued that he was duly instructed to act for the respondent. Although there was no letter of instructions, the same could be inferred from the conduct of the parties. He contended that he witnessed the execution of the sale agreement documents which is a legal service for which fees are chargeable. What is more, if the respondent was dissatisfied with the taxation, the issue should have been raised before the taxing officer which he failed to do even though he was served with the bill of costs. Moreover, at the time of taxation the appellant argued that the respondent never raised the issue of representation, thus in his view the reference was a mere afterthought. According to the appellant, the law allowed him to act for both the vendor, purchaser and the chargor and

also to charge fees from all including the registration of a charge, which was separately paid by the bank. Therefore, he denied the allegation of unjust enrichment.

[5] The matter fell for hearing once again before **Mbogholi J.**, who considered the rival submissions and overruled the matters raised in the preliminary objection. The learned Judge further held that there were contentious issues that ought to be determined before the bill of costs was taxed. This is what the Judge stated in his own words;-

> ***"…Whether or not there was non-disclosure of material facts is a contentious issue, and also whether or not the respondent had no instructions or that he taxed the bill against only one person is also an issue for determination. Therefore, both the reference and application for stay succeed. The order following the taxation is hereby set aside in its entirety and the bill shall now be placed before another taxing master of competent jurisdiction to go over the process. As there is evidence that the applicant had been served with the notice of taxation and elected not to attend, he shall pay the costs incurred by the respondent to defend both the reference and this application."***

[6] The above orders triggered this appeal that is predicated on some 4 grounds of appeal that can be summed up into two that is; the learned Judge is faulted for purporting to determine an application which he had previously rendered a decision on; and for not holding that the reference was incompetent for lack of a valid notice of objection in compliance with **Rule 11 (1)** of the **Advocates Remuneration Order**. The appellant therefore urged the appeal be allowed by setting aside the order of 21st February, 2017 and restoring the orders of the taxing officer for Kshs.73,235.

[7] During the plenary hearing both **Messrs M. Mwanthi** holding brief for **Miss Kangethe** for the appellant and **Kevin Omondi** for the respondent relied on their written submissions and did not make any highlights.

[8] Counsel for the appellant was emphatic that the Judge misdirected himself when he purported to allow an application vide his ruling delivered on 21st February, 2016 that was not only not for consideration before him, but which he had already rendered a decision on. On the merit of the reference, counsel was of the view that there was no valid reference before the Judge because under **Rule 11 (1)** of the **Advocates Remuneration Order**, it is provided that;-

> ***"Should a 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."***

In this case the respondent merely requested to be furnished with the reasons for the ruling on taxation and did not specify the items objected to. Counsel cited the case of **Machira & Co Advocates vs. Arthur Magugu & Another (2012) eKLR**. In that judgment the court emphasized that objections to bills of costs should be dealt with by references and not appeals or reviews for the sake of expediency. In which case a party objecting is supposed to specify the items objected to, by seeking reasons. According to the appellant the reference was defective; the reasons were also furnished in a ruling by the taxing officer vide a letter dated 28th July, 2015 and the reference was filed after an inordinate delay of 120 days as opposed to the 14 days provided in the Rule.

[9] As aforementioned, this appeal was opposed; in the respondent's submissions it was argued that the orders of 4th March, 2016 were a stay of execution of proceedings that had commenced before the Chief Magistrates' court which if not stayed, the whole exercise of filing a reference would have been rendered worthless. Moreover, a Judge has power to preserve the status quo of a matter that is before the court. On the competency of the reference, counsel for the respondent responded by stating that the provisions of **Rule 11 (1)** are not couched in mandatory terms, the notice of objection to the taxation was sent to the Deputy Registrar on 13th July, 2016 and a response was written on 28th July, 2016 to the respondent which was never dispatched to the advocate on record. Counsel further submitted, that the Judge was right to determine all matters on merit as opposed to technicalities that were raised by the appellant.

[10] Since the bill of costs was taxed exparte, the appellant had a duty to disclose to the taxing officer the work done to warrant the fees charged, and as the ruling did not contain any reasons, it was impossible to ascertain how the taxing officer arrived at the decision on the amount to award on each of the individual items in the bill of costs. Counsel for the respondent went on to argue that there were no instructions issued; which was demonstrated by the fact that the appellant was giving the respondent a professional undertaking on behalf of the bank. How then would he have been acting for the bank and the respondent? Counsel went on to submit that even if this Court were to find there were instructions, other key elements such as the work commensurate to the fees charged were not disclosed as the appellant was apparently representing multiple parties and therefore the taxing officer erred by awarding him the full fees. **Section 29** of the **Advocates Remuneration Order** provides that an advocate acting for purchaser, vendor and chargor is entitled to one sixth of the costs. Counsel urged us to dismiss the appeal.

[11] We have considered the appeal and the rival submissions. The decision appealed from is a Ruling on a reference filed by the respondent who was aggrieved. It was made in exercise of the discretionary power of the court. As this Court stated in **Mbogo and Another vs. Shah [1968] EA 93** it is well settled:-

> ***"… that this Court will not interfere with the exercise of…discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The question for our determination therefore is whether the impugned Ruling is clearly wrong on account of: misdirection by the learned Judge by ruling on a matter already decided and by failing to find the reference was bad in law and therefore a nullity.

[12] On the first issue, that the Judge misdirected himself by ruling on a matter twice; the record shows that there were two applications

before the learned Judge, one seeking an order of stay of proceedings before the Chief Magistrate's court and the other a reference. As stated above, the proceedings of 4th March, 2018 show that the learned Judge issued an order of stay of proceedings in the lower court until the reference was heard. To us this order was made pursuant to the learned Judge's exercise of his discretionally power, to avert a situation which would have rendered the hearing and determination of the reference moot. As stated above, this was an extemporal order and the reasons were contained in the final ruling after the parties were fully heard. We therefore find no merit in this ground of appeal which fails.

[13] Did the Judge err by allowing the reference which according to the appellant was filed out of time and did not specifically comply with the provisions of **Rule 11 (1)** of the **Advocates Remuneration Order**? The said Rule require a party who objects to the decision of the taxing officer to give notice in writing of such objection within 14 days. The respondent contends that a notice was issued on 13th July, 2015 seeking to be furnished with reasons but the reply was addressed to the respondent instead of his counsel who was on record. In any event we agree with counsel for the respondent that the provisions of the said Rule are not couched in mandatory terms. We are not persuaded that the learned Judge erred by exercising his discretion and admitting the reference out of time as the provisions of the Rule do not seem to have been cast in stone. As was held by **Ringera, J.** (as he then was) in **the Matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996**, the learned Judge expressed the opinion, correctly in our view, that a party aggrieved by a decision of a taxing officer;-

> ***"Whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bill as a whole or any items thereof."***

Has recourse to the High court by way of reference under Paragraph 11 of the Advocates (Remuneration) Order and that the said Order is a complete code.

[14] It is clear to us that the Judge considered the reference within the parameters cited here above and ordered the issues such as the validity of the bill as a whole and the items or the entire quantum be subjected to a fresh hearing. We think we have said enough to demonstrate that this appeal lacks merit and we order it dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of April, 2019.

M.K. KOOME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR