



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS APPLICATION NOS.666 & 667 OF 2012**

**OYATTA & ASSOCIATES ..... ADVOCATE/ RESPONDENT**

**VERSUS**

**NILAM DOSHI ..... CLIENT/ APPLICANT**

**R U L I N G**

1. Before this Court are 2 Applications brought by way of Notices of Motion both dated 10th January 2013 seeking to set-aside 2 Judgements dated 27th of November 2012. The applications are brought under the provisions of **section 51** of the *Advocates Act* and **Order 51 Rule 3** of the *Civil Procedure Rules* as well as under the general powers of the Court given to it under **sections 1A, 1B and 3A** of the *Civil Procedure Act*. Both Applications are supported by the Affidavits of the Client **Nilam Doshi** sworn on the same date. However, the Grounds in support of the Application in *Application No. 666 of 2012* are different from those in *Application No. 667 of 2012*. Those in *Application No. 666 of 2012* read as follows:

**“1) The Respondent taxed a bill of costs against Sanjita Shah in HCCC No. 804 of 2002.**

**2) A Certificate of Costs was issued in favour of the Respondent against Sanjita Shah on the 31st October 2012.**

**3) The Respondent applied for judgement against Nilam Doshi based on the aforesaid Certificate of Costs issued against Sanjita Shah.**

**4) The respondent has proclaimed of the goods of Nilam Doshi.”**

While those in *Application No. 667 of 2012* detailed:

**“1) The Respondent moved to the Honourable Court *ex parte* and obtained judgement and decree against the Applicant.**

**2) The said application was made in direct violation of statute and rules of natural justice.**

**3) The Respondent failed to disclose material facts to the Honourable Court.**

#### 4) The Respondent has proclaimed the Applicant's goods."

2. Obviously the two Affidavits in support of the two Applications were different as in *Miscellaneous Application no. 667 of 2012*, auctioneers arrived at the home of the Client/Applicant to execute as against the Decree obtained therein. However, the Affidavits referred to Rulings delivered by the Taxing Officer of this Court on 4th October 2012 in respect of the Advocate/Respondent's advocate/client Bills of costs in *HCCC No. 802 of 2002* and *HCCC No. 804 of 2002*. The Advocate/Respondent had made *ex parte* applications for judgements based on the amounts certified in the two suits in relation to the costs of the Advocate/Respondent. The deponent of the two Affidavits, **Nilam Doshi** noted that so far as *HCCC No. 804 of 2002* was concerned, the party in the suit was the said Sanjita Shah and not herself. As a result, she swore the Affidavit in support of her application for the Judgement and Decree dated 27th November 2013 to be set aside. As regards *HCCC No. 802 of 2002*, the deponent maintained that when application for Judgement had been made, the Advocate/ Respondent did not disclose that there was a pending reference to the Ruling delivered by the Taxing Officer in relation to the Advocate/Respondent's Bill of Costs. As a result, the Client/ Applicant sought to set-aside the Taxing Officer's said Ruling.

3. By the time that the 2 Applications came before this Court, the parties' advocates had clarified the position with regard to the three High Court suits involved being *HCCC Nos. 802, 803 and 804 of 2002*. *HCCC Nos. 803 and 804 of 2002* had been consolidated covering the 2 Plaintiffs therein namely Nilam Doshi and Sanjita Shah. What was before this Court was only the Taxation References in relation to *HCCC Nos. 802 of 2002* as under *Miscellaneous Application No. 666 of 2012* and, in relation to *HCCC Nos. 803 and 804 of 2002* as under *Miscellaneous Application No. 667 of 2012*. Counsel had also clarified that Objections had been filed in relation to the Taxation proceedings in the 3 High Court Files. Further, counsel had agreed that the Objections were only based on 2 items on both files namely the Instruction fees and the Getting up fees. It was also agreed that the submissions made on the one file would apply to the other.

4. Mr. Wandabwa appearing for the Client/Applicant noted that it was the Getting up fees which were disputed on all 3 High Court files and for *HCCC No. 804 of 2002*, it was also the Instruction fees. He asked that judgement be entered on the amount that the Court decides upon as regards all 3 files. Counsel then detailed the history of the three files noting that on 2nd December 2011 all three cases had been dismissed as the parties' documents had not been placed and put before court in agreed bundles as directed and the suits had been dismissed for want of prosecution by **Kimondo J.** on that date. Counsel referred to the learned Judge's Ruling where there was a finding that there had been insufficient reason put forward in the parties' Affidavits showing cause why the cases should not be dismissed, and as to why they could not proceed to hearing. Counsel submitted that the plain fact was that the cases did not proceed to hearing and, as a result, the Taxing Officer should not have awarded Getting up fees. As regards *HCCC No. 804 of 2002*, that case having been consolidated with *HCCC No. 803 of 2002*, he noted that when the Taxing Officer was taxing the Instruction fee in *HCCC No. 804 of 2002*, she had erroneously assumed the same amount being in dispute when she should have applied the figure of Shs. 51,550,680/-and not the amount that was in dispute as per the Plaint in *HCCC No. 803 of 2002*.

5. Mr. Oyatta, at the commencement of his submissions before Court, conceded that the Taxing Officer in *HCCC No. 803 of 2002* had based her calculations on a judgement figure of Shs. 165 million (the sum claimed in the Plaint) whereas the figure should have been the same as in *HCCC No. 804 of 2002* being Shs. 51,550,680/-. After counsel had discovered the mistake, he recalculated the instruction fee which came out at Shs. 1.3 million as opposed to Shs. 2.5 million. As regards the Getting-up fee, Mr. Oyatta maintained that it was not true that the matters weren't ready for trial. The agreed issues had been filed as well as the bundle of documents before 21th October 2009 when the case came for hearing before **Kimaru J.** He maintained that the Court record would show that the Supplementary Bundle of Documents was filed on 17th of July 2008. The only thing that transpired before **Kimaru J.** is that the Judge observed that the parties before Court were the same and he made an Order consolidating the two files as well as directing parties

to file a joint bundle of correspondence and documents so as to ease the hearing of the matter and to avoid repetition. Counsel then went into the history of the matter before 21st October 2009 when it was clear that **Lesiit J.** fixed the hearing of all three files for 11th December 2008. Counsel detailed that on that date the parties were present in Court ready to proceed with the hearing after preparing for trial but the matter was taken out due to the unavailability of Judges. The hearing was thereafter fixed again for 19th October 2009 before **Khaminwa J.** who mooted the idea of two out of the three files being consolidated for hearing which resulted in the aforesaid consent Order before **Kimaru J.** on 21<sup>st</sup> October 2009. The Judge, on that date, had also directed the parties to file Supplementary Agreed Issues based on the consolidation.

6. Mr. Oyatta reiterated that it was not right that this suit was not ready for hearing at the time it came before **Kimondo J.** Counsel went on to say that the next thing that transpired was the Notice from Court to show cause why the three suits should not be dismissed. He concluded that the Taxing Officer could not be faulted in awarding Getting up fees because counsel had prepared for trial. He maintained that it was unfortunate that the matter had been dismissed by the Court because of the failure to put in a joint Bundle of Documents. This could be explained as there were other advocates' firms involved in the case who came off the record, making it difficult for the advocates to trace the 2nd and 3rd Defendants. In a short rejoinder, Mr. Wandabwa drew the attention of the court to paragraph 9 of Mr. Oyatta's Affidavit dated 12th September 2011 in which he had stated that:

**“we were unable to set the suit down for hearing”.**

7. Arising out of the above submissions, it appears that what this Court is required to determine is just what the Instruction fees should be awarded in the 3 High Court suits being *HCCC Nos. 802, 803 and 824 of 2002*, always bearing in mind the consolidation of the latter two suits. Further, as regards whether the Advocates are entitled to Getting up fees in respect of the said suits. As regards *HCCC No. 802 of 2002* – I have perused the Ruling of the Taxing Officer delivered on 4th of October 2012. She detailed that the value of the subject matter of the suit was not disputed in the amount of Shs. 21,093,780.80. This figure relates to the amount claimed in the Complaint dated 26th June 2002. I have perused the Taxing Officer's calculations as regards to the Instruction fee which she allowed at Shs. 356,406.71. I would endorse the calculations in that regard. At page 2 of the Ruling, the Taxing Officer allowed one third of the Instruction fees as Getting up fees. Again, I have no quarrel with that apart from whether the Advocate/Respondent was entitled to a Getting up fee. The relevant paragraph of *Schedule VI of the Advocates (Remuneration) Order* as regards Getting up fees is subparagraph 2 thereof which reads as follows:

**“2. FEES FOR GETTING UP OR PREPARING FOR TRIAL**

**In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:**

**Provided that –**

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;**
- ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15 per cent of the instructions fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;**
- iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph”. (underlining mine).**

8. I have perused the record of the Court prior to the matter going before **Kimaru J.** on 21st October 2009. There was an appearance before the said Judge on 17th June 2008 when the following Order was recorded:

**“By consent matter be mentioned on 1/7/2008 with a view to fixing a hearing date. Mention notice to be issued to the 2nd & 3rd Defendants by the Plaintiff.”**

Then on 1st July 2008 before **Lesiit J.** the Court ordered that the suit be heard on 9th December 2008. Again on that day, the matter came before **Khaminwa J.** who recorded:

**“Taken Out. Judges on official assignments.”**

In my opinion, and taking into account proviso (ii) of subparagraph 2 as above, I find that the suit was confirmed for hearing on 9th December 2008 by **Lesiit J.** I have no doubt that parties came before Court on 9th December 2008 ready to proceed with the hearing and having prepared for the same. As a result, I believe that the Advocate was entitled to the Getting up fee and, as a consequence, I would confirm the finding of the Taxing Officer when she taxed the Advocate’s Bill of Costs in the total amount of Shs. 782,989.41.

9. I turn now to the Ruling of the learned Taxing Officer, Mrs. Nyambu, delivered again on 4th of October 2012, in respect of the consolidated cases of *HCCC No. 803 and 804 of 2002*. It is apparent that the Taxing Officer worked her calculations as regards the Instruction fee on what she termed the value of the subject matter at Shs. 165,274,849.30. Both counsel agreed that in fact the figure upon which the calculations should have been made and which was detailed in the Plaint in *HCCC No. 804 of 2002* – Shs. 51,550,684.95. If the Taxing Officer had based her calculations on that figure, then the Instruction fee would have been Shs. 813,260.27. This is the figure that I would award the Advocate under this head. The further question to be determined is whether the Advocate would have been entitled to a Getting up fee in respect of this file. Again I have perused the record of the Court. I find that on both *HCCC No. 803 and No. 804*, there were similar appearances in respect of both files before **Kimaru J.** on 17th June 2008 at which the same consent Order was recorded as for *HCCC No. 802 of 2002* as above. Both files also came before **Lesiit J.** (again as for *HCCC No. 802 of 2002*) on 1st July 2008. On *HCCC No. 803 of 2002*, the learned Judge fixed the hearing for 11th December 2008. On *HCCC No. 804 of 2002*, the Judge fixed the hearing for 8th December 2008. There is no record for what transpired on the 8th December 2008 on *HCCC No. 804 of 2002*. However, on the 11th of December 2008 on *HCCC No. 803 of 2002*, **Khaminwa J.** recorded:

**“Taken Out. Judges not available.”**

This inevitably leads me to the same conclusion as I reached above as regards *HCCC No. 802 of 2002* that the other 2 cases having been confirmed for hearing, the Advocate was entitled to the Getting up fee. As a result, I would endorse the decision of the Taxing Officer (although based on the wrong figure for Instruction fee) to allow one third of the Instruction fee for the Getting up fee. I calculate that to be Shs. 271,086.75. Further, I see no reason to differ (as agreed by Counsel) from the learned Taxing Officer with regard to the other items that she taxed off in respect of the Advocate’s Bill of Costs dated 27th April 2012. As a result, I would declare the said Bill of Costs taxed at Shs. 1,022,600.02.

10. In conclusion, and as invited by counsel, I would enter Judgement for the Advocate/Respondent in respect of *HC Misc Appl. No. 666 of 2012* in the amount of Shs. 782,989.41. Further, I would enter Judgement for the Advocate/Respondent in respect of *HC Misc Appl. No. 667 of 2012* in the amount of Shs. 1,022,600.02. The Advocate/Respondent will have the costs of this Application.

**DATED and delivered at Nairobi this 30<sup>th</sup> day of October, 2013.**

**J. B. HAVELOCK**

**JUDGE**