



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 166 OF 2012

IN THE MATTER OF HAIDERALI KANJI SAYANI

CECIL G. MILLER T/A MILLER & COMPANY ADVOCATES..APPLICANT

VERSUS

PARIN SHARIFF

NAZLIN NIZAR JETHA

YASMIN JANMOHAMED & ANAR HANALI..... RESPONDENTS

RULING

These proceedings were instituted by way of a Bill of Costs filed by the applicant who is an advocate of the High Court of Kenya against the respondents who he alleges were/are his clients. Accordingly, in this ruling the two parties will be referred to as the advocate and the client respectively.

The matter as is the procedure in such matters was fixed before the Deputy Registrar of this Court on 20th April 2012. On that day **Mr. Miller**, the advocate, indicated to the Court that he was ready to proceed while **Mr. Litoro**, learned counsel for the clients informed the Court that he would be seeking for particulars under the provisions of rule 13A of the Advocates Remuneration Order for which he required time to make a formal application, and hence prayed for an adjournment. In a lengthy ruling in the circumstances, the learned Deputy Registrar, disallowed the application for adjournment and directed the parties to file their submissions within 14 days and the matter was then fixed for mention on 8th May 2012. That mention was not to be. On 4th May 2012, the client filed an application dated 4th May 2012, in which it now seeks the following orders:

1. **That this Application be certified as urgent and be heard ex-parte in the first instance;**
2. **That an urgent date be set for the inter partes hearing of this Application.**
3. **That pending hearing and determination of this application, this Honourable Court be pleased to order a stay of the order and directions issued on 20th April 2012 and any further proceedings in this matter.**
4. **That this Honourable Court be pleased to Order the Applicant to supply the Respondents with particulars and produce documents for inspection in terms of a Request for Particulars dated 23rd April 2012 and filed herewith within 14 days of this Order thereof or at such time as may be prescribed by the Court;**
5. **That in the event of the Applicant, Advocate's default to comply with Order 3 above, the Bill**

of Costs dated 8th March 2012 be deemed struck out.

6. That the Costs of this application be provided for.

The said application was placed before **Waweru, J** on 7th May 2012 who directed that the same be served and fixed the same for mention inter partes on 8th May 2012. On 8th May 2012, counsel agreed by consent that the matter be mentioned before the Deputy Registrar on 15th May 2012. On the said 15th May 2012 when the matter was placed before the Deputy Registrar, the latter referred the matter back to the Judge seeking directions of how to proceed. On 18th May 2012, the learned Judge, **Waweru, J** directed that the application be canvassed on 13th June 2012 and that is how this matter landed on my laps.

However, on 8th of June 2012, the advocate filed a notice of preliminary objection on the following grounds:

1. **That the Respondent's said application is not provided for in law particularly under the Advocates Remuneration (Amendment) Order 2009.**
2. **That the Respondent's said application is incompetent, misconceived, bad in law and merely intended to frustrate and delay the conclusion of the matter herein.**
3. **That the Respondents said application is premature, frivolous, vexatious, brought in bad faith and is otherwise an abuse of the court process.**

These objections that are the subject of the instant ruling. Counsel agreed that the submissions in High Court Misc. Application No. 165 of 2012 would be adopted in this Cause.

In his submissions, **Mr. Miller** contended that the application sought to be canvassed was never canvassed before the Deputy Registrar since the prayers sought therein were never made before the Deputy Registrar. In any case it was argued that what is sought in the present application could be sought within the process of taxation and therefore to bring this application amounts to an abuse of the Court process. To the advocate the said application is un-procedural and is meant to waste the Court's time.

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. Based on the said decision, it is submitted that the present application is bad in law and incompetent. With respect to the overriding objective as stipulated in sections 3A and 3B of the Civil Procedure Act, support is sought from **Hunker Trading Company Limited vs. Elf Oil Kenya Limited [2010] eKLR** under which it is stated that under section 1A(3) an applicant has a duty to obey all court processes and orders. Here, it is submitted, the client's actions are aimed at delaying the taxation by clogging the court system with unnecessary applications contrary to the overriding objective. Based on the same decision, it is submitted that the client has not obeyed the directions and orders of the Deputy Registrar and that compliance with past rules and precedents which are O2 compliant must be insisted upon. In conclusion it is submitted that the application is an abuse of the process of the Court and the client should go back and canvass the same before the Deputy Registrar hence no prejudice will be suffered by the striking out and dismissal of the application.

On his part **Mr. Ojiambo**, Senior Counsel, who appeared with **Mr. Litoro** in this matter submitted that the basis of the application is to secure the particulars of the work for which the fees is claimed. The decision of the Taxing Master can only be under rule 11 of the Remuneration Order in the taxation itself. No provision, however, has been pointed out dealing with the furnishing of particulars, it is submitted. According to counsel rule 11 only deals with the mechanical aspect of the taxation but not with an order for particulars. Accordingly, counsel has no quarrel with the authorities cited in so far as they deal with matters arising from rule 11 aforesaid. The application is not, in counsel's view, premature since it seeks particulars which are not contained in the Bill. Rule 11 requires the Taxing Officer to look at all the particulars in arriving at the decision, yet this cannot be done unless the particulars are provided and he cannot order for the furnishing of the same.

It is submitted that the Deputy Registrar's jurisdiction is delegated jurisdiction because it is actually the jurisdiction of the High Court and does not take away the latter's jurisdiction under the Constitution. However, with respect to **Sharma's Case** it is submitted that the limitation is with respect to taxation of costs which the present application is not. To say that it is unjust to supply particulars, counsel submits, cannot be right since Article 159(2)(d) enjoins the Courts to give substantive justice without undue regard to procedural technicalities. Here, it is submitted, the client is entitled to know the particulars for which the advocate claims his costs. According to counsel, the client is before court because there is no provision in the Remuneration Order under which the Registrar can order for particulars unlike under the Civil Procedure Rules. Accordingly the Court has inherent jurisdiction to do what is just. With respect to the decisions cited, counsel reiterated that the same were in respect of a taxation and an appeal and reference only applies where orders are made within jurisdiction such as where there is a taxation. To seek particulars cannot, in counsel's view, amount to an abuse of the process of the Court since the conduct of an advocate as an officer of the Court is a matter within the jurisdiction of the Court and it cannot be outside the Court's jurisdiction to make orders for particulars. Advocates must justify charges made for services rendered and therefore to fail to supply particulars, in counsel's view, would be a travesty of justice. There is no justification, therefore, why the application cannot be heard.

In a rejoinder, **Mr. Miller** submitted that the only reason advanced for the making of the application is that no provision exists for such application under the Remuneration Order. He submitted that the application is an attempt to run away from the laid down procedure under the Remuneration Order. In his view, there is no lacuna since the Deputy Registrar is competent to decide on the sufficiency of particulars. There is a remedy only that such an application has not been made, it is submitted.

Having considered the foregoing, this is the view I form of the matter.

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 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 **Kimani Wanyoike vs. Electoral Commission & Another Civil Application No. Nai. 213 of 1995**, 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.

However, here the client’s position is that what is being challenged is not a decision by the Registrar but rather what is sought are orders whose effect would enable the Registrar arrive at a just decision. That obviously calls for the examination of the powers of the Registrar as a Taxing Officer. It is unfortunate that none of the counsel addressed the Court on the provisions of paragraph 13A of the Advocates Remuneration Order which provides as follows:

“For the purpose of any proceeding before him, the taxing officer

shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”.

From the record, **Mr. Litoro** was well aware of the foregoing provision because he alluded to the same while making the application for adjournment before the Deputy Registrar. If I am not wrong, **Mr. Miller**, likewise, must have been alluding to the same provisions when he submitted that the client should go back and canvass the application before the Deputy Registrar. Under the foregoing provision the Taxing Officer has power to order production of any document that may be of assistance to the taxation and to adopt any necessary proceedings which are in his view necessary for the determination of any dispute before him. To order that a party furnishes particulars cannot therefore be said to be outside the powers of the Taxing Officer under the said provision. I therefore, with respect, disagree with counsel for the client that there is no provision for ordering particulars under the Advocates Remuneration Order. As correctly submitted by **Mr. Ojiambo**, in taxing the Bill, the Deputy Registrar is in fact exercising a delegated jurisdiction. It is the same jurisdiction of the High Court but simply delegated to the Deputy Registrar such as the power to amend pleadings which is delegated to the same officer under Order 49 rule 7(1)(b)(vi) of the Civil Procedure Rules. **Waweru, J** must have been aware that the Deputy Registrar had jurisdiction when he, on 8th May 2012, by consent of the parties directed that the matter be placed before the Taxing Officer on 15th May 2012. I derive support from **Taj Deen Vs. Dobrosklonsky and Bhalla & Thakore [1957] EA 379** in which the then East African Court of Appeal held *inter alia* that if advocates make obviously excessive claims as regards instructions and support them by misleading particulars, taxing officers should deal drastically with them. This, in my view, is a clear indication that

the issue of particulars can be properly dealt with by the Deputy Registrar in the exercise of his jurisdiction as a Taxing Officer. Even if there was no express provision in the Remuneration Order the last part of the above provision is, in my view, wide enough to allow for the principles of overriding objective. In the case of **John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007**, Waki, JA held *inter alia* that:

“jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court’s view, dealing with a case justly includes *inter alia*, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases”(Underlining mine).

In my view the grant of an order for particulars is one of the interim reliefs that may be granted under the aforesaid paragraph 13A in deserving cases. Whether this is a deserving case or nor can only be determined by the Court properly seized of the application.

Having arrived at the above decision, the only issue remaining is what should be done to the Notice of Motion dated 4th May 2012. In the advocate’s view the same should be struck out and dismissed so that the issues raised can be canvassed by the Deputy Registrar. That calls for a re-examination of the place of preliminary objections in the judicial system.

In **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**, Law, JA was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

To deserve being considered as a preliminary objection, the objection must be capable of disposing of the suit. From **Mr. Miller’s** own submissions, there is an implied admission that the issues raised herein should be raised before the Deputy Registrar. Clearly therefore, the objection herein will not be capable of disposing of the application with the result that the objection does not satisfy the criteria set out for upholding of preliminary objections.

However, it is trite that as a matter of good practice and prudence all matters ought to be filed at the lowest competent adjudicating body, which can deal with the issue in dispute. See **Steel Structures Limited Vs. David Engineering Limited Nairobi (Milimani) HCCC No. 189 of 2007**. This practice is founded on the fact that a party should be given as much latitude as the law permits in challenging a decision. To deal with the matter at the higher echelons of judicial hierarchy, even if the higher court is clothed with jurisdiction may amount to denying a party the opportunity to challenge a decision. In this case, if the High Court were to accommodate the said application, the opportunity to object to the decision which is available if the decision is made by the Deputy Registrar would be lost. As was held by **Ringera, J** (as he then was) in **Re: Leisure Lodges Limited Nairobi (Milimani) HCWC No. 28 of 1996**, a party who is aggrieved by any decision of the taxing officer whether interlocutory or final and whether it be on the quantum awarded on the bill as a whole or any items thereof has a recourse to the High Court by way of a reference under paragraph 11 of the Advocates Remuneration Order. A decision made by a Taxing Officer on an application such as the one the subject of the objection herein would clearly be an interlocutory decision and, according to the Judge, whose decision I, with respect associate myself, amenable to challenge under paragraph 11 aforesaid.

Accordingly while not acceding to the objection raised, I, however decline to entertain the application and instead direct that the same be heard and determined by the Deputy Registrar under the provisions of

paragraph 13A aforesaid.

I, however, note that in disallowing the application for adjournment the Deputy Registrar may have unwittingly trespassed into the merits of the application itself. In the premises I direct that the application be heard by any Deputy Registrar of the High Court other than **Mr. A K Ndungu**. The costs of this application shall in cause.

Ruling read, signed and delivered in Court this 29th day of June 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Miller for the applicant

Ms. Anjeline Waweru for Mr. Ojiambo for the respondent