REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.158 OF 2014

VISHISHT TALWAR …….....… APPELLANT/APPLICANT

VERSUS

ANTHONY THUO KANAI t/a A. THUO KANAI ADVOCATES ….. RESPONDENT

R U L I N G

The applicant/appellant Vishisht Talwar filed this appeal against Anthony Thuo Kanai advocate challenging the taxation order issued by the taxing officer L.M. Wachira on 8th April 2014 in Nairobi HCC Miscellaneous Application No. 158 of 2014.

The appeal was filed on 25th April 2014 by a memorandum of appeal dated 23rd April 2014.

Upon lodging the said appeal herein, the appellant did by an application dated 23rd April 2014 by way of notice of motion file an application pursuant to the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that:

> **1.The Honourable Court be pleased to stay the orders issued on 8th April 2014 pending hearing and determination of the appeal.**
>
> **2.That costs of this application be in the appeal.**

The application was premised on the grounds that he has filed an appeal and if stay is not granted the appeal will be rendered nugatory; that the appeal has merits and has high chances of success; and that the applicant will suffer irreparably if the stay is not granted.

The application is filed and prosecuted by M/s Zed Achoki & Company Advocates for the appellant/applicant. It was supported by a 15 paragraph affidavit sworn on 23rd April 2014 by Vishisht Talwar the appellant/applicant herein.

The application was opposed by the respondent's advocate Mr. Anthony Thuo Kanai who swore a lengthy replying affidavit on 11th July 2014 together with a notice of preliminary objection filed on 11th July 2014 seeking to have the appellant's application and the appeal dismissed for want of jurisdiction. He further contends that there is no right of appeal under the provisions of the Civil Procedure Act against the decision of a taxing officer whose jurisdiction is derived from the Advocates Remuneration Order – paragraphs 13 and 13A thereof. In addition, the preliminary objection further states that there is no provision for stay of the decision of the taxing officer and therefore Order 46 Rule 6 of the Civil

Procedure Rules is inapplicable in the circumstances. The preliminary objection raises points of law, summarizing what the respondent has also deposed in his replying affidavit. The respondent cited two decisions **NRB HCC 18/2004 Donhold Rahisi Stores** wherein the defendant applied for stay of further proceedings in particular the taxation of the bill of costs awarded to one Mohammed Wahat Kumo who had been sued as defendant in the counterclaim lodged by the defendant East Africa Portland Cement Ltd, the court dismissed the application and held among others that:

> ***"Taxation of costs whether those costs be between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of a reference (from a decision on taxation made under Rule 11 of the Advocates Remuneration Order. The present application is not such reference …"***

The court noted that as the application was not for stay of recovery of costs pending whatever event, say an appeal against the order granting the costs or a reference under Rule 11 of the Advocates Remuneration Order, it was unacceptable assault upon the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. Further that:

> ***"The taxing does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the Advocates Remuneration Order. The present application is not for stay of recovery of taxed costs…"***

Mr. Thuo further relied on the authority of **S. Gichuki Waigawa Advocate – Vs – Nina Marie Ltd – Client in HC Misc 862/2003** where the court held that it had no power under the Advocates Act and or the Advocates Remuneration Order to stay execution for costs pending appeal and that legislation having not provided such power to stay, to the court, the court could not enter the realm of creating legislation as it had no power to fill that gap by invoking its inherent power.

When the application herein came up before me for hearing on 22nd October 2014, the applicant and his advocate were absent although the date was taken by consent before **Hon. Justice Onyancha J** on 15th July 2014. Only the respondent's advocate attended court and I allowed him to proceed with his opposition of the application.

Notwithstanding the absence of the applicant to propose and argue out his application, I have considered the said application together with the annextures thereto as if the same was proposed to the court.

I have also considered the opposition raised by the respondent in his submissions in court as well as his replying affidavit and the notice of preliminary objection filed herein. Counsel/respondent argued in opposition both the preliminary objection and his depositions in the replying affidavit, urging the court not only to dismiss the application but also to strike out the appeal as a whole as being fatally defective and incompetent before the court.

Clearly, the taxing officer did tax the respondent's bill as presented after rejecting a preliminary objection raised by the applicant. The applicant upon being dissatisfied with the order of taxation filed an appeal and this application for stay. I have no doubt in my mind that the applicant misapprehended the law relating to the challenge to the taxing officer's orders.

Under paragraph 11 of the Advocates Remuneration Order, the applicant herein ought to have filed a reference by way of chamber summons seeking to set aside, vary the orders of the taxing officer's orders. The said provisions state as follows:

> ***11 (1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***

(2) The taxing officer shall forthwith record and forward to the objector the reason for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge in chamber, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub-paragraph (2) may, with the leave of the judge but not otherwise, appeal to the court of appeal.

(4) The High Court shall have power in its discretion by order enlarge the time fixed by sub paragraph (1) or sub paragraph (2) of 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."

The other provision sets out the following clear steps to be adopted in proceedings relating to objections to decisions on taxation.

1.Notice of objection to the taxing officer indicating the items of taxation objected tom to be filed within 14 days after the decision of the taxing officer;

2.The taxing officer to forward the reasons for the decision on the items objected, to the objector;

3.The objector to file and serve chamber summons within 14 days from the date of receipt of the reasons for the decision of the taxing officer; and

4.If the objector is aggrieved by the decision of the judge, he may with leave of the judge appeal to the Court of Appeal.

The notice of motion before me dated 23rd April 2014 and filed in court on 2nd May 2014 seeks to stay the execution of the order of the taxing officer made on 8th April 2014 pending an appeal filed challenging the said taxation order.

The issue therefore, for determination is whether the purported appeal and this application are tenable. My quick answer is no, for the following reasons:

Even assuming that the applicant erroneously filed an appeal, as opposed to the expected chamber summons as a reference, thereby making this court determine the issues applying substantive justice as opposed to procedural technicalities and for want of form, the said appeal was filed after 17 days instead of within 14 days as provided for under paragraph 11 (1) of the Advocates Remuneration Order, which appeal, assuming this court treats it as a reference, could only have been filed out of the 14 days stipulated above, with leave of court extending or enlarging such time as fixed under sub paragraph (1) or sub paragraph 2, of paragraph 11 of the Advocates Remuneration Order.

The applicant filed the purported appeal out of the stipulated time without seeking enlargement of time hence the same is incompetent and this court's jurisdiction is ousted from entertaining the same.

However, before I depart from that issue of whether or not an aggrieved party to a taxation order can file an appeal or a reference as envisaged under paragraph 11 of the Advocates Remuneration Order, I must exhaust it with clear directions. In my view, no direct appeal lies from the taxing officer's decision on a bill of costs.

The appellate jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. In **Machira – Vs – Magugu HC MISC Appl No. 358/2001 Hon. Ringera J** held that the Advocates Remuneration Order is a complete code which does not provide

for appeals from a taxing officer's decisions.

The above holding was upheld by the Court of Appeal in **Machira & Co Advocates – Vs – Arthur K. Magugu & Another CA 199/2002 [2012] eKLR** that:

> ***"Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on advocate's bills of costs through references under Rule 11 to a Judge in chambers."***

In the above appeal, the Court of Appeal dismissed the reference and restored the taxing officer's bill of costs.

I have no doubt in my mind that the above cited decisions set out good law regarding the procedure to be adopted in challenging taxed bill of costs whether it is between party and party or advocate and client.

In the end, I proceed and not only strike out the appeal as filed, but as there is nothing upon which the application for stay herein is grounded, which application is dated 23rd April 2014, I accordingly strike it out as being incompetent.

I award costs of the appeal as filed and the application for stay herein to the respondent's advocate.

Dated, signed and delivered at Nairobi this 16th Day of December, 2014.

R.E. ABURILI

JUDGE