



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS-COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 1474 OF 2001**

**DIAMOND TRUST BANK KENYA LIMITED .....APPLICANT**

**Versus**

**GAREX (K) LIMITED .....1<sup>ST</sup> DEFENDANT**

**FIRESTONE E.A. (1969) LIMITED .....2<sup>ND</sup> DEFENDANT**

**JAMES MWANGI GITAU T/A FOREFRONG AGENCIES .....3<sup>RD</sup> DEFENDANT**

**RULING**

**Amending a Bill of Costs**

[1] I am being asked by a Notice of Motion dated 15<sup>th</sup> July, 2013 to grant the Applicant leave to amend its Bill of Costs in the manner shown in the annexed draft amended Bill of Costs. I am also being asked that upon grant of leave and payment of the requisite court fee, the said Amended Bill of Costs to be deemed as duly filed and served. Finally, the Applicant prays for costs of the application. The said Motion is expressed to be filed under Rule 71 of the Advocates (Remuneration) Order, 2009, Order 51 Rule 1 of the Civil Procedure Rules, 2010 & Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya.

[2] The application is supported by the affidavit of Stephen Kodumbe and is based on the following grounds:-

- a. That the proposed amendments will enable the Applicant's Bill of costs to reflect further and better particulars for the proper attainment of justice.
- b. That it is only just and fair that the Applicant be allowed to bring the whole of its claim in respect of the cause of action herein in the manner proposed.
- c. That no prejudice shall be occasioned to the defendant by the proposed amendment.

**APPLICANT'S SUBMISSIONS**

[3] The Applicant filed submissions on 23<sup>rd</sup> May, 2014 and elaborated upon the above grounds.

It recited some useful background information: That on 29<sup>th</sup> January, 2010 judgment was entered in favour of the Applicant against the Respondents jointly and severally for the sum of Kshs. 400,000/= together with costs and interests from 26<sup>th</sup> August, 1999. A Decree was issued on 26<sup>th</sup> March, 2010. Thereafter the Applicant prepared and filed a Bill of Costs dated 26<sup>th</sup> March, 2010 to recover costs incurred in the suit. This first Bill of Costs that was filed was incomplete as it failed to include all the disbursements, court attendances, filing fees, fees chargeable for correspondences and fees chargeable for copies of pleadings and documents. As a result the Applicant filed an application dated 11<sup>th</sup> April, 2011 seeking leave to amend the Bill of Costs. The said application was, however, withdrawn through Notice of Withdrawal dated 14<sup>th</sup> May, 2014 and filed on 20<sup>th</sup> May, 2014. Therefore, there is no any other application to amend the bill of costs apart from the present one before this Honourable court.

[4] According to the Applicant, despite the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, taxation process is far from over as the Taxing master has not made any determination of any of the bill of Costs filed. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not paid the entire decretal sums as averred because there has not been a final determination on the costs payable to the Applicant. The draft bills of costs annexed to the application seeks to include several chargeable items which had not been previously included in the earlier bill of costs. The present application seeks leave of this Honourable Court to permit the draft amended Bill of Costs to be filed and thereafter taxed by the taxing officer so that the Applicant may recover its costs. Amendment of bills of costs is permitted under Order 71 of the Advocates (Remuneration) order 2009 which provides:

**No addition or alteration shall be made in a bill of costs by the party submitting the same after the bill has been lodged for taxation except by consent of the parties, or by permission or discretion of the court or taxing officer (Emphasis added)**

[5] The Applicant found support in the case of **UNILEVER KENYA LIMITED v THE COMMISSIONER OF INCOME TAX (2003) eKLR**, the High Court (sitting as an appellate court on an income Tax appeal) made the distinction between Order VIA Rule 3(1) of the Civil Procedure Rules and rule 71 of the Advocates (Remuneration) Order 2009 in the following terms:

**“It is true that amendment of pleadings can be allowed at any stage of the suit. That is clearly provided for under Order VIA Rule 3(1) of the Civil Procedure Rules. That rule is not applicable to amendment of Bill of Costs which is provided for under paragraph 71 of the Advocates Remuneration Order, Paragraph 71 does not limit the period within which such an amendment can be allowed. However, the court must be alive to the interest of the other party and can only allow such an amendment at a late sage only where there are very compelling reasons. (Emphasis added)**

Accordingly, the authority cited by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, i.e. **KYALO v BAYUSUF BROTHERS LTD (1983) KLR 229** is irrelevant as it related to amendment of pleadings and not amendment of bill of costs.

[6] The Applicant relied on the decision in Unilever Kenya (supra) in answer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s submission that the application is time – barred; there is no time limit within which such an amendment may be allowed. Rule 71 of the Advocates (Remuneration) Order allows amendment to a Bill of Costs to be made at any time as long as it is with the permission of discretion of the court or taxing officer. Therefore, the application herein is not an abuse of process and it should be allowed as prayed.

[7] The Applicant submitted that the proposed amendments are substantial, necessary and on chargeable items. The amendments will enable; 1) the Applicant to plead the whole amount of costs incurred in prosecuting the suit; and 2) the court to determine the proper amount of costs on the suit in line with the principle that a successful litigant ought to be reimbursed for the costs he has had to incur. That principle of the law constitutes a compelling reason to allow the amendment

sought. The court of Appeal in **PREMCHAND RAICHAND LTD & ANOR v QUARRY SERVICES OF EAST AFRICA LTD & OTHERS (NO.3) [1972] E.A 162** stated:

**The Court must consider the following principles;**

- a. **That costs be not allowed to rise to such a level as to confine access to the wealthy;**
- b. **That a successful litigant ought to be fairly reimbursed for the costs he had had to incur.**
- c. **That the general level of remuneration of advocates must be such as to attract recruits to the profession; and**
- d. **That so far as practicable there should be consistency in the awards made; (Emphasis added)**

[8] The Items sought to be included in the Bill of costs are not exaggerated but are reasonable. They relate to attendances in court all of which are chargeable and recoverable under the Advocates (Remuneration) Order, 2009. It is only fair and just to have them included in the Bill of Costs.

[9] The Applicant argued further that, contrary to claims by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, the proposed amendments do not introduce new matters which will prejudice them because the intended amendments are merely additions of chargeable items. Indeed, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant have not filed anything to show the prejudice that will befall them. They alleged to have paid the decretal sum but have failed to produce any evidence to that effect. In *Unilever Kenya (supra)* the court declined to grant the amendments sought because the taxing officer had completed the taxing process and therefore the decision could only be challenged under Rule 11(2) of the Advocates Remuneration Order. The court felt that by allowing the amendments it would be giving the applicant a second bite at the cherry despite completion of the taxing process and that this would prejudice the respondents. The situation in the present case is quite different; the taxing process has not been completed, the Bill of Costs filed earlier had gaps and was withdrawn so that it could pave way for the present application for amendment. On the other hand, it would be the Applicant that would suffer prejudice if the amendments are not allowed. The Applicant would not have the opportunity to recover the costs that it has incurred despite being the successful litigant. The Respondents will not suffer any prejudice because they have the opportunity to oppose items on the Bill during the taxation process. The Court should allow the amendments..

## **2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' SUBMISSIONS**

[10] The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (hereafter the Respondents) filed the following Grounds of opposition dated 06/08/2013:

- i. That the application is an abuse of the court process as a similar application dated 11/04/2011 was filed and is yet to be determined.
- ii. That the application is filed inordinately late as the material Bill of costs intended to be amended is dated 21/04/2010 and filed on even date.
- iii. That the application is time-barred, as the taxation process is over, the taxing master having directed on 02/07/2010 that both parties file their respective submissions, and the Respondents filed theirs on 08/07/2010. The matter was pending ruling.
- iv. That, the intended amendments want to introduce new matters that will prejudice the respondents.
- v. That the interest of justice is for the dismissal of the application.
- vi. That the Applicant has been paid the decretal sums in full by the 2<sup>nd</sup> defendant.
- vii. That the justice of the case is in favour of the respondent

[11] The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also filed submission to amplify the above grounds; 1) That the applicant filed an application dated 01/07/2011 on similar grounds and seeking similar orders which application has never been prosecuted; 2) That the Applicant has not discharged the burden for the inordinate delay; and 3) That the Applicant has no legal or factual basis for filing this

application as it has been paid the decretal sums in full by the 2<sup>nd</sup> defendant. They cited the relevant law and stated that in exercising discretion, the courts should take into consideration that an amendment does not work injustice to the other side. But the Applicant does not excite exercise of discretion in its favour and therefore the application should be dismissed with costs. They relied on **SYLVESTER KYALO AND ANOTHER v BAYUSUF BROTHERS LTD (1983) KLR 229** where Madan, Law and Miller JJA held that applications for amendment of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. In this case the amendment came six years late. They submitted further that Section 6 of the Civil procedure Act prohibits a court from proceeding with a suit or proceedings between the same parties, where a similar matter is still pending in court with jurisdiction to grant the orders being sought. A similar application dated 11/04/2011 was filed and is yet to be determined. See **LAWRENCE MASEGAI NYABOGA v TRANS-NATIONAL BANK LTD (CIVIL CASE 138 OF 1999)**, Sitati J held that the Applicant/applicant's application had not merit because of the delay to set the suit down for hearing and that he was guilty of abuse of the due process of court. For those reasons, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents believe the Applicant's application is not in the best interests of justice.

## **COURT'S RENDITION**

[12] I see several issues but which are all inter-twined. The first issue is of preliminary significance and it is, whether the application for amendment has any legal, basis. The other issues are; whether this application: is time-barred; or is tinctured with inordinate delay; or is an abuse of the process of the Court; and will cause prejudice to the Respondents. Due to the inextricable nature of the last three issues, I propose to deal with them under a conglomerate title of 'Exercise of Discretion of Court'. Let me deal with the first issue.

### **Legal basis of amendment of a bill of costs**

[13] I will tackle this issue from two stand points: 1) the statutory foundation of amendment of a Bill of Costs; and 2) the competence of the application before me. The former is straight forward. Amendment of bills of costs is permitted under Order 71 of the Advocates (Remuneration) order 2009 but by the consent of the parties, or by the permission or discretion of the Court or taxing officer. Order 71 of the Advocates (Remuneration) Order 2009 provides:

**No addition or alteration shall be made in a bill of costs by the party submitting the same after the bill has been lodged for taxation except by consent of the parties, or by permission or discretion of the court or taxing officer.**

[14] Therefore, I make it clear that application for amendment of a bill of costs is governed by the said Order 71 of the Advocates (Remuneration) order 2009 and not Order VIA Rule 3(1) of the Civil Procedure Rules. That distinction was made in a subtle manner in the case of **UNILEVER KENYA LIMITED v THE COMMISSIONER OF INCOME TAX (2003) E KLR**, (supra). The instant application is brought under Order 71 of the Advocates (Remuneration) order 2009 and is, thus, properly grounded.

[15] The competence component entails the Respondents' argument that there is an existing application which is similar to and based on same grounds as those on which the instant application is premised. The application which the Respondents claim is pending ruling is the one dated 17<sup>th</sup> April, 2011. The Applicant on the other hand claims that it filed a notice of withdrawal of the said application for amendment dated 17<sup>th</sup> April, 2011. Surely, from the record a Notice of Withdrawal was filed in Court on 20<sup>th</sup> May, 2014. But, I do not see any evidence of service of the said Notice on the file. Nonetheless, that issue has not been contested by any party and I leave it at that. The only quarrel I may fasten with the Applicant is that it filed the said Notice of Withdrawal after the Application dated 15<sup>th</sup> July, 2014: which means that, at one time, the two applications for amendment of the bill of costs herein were subsisting at the same time. That may be an improper

state of things for which the Applicant should receive a judicial scolding, and in extreme circumstances such is deemed to be an abuse of the court process. But, when such scenario emerges, the law give the offending party certain options: elect to withdraw one application and proceed with the other as long as it is such move is not contrived to abuse the process of the Court. In the present case, the Applicant, although belatedly, withdrew the earlier application: a gesture that makes me to spare the application the proverbial "Sword of the Damocles". But, that penultimate decision is subject to the findings of the court on the other issues and grounds herein. I presume the notice of withdrawal was properly given and the offending application was served a legal demise. Accordingly, I hold and find that the application before me is sound and properly before the Court. Before I quit this point, I should correct a misrepresentation by the Respondents, and state that the earlier application was not pending ruling by the taxing master. It was yet to be heard although the Respondents had filed submissions. The way is now clear for determination of the other issues in the manner below.

### **The arguments that application is time-barred**

[16] I can do no better on this issue than to recite **UNILEVER KENYA LIMITED v THE COMMISSIONER OF INCOME TAX (2003) E KLR**, (supra) that:

**"... Paragraph 71 does not limit the period within which such an amendment can be allowed. However, the court must be alive to the interest of the other party and can only allow such an amendment at a late sage only where there are very compelling reasons"**.

[17] I find that the application herein for amendment of the bill of costs is not time barred.

### **Discretion of the Court**

[18] I promised to deal with the other grounds under this conglomerate heading because they all relate to the exercise of discretion by the Court. At the risk of dull monotony, courts have said time and again that discretion of the Court should be exercised in accordance with established legal principles; not whimsically; not capriciously. It should depend also on the circumstances of each case. Amendment, albeit would ordinarily be granted, is not a matter of course. The usual principles which attend amendment of pleadings also apply to amendment of a bill of costs. The Court must see whether the amendment will prejudice or deny the Respondent an accrued defence or right; whether the amendment is introducing a new matter; whether the amendment are necessary and will assist the court determine the real issues in controversy completely and effectually. Delay in bringing the application is also an aspect of prejudice to the Respondent and should be so considered.

[19] Applying the said test, the application herein was filed in 2013 and the original bill of costs was filed in 2010. There is a delay there. But as a matter of justice, even where there has been a delay in applying, other higher objectives of ensuring substantive justice is served would dictate favourable exercise of discretion. The Applicant is the successful party in this suit and was awarded costs. It applied earlier on to amend the bill of costs but withdrew that application which negates labelling of such litigant as indolent or not keen on pursuing its claim. In that context, although there is some form of delay, it is not contumelious and therefore inexcusable. I will go back to the general rule for guidance, that, ordinarily, unless an amendment of the bill of cost would occasion prejudice on the Respondent, it should be allowed. Most of the amendments relate to attendances and are items which are permitted under the Advocates (Remuneration) Order. It is not, therefore, defensible for the Respondents to state that the amendments are introducing new matters or will cause prejudice on them. One other matter; taxation process is not concluded as claimed by the Respondents; the bill of costs is yet to be taxed. And, therefore, questions that the items being proposed for amendments are exaggerations or that the 2<sup>nd</sup> Defendant has paid all costs due to the Applicant are matters within the province of the taxing officer and are normally taxed off. They are of no use at this level. In addition, the items as presented are necessary in

order to enable the Court determine, completely and effectually, the costs payable on the suit between the parties. That is the real issue in controversy here. And as I stated, I do not see the prejudice the Respondents will suffer by this amendment. From all the things I have said, it clear the direction the Court is taking. The upshot is that the application dated 15<sup>th</sup> July, 2013 is allowed. Except; the costs of the application are awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents because it is the Applicant's negligent approach in filing incomplete bill of costs that subjected the Respondents to unnecessary costs in defending this application. It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 18<sup>th</sup> day of September, 2014**

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**F. GIKONYO**

**JUDGE**