



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 123 OF 2016**

**(Before Hon. Justice Hellen S. Wasilwa on 4<sup>th</sup> June, 2018)**

**JACKLINE CHEPKEMOI KIMETO.....APPLICANT/RESPONDENT/CLIENT**

**VERSUS**

**OBURA MBECHÉ & COMPANY ADVOCATES.....RESPONDENT/ADVOCATE**

**RULING**

1. The Application before me is dated 28<sup>th</sup> August 2017 and is filed by the Respondent/Claimant herein brought through a Notice of Motion filed under Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 40 and 50 of the Civil Procedure Rules, Rule 3 (1) and (2) of the High Court (Practice & Procedure) Rules and the Inherent Powers of the Court.
2. The Applicant sought orders for stay of execution of the certified ruling of the Taxing Master dated 1.8.2017 issued in Misc Cause No. 123 of 2017 pending the hearing of this Application which is an Objection and Reference filed herein.
3. The Application was supported by the annexed affidavit of Jackline Chepkemoi Kimeto, the Applicant herein and on the grounds that there is demand to execute against her. That she has objected to the ruling on taxation and filed a Reference before this Court and a judgement in these proceedings is pending.
4. She avers that the Objection and Reference has an arguable chance of success and the same will be rendered nugatory unless a stay is granted.
5. In addition to the above Application, the Applicant also filed another Application on 28/8/2017, filed on 31/8/2017 brought under Order 11(2) of the Advocates (Remuneration) order seeking orders:-

- 1. That the Honourable Court be pleased to set aside the Taxing Officers' Ruling delivered on 1.8.2017 as it relates to the reasoning and determination pertaining to item No. 1 of the Advocate/Client Bill of costs dated 27<sup>th</sup> October 2016.*
- 2. That this Court be pleased to re-assess the instruction fee due to the Respondent/Advocate in respect of item No. 1 of the Advocate/Client Bill of Costs dated 27<sup>th</sup> October 2016 and make a finding on the same.*
- 3. That in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit the Advocate/Client Bill of Costs dated 27<sup>th</sup> October 2016 for review and reconsideration by the Taxing Master in respect of item No. 1 thereof.*
- 4. That the Honourable Court be pleased to adjust the figures, re-assess the instruction fee due and find for the Applicant/Client as presented in the Client/Respondent submissions filed on record.*
- 5. That the Honourable Court be pleased to grant any other relief or make any order it deems fit to grant.*
- 6. That costs of this application be provided for.*

6. The Application is premised on the following grounds:-

*a) That the Taxing Officer misdirected herself on the principles of law applicable.*

*b) That the Taxing Officer exceeded and abused her discretion.*

*c) That the Taxing Officer disregarded and or neglected to consider the pleadings of the Respondent/Applicant duly filed and present on the Court file.*

*d) That the Taxing Master failed to give reasons for or grounds to justify not only the quantum but the award pertaining to item No. 1 of the Advocate/Client Bill of Costs dated 27<sup>th</sup> October 2016.*

*e) That the fee awarded is manifestly high in the circumstances of the instructions being fraudulently and deceptively obtained as to justify the reconsideration of the same.*

*f) That it is in the interest of justice that the reliefs sought herein are granted.*

7. The Application is also supported by the supporting affidavit of the Applicant wherein she deposes that she contests the taxation on two grounds:- instructions and getting up fees.

8. It is her averments that the instructions were obtained illegally and fraudulently due to the admitted fact that the Respondent/Advocate known as Mary Bonyo, a Partner in the Respondent Firm and who personally received her instructions to act on her behalf failed to disclose at the onset that she was in fact married to and/or cohabiting as husband and wife with Mr. Georgiadis Khaseke, a Partner in the firm that was representing the Defendant in Cause No. 1375 of 2015 and thereby occasioning a serious conflict of interest which should have been disclosed to her before taking instructions (**Appendix JC -1**).

9. She avers that she raised these concerns with the Respondent's Managing Partner Mr. Geoff A. O'rao Obura who dismissed her concerns and instead handed over her file to a junior advocate in the firm (**Appendix JCK -2**).

10. On account of this, she decided to withdraw her file and appointed a new firm of advocates to act on her behalf thereby prompting the Respondent Advocate to raise a claim of legal fees in the sum of Kshs.839,986.40 (**Appendix JCK-3**).

11. That the Advocate/Client Bill of costs aforesaid was taxed and Taxing Master delivered her ruling on 1.8.2017 taxing the bill at 565,447/= (**JCK-4**).

12. It is this ruling that they challenge on the ground that the Taxing Master did not take into account her submissions challenging the legality of the instructions fee on account of how instructions were obtained.

13. She avers that the withdrawal of instructions was promptly brought to the attention of the Taxing Master in her submissions but her submissions pertaining to item No. 1 of the bill of costs were ignored and instruction fees of 237,740/= awarded.

14. She contends that she is prejudiced as she had to pay instruction fees to another Counsel of 400,000/= and thus this Notice of Objection.

15. She contends that the bill was taxed without due consideration of her submissions and hence the prayers sought.

16. The Respondent opposed the Application. They filed their Replying Affidavit disposed to by one Geoffrey O'rao Obura on 28/9/2017 and filed in Court on 29/9/2017. They contend that the Taxing Master's decision was legally sound and that the Application in Court is meant to mislead the Court to avoid her obligation to them.

17. They contend that the matter was handled by their Mr. Burugu and that the Applicant proceeded against Miss Bonyo in an unprofessional way. They aver that the problem with the Applicant was she expected this to get evidence on behalf from Kenya Association of Travel Agents (KATA) in an unprofessional matter.

18. I have considered the averments and submissions of both parties. The contention relates to item No.1 of taxed costs relating to instruction fees and getting up fees. The issue of conflict of interest has been raised by the Applicant in relation to the Respondent and the firm of Advocates representing the Respondent in the claim in question.

19. This conflict of interest is apparent from the fact that the demand notice was done by one Miss Bonyo hence the reply from the firm of Mohamed Muigai dated 28/4/2015 and further one dated 15/5/2015 (page 22) of the Application.

20. It is at this point that the issue of conflict of interest should have been raised by Miss Bonyo which she failed to do and any instructions taken beyond this point were in my view not in good faith. Despite another Counsel in the same firm taking over, the issue of conflict or perceived conflict cannot just be wished away.

21. In the circumstances, I find the Application by the Applicant has merit. I allow the Application and re-direct the taxation of this bill to the Taxing Master taking into consideration these aspects of conflict to the extent that the Applicant should not be condemned to pay instruction fees in circumstances where instructions were given without full disclosure of the conflict situation.

22. Costs in the cause.

**Dated and delivered in open Court this 4<sup>th</sup> day of June, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Applicant Kimeto – Present

Tiego for Respondent – Present