IN THE COURT OF APPEAL
AT NAIROBI
(CORAM:GITHINJI, OKWENGU & MARAGA JJ.A)
CIVIL APPEAL NO. 199 OF 2002

BETWEEN

MACHIRA & CO. ADVOCATES……...……………….APPELLANT

AND

ARTHUR K. MAGUGU………………………….1ST RESPONDENT
MARGARET WAIRIMU MAGUGU…...……….2ND RESPONDENT

(An Appeal from the Order/Ruling of the High Court of Kenya At Nairobi (the Honourable Mr. Justice John Mwera) dated 7th February 2002

In

HCC MISC APPLICATION NO. 151 OF 2001)
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JUDGMENT OF THE COURT

1. The Appellants acted for the Respondents in Nairobi HCCC No.749 of 1998. It would appear that at some stage the Respondents withdrew instructions from them and instructed another firm of advocates. Consequent upon that withdrawl, the Appellants filed their client/Advocate bill of costs on 4th April 2001. On 30th July 2001 the Deputy Registrar taxed it at Kshs.4,500,000/=

2. Being aggrieved by that taxation, on 9th September 2001 the Respondents filed an application under **Sections 44** and **51** of the **Advocates Act** (the Act) and **Rules 11(1) & (2)** and **13 (1)** of the **Advocates Remuneration Order** (the Rules) and sought to have that taxation "set aside and varied by decreasing the sum payable to the advocate." Although in his ruling of 15th November 2001 the Judge agreed with the Appellants that the application was "in essence... incompetent" for being grounded on the taxing master's ruling and not on the reasons for his decision, he nevertheless allowed it to be argued.

3. In his second ruling of 7th February 2002, the learned Judge held that the taxation of the Appellants' bill of costs was premature and allowed the application. He said it is the constitutional right of every litigant to change advocates. Basing himself on the provisions of **Paragraph 62A** of the **Advocates Remuneration Order**, he said where there is a change of advocates, it is undesirable and against the practice of the court to allow "each separate advocate, when changed, to draw up him/her (sic) bill of costs and have it taxed even as the cause is still going on." This appeal is against that ruling.

4. Arguing before us grounds 1, 2, 3 and 5 of this appeal, Mr. Wachira for the Appellants submitted that **Rule 11(2)** of the Rules require a party aggrieved by taxation to seek the taxing master's reasons for taxing each item complained of and base his application to the High Court on those reasons. He said in this case the Respondents' advocates having sought and obtained the taxing master's decision and not the reasons for that decision, the application was clearly incompetent and should have been struck

out. Instead of doing that the learned judge did not only allow it to be argued but he also allowed counsel for the Respondents to argue that the taxation was premature, a point that had not been canvassed before the taxing master and actually went ahead to base his decision on that point. Counsel further argued that even if the decision, which counsel for the Respondents had sought were to be taken as containing the reasons for the decision, having been filed about two months later and not within 4 days as required by **Rule 11(1)** of the **Rules,** the application was, on that score, also incompetent and should have been struck out.
5. On ground 4, counsel for the Appellant submitted that the judge treated the application as an appeal when there is no provision for an appeal to the High Court from the taxing master's decision; that the Rules provide for applications and not appeals; and that as required by **Rule 11** of the **Rules**, the High Court is supposed to address its mind to the aggrieved party's objection on each item.

6. Counsel was highly critical of the Judge's decision that the taxation was premature. He submitted that once a client changes advocates, his contractual relations with the dropped advocates comes to an end and those advocates are entitled to have their bill taxed forthwith and that to require such advocates to wait, as the Judge held, until the case is finalized and the advocate finally on record files a combined bill of costs is not only unfair but also totally unreasonable. Counsel relied on the decision of Ringera J (as he then was) in **Machira & Co. Advocates vs Arthur Magugu & Another, HCC Misc. App. No. 358 of 2001** and submitted that **Paragraph 62 A of the Advocates Remuneration Order** applies to party and party bills of costs and not Advocate/Client bills of costs. He therefore urged us to allow this appeal and reinstate the certificate of costs. He also prayed for the costs of this appeal and those of the application in the High Court.

7. The appeal was opposed. Mr. Gichuhi for the Respondent submitted that the Respondents' advocates' notice of 1st august 2001 should be taken as asking for the taxing master's reasons for his decision. The letter forwarding the ruling was received on 6th September 2001 and the application was filed on 11th September 2001. He said that was within the 14 days period allowed and the question of the application being filed out of time does not arise.

8. Counsel further submitted that although the Rules do not provide for an appeal, the application under **Rule 11** of the **Advocates Remuneration** O**rder i**s basically an appeal and the Judge was right in treating it as such. He also referred us to **Paragraph 62A** of the **Advocates Remuneration Order** and submitted that the Judge was right to hold that the taxation was premature and with that he urged us to dismiss this appeal with costs.
9. We have considered these rival submissions and read the authorities cited to us in this matter. Three issues arise from the arguments in this appeal: whether or not an appeal lies from the taxing master's decision on a bill of costs; whether or not the Respondents' reference was incompetent; and whether or not the taxation of the Appellant's bill of costs was premature. We shall deal with them in that order.

10. The appellate jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to advocates' bills of costs, we agree with the decision of Ringera J (as he then was) in **Machira vs Magugu**[1] that the **Advocates Remuneration Order** is a complete code which does not provide for appeals from taxing master's decisions. **Rule 11** thereof provides for ventilation of grievances from such decision through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in **Section 80** of the **Civil Procedure Act** of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on advocates' bills of costs through references under **Rule 11** to a judge in Chambers.

11. Two points were argued on the issue of whether or not the Respondents' reference was competent. The first one related to the time within which the reference should have been lodged and the second to the basis of the reference. As both of them are based on **Rule 11** and for ease of reference we wish to set it out verbatim. It reads:

“11

(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.

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

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

12. **Sub-rule (1)** requires the party objecting to give notice in writing within 14 days “of the items of taxation to which he objects.” As the trial judge correctly found, the Respondents notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.

13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

14. Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master’s decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master’s reasons for his decision.

15. The third and last issue raised in this appeal was whether or not the Appellant’s bill of costs was prematurely taxed. We are not in any doubt that the Judge erred in holding that it was. **Paragraph 62 A (1)** upon which the judge based his decision states that:
“Where there has been a change of advocates or more than one change of advocates, the advocate finally on record shall draw a single bill for the whole of the matter in respect of which <u>costs have been awarded</u>.”(Emphasis supplied).

16. Save for interlocutory applications, costs are normally not awarded until the determination of the matter. That being the case, the above provision clearly refers to party and party costs and not to advocate/client costs. As Justice Ringera observed, the objective behind the provision is to shield litigants from being “burdened with costs incurred as a result of change of advocates by the adverse party.[2]

17. We hold that paragraph 62A (1) does not apply to advocate/client bills of costs. An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed.

18. For these reasons, we allow this appeal, set aside the ruling of the High Court dated 7th February 2002 and substitute it with an order dismissing the Respondents' reference with costs with the result that the order of the taxing master dated 20th July 2001 taxing the Appellant's bill of costs at Kshs.4,500,000/= is restored. The Appellant shall have the costs of this appeal with interest thereon at court rates from the date of taxation.

19. As counsel for the parties agreed at the hearing of this appeal, this judgment also applies to Civil Appeal No. 198 of 2002 which is also between the same parties.

DATED and delivered at NAIROBI this 2nd day of March, 2012.

E.M GITHINJI

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JUDGE OF APPEAL

H.M. OKWENGU
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JUDGE OF APPEAL

D.K. MARAGA
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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR

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[1]**HCC Misc. App. No. 358 of 2001(supra)**
[2]**Machira vs Magugu HCC Misc. App. No. 358 of 2001 (supra)**