



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**MISCELLANEOUS CIVIL APPLICATION (SIC)450 OF 2014**

**JOHN NYARIKI.....PLAINTIFF(SIC)**

**VERSUS**

**BRITISH – AMERICAN INSURANCE**

**COMPANY (KENYA) LIMITED.....DEFENDANT(SIC)**

**RULING**

**INTRODUCTION**

1. The Applicant's Chamber Summons application dated 23<sup>rd</sup> September 2014 and filed on 24<sup>th</sup> September 2014 was brought pursuant to the provisions of Paragraph 11(2) of the Advocates Remuneration Order 51 and Section 3A of the Civil Procedure Act, the Inherent Powers of the Court and all enabling provisions of the law. It sought the following orders:-

1. **THAT this Honourable Court be pleased to set aside the decision of the Ruling by the Deputy Registrar dated 10<sup>th</sup> September 2014.**
2. **THAT this Honourable Court be pleased to award the Applicant such costs as are in accordance with the Advocates (Remuneration) Order.**
3. **THAT costs of this application be provided for.**

**THE APPLICANT'S CASE**

2. The application was supported by the Applicant's Affidavit that was sworn on 23<sup>rd</sup> September 2014. His Written Submissions and Bundle of Authorities were both dated and filed on 15<sup>th</sup> December 2014.

3. The Applicant filed a Bill of Costs dated 20<sup>th</sup> July 2012 in the High Court. On 10<sup>th</sup> September 2014, the Taxing Master declined to tax the said Bill of Costs that had been filed in accordance with Paragraph 69 of the Advocates Remuneration Order and instead upheld a Preliminary Objection dated 1<sup>st</sup> October 2012 that had been filed by the Respondent and struck out the said Bill of Costs.

4. The Applicant's case was generally that the learned Taxing Master erred in law and fact in failing to follow the principle that costs follow the event, in failing to assess costs on an indemnity basis, in failing to find that the costs assessed by the lower court ought to have been set off against the taxed costs that

were to be assessed in the Bill of Costs, in appreciating that he had applied for a Certificate of Costs but failed to consider that the Certificate of Costs was not calculated in accordance with Schedules V and VI of the Advocates Remuneration Order, in failing to give him an opportunity to be heard on the Bill of Costs and in holding that Section 68A of the Advocates Act was the applicable section to the exclusion of other provisions of the Advocates Remuneration Order.

5. Being aggrieved by the said Taxing Master's decision, the Applicant filed the present Reference which he urged the court to grant as he had prayed.

### **THE RESPONDENT'S CASE**

6. In opposition to the said application, on 21<sup>st</sup> October 2014, Jesse Charagu, an Assistant Manager, Legal & Compliance of the Respondent swore a Replying Affidavit on behalf of the Respondent. It was filed on 22<sup>nd</sup> October 2014. However, pursuant to the court Order of 27<sup>th</sup> October 2014, the said deponent swore another Replying Affidavit on 30<sup>th</sup> October 2014 that was filed on 31<sup>st</sup> October 2014 as he could not amend the Replying Affidavit that was sworn on 21<sup>st</sup> October 2014. The Respondent's Written Submissions were dated and filed on 21<sup>st</sup> January 2015.

7. The Respondent stated that after the delivery of judgment in **RMCC No 9533 of 2002**, the Applicant applied for a Certificate of Costs in **HC Misc Cause No 469 of 2014** which Certificate was issued on 11<sup>th</sup> January 2011. It was emphatic that as the said Certificate of Costs had not been set aside to date, the said Taxing Master correctly upheld its Preliminary Objection because the Applicant's Bill of Costs was an abuse of the court process.

8. It further averred that the said Certificate of Costs was issued in lieu of taxation in accordance with Paragraph 68A (2) of the Advocates Remuneration Order and consequently the Applicant was precluded from taxing a bill of costs once he elected to extract a Certificate of Costs.

9. It was its case that taxation and ascertainment of costs in a certificate of costs were mutually exclusive under the provisions of Order 21 Rule 9 of the Civil Procedure Rules and that in any event, the Applicant had not been precluded from enumerating his costs as desired when he applied for the Certificate of Costs. It was also his averment that the said Taxing Master considered the parties' respective positions when she rendered her Ruling of 10<sup>th</sup> September 2014.

10. The court carefully considered the cases that were relied upon by the Applicant and noted that the same represented the correct position of the law, that costs follow the event and that a successful party ought to be reimbursed for the costs he has incurred in prosecuting or defending a cause of action. In addition, a Taxing Master has discretion to assess the instruction fees and Getting-Up Fees and that an appellate court will not interfere with the discretion of a Taxing Master on the question of quantum unless it is satisfied that the said Taxing Master has proceeded on the wrong principles.

11. In this regard, the Applicant relied on the cases of **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited & Others EALR [1972] EA**, **Wambugu, Motende & Co Advocates vs Attorney General of Kenya (2013) eKLR** amongst several others that were listed in his Bundle of Authorities.

12. Unfortunately, none of the cases addressed the issue of whether or not a party can file a Bill of Costs in the High Court where a Certificate of Costs has been issued by a taxing master under the provisions of Paragraph 68B of the Advocates Remuneration Order which stipulates as follows:-

**“Where in any case to which paragraph 68 could apply, no increase on the scale fee is obtained on a bill of costs lodged for taxation under paragraph 70, no further costs shall be allowable than would have been allowed under paragraph 68A.”**

13. Paragraph 68A of the Advocates Remuneration Order provides as follows:-

**“Notwithstanding anything to the contrary in this Order, when the Registrar of the High Court enters final judgment under Order XLVIII, rule 2 of the Civil Procedure Rules (Cap 21, Sub. Leg.), he may, on application in writing and without the filing or taxation of a bill of costs or of notice to any party, sign a certificate of the costs of the suit calculated with item 15 of Schedule VI.”**

14. It is clear that Paragraph 68A of the Advocates Remuneration Order was not applicable in the circumstances of the case herein as judgment was neither entered by a Registrar of the High Court nor was final judgment entered under Order XLVIII Rule 2 (now replaced with Order 50 Rule 2) of the Civil Procedure Rules in which it is stated as follows:-

**“Judgment may, on application in writing, be entered by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:**

- a. **under Order 10: (consequence of non-appearance, default of defence and failure to serve);**
- b. **in all other cases in which the parties consent judgment being entered in agreed terms: or**
- c. **under Order 25, rule 3 (costs, where suit withdrawn or discontinued).**

15. Indeed, a perusal of the Decree given on 29<sup>th</sup> April 2011 shows that the same was made pursuant to **CMCC No 9533 of 2002 John Nyariki vs British American Insurance Co Ltd** having come for hearing on 19<sup>th</sup> and 20<sup>th</sup> January 2011 before Honourable Mrs. Atika S.R.M. and judgment being delivered on 29<sup>th</sup> April 2011.

16. By virtue of Paragraph 68A of the Advocates Remuneration Order, it is clear that costs in a subordinate court cannot therefore be calculated in accordance with Item 15 of Schedule VI of the Advocates Remuneration Order. The position in law is that costs in a subordinate matter are assessed under Schedule VII of the Advocates Remuneration Order which is specifically titled **“Costs of proceedings in subordinate courts.”**

17. The court’s position is further fortified by Paragraph 51 of the Advocates Remuneration Order that states that:-

**“Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi’s Courts) is that set out in Schedule VII.”**

18. The Applicant did not elect to tax his Bill of Costs under Schedule V of the said Advocates Remuneration Order as provided in Paragraph 22 (1) of the Advocates Remuneration Order and hence the applicable Schedule was VII.

19. Paragraph 22 (1) of the said Order provides as follow:-

**“In all cases in which any other Schedule applies an Advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.”**

20. In this regard, the court was in agreement with the holding of Kasango J in the case of **Angelo Gitonga vs Angelo Gitonga & Another [2010] eKLR** that was relied upon by the Respondent where she observed that:-

**“...There is no provision in the Advocates (Remuneration) Order for taxation of Subordinate Court’s costs. A practise is however arising, where parties in the subordinate court file**

**laborious and detailed bills of costs, and then engage the magistrate in taxation. That in my view is uncalled for and should be discouraged.** Subordinate court's party and party costs should be assessed following the provisions of Schedule VII of the Order..."

21. There was no indication that the Applicant applied for a Certificate of Costs. What was, however, evident from page 2 the Ruling of 10<sup>th</sup> September 2014 of Hon Nyambu was that a decree containing particulars of the costs payable was drawn and duly approved. It was also stated in the said ruling that on 29<sup>th</sup> March 2012, the advocates for the parties filed a consent wherein they agreed on the mode of payment.

22. There is no express provision that bars a party having a matter in the subordinate court from applying for a certificate under the provisions of Paragraph 68A (2) of the Advocates Remuneration Order. However, bearing in mind that Paragraph 68A(1) of the Advocates Remuneration Order relates to final judgment entered by a Registrar of the High Court, it does appear to this court that the Certificate of Costs issued by the lower court was not that that was envisaged in Paragraph 68A (1) of the Advocates Remuneration Order but rather that that was issued under Schedule VII of the Advocates Remuneration Order.

23. However, if the judgment had been entered by a Registrar of the High Court as aforesaid and an applicant applied for a Certificate of Costs which a Registrar declined to issue and certified his refusal in writing, such an applicant would have filed a reference under Paragraph 11 of the Advocates Remuneration Order as provided in Paragraph 68A (3) of the Advocates Remuneration Order whereupon the jurisdiction of the High Court would have been invoked.

24. In particular, Paragraph 68A (3) of the Advocates Remuneration Order stipulates that:-

**"If the Registrar refuses an application under this paragraph he shall certify his refusal in writing to the applicant and the applicant may within fourteen days of receipt of the certificate give notice of objection, whereupon paragraph 11 shall apply."**

25. It is important to point out that the Deputy Registrar proceeded on the correct principles when she upheld the Respondent's Preliminary Objection. The procedures adopted by the Applicant were clearly erroneous as he had applied for a Certificate in lieu of taxation.

26. Having said so, Note 2 of Schedule VII of the Advocates Remuneration Order provides that costs exceeding the Schedule may be ordered on special grounds arising out of the nature and importance or difficulty or the urgency of the court. However, it did appear to the court that the Applicant did not object to the assessed costs. If he did, he did not furnish the court with any evidence in this respect.

27. It was clear from the said Decree that some of the reliefs that were granted to the Applicant herein had not been ascertained. The same were as follows:-

a. ...

b. ...

c. ...

**d. The Defendant to release all commissions for 2001 and 2002 and pay the commission therein and to continue to do so for the client's holders who are still servicing their policies upto the 10<sup>th</sup> year.**

**e. Loss of Tax Relief from part of year 2000, year 2001 and year 2002 to be calculated and paid.**

f. ...

g. ...

h. ...

i. ...

**j. Interest at court rates on (a), (b) and (c) only.**

28. What the court could ascertain was a sum of Kshs 241,337.37 where the minimum party and party costs under Schedule VII of the Advocates Remuneration Order ought to have been Kshs 25,200/=. Under Schedule VII Paragraph I, costs will be assessed on a higher scale if a matter was defended. In the aforesaid decree, it did appear to the court that the matter was defended as it was indicated that Hon Mrs. Arika heard both counsel for the Plaintiff and counsel for the Defendant. It is not therefore clear to the court why the said costs were assessed on the lower scale leading to the Applicant being awarded Kshs 15,000/=.

29. In the same manner that Kasango J invoked the inherent jurisdiction of the court in the case of **Angelo Gitonga vs Angelo Gitonga & Another** (Supra) as contemplated in Article 165 (2) of the Constitution of Kenya, 2010, this court found that it could have interfered with the assessment of the magistrate in the subordinate court as the assessment was clearly premised on the wrong principles of law and fact.

30. In this respect the court was in agreement with the holdings in the cases of **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited & Others**(Supra), **Wambugu, Motende & Co Advocates vs Attorney General of Kenya** (Supra), **Green Hills Investments Limited vs China National Complete Plant Export Corporation (Complaint) [2004] eKLR** and several others that were relied upon by the Applicant that the court will interfere with the discretion of a taxing master where she has erred on principle. The error of the Taxing Master in the subordinate court was not merely a question of quantum.

31. However, the adequacy or otherwise of the quantum by the Taxing Master was not an issue that was before this court for determination. Notably, the Applicant did not seek the intervention of the said Taxing Master to upset the said assessment of 11<sup>th</sup> November 2011. It would create a dangerous precedent if the court was to overreach itself and ascertain what those costs were. Indeed, several reasons dissuaded the court from re-opening the issue of quantum of the costs that were assessed.

32. Firstly, the court was unable to determine the quantum of the Applicant's claim in the subordinate court as there were reliefs that had not been ascertained and/or liquidated. Secondly, although the Applicant did not present to this court his said Bill of Costs, the court was of the considered view that the same had been filed pursuant to Schedules V and VI of the Advocates Remuneration Order as seen in Paragraphs (9), (11) and (13) of his Supporting Affidavit and the grounds on the face of his application and not Schedule VII of the said Order that was applicable in the circumstances of the case herein.

33. Thirdly, the Taxing Master in **HC Misc Cause No 469 of 2010** was right in upholding the Respondent's said Preliminary Objection as she could not sit on an appeal in a matter that a magistrate had assessed costs in the subordinate court.

34. The proper procedure would have been for the Applicant to have sought intervention of this court if he had been dissatisfied with the magistrate's decision in the subordinate court and for this court to have invoked its inherent jurisdiction as was held in the case of **Angelo Gitonga vs Angelo Gitonga & Another** (Supra) in the event the magistrate would have failed to take into account Note 2 of Schedule VII of the Advocates Remuneration Order but only if the same was applicable in the circumstances of the case therein.

35. Accordingly, having considered the pleadings herein, the affidavit evidence, the oral and Written Submissions and the case law that was relied upon by the parties herein, the court found and held that the Taxing Master rightly found that she could not tax the Applicant's Bill of Costs, a Certificate of Costs

having been issued under Schedule VII of the Advocates Remuneration Order. The same had not been set aside or challenged.

36. Had the Applicant filed a Bill of Costs under Schedule VII of the Advocates Remuneration Order as was contemplated under Paragraph 10 of the said Order and was aggrieved by the decision of the Taxing Master, he could have filed a Reference under Paragraph 11 (2) of the said Order for determination.

The Applicant did not proceed under that procedure and could therefore enjoy the benefit of Paragraph 11 (2) of the said Order.

**DISPOSITION**

37. The Applicant's Chamber Summons application dated 23<sup>rd</sup> September 2014 and filed on 24<sup>th</sup> September 2014 was misplaced and therefore unmerited for the foregoing reasons. The same is hereby dismissed with costs to the Respondent.

38. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of July 2015**

**J. KAMAU**

**JUDGE**