REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 305 of 2012

IN THE OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATES …..…..... APPLICANT/ADVOCATE

VERSUS

P & L INVESTMENTS LIMITED ……..…….. 1ST RESPONDENT/CLIENT

LALIT BABA KANA …… 2ND RESPONDENT/CLIENT

R U L I N G

1.In this matter, there are 2 Applications that are pending before this court, the first being a Notice of Motion brought by the Applicant/advocates dated 25 September 2012 seeking Judgement be entered based on the amount certified in a Certificate of Taxation dated 19 September 2012. The second Application dated 20 November 2012 is brought by the Respondents praying for an order to stay the proceedings of the hearing of the Applicant's Application as above. The Applicant has filed a Preliminary Objection dated 3 December 2012, to the said Application dated 20 November 2012. The Preliminary Objection details that the said Application does not lie in law and is a non-starter as it is has been brought under the provisions of the Civil Procedure Rule which are not applicable to the taxation proceedings which, the Applicant maintains, are wholly governed by the Advocates Remuneration Order, which in itself is a full legal code.

2.It seems to me that I should consider the Respondent's Application for stay dated 20 November 2012 and the Preliminary Objection dated 3 December 2012 first, although the court had previously directed that the 2 Applications and the Preliminary Objection should be heard together. The Respondent's said Application seeks the principle prayer that there be a stay of proceedings of the Applicant's said Application of 25th September 2012 pending the hearing and determination of an intended Reference as against the Ruling delivered by the Deputy Registrar of this court, whereby she taxed the Bill of Costs lodged by the said advocates and allowed against the Respondents in the sum of Shs. 2,770,498.55. That

Ruling was delivered on 15 August 2012. The main ground of the Application was that despite the Respondents lodging their objection to the said Ruling on 29 August 2012, they had sought the reasons for the taxation and such had not been furnished. Such reasons had been sought under cover of two letters addressed to the Deputy Registrar by the Respondents' advocates dated 6 September 2012 and 10 October 2012.

3.Under ground No. 8 upon which the said Application by the Respondents was based, they set out the items of the taxation with which they were aggrieved. The Respondents noted the prayers sought by the Applicant's Notice of Motion dated 25 September 2012, more particularly that Judgement be entered against them in the sum of Shs. 2,770,498.55. The Application was supported by the Affidavit of the second Respondent sworn on 20 November 2012. The deponent related the history of the matter so far as the objection to the taxation of the Bill of Costs filed by the Applicant as well as the letters of reminder as to the reasons for the Deputy Registrar's Ruling. The second Respondent maintained that if the stay orders were not granted he would stand to suffer grave injustice and irreparable loss as the Reference raised cogent issues of law and fact. Then as exhibit "LBK-7" the second Respondent detailed a draft Chamber Summons setting out the Reference and appealing the decision of the Deputy Registrar dated 15 August 2012. The draft went into the various items taxed and disputed going into some 16 paragraphs as to why the Ruling should not be set aside and the Bill of Costs taxed afresh.

4.The Respondents' said Application dated 20 November 2012 was disputed by way of a Replying Affidavit dated 3 December 2012 sworn by one **Wilfred Akhonya Mutubwa** an advocate practising with the Applicant's legal firm. The deponent maintained that the said Application had been brought in bad faith and was meant to delay the prosecution of the Applicant's Application dated 25 September 2012. He noted that the Respondents had not sought leave to file their reference out of time but, instead, had opted to file the current application for stay of proceedings. He maintained that there was inordinate delay on the part of the Respondents in filing the said Application almost 2 months after the Applicant had filed its Application for judgement on the amount stated in the Certificate of Costs. The deponent made two comments in his said Affidavit as regards to the law, firstly, that a party to taxation proceedings could not raise an objection without stating the items for taxation upon which its objection was based. Secondly, the failure and/or delay by the Deputy Registrar to furnish reasons for her said Ruling did not prevent a party from filing a reference. The deponent noted that the Company upon whose behalf the Applicant had acted was in liquidation and was in the process of disposing of its assets. The deponent was of the view that by the time Applicant's Application is allowed, the Company would only be a shell with no assets available for attachment.

5.Mr. Mutubwa then commented upon the draft Reference by way of Chamber Summons as referred to above and maintained that the same lacked merit for the following reasons:

"a.The Client's objection to items 1, 69, 70, 71, 72 and 75 are matters of computation, which are purely within the jurisdiction of the Taxing Master which was properly exercised in arriving at a Ruling. Matters of quantum are solely the preserve of the jurisdiction of the Taxing Master and cannot be questioned except for exceptional cases and no error in principal has been pleaded or demonstrated.

b.The Objection on the ground that the Advocate has no instructions is res judicata as the same was raised during the taxation proceedings and a decision arrived at on the same. The Client is therefore estopped from raising the issue of instructions. In any event, the Advocate had proper instructions as is demonstrated in the documents produced in Court. The allegation of lack of instructions is a belated misconceived afterthought.

c.The calculation of instruction fees based on the amount of Kshs.244,000,000/= is proper as that was the figure agreed upon by the parties in the winding up proceedings as the settlement figure. The settlement was in writing and filed in the said parent cause. In any event, the subject matter of the taxation was never in issue before the Taxing Master and was indeed undisputed; the Client is precluded from raising new grounds not advanced before the Taxing Master.

d.The Advocates carried out the instructions of the client to finality culminating in a settlement recorded in court".

Mr. Mutubwa concluded his said Affidavit by stating that if the Respondents' said Application was allowed he would request that they be ordered to furnish security for costs in the said sum of Shs. 2,770,498.55.

6.As I have detailed above, the Preliminary Objection dated 3 December 2012 pointed out that the Respondents' Application dated 20 November 2012 had been brought under the provisions of **Order 42 Rule 6 (1)** of the *Civil Procedure Rules* and not under the provisions of the *Advocates Remuneration Order*. The Applicant, in its submissions dated 22 January 2013, repeated its observation that the Application was a non-starter as the Court had been moved under the Civil Procedure Rules. It maintained that the Respondent should have filed an application for leave to file the intended Reference out of time and at the same time, request the Court that such leave as granted to operate as a stay of proceedings pending the hearing and determination of the intended Reference. The Court was referred to the case of **Orbit Chemicals Industries Ltd versus Otieno-Odek & Co. Advocates (2006) eKLR** where my learned sister **Kasango J** stated:

"It is correct that the Advocates Act does not provide for stay of taxed costs. That being the case this court ought not to grant such a stay. I am however, of the view that the party should immediately raise an objection as provided as under paragraph 11 and also seek reasons for the ruling of the taxation. With such an application before court, the court may be persuaded to invoke its inherent power to grant stay of execution of the taxed costs which prayer will be alongside with the prayers seeking to set-aside the ruling of the taxation. I am of the view that a party cannot invoke the Civil Procedure Act or Rules for indeed the Advocates Act is a complete Act in itself. I am of the view that the preliminary objection raised by the Advocate has merits."

7.Later in its submissions, the Applicant restated its position that the Respondents' Application did not apply in law as the Advocates Remuneration Order did not contemplate a stay of proceedings after costs had been taxed. The Court was referred to the decision of **Waweru J** in **Donholm Rahisi Stores versus East Africa Portland Cement Ltd (2005) eKLR** wherein the learned Judge had this to say:

"Taxation of costs, whether those costs be between party and party or between advocates, 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 reference (from a decision on taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself."

8.The Respondents responded to the Preliminary Objection by stating that it lacked merit and should be overruled because they were seeking orders of stay of proceedings which are governed by the Civil Procedure Act and the Rules made thereunder. They maintained that it was irrelevant as to the nature of the proceedings that were sought to be stayed. The Application had been brought by way of Notice of Motion for which the Advocates Act had no provision under which such an application could be made. The Respondents maintained that it was idle and hypocritical for the Applicant/Advocates to allege that the Civil Procedure Act and the Rules had no application to proceedings which were purely civil in nature. Further, the Respondents maintained that the Applicant's argument that the Advocates Remuneration Order does not contemplate a stay of proceedings, as well as the argument that no order can be given to stay the Advocate's costs, are both without merit. The Respondents submitted:

"It is not true that the Advocates Remuneration Order does not contemplate a stay of proceedings as alleged but even if that were true (which is denied) it does not follow that the court has no power to order a stay of proceedings if the facts and circumstances of a particular case so seriously demand that a stay order be granted. This court has wide powers to grant any order that the ends of justice require."

9.I have taken into account the findings in both the **Orbit Chemicals** and **Donholm Rahisi Stores** cases. Those authorities are supported by the finding of my learned brother **Azangalala J** in the case of **Gatimu & Anor. versus Muya & 3 Ors. (2006) eKLR** where he took note of the decision in the Court of Appeal case of **Francis Kabaa versus Nancy Wambui & Anor. C.A. No. 298 of 1996 (unreported)** in which that Court was of the view that stay of execution may not be available in respect of costs. The Judge went on to say:

"The plaintiffs have also invoked Order XLI Rule 4 (1) of the Civil Procedure Rules. In my view whereas the court may be guided by the conditions set in that order, and take an analogy therefrom, the said provisions have no application at all to applications for stay of execution pending the hearing and determination of an intended reference. In any event even if the application were to be determined under the said order, the plaintiffs have not satisfied the conditions set in that order to wit: the demonstration of substantial loss, the furnishing of security for the due performance of the decree and the showing of sufficient cause."

10.The Respondents in their submissions dated 12 February 2013 referred me to the cases of **Nyakundi & Co. Advocates versus Kenya National Housing Corporation (2004) eKLR, National Bank of Kenya Ltd versus First Interstate Trading Company Ltd & Ors (2006) EA 287** and **Wanga & Co. Advocates versus Busia Sugar Company Ltd (2004) KLR 506**. Those cases and others in similar vein were summed up in a comprehensive Ruling delivered by my learned brother **Odunga J** in the case of **Cecil G. Miller t/a Miller & Co., Advocates versus Parin Sharrif & 3 Ors Misc Civil Appl No. 166 of 2012**. In that case counsel for the Applicant/Advocates cited a number of cases relevant to this matter as follows:

"Relying on Sharma vs. Uhuru Highway Development Ltd [2001] 2 EA 530, Mr. Miller submitted that the Registrar is the Taxing Officer and not the Judge of the High Court and that the said application is aimed at involving the Judge in a taxation dispute while the Judge's role in such matters is limited to references. Citing the case of Wanga & Co. Advocates vs. Busia Sugar Company Ltd. [2004] KLR 506, it was submitted that the jurisdiction of the judge can only be exercised after the taxing officer has given reasons for his or her decisions pursuant to paragraph 11(2) of the Remuneration Order. As no decision has been made in the instant case, this Court cannot exercise its jurisdiction. On the authority of Housing Finance Company of Kenya Ltd vs. Embakasi Youth Development Project [2004] 2 KLR 548, it is submitted that taxation of costs is the responsibility of the taxing master and not the judge and that the Judge only steps in on an appeal for consideration of the relevant matter of law hence it is not possible in law for a Judge to consider granting prayers unless they come in the form of an appeal. Learned Counsel also relied on Machira and Co. Advocates vs. Magugu [2002] 2 EA 428 for the submission that the Advocates Remuneration Order is a complete Code and hence there is no room for invocation of the Civil Procedure Rules and under the Order any complaint arising from taxation of any item is to be ventilated by way of reference. Accordingly, it is submitted that the invocation of the provisions of the Civil Procedure Act and Rules thereunder renders the whole application defective. With respect to First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64, it is submitted that the High Court only interferes with the discretion of the Taxing Officer where there is an error. In this case no such error had been committed and to seek particulars as is sought herein amounts to an abuse of the Court process. The case of Ahmednassir Abdikadir and Company Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5, it is contended, is an authority for the proposition that a person who is aggrieved by the decision of the Taxing Officer should only do so within fourteen days of the said decision by way of a notice in writing. As there is no such decision made by the Taxing Officer, it is submitted, the subject application is premature. Relying on Afrison Import and Import Ltd vs. Continental Credit Finance Ltd and Another [2004] 1 KLR 121, it is submitted that section 3A of the Civil Procedure Act will not aid a party where there is a clear provision of the law governing a matter in which a step or steps shall be taken in an action."

11.In his own finding in respect of the **Miller** case, **Justice Odunga** summed up as follows:

"It is important in my view to understand the role of the Deputy Registrar of the High Court as a

Taxing Officer. The Taxing Officer derives his powers under paragraph 10 of the Advocates Remuneration Order which provides:

"The taxing officer for the taxation of bills under this Order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint"

Clearly a Judge, being neither the registrar nor a deputy/district registrar, is not a taxing officer for the purposes of the Remuneration Order. It is noteworthy that under Order 49 of the Civil Procedure Rules the terms used in rule 1 is "may" which gives the discretion to the registrar as opposed to the word employed under the Remuneration Order which is "shall". It is therefore clear, that whereas the High Court cannot be said to lack jurisdiction in matters of taxation, in light of the clear provisions of Article 165(3)(a) of the Constitution, that jurisdiction is clearly fettered by the provisions of the Advocates Remuneration Order. The consequences of this fetter is that the High Court Judge does not in the initial stages handle matters dealing with taxation but such matters only come to the Judge when an objection is taken under Paragraph 11(2) of the Advocates Remuneration Order. That objection is by way of Chamber Summons. It is strictly speaking not an appeal though it is in the nature of an appeal. Since the objection is dealt with in the same proceedings in which the decision giving rise to the objection was made, it is a clear manifestation that in exercising his powers under the Remuneration Order, the Taxation Officer is actually exercising the powers delegated to him by the Court.

It therefore follows that the decisions cited by Mr. Miller are, in my respectful view, correct that any decision made by a Taxing Officer can only be challenged by way of an objection which is commonly referred to as a reference. In other words, a party aggrieved by such a decision cannot for example purport to have it set aside in the exercise of the inherent powers of the Court. Whereas it is true that the inherent powers of the Court are not donated by section 3A of the Civil Procedure Act but are only preserved thereunder, that jurisdiction is meant to be invoked to prevent abuse of the process of the Court and the law, since the case of <u>Kimani Wanyoike vs. Electoral Commission & Another Civil Application No. Nai. 213 of 1995</u>, is clear that where there is a clear procedure of redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. To fail to adhere to a procedure provided, in my view, would amount to abuse of the process of the court which may invite the wrath of the inherent jurisdiction of the Court."

12.I also take cognizance of **section 51 (2)** of the *Advocates Act* which reads as follows:

"51. (2)The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, <u>"and the Court may make such order in relation thereto as it thinks fit"</u>, including, a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs". (Underlining mine).

To my mind, that wording is very clear and would include the making of an Order for the stay of proceedings. I would conclude therefore, that I consider the Advocates' Preliminary Objection dated 3 December 2012, to have merit and uphold the same accordingly. As a result, the Respondents' Application dated 20 November 2012 is dismissed with costs to the Applicant/Advocates.

13.That leaves the Advocates' Application dated 25 September 2012 to be determined. The Advocates' submissions dated 22 January 2013 were very clear in what it regarded was the legal position under **section 51 (2)** of the *Advocates Act* which it set out in full. Those submissions read:

"Section 51 is very clear that unless the Certificate of Costs be set aside or altered by the Court, the same shall be final as to the amount of the costs and that judgement can be entered against a Respondent for the sum stated in the Certificate of Costs. There is a valid Certificate of Costs on record which has not been set aside or altered by this Honourable Court and as such Judgement

can be entered on the amount stated in the Certificate of Costs."

The Applicant/Advocates went on to submit that the only reason as to the Respondents' failure to file a reference under **Rule 11** of the *Advocates (Remuneration) Order* was that the Deputy Registrar had failed to give her reasons for her Ruling in the taxation matter. The Applicant maintained that it was well settled law that the failure of the Deputy Registrar to state her reasons did not bar a party from filing a reference. I was referred to the well-known case of **Kipkorir, Titoo & Kiara versus the Deposit Protection Fund, Civil Appeal No. 220 of 2004 (unreported)** in which the Court of Appeal had stated:

"Indeed, we of the view, that if a taxing officer totally failed to record any reasons and to forward them to the objector, as required, then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

14.The Respondents submitted 2 grounds for the dismissal of the Application dated 25 September 2012 filed by the Applicant/Advocates. As I understood those submissions, the first basis put forward as regards the Application was that the issue of the lack of retainership was never considered before the Bill was taxed. The Respondents had maintained throughout that they had never instructed the Advocates to carry out what they had purportedly done on their behalf by way of legal services. The Respondents maintained that by virtue of the provisions of **section 51 (2)** of the *Advocates Act*, no Order could be made as sought in the said Application. The second ground put forward by the Respondents was that they had initiated a process that would definitely lead to the setting aside of the Certificate of Taxation. I was quite unclear as to what such process the Respondents were referring to, other than the belated Application to stay the proceedings which, as detailed above, was filed on 20 November 2012, nearly 2 months after the Applicant's Application. In that regard, the Respondents in maintaining that the process would eventually lead to setting aside the said Certificate of Taxation, maintained that it would be unjust to grant the orders sought in the Applicant's Application of 25 September 2012.

15.It would seem to me that on the strength of the **Kipkorir** case as well as the **Orbit Chemicals** and **Donholm Rahisi Stores** cases, the Respondents only meaningful process to set aside the Certificate of Taxation would have been to have filed a Reference under **Rule 11** of the *Advocates (Remuneration) Order*. If they had done so, then this Court would have the judicial authority to review the Ruling of the Deputy Registrar and possibly to have set the same aside. However it should be said that in arriving at her Ruling the Honourable Deputy Registrar considered the written submissions of both the Applicant and the Respondent herein. I have had an opportunity of perusing the same and I note that under Item Number 1- Instruction Fees in relation to the Bill of Costs the Respondent detailed:

"The Applicants purport to claim the exorbitant amount of Ksh. 6,509,500/= as instruction fees yet there is no record that stands for the fact that they were instructed to act for the Respondents in this matter. The Retainer as claimed by the applicants is disputed in toto."

Thereafter, the Respondents go into considerable detail as to what the Instruction Fees should have been in relation to the subject matter of the suit. I have no doubt that the Deputy Registrar considered all these matters in arriving at her Ruling delivered on 15 August 2012. Further in perusing her said Ruling, I am satisfied that she gave full reasons for her findings therein.

16.The conclusion to all the above is that I allow the Applicant/Advocates' Notice of Motion dated 25 of September 2012 in terms of prayers 1, 2 and 3 thereof. I also award the costs of the Application to the Applicant/Advocate.

DATED and delivered at Nairobi this 30th day of April, 2013.

J. B. HAVELOCK
JUDGE