



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**MISC CIVIL CAUSE NO. 39 OF 2019**

**IN THE MATTER OF TAXATION OF PARTY AND PARTY BILL OF COSTS**

**RICHARD OTIENO OLOO.....APPLICANT**

**-VERSUS-**

**ANASTACIA ANDITI OLOO....1<sup>ST</sup> RESPONDENT**

**PETER OKECH OMBURO.....2<sup>ND</sup> RESPONDENT**

**RULING**

Through a Chamber Summons Application dated 23/3/2021, the applicant seeks the following orders;

- a. That this court be pleased to enlarge time for the Applicant to file this reference to the ruling of the Deputy Registrar delivered on 18/3/2021 to the Party and Party Bill of Costs dated 4/12/2019.**
- b. That this court be pleased to set aside the said ruling expunging the submissions dated 2/11/2019, striking out the Party and Party Bill of costs dated 4/12/2019.**
- c. That this court be pleased to refer back the Bill of Costs to the Deputy Registrar for taxation in accordance with the law.**
- d. That this court be pleased to reinstate the submissions dated 2/11/2019 on record and the same be relied upon.**
- e. Costs be awarded to the Applicant.**

The application is supported by the Affidavit of Counsel for the Applicant, Mr. Obach Humphrey and is premised on the grounds found on the face of it. It is also noted that this is the lead file in two other taxation files being **Miscellaneous Applications Nos. 38 and 39 of 2019**.

The applicant's case is that the Deputy Registrar erred in finding that the Respondents were not served with the bill of costs while the same was served and duly received by the Respondents; that the Applicant served the Respondents with the taxation notice on 16/1/2020 which was received under protest; that the Deputy Registrar erred in expunging the Applicant's submissions dated 2/11/2019 and the bill of costs dated 4/12/2019; that the Respondents' Counsel misled the court with an oral application based on

falsehood knowing very well that they were served by the Applicant's Advocates. The Applicant will suffer great prejudice if the ruling of the Deputy Registrar dated 18/3/2021 is not set aside.

The application was opposed. The Respondents through the firm of Gembe Capis Omolo & Co. Advocates filed grounds of opposition dated 22/4/2021 which are as follows:-

- a. The application offends the mandatory provisions of the law upon which it is premised.**
- b. The application is supported by a supporting affidavit not sworn by the Applicant, thus rendering it incompetent, null and void.**
- c. Prayers 2, 3, 4 and 5 are convoluted with prayer 1 which has no basis in law.**
- d. The application is defective, frivolous, vexatious and an abuse of the court process.**
- e. This court lacks jurisdiction to grant the orders sought.**

Parties canvassed the Application by way of written submissions which I have considered. On whether this court should set aside the ruling by the Deputy Registrar on 18/3/2021, the appellant He submitted that the bill of costs dated 4/12/2019 was served upon the Respondents on 4/1/2020 and the submissions were served upon the Respondents' Advocates through their clerk in court; that the notice of taxation was served upon the Respondents on 16/1/2020 but it was received under protest; that there is an affidavit of service on record sworn by the Applicant's Advocate on 16/1/2020 to confirm this fact; that therefore, the Deputy Registrar erred in finding that the bill of costs and the submissions were not served upon the Respondents. The Applicant further supported his submissions by the finding of the court in **Justus Mungumbu Omiti vs Walter Enock Nyambati Osebe & 2 Others (2010) eKLR** and the provisions in **Section 107 of the Evidence Act, Rule 13A of the Advocates Remuneration Order and Article 159 (2) (b) and (d) of the Constitution.**

The Respondents' submissions are dated 12/7/2021. The Respondent's Counsel Gembe Advocate submitted that the application is brought under Rule 11 of the Advocates Remuneration Order but the same ought to be Paragraph 11 of the Advocates Remuneration Order; that without due amendment, the court is not seized of jurisdiction to grant the orders sought in the application. The Respondents referred to the findings in the case of **Rose Jebor Kipngok vs Kiplagat Kotut (2020) where it was held that if a party does not invoke the correct the correct Constitutional or Statutory provisions, the court has no option but dismiss the application.** Further, the Respondents submitted that the present application ought to have been preceded by an order enlarging time as envisaged under Paragraph 11 sub - paragraph 4 of the Advocates (Remuneration) Order, hence the application is dead upon filing and prayer 2, 3, 4 and 5 cannot be granted.

The Respondents further submitted that the court record indicates that on 12/11/2020, 17/12/2020 and 9/3/2021 Counsel for the Respondents indicated to court the none service of the submissions by the Applicant. It was for this want of service that the Deputy Registrar was moved to expunge both the submissions and the bill of costs thus the application is frivolous as the Applicant's Counsel does not explain why he never attended court. The Respondents submitted that the application is null and void as it offends Paragraph 11 (2) of the Advocates Remuneration Order as it is not supported by an Affidavit sworn by the party. The Respondents concluded that the only affidavit of service on record indicates service of the bill of costs and taxation notice but there is no indication that submissions were served.

I have carefully considered the application and the rival arguments by both parties. The two main issues for determination is:-

- a. Whether the application is incompetent.**
- b. Whether the application as filed is premature.**
- c. Whether the ruling and order of the Deputy Registrar delivered on 18/3/2021 should be set aside.**

On the competence of the application, the Respondent's Counsel submitted that the application was filed under the wrong provisions of the law hence it is incompetent. The application was filed pursuant to Section 1A, 1B & 3A of the Civil Procedure Act and Order 22 Rule 25 of the Civil Procedure Rules. The former provisions, invoke the inherent jurisdiction of the court while the latter provision under the Civil Procedure Rules provides for stay of execution pending suit between the decree holder and judgement debtor.

In his prayers in the application, the Applicant has not asked this court to stay any ensuing execution; but the Applicant has invoked the inherent powers and jurisdiction of this court which is proper as I shall expound later on in this ruling. Further, the Respondents contend that the application indicates "**under Rule 11 of the Advocates (Remuneration) Order**" but the same ought to be "**Under Paragraph 11 of the Advocates (Remuneration) Order**" and hence the court is not seized of jurisdiction to grant orders sought in the application.

Article 159 (2) (d) of the Constitution, urges the courts in exercising judicial authority to decide cases without regard to procedural technicalities. It is this court's view that the failure of the Applicant's Counsel to cite the correct provision as a "Paragraph" instead of a "Rule" cannot render the whole application as incompetent. It was a mere error. The substance of the application is clearly under paragraph 11 of the Advocates Remuneration Order.

I should also observe that the case law referred to and attached by Counsel is not the proper one. The proper case law but with the same parties is Supreme Court of Kenya Civil Application No. 34 of 2019 which was decided on 4/9/2020. The cited case law is distinguishable with the instant one as the Applicant therein failed to cite the specific Appellate Court Rules for Certification of the Appeal.

**On whether the application is premature, Paragraph 11 (1) and (4) of the Advocates Remuneration Order provides:-**

**(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.**

**(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.**

It is common knowledge and rule of practice that appeals from the decision of the taxing officer are commenced by way of Reference to the High Court.

Paragraph 11 Rule (1) of the above provision provides that when a party is not satisfied with the decision of a taxing officer, they should within fourteen (14) days after the decision, give notice in writing to the taxing officer of the items of taxation they wish to object. Rule 4 provides for the discretionary powers of the High Court to enlarge time.

**Paragraph 2 of the Advocates Remuneration Order provides for the application of the Order as follows:-**

**This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) and in a Tribunal established under the Rent Restriction Act (Cap. 296).**

The application of the Order is within the following parameters;

**a. Remuneration of an Advocate in contentious and non - contentious matters.**

**b. The taxation thereof in matters enumerated above.**

**c. Taxation of costs as between Party and Party in contentious matters in the High Court, Subordinate Court (Other than Kadhi's Courts) and Tribunals appointed under Cap 301 and Cap 296.**

I have found it prudent to outline the application of Paragraph 2 of the Order owing to the unique circumstances of the instant application. The instant application does not challenge the outcome of taxation proceedings before the taxing officer. That is, the application does not object to items of taxation. The application seeks reinstatement of the expunged submissions dated 2/11/2019 and the party and party bill of costs dated 4/12/2019 which was struck off.

I have gone through the Advocates Remuneration Order with a fine-tooth comb. There seems to be no guidance or provisions on how to deal with appeals from the taxing officer on decisions other than those arising from taxation of the bill of costs. In other words, there are no specific enabling provisions for which appeals of other decisions from the taxing officers can be brought to the High Court and the timelines for filing such appeals. Nevertheless, there can never be a vacuum in the law.

I am of the view that where there are no specific provisions under the law for making such like applications, **Section 3 of the Civil Procedure** is applicable where the court is empowered to invoke its special jurisdiction or power conferred, or any special form or procedure prescribed by or under any other law for the time being in force. In addition, the Court may also make orders by invoking the inherent jurisdiction as stipulated in **Section 3A of the Civil Procedure Act** to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court. For the above reasons, the Applicant's application is not premature or incompetent.

In his submissions and the prayers in the application, the Applicant has asked this court to set aside the ruling delivered on 18/3/2021 expunging the submissions dated 2/11/2019 and striking out of the bill of costs dated 4/11/2019. I do not see how it is possible that submissions to the bill of costs would have been filed before the drawing, filing and service of the bill of costs. I believe it was an error and that Counsel for the Applicant is referring to the submissions dated 2/11/2020.

The contention by the Applicant is that the allegations by the Respondents' Advocates that they were not served with the submissions is false and therefore the Deputy Registrar ought to have investigated the allegations before expunging the bill of costs. The Respondents submitted that there is no evidence of service of the submissions and therefore based on that, the Deputy Registrar expunged the bill of costs as the same would serve no judicial purpose on record without service at all.

Parties first took directions before the Deputy Registrar on 21/1/2020 and she directed that each party to file and serve submissions within 14 days each beginning with the Applicant. It was further directed that highlighting of the submissions was to be done on 24/2/2020. On the said date, the court was not sitting and the registry issued another date being 12/11/2020. This date was taken by the Applicant and he was directed to serve the Respondents. Despite taking the date of 12/11/2020, the Applicant did not attend court on that date, but the Respondents did.

On the proceedings of 12/11/2010, the Respondents' Counsel informed the court that he had not been served with the Applicant's submissions. The court extended the time to enable him to comply, on 17/12/2020. On the said date, the Appellant's counsel did not appear in court despite service via email. The Deputy Registrar noted that the email which the service was effected was different from the one in the return of service by the Respondent and gave a further mention date of 9/3/2021. There is an affidavit of service on record dated 6/3/2021 which shows that the mention notice was served upon and received by the Applicant's Counsel on 28/1/2021 which has not been disputed.

Again on 9/3/2021, Applicant's Counsel did not attend court and it is then that Respondents' Counsel through an oral application, moved the court to expunge the submissions and strike out the bill of costs for want of service. The Respondents asked that similar orders apply to Misc Applications 38 and 39 of 2019. A ruling on the application which is the subject of this judgment was reserved for 18/3/2021.

From the above observation, there was obviously laxity on the part of the Applicant's Counsel for failure to attend court three times despite service. Counsel for the Applicant failed to act diligently in prosecuting the bill of costs dated 4/12/2019 in Miscellaneous Applications 37, 38 and 39 all of 2019. Upto date, the counsel, has failed to explain to this court his failure to attend court on those three occasions which he was served or even on 12/11/2020 a date which his clerk took at the registry. Though he has was acting for the applicant, he seemed to be sitting back and instead the Respondent's counsel was keen on having the application prosecuted. Equity does not aid an indolent person and the applicant was one.

Although the Applicant strenuously submitted that he served the Respondent's Counsel through his clerk, there is no evidence even in the present application to support that contention. It is not in dispute that the submissions were filed; what is in dispute is the service of the submissions on the Respondent's counsel. Contrary to the orders of 21/1/2020, the Applicant's Counsel failed to serve submissions as directed by the court. It is trite law that court orders must be obeyed and taken seriously. In the absence of the Applicant's Counsel attending and guiding the court as to the true position on record, there is nothing more the Deputy Registrar would have done apart from striking out the bill of costs for want of service of the submissions on the Respondents to enable them respond and proceed with the hearing of the Bill of costs. It was also proper to strike out the bill of costs for they would not have served any purpose in the absence of service of submissions.

In the exercise of the inherent powers of this court, the court has to act judiciously. The court has to determine whether the applicant was diligent and acted reasonably in the circumstances of this case. This court expected a reasonable explanation from the applicant. On three different occasions, the court indulged Counsel for the Applicant to attend court to take directions on his application but without giving any explanation, he did not. He has not tendered any explanation for his conduct. For the failure to attend court three times and failure to serve his submissions, this court finds that the Applicant is not deserving of the exercise of this court's discretion to grant the orders sought. In the end, the application dated 23/3/2021 is hereby dismissed with costs to the Respondents. These orders apply to **Misc Application Number 37 of 2019** Richard Otieno Oloo =vs= Anatacia Anditi Oloo and Peter Oketch Omburo and **Misc Application Number 38 of 2019** Richard Otieno Oloo =vs= Anatacia Anditi Oloo and Peter Oketch Omburo.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

Ms. Kijana holding brief for Mr. Gembe for the Applicant.

No appearance for the Respondents.

**Nyauke** Court Assistant



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