REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALITY DIVISION

MISC APPL NO. 296 OF 2012

MAKHECHA & COMPANY ADVOCATES …… APPLICANT

VERSUS

CENTRAL BANK OF KENYA ……. RESPONDENT

R U L I N G

1. The Advocate/Applicant filed a Chamber Summons dated 5 of November 2012 under the provisions of **Rule 11 (1)** and **(s)** of the *Advocates Remuneration Order, 2009*. The Application sought to set-aside the Ruling of the Deputy Registrar of this court delivered on 12 October 2012 as regards the Applicant's Bill of Costs dated 15 May 2012. The Application also sought orders that this court be pleased to tax the said Bill in the interests of justice and expediency and further to order that the said Bill of Costs be taxed as drawn. The Application was supported by the grounds that the Deputy Registrar had erred in law and in principle, in failing to appreciate that item 1 of the Bill of Costs was drawn according to scale. The learned Deputy Registrar, according to the Applicant, had erred and misdirected himself in accepting to compromise the Applicant's claim to full fee and further that he had erred and misdirected himself in finding that instruction fees had been agreed at Shs. 12,972,240/-. The Applicant maintained that it had insisted that fees to the client/respondent would be chargeable under the Schedule VIB of the Advocates Remuneration Order as per its letter dated 13 May 2012. Again the Deputy Registrar had erred and misdirected himself in failing to find that instruction fees were Kenya shillings 25,964,480/- which was what the respondent/client had paid in party/party costs. In order for there to be a compromise of these, there has to be agreement between parties which, in this case, there was clearly not.
2. The client/respondent filed a Replying Affidavit in opposition to the Application, sworn by one **Kennedy Abuga** dated 20 November 2012. The deponent stated that he was the client/respondent's director in charge of legal services. He noted that on 26 October 2012, the client/respondent being satisfied with the Ruling delivered by the Deputy Registrar on 12 October 2012 had filed a Notice to the Taxing Master under paragraph 11 (1) of the Advocates Remuneration Order, 2009. The deponent had been advised by his advocates on record that the Applicant's Chamber Summons dated 5 November 2012 was incurably defective and bad in law for the reason that it was filed out of time without the requisite leave of this court having been sought and obtained. Further, Mr. Abuga observed that after the said Ruling had been delivered on 12 October 2012, the Applicant's advocates had written a letter to the advocates on record for the client/respondent requesting settlement of the taxed costs. In the deponent's opinion that was a clear indication that the Applicant was satisfied with the Deputy Registrar's Ruling. He was also of the opinion that the Application, being time-barred, was an afterthought and brought in an attempt to counter the Respondent's Notice to the Taxing Master as aforesaid.
3. As to the client/respondent's allegation that the Application dated 5 of November 2012 was filed

out of time, Mrs. Shaw for the client/applicant, maintained that the Deputy Registrar's Ruling was delivered on the 12 October 2012 but the reasons therefore were only received by the Applicant on the 26 October 2012. The Applicants could not have received the Ruling details earlier. It was counsel's contention that in the Applicant's Bill of Costs, Item No. 1 was based on the Schedule VIB of the Advocates Remuneration Order which provides for party/party costs as distinct from advocate/client costs which were to be increased by one half under that Schedule. Counsel referred the court to the Ruling of this court in **Evans Thiga Gaturu, Advocate versus Kenya Commercial Bank Ltd HC Misc. Appl. No. 343 of 2011** as per the finding of my learned brother **Odunga J** as follows:

> **"It is therefore clear that the interpretations by the Court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing Master was exercised on sound legal principle. However, where there are reasons on the face of the decision it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that the insufficiency may be the very reason for preferring a reference."**

4. Mrs. Shaw submitted that the Ruling of the Deputy Registrar contained those reasons as per the authority cited above and such were received by her firm on 26 October 2012. Thereafter, she referred to the correspondence exhibited to the Taxation Application before the Deputy Registrar and noted that the client/respondent had offered to settle the party and party costs as well as the applicant/advocate's Bill of Costs under Schedule VIB on 23 April 2010 in *Civil Appeal No. 155 of 2005*. This offer had been accepted by the defendants in the said Civil Appeal and the party/party costs were paid. Consequently in a letter dated 12 May 2010 the respondent/client went back on what it had said and proposed that the advocate/client costs should be rebated at 50% of the decretal sum of Shs. 25,944,480/-which would come to an amount of Shs. 12,972,240/-. The letter from the respondent/client dated 12 May 2010 amounted to a qualified acceptance of this latter amount but such had not been accepted by the Applicant/advocate. There was no *consensus ad idem*. Counsel then referred this court to the two authorities of **Foakes versus Beer (1884) HL 605** and **D & C Builders Ltd versus Rees (1966) QBD 617**. The Applicant/advocate maintained that what the correspondence showed did not comprise an offer and satisfaction. A creditor is not bound by a promise to accept partial satisfaction. The only exception to the rule in these cases is where the debtor can prove that the offer was accepted in full and final settlement, which certainly was not the case here. In counsel's opinion the finding by the Deputy Registrar that there was an agreed settlement at Shs. 25,000,000/- on costs and subsequently that Shs. 12 million was paid in full and final settlement was arrived at as a misconception of the law.
5. The Applicant/advocate also maintained that the Deputy Registrar had erred in awarding V. A. T. which had not been pleaded and was not included on the Bill of Costs. Counsel maintained that it was optional as to whether one should include V. A. T. on a Bill of Costs or not. As she saw it, there were two options open to this court as regards the appeal against the Deputy Registrar's said Ruling. Firstly, the court could rule that the costs should be the same as party/party +1/2 or that there had been an accord and satisfaction by the advocate/client accepting the said sum of Shs. 12 million and leave it at that. Finally, as regards the client/respondent's suggestion that an Affidavit was required in support of the Application, Mrs. Shaw detailed that the Advocates Remuneration Rules and Order are a complete code and in making application thereunder, the Civil Procedure Rules do not apply. Under the Advocates Remuneration Order, the form is provided as regards appeals against the decision of the Taxing Master.
6. Mr. Kiprop for the client/respondent relied on the Replying Affidavit of Mr. Abuga dated 20 November 2012. Counsel informed the court that the advocates for the Applicant/advocate had served a Notice to the Taxing Master which had not been copied to or served upon the client/respondent and which he considered as an ambush. In this regard he detailed that the Deputy Registrar's Ruling was delivered on 12 October 2012. The Notice to the Taxing Master which the

Applicant/advocate had filed, was dated 26 October 2012. On 29 October 2012 his firm received a letter dated the same day which had been annexed to the Replying Affidavit as "KA 2". In that letter the applicant/advocate had asked for the settlement of the taxed costs and there was no mention of any dissatisfaction with the Ruling of the Deputy Registrar. In counsel's opinion this could only be inferred as an admission that the Applicant/advocate was satisfied with the Ruling. On 1 November 2012, his firm had filed the Notice to the Taxing Master on behalf of the client/respondent. Counsel stated that when this Application before court was filed on 5 November 2012, seeking to set-aside the Deputy Registrar's Ruling, such was a veiled attempt to counter the action by the client/respondent. The latter still reiterated that the Application before court was filed out of time. Rule 11 of the Advocates Remuneration Order was very clear that any party wishing to object to a taxation ruling must do so within 14 days of the delivery of the same. The rule also detailed the mode of such challenge. The client/respondent submitted that that the Applicant failed to challenge the decision of the Deputy Registrar in time.

7. Mr. Kiprop also pointed out the provisions of **rule 11 (1)** of the *Advocates Remuneration Order* to the extent that an applicant coming before court thereon must give details of which items of taxation in the Bill of Costs to which he/she/it objects. The Application before court made no mention of such items and this should have been included upon when Notice was given to the taxing officer. Counsel stated that there was no provision under **rule 11 (f)** for appeal to the Judge and as such, the Application was fatally defective. Commenting upon the decision of the Deputy Registrar, counsel maintained that the officer had a discretion which had been properly exercised. The Ruling is very detailed and the finding, correctly so, was that there was an agreement on fees as between the Applicant/advocate and the client/respondent. That decision had been arrived at after considering the pleadings, the affidavits and the submissions of the parties in the taxation proceedings. Further, in counsel's view this Application was premature for the reason that the client/respondent has also challenged the Ruling of the taxing officer by its notice dated 26 October 2012, which has not been responded to by the taxing officer.
8. In a brief reply, Mrs. Shaw noted that the decision of the taxing master as per the Advocates Remuneration Order Schedule 6B and paragraph 57 of the Act was not discretionary. She agreed that in the heading of the Application there was a typographical error in that paragraph 11 (f) did not exist and it should have read paragraph 11 (2). She maintained that in the exercise of a statutory right of appeal, no *mala fides* could be inferred and the reference was in fact, within time. As regards the Applicant/advocate's letter demanding the taxed costs, in accordance with the principle as expounded in **Foakes v Beer** (supra) in demanding the same the Applicant/advocate does not waive his right of appeal. What the respondent/client had not said was whether it was willing to pay the amount of the taxed costs or not.
9. As far as this court is concerned the procedural steps under the Advocates Remuneration Order as regards taxation appeals are clear. **Rule 11 (1)** reads:

> **"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 the objects."**

As I understand it from a perusal of the court file, the Applicant/advocate forwarded a letter dated 15 October 2012 addressed to the Deputy Registrar of this court not referring to any particular item in the Bill of Costs which was being taxed but asking that reasons be given for the taxing officer's decision in the Ruling delivered on the 12 October 2012. The advocates for the Applicant/advocate admitted that a copy of that letter had not been served upon the advocates for the respondent/client. However Rule 11 does not require that a copy need be served on the other side. From the contents of that letter, dated 15 October 2012, the Applicant/advocate quite clearly wished to lodge a reference against the whole of the said Ruling not necessarily individual items. Although the Applicant/advocate filed no affidavit as to when the reasons for the Deputy Registrar's Ruling were delivered to it, it seems quite apparent to me that the certified copy of the same was dated 26 October 2012. In my opinion, the 14 days in which the Applicant/advocate had in which to file the appeal Application would have run from that date. The Application was filed on 5 November 2012 four days within the stipulated time limit. Accordingly, I do not think that the respondent/client has any point to make in that regard. Further, the fact that the taxing officer has yet to deal with the notice sent to him by the client/respondent dated 26 October 2012 I don't

think has any relevance in relation to a decision on the Application before court.

10. I have perused the Ruling of the Deputy Registrar delivered on the 12 October 2012. There would seem to be no doubt as to his findings as regards party and party costs in respect of the Civil Appeal No. 125 of 2005. The learned Deputy Registrar quite clearly adopted the contents of what he termed the confirmed settlement letter dated 12 May 2010. That letter confirmed party and party costs at Shs. 25,944,480/-together with interest thereon. The Deputy Registrar states that as far as the advocate/client fees were concerned a rebate of the 80% of the decretal amount of Shs. 25,944,480/-was placed on the table as an offer for the applicant/advocate to accept or otherwise. The learned Deputy Registrar then referred to the Applicant/advocate's letter dated 13 May 2010. The fourth paragraph of that letter reads as follows:

"As regards our fees, we are agreeable to settlement of the same as per your letter dated 23rd of April 2010 and confirm that you may proceed to pay us K. Shs. 12,972,240/-."

There is no doubt that it was upon the basis of that agreement by the advocate/applicant that the learned Deputy Registrar came to the view that an agreement had been reached as between advocates and client in respect of fees payable and that the amount confirmed was Kenya shillings 12,972,240/-. The Deputy Registrar in order to buttress his finding made reference to **section 45 (1) (a) and (b)** of the *Advocates Act* which provides that:

"before, after or in the course of any contentious business, an advocate and his client may make an agreement fixing the amount of the advocate's remuneration in respect thereof".

11. The learned Deputy Registrar then went on to find that despite the agreement reached between advocate and client, no payment was made in respect of the advocate's fees. Rather strangely, the Deputy Registrar then applied Schedule VI B covering costs of proceedings in this court in relation to advocate/client costs and increased the fee as agreed by the parties as above as per paragraph 57 of the Advocates Remuneration Order by one half. Paragraph 57 reads as follows:

"(1) If, after the disposal of any proceedings by the court, the parties thereto agree the amount of costs to be paid in pursuance of the Court's order or judgement therein, the parties may instead of filing a Bill of costs and proceeding to taxation thereof, request the registrar by joint letter to record their agreement, and unless he considers the amount agreed upon to be exorbitant the registrar shall do so upon payment of the same court fee as is payable on the filing of any document which no special fee is prescribed.

(2) Such agreement where recorded shall have the same force and effect as a certificate of taxation by the taxing officer:

Provided that, if the taxing officer considers the amount so agreed upon to be exorbitant, he may direct the said costs to be taxed in accordance with this Order and paragraph 11 shall apply in regard to every such taxation."

As I understand it, the conclusion to the Deputy Registrar's decision was that he accepted the agreed amount of Shs. 12,972,240/-. He increased that item by half coming to Shs. 6,486,120/-. Such would give a sub-total of Shs. 19,458,360/-. To this the Deputy Registrar added V. A. T. at 16% being Shs. 3,113,337/-. He also added disbursements at Shs. 2206/-giving a grand total of Shs. 22,573,903/-. Thereafter the Deputy Registrar noted that the Applicant/advocate had acknowledged receipt of Shs. 13,656,240/-and consequently the net payable was Shs. 8,917,163/-which he termed as 'all-inclusive'.

12. I set out all the above in comparative detail so that I can try to understand where the Applicant/advocate is coming from in its objection to the said Ruling. As I understood it from the applicant/advocate's counsel and the Application before court, the Deputy Registrar's decision is in error and what he should have done is allowed the advocate/client Bill of costs as drawn which

detailed under Item No. 1 instruction fees at Shs. 25,964,480/-which together with Item No. 2 the addition of one half for advocate/client costs at the total of Shs. 12,989,740/-totalling (taking into account other miscellaneous matters) Shs. 38,956,426/-. The Applicant/advocate's Bill of Costs acknowledged payments made and received totalling Shs. 13,656,740/- leaving a balance due of Shs. 25,299,686/-. Counsel for the Applicant/advocate by her submissions in respect of the **Foakes v Beer** and **D & C Builders Ltd** cases wishes me to find that the agreement on fees reached between the Applicant/advocate and the respondent/client had been compromised. I have reviewed the correspondence in and around April/May 2010. There is no doubt in my mind that the client/respondent's letter of the 23rd April 2010 was instructing the advocate/applicant herein as regards the settlement of party/party costs and interest thereon bearing in mind the contents of the previous letters of the 20 April 2010 and 22nd of April 2010. Indeed in the client/respondent's letter of the 20 April 2010 it was indicated that the client bank was willing under paragraph 2 to:

"Settle Advocate/Client fees payable to yourselves based on the sum of Party & Party Costs agreed upon under (1) above and computed as provided for in Schedule VIB of the Advocates Remuneration Order."

This exact wording was repeated in paragraph 3 of the client/respondent's letter of 23rd of April 2010. However, when it came to the letter of 12 May 2010 the client/respondent's position with regard to Advocate/Client fees had changed and in the penultimate paragraph thereof it stated:

"that Bank proposes that you accept payment of fees rebated at 50% of the decretal sum of Kshs 25,944,480/-which will compute to Kshs 12,972,240/-net. Please confirm."

The difference between the former two letters and that of the 12 May 2010 was that the client/respondent had found itself having to agree to the payment of interest on Party & Party costs amounting to Shs. 11,026,404/-. Obviously the client/respondent looked to save itself money by cutting down the amount of fees it would have to pay to its own advocates. Then we come to the fateful letter from the Applicant/advocate dated 13 May 2010. There is no doubt in my mind that the Applicant/advocate made an error in although it referred to the client/respondent's letter of 23 April 2010, to my mind it confirmed payment of fees to it in the amount of Shs. 12,972, 240/-.

13. I am acutely aware that I am bound by the House of Lords' decision in the **Foakes versus Beer** being an 1884 case. However, what principle did that case decide? As per **Danckwerts LJ** in the **D & C Builders** case applying the decision in **Pinnel's Case 5 Co. Rep 117a**:

"…. Settled and definitely the rule of law that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction."

Also in the **D & C Builders** case, **Lord Denning** in his capacity as Master of the Rolls had this to say:

"This doctrine of the common law has come under heavy fire. It was ridiculed by Sir George Jessel in *Couldery v Bartram*. It was said to be mistaken by Lord Blackburn in Foakes v Beer. He was condemned by the Law Revision Committee (1945 Cmd 5449), paras. 20 and 21. But a remedy has been found. The harshness of the common law has been relieved. Equity has stretched out a merciful hand to help the debtor. The courts have invoked the broad principle stated by Lord Cairns in *Hughes v Metropolitan Railway Co.*

'It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that *the strict rights arising under the contract will not be enforced*, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights *will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties*.'

It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.

Later in the same judgement, **Lord Denning** had this to say:

"In applying this principle, however, we must note the qualification: The creditor is only barred from his legal rights when it would be *inequitable* for him to insist upon them. Where there has been a *true accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts upon* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been surely an accord between them."

14. I am of the considered opinion that both the **Foakes v Beer** and the **C & D Builders** cases are distinguishable here. I think that there was an accord as between the Applicant/advocate and the client/respondent that the advocate/client fees were agreed at Shs. 12,972,240/-as per the Applicant/advocate's letter of 13 May 2010. I concur with the Deputy Registrar's said Ruling delivered on the 12 October 2012 as to the finding of the above amount as instruction fees. I find that the client/respondent has also acted upon the accord reached with the Applicant/advocate, in view of the fact that payments had been made to the advocate in the total amount of Shs. 13,656,740/- as per the Bill of Costs dated 15 May 2012. Accordingly I dismiss the Advocate/applicant's Chamber Summons dated 5 November 2012 with costs to the client/respondent.

DATED and delivered at Nairobi this 23rd day of January 2013.

J. B.HAVELOCK

JUDGE