



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. 13 OF 2019

JOSCARLOS ABUKUSE OBAGA.....APPELLANT

- VERSUS -

GLOBAL CARGO MOVEMENT LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th November, 2021)

RULING

The respondent filed on 04.06.2021 an application by chamber summons through Asige Keverenge and Anyanzwa Advocates. The application was under section 51(2) of the Advocates Act (Chapter 16, Laws of Kenya), and paragraph 11(2) of the Advocates (Remuneration) order 2009 together with all applicable provisions of the law. The application was for orders:

1) (spent).

2) (spent).

3) That the Honourable Court be pleased to set aside and or alter the certificate of taxation dated 18.05.2021 for Kshs. 172, 950.00 together with any and all consequential or subsequent orders or proceedings upon such terms or condition as may in the interest of justice deem expedient.

4) That the Honourable Court be pleased to make such other and further orders it may deem just and necessary in the circumstances.

The application was based on the attached affidavit of Sameer Hussein Mohamed G. Virjee and upon the following grounds:

a) The applicant is aggrieved by the certificate of taxation.

b) The applicant has duly requested for the reasons for the decision by the taxing master delivered on 18.05.2021 in respect of which the certificate of taxation was issued.

c) The taxing master has not furnished the reasons at the time of filing the application but the reasons cannot be different from those in his ruling delivered on 18.05.2021.

d) The appellant has already been paid the Kshs. 90, 000.00 awarded to him by the Court on 09.04.2020.

e) The appellant has been paid Kshs. 65, 828.00 being costs in the lower court in CMCC 234 of 2019 and Kshs. 24, 400.00 being auctioneer's fees, thus a further sum of Kshs. 90, 228.00.

f) The taxing master failed to appreciate that the award was for Kshs. 90, 000.00 and awarded instruction fees at Kshs. 75, 000.00 instead of Kshs.25, 000.00; failed to consider the applicant's objection in respect of all the items in the applicant's objection or provide explanation in the manner discretion was exercised in taxing the items; failed to apply law and principles governing taxation of party to party bill of costs thereby arriving at an amount payable that was clearly excessive and manifestly high.

g) The party to party bill of costs was filed for the appellant on 02.05.2020 for a sum of Kshs. 140, 450.00 and an amended bill was dated 30.10.2020 for Kshs. 172, 950.00. A notice of taxation was served on 21.07.2020 and fixed for taxation on 30.07.2020 but was adjourned. The taxation then came up on 10.03.2021 and both parties were represented. Ruling was fixed for 18.05.2021 and which was delivered taxing the bill at Kshs. 172, 950.00. On 21.05.2021 the applicant filed a notice of objection to the taxation under rule 11(1) of the Advocates Remuneration Order indicating the disputed items.

The appellant opposed the application by filing on 14.06.2021 the replying affidavit by its counsel, Earnest Mokaya Advocate. It was urged for the appellant as follows:

- a) The appellant lost the suit in the lower court per dismissal decree on 04.06.2019. The appellant appealed and the Court (Ndolo J) awarded Kshs. 90, 000.00 plus costs of appeal and in lower court. The applicant herein applied for review of the judgment but application was dismissed with costs.
- b) The appellant filed and served the bill costs as amended. The applicant filed no submissions or made no oral submissions to object to any of the items in the bill. Ruling was delivered on 18.05.2021 and certificate of taxation extracted on 25.05.2021 for Kshs. 172, 950.00.
- c) On 21.05.2021 the applicant requested for reasons for decision of 18.05.2021 but which reasons were in the ruling of 18.05.2021. The taxing master's decision should not be reviewed or set aside because the applicant never objected to any of the items.

Parties filed their respective submissions. The Court has considered the material for and against the application and returns as follows:

1) As submitted for the appellant and admitted for the applicant, the reasons for the decision by the taxing master were contained in the ruling of 18. 05.2021. As was held by Odunga J in **National Oil Corporation Ltd –Versus- Real Energy Limited & Another [2016]eKLR**, where the ruling by the taxing master contains the reasons, there is no magic in requiring the taxing officer to furnish reasons before making a reference and, “**Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so.**” Paragraph 11(4) of the Advocates (Remuneration) Order provides that the objector may apply to a Judge within 14 days from the date the reasons by the taxing officer are provided. In the instant case there is no dispute that the reasons were in the ruling of 18.05.2021 and the application was filed belatedly on 04.06.2021 instead of by 01.06.2021. The appellant's submissions that in absence of extension of the time the application was time barred is upheld. It is also returned that the reasons having been conveyed in the ruling and the applicant having known as much, it was superfluous for the applicant to have filed the objection seeking the reasons which had already been provided.

2) The applicant does not dispute the appellant's case that the ruling was clear that the applicant never filed a document or made oral submissions to oppose the bill as had been amended. The Court finds that the applicant having failed to raise opposition to the itemised bill at the taxation stage, it cannot be that such opposition to the bill is being raised in the final submissions to the present application. The Court considers that the applicant ought to have raised the opposition at the taxation but he failed to do so and it is an abuse of the court process to seek a fresh taxation of the bill in the present application and which purports to be a reference but in fact, being a pursuit for a fresh taxation. As already pointed out, the itemised opposition has been belated in the applicant's submissions and not in the application or before the taxing officer so that the appellant has been ambushed and been denied an opportunity to specifically traverse the itemised opposition.

In conclusion and for the stated findings the application by the chamber summons dated and filed on 04.06.2021 is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 26TH NOVEMBER, 2021.

BYRAM ONGAYA, JUDGE