



**REPUBLIC OF KENYA**

**COURT OF APPEAL**

**AT MALINDI**

**CIVIL APPEAL 56 OF 2008**

**EAST AFRICAN POWER MANAGEMENT LIMITED.....APPELLANT**

**VERSUS**

**STEPHENS KITHI NGOMBO T/A STEVE KITHI & COMPANY  
ADVOCATES.....RESPONDENT**

**(Appeal from the decision of the High Court of Kenya at Mombasa (Sergon, J) dated 12<sup>th</sup> October, 2007**

**In**

**H.C.C.C. NO. 506 OF 2004)**

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**JUDGMENT OF THE COURT**

On 4<sup>th</sup> June, 2004, **STEPHEN KITHI NGOMBO T/A STEVE KITHI & COMPANY ADVOCATES** (hereinafter referred to as the Advocates) filed a bill of costs titled:

**“Advocates/Client Bill of Costs.”**

The matter came up for hearing before the Deputy Registrar by the name **Kwena**, on 10<sup>th</sup> September, 2004. The record of proceedings show that the two respondents who are named in the Bill as, **NINA WANGUI BAYUNI** and **EAST AFRICAN POWER MANAGEMENT LIMITED**, as 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively, were served but only the 1<sup>st</sup> respondent appears to have entered appearance or was represented when the bill came up before the Deputy Registrar. We say so because there is no notice of appointment or a response by the 1<sup>st</sup> respondent that is on record. Our efforts to trace the affidavit of service so as to establish whether the 1<sup>st</sup> appellant was served with the notice of taxation were also not successful.

Going by the proceedings leading to the order of taxation, we see it was Counsel for the respondent who was present during the taxation. The short proceedings show that counsel urged the Deputy Registrar to allow the Advocates/Client bill as drawn against the 2<sup>nd</sup> respondent.

The record shows that the matter was stood over to 22<sup>nd</sup> October, 2004, for further orders. On that date, Mr Kithi addressed the court as follows:

*“I would like to adopt submissions made in HC MISC Civil Application No 505 of 2004 with a few amendments. Civil Application No. 506 of 2004, I will rely on the affidavits that have been adduced as proof of our instructions. There is a letter of instructions. The sums have been confirmed. The receipt of the funds is the reason we pray that the bill be taxed as drawn.”*

The reason why we have reproduced the above portion of the proceedings is to show that there was no appearance by the appellant, and secondly, there were many other matters being taxed by the same taxing master, that is, **HC MISC Civil Application Nos. 505 of 2004 and 506 of 2004**. We shall revisit this issue later in the judgment.

On 5<sup>th</sup> November, 2004, the Deputy Registrar delivered the following ruling:

*“The bill of costs dated 7<sup>th</sup> June, 2004. It is in respect of various services rendered for the Respondents. There are various affidavits showing that the Applicant had instructions to act for the Respondents. The bill is (sic) not taxed against the 2<sup>nd</sup> Respondent who was served but failed to enter appearance and/or attend during taxation. Item 1 is drawn to scale. The other items are reasonable. The bill will be taxed as drawn.”*

According to the appellant, they were not served with the bill of costs and they became aware of the taxation when the respondent filed a Winding up Cause against the appellant and attached copies of the Advocate/Client Bill of Costs and a certificate of taxation. That petition was filed in court on 5<sup>th</sup> November, 2004. On being served with the Winding up petition and the certificate of costs, the appellant filed a Notice of Motion seeking to set aside the order of taxation. That motion was brought under the provisions of **Order L, rule 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**.

That application was heard by **Sergon, J**, and by a ruling delivered on 12<sup>th</sup> October, 2007, the learned Judge struck out the Notice of Motion with costs to the Advocates.

On page 2 of that Ruling, the learned Judge stated:

*“In my humble view, I agree with the submissions of Mr Stephen Kithi Ngombo that the motion is incompetent in view of the fact that it is premised on the provisions of the Civil Procedure Act and Rules. The relevant law applicable in the circumstances is the Advocates. In fact the procedure of sorting out such disputes is provided for under the Advocates (Remuneration) Order. The rules therein clearly indicate at what stage this Court can step in and gain jurisdiction in disputes in relation to taxation of costs. I do not want to consider the merits of the motion because I may prejudice the 2<sup>nd</sup> Respondent’s rights to agitate the same at the appropriate time by a competent application. For the above reasons, I uphold the preliminary objection raised by Mr Stephen Kithi Ngombo and hereby order the motion to be struck out with costs to the Advocate/Applicant.”*

Being aggrieved by that decision, the appellant has appealed as per the following grounds of appeal:

1. *The Learned Judge erred in law and fact in upholding the Preliminary Objection raised by the Respondent.*
2. *The Learned Judge erred in law and fact in holding that the Application by Motion filed by the Appellant is incompetent.*
3. *The Learned Judge erred in misdirecting himself in law and in fact in finding that the said Application by Motion is premised on the provisions of the Civil Procedure Act and Rules.*
4. *The Learned Judge erred in law in holding that the relevant law applicable is the Advocates Act.*

5. *The Learned Judge erred in misdirecting himself both in law and in fact in his finding that the procedure of sorting out disputes relating to this matter is provided for under the Advocates (Remuneration) Order whereas the Learned Judge failed and or omitted to take into consideration that there is no specific procedure for the setting aside of an ex parte order of taxation which is also not expressly provided for in the Advocates' Act and or the Advocates (Remuneration) Order.*

In further arguments to support the above grounds, **Mr. Khanna** learned counsel for the appellant, concentrated on ground number 5 of the grounds of appeal. This raises the fundamental issue in this appeal on whether the Civil Procedure Rules apply when dealing with an application to set aside a certificate of bill of costs which is taxed *ex parte*. The appellant's Notice of Motion was based on the grounds that there was no service of the Notice of the bill of costs that was effected upon the appellant. Under **rule 72 of the Advocates Act**, each Advocate and any other person whose name is endorsed on the bill is entitled to receive a notice of taxation; however there is no provision on the applicable procedure for setting aside.

Both the Advocates Act and Remuneration Order do not make provisions on how an application to set aside an *ex parte* certificate of taxation can be dealt with, that is why the appellant fell back on the provisions of **Section 3A of the Civil Procedure Act**. **Mr. Khanna** was of the view that the provisions of **Rule 11 of the Advocates Remuneration Order** apply to a situation where a party is objecting to a particular item or items arising from the decision of the taxing officer. He drew a distinction in this case in that the taxation was done *ex parte*.

This appeal was opposed; Mr. Keith learned counsel for the respondent maintained that any party objecting to an order of taxation has no choice but to follow the provisions of Rule 11 of the Advocates Remuneration Order to the letter. There is no distinction between a bill that was taxed *ex parte* and any other bill, in any event the appellants failed to attend court during the taxation. We were also invited to consider that the appellant is guilty of delay. They first became aware of the order of taxation on 30<sup>th</sup> November 2004, they should have come to court within 14 days. The earliest opportunity that was available to the appellants to come to court was 12<sup>th</sup> December 2004. Lastly nothing stopped the appellants from challenging all the items.

In determining this appeal, the issue of whether the appellant was served with the notice of the taxation has caused us some concern because as pointed out earlier, there is no affidavit of service on record. Upon examination of the record of proceedings, we are not able to tell whether the notice of taxation was served upon the appellant.

We therefore made further efforts and called for a related file – **MISC Civil Application No. 505 of 2004** but even in that file, there is no affidavit of service to show that the appellant was served. For that reason, we agree with counsel for the appellant that his client was not given an opportunity to be heard before the advocate/client bill of costs was taxed.

This now leads us to the question of whether the appellant should have challenged the order of taxation by invoking the provisions of **Rule 11 of the Advocates Remuneration Order**. That rule provides:

“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 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 14 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.*

3 *Any person aggrieved by the decision of the judge upon any objection referred to such judge under paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”*

We agree with counsel for the respondent that the Advocates Remuneration Order provides its own

procedure and there is no reference to the Civil Procedure Rules. However, we find this case was different because the appellant was not aware of the taxation. It follows, therefore, that the appellant could not have followed the procedure provided for under the above Remuneration order. The appellant followed the procedure of setting aside orders that is provided for under the Civil Procedure Rules and thus invoked the inherent powers given to a court to make such orders as may be necessary for ends of justice or to prevent abuse of the court process.

We are satisfied that as the appellant was not served, there was failure of justice, and had the learned Judge addressed himself to the fact that the appellant was not served with the notice of taxation, and in the circumstances the appellant could not have brought itself strictly within the provisions of **Rule 11 of the Advocates Remuneration Order**, the Learned Judge would have probably arrived at a different conclusion.

We find that there was a further problem in the proceedings, in that the learned Judge set out to determine the Notice of Motion dated 10<sup>th</sup> February, 2005, but by the ruling delivered, it would appear that what was determined was a preliminary objection. Although the preliminary objection was addressed within the application, the learned Judge did not address himself on the merits of the application.

For the foregoing reasons, we find the appellant is entitled to be given a hearing on the Bill of costs, and this hearing will not cause the respondent any prejudice that cannot be compensated for with costs in the cause. We find that this appeal has merit. We accordingly allow the appeal and set aside the order made on 12<sup>th</sup> October, 2004.

The Advocates/Client Bill of Costs may be submitted for taxation before another Deputy Registrar.

The appellant shall have the costs of this appeal.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of March, 2012.**

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR