



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL MISC. APPL. NO. 113 OF 2017**

**MWANIKI GACHOKA & COMPANY ADVOCATES.....PLAINTIFF**

**-VERSUS-**

**ARISTIDE BRILLANT NKOUMONDO.....RESPONDENT**

**RULING**

1) The subject matter of this ruling are two applications. The first application is the motion dated 10<sup>th</sup> November 2020 taken out by the advocate/respondent in which he sought for the following orders:

*a) Judgement be and is hereby entered in favour of the applicant, Mwaniki Gachoka & Company Advocates, for the sum of kshs.23,046,039.00 pursuant to the certificate of taxation dated 7<sup>th</sup> October 2020.*

*b) Interest be and is hereby granted on prayer 1 hereinabove at court rates from 7<sup>th</sup> October 2020 until payment in full.*

*c) Costs in the applicant's favour.*

2) The applicant filed in support of the motion, the affidavit sworn by Raphael Ndirangu Gachoka. In response to the aforesaid application Aristide Brillant Nkoumondo, the Client/Applicant filed the chamber summons dated 30<sup>th</sup> November 2020 whereof he sought for the following orders

*a) THAT there be a stay of the proceedings and enforcement or execution of the ruling of the taxing master dated and delivered on 24<sup>th</sup> September 2020 and the resulting certificate of costs pending the hearing and determination of the reference to this honourable court dated 30<sup>th</sup> November 2020 or until further orders of this honourable court.*

*b) THAT the costs of this application be provided for.*

3) The Client/Applicant filed an affidavit he swore in support of the summons. The Advocate/Respondent filed the replying affidavit sworn by Paul Mwaniki Gachoka to oppose the

summons.

4) This court gave directions to have the two applications determined together by way of written submissions. I think it is appropriate to first determine the summons dated 30<sup>th</sup> November 2020. I have considered the rival grounds stated on the summons and the facts deponed in the rival affidavits. I have further considered the rival written submissions of the parties.

5) Aristide Brillant Nkoumondo, the Client/Applicant beseeched This court to set aside the decision of Hon. L. A. Mumassabba, learned Deputy Registrar delivered on 24<sup>th</sup> September 2020 taxing the advocate-client cost at ksh.23,046,039/=.

6) It is the submission of the Client/Applicant that the taxing officer

misdirected herself in basing her decision on a Party to Party certificate of costs dated 6<sup>th</sup> February 2017 for ksh.13,244,850/= which was set aside in H.C.C.C no. 184 of 2014 East Africa Breweries Ltd =vs= Aristide Brillant Nkoumondo. It stated that upon setting aside of the aforesaid Party to Party certificate of costs a fresh certificate of taxation was issued for the sum of ksh.3,386,670/50 on 14<sup>th</sup> May 2019.

7) The Advocate/Respondent urged this court to dismiss the reference (summons) because the same is incompetent having been filed out of time and in contravention of paragraph 11 of the Advocates Remuneration Order. It is further pointed out that the Client/Applicant has failed to seek for leave to file a reference out of time as required under Paragraph 11(4) of the Advocate Remuneration Order, 1962.

8) In response to the Advocate/Respondent's submission, the Client/Applicant stated that he applied for reasons and duly paid on 5<sup>th</sup> October 2020 but received a copy of the ruling on 20<sup>th</sup> November 2020 and that he filed the reference on 30<sup>th</sup> November 2020, within the requisite 14 days.

9) Having considered the rival arguments, it is not in dispute that Hon. L. A. Mumassabba, the learned taxing officer delivered her ruling on 24<sup>th</sup> September 2020 in which she taxed costs in this matter at ksh.23,046,039/=. It is also not in dispute that the Client/Applicant filed the instant reference on 30<sup>th</sup> November 2020 nearly two months after the decision on taxation was delivered.

10) It is apparent that the averments made by Aristide Brillant Nkoumondo in his affidavit filed in support of the reference sworn on 30<sup>th</sup> November 2020 that the ruling on taxation was delivered online in the presence of learned counsels from both sides.

11) Lady Justice Thurairaja, in her ruling in respect of the motion dated 30<sup>th</sup> November 2020 delivered on 8<sup>th</sup> July 2021, came to the conclusion that the Client/Applicant requested to be given reasons for the taxation on 5<sup>th</sup> October 2020 and was indeed provided with the reasons on 20<sup>th</sup> November 2020. The learned Judge further concluded that the reference is competently and properly before this court.

12) Having considered the rival arguments, I have also come to same conclusion like Lady Justice B. Thurairaja Jaden that the reference is properly before this court. The question left for the determination of this court is whether the taxing officer misdirected herself in basing her decision on taxation on the certificate of costs on party and party dated 6<sup>th</sup> February 2017 for ksh.13,244,850/= which had been set aside.

13) In response to the Client/Applicant's argument the taxing officer misdirected herself in basing her decision on taxation on a certificate of costs which had been set aside and substituted with a fresh certificate of cost, the Advocate/Respondent urged this court to reject the argument stating that the reliance on the certificate of taxation dated 14<sup>th</sup> May 2019 is incorrect as the same was as a result of a consent order and that the ruling of the taxing officer in party and party costs has never been overturned or set aside on its merits.

14) The Advocate/Respondent accused the Client/Applicant of material non-disclosure and for misrepresenting facts to look as if the ruling was set aside.

15) Having considered the rival submissions on the issue as to whether or not the taxing officer misdirected herself, I have come to the following conclusions. First, that the ruling on taxation in respect of Party and party costs dated 6<sup>th</sup> February 2017 was never set aside nor overturned on its merits, therefore the Client/ Applicant made an erroneous submission that the aforesaid certificate of costs for ksh.13,244,850/= was set aside and replaced with the certificate of costs of ksh.3,386,670/50.

16) The truth of the matter is that there are two certificates of costs. One is that issued by the taxing officer upon determining the Party and Party Bill of costs while the other arose out of a consent order recorded by the advocates for the plaintiff and the

defendant.

17) With respect, I am persuaded by the Advocate/Respondent's submission that since the certificate of taxation was as a result of the consent of the parties, the same cannot be used as a ground to vary or overturn a decision of the taxing officer determined on merits. In other words, the certificate of taxation issued on 14<sup>th</sup> May 2019 being the product of a consent order cannot be used to infer that the ruling of the taxing officer made on 6<sup>th</sup> February 2017 was set aside and or varied by the court.

18) Secondly, that since the Client/Applicant did not deem it fit to disclose the consent order before the taxing officer, then the taxing officer could not be in a position to rule on the same. I am persuaded by the Advocate/Respondent's averment that the issue is now being raised as an afterthought to delay the conclusion of this matter.

19) It is apparent that the Client/Applicant has not explained why he did not inform the taxing officer of the certificate of taxation and the circumstances under which it was issued. In the end, I find that the learned taxing officer cannot be faulted and cannot be said that she misdirected herself.

20) The Client/Applicant has failed to provide valid grounds to warrant this court to interfere with the decision of the taxing officer. I am convinced that the taxation was done in accordance with Schedule 6B of the Advocates Remuneration Order. The Client/Applicant's reference dated 30<sup>th</sup> November 2020 is found to be without merit. The same is dismissed with costs being awarded to the advocate/respondent.

21) Having determined the reference, I now turn my attention to the advocate/respondent's motion dated 10<sup>th</sup> November 2020. In the aforesaid motion the advocate/respondent sought for entry of judgment in terms of the certificate of taxation dated 7<sup>th</sup> October 2021. The Client/Applicant relied on the arguments put forward in support of his reference dated 30.11.2020 to oppose the motion.

22) It is apparent that the Advocate-Client bill of costs was taxed at ksh.23,046,039/= and a certificate of taxation dated 7<sup>th</sup> October 2020 was issued. Having dismissed the Client/Applicant's reference, the advocate/respondent therefore is entitled to have the orders sought in the motion dated 10.11.2020. I find the motion dated 10<sup>th</sup> November 2020 to be meritorious. Consequently, the application is allowed thus giving rise to issuance of the following orders:

**i. Judgment is entered in favour of Mwaniki Gachoka & Co. Advocates, the Advocate/Respondent and against Aristide Brillant Nkoimondo, the Client/Applicant in the sum of ksh.23,046,039/= pursuant to the certificate of taxation dated 7<sup>th</sup> October 2020.**

**ii. The aforesaid sum to attract interest at court rates from 7<sup>th</sup> October 2020 until the date of full payment.**

**iii. The advocate/respondent to be paid costs of the application.**

**For the avoidance of doubt, the reference dated 30<sup>th</sup> November 2020 is dismissed while the motion dated 10<sup>th</sup> November 2020 is allowed with costs being awarded to the advocate/respondent.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30<sup>TH</sup> DAY OF DECEMBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent



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