



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

Miscellaneous Application 138 of 2011

**MORONGE & COMPANY ADVOCATES (A FIRM).....RESPONDENT/ADVOCATE**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....APPLICANT/CLIENT**

**RULING**

The respondent hereinafter referred to as ‘Advocate’ was retained by the respondent hereinafter referred to as ‘Client’ to defend it in Kisumu HCCC 179/2009. The said suit which the plaintiff sought the sum of Kshs. 25,524,000,000/= was struck out with no orders as to costs at the preliminary stage. Subsequently the advocate sought his fees from the client and as a consequence he filed his bill when there was no agreement on the same. The taxing master awarded the advocate the sum of Kshs. 278,466,690/=. The client did file an application vide Kisumu HCCC 124/2011 between the client and the advocate. Pursuant to this application I made the following observation on 21-11-2011:- “The applicant shall within the next fourteen (14) days from the date herein file and serve the reference in case No. Misc. Application 138/2011”.

On 29-11-2011 the client filed a notice of motion and sought the following prayers:- That the decision of the Deputy Registrar dated 31-5-2011 together with the certificate of taxation issued on the 7th June 2011 be set aside and the Respondent’s advocate – client’s Bill of Costs dated 5-5-2011 be taxed afresh. That this honourable court be pleased to order that the execution of the certificate of costs be issued on 7th June 2011 be stayed pending the hearing and determination of this application. The same is supported by the affidavit of Joy Nyaga sworn on 29-11-2011. The advocate on the other hand filed a replying affidavit in opposition by one Evans Moronge sworn on 2-12-2011 as well as taking out a preliminary objection dated 2-12-2012.

Before dealing with the main issues of the applicant’s application it is imperative to determine the preliminary point raised by the respondent. This is the validity of the procedure adopted by the applicant in filing the application.

According to the respondent the same is fatally defective. The applicant ought to have filed a chamber summons and not a notice of motion. This is buttressed by the provisions of Rule 11 of the Advocates Remuneration Order which state that a party being dissatisfied by the decision of a taxing master ought to file a chamber summons. Secondly, a part from being brought under a wrong procedure the same has been brought under wrong provisions of the law.

I do agree with the respondent in this regard. However, this is an issue of procedure and not substance. It does not go into the root of the issue at hand. Had it been that it goes into the root of the substantive issues in which the parties are litigating over then perhaps I would have thought otherwise. I do not see any prejudice the respondent stand to suffer in any event.

I do further invoke the provision of Article 159 (2) (d) of the constitution which states:- “In exercising judicial authority the courts and the tribunals shall be guided by the following principals:-

(d) Justice shall be administered without undue regard to procedural technicalities”.

As observed by Justice Ringera as he then was in Microsoft Corporation –VS- Mitsumi Computer Garage Ltd & Another, HCCC 810/2001 Nairobi. The rules of procedure are handmaiden and mistress of justice.

There was the other preliminary issue raised by the respondent that the Deputy Registrar did not give his reasons as envisaged by Rule 11 of the Advocates Remuneration Order. This point was sorted out by my ruling earlier on quoted of 21-11-2011. I granted the applicant leave to file within 14 days its reference.

Having found that the notice of motion is proper before me, I shall consequently treat the grounds thereof as issues to be determined as well as the rival affidavits filed by the parties herein. The substantive issue to determine is whether the award of Kshs. 278,466,690/= was excessive in the circumstances. The plaint in case No. HCCC 179/2009 shows that the plaintiffs demanded:- “An order that the defendant do compensate and or adequately compensate the plaintiff the sum of Kshs. 25,542,000,000/- as particularized in paragraph 12 here before. Damages for loss and profits for breach of agreement. Interest and costs”.

There is no basis for the sum of Kshs 25 billion demanded by the plaintiffs therein. There is no valuation or any other document in support of their claim at all.

Infact, in their letter dated 14-1-2010 by the advocate to the client the respondent while giving their opinion said:

“.....this amount to mere quotation of figures which would normally be adequate where special damages are alleged. The claims as set out in the plaint are completely baseless and amorphously wholly as the plaintiff have failed to particularize each of their grievances and claims and such the same cannot sustain in any manner a cause if action. We opine that the plaintiffs cannot succeed in their claim. They are mere busy bodies and joy riders trying to reap what they did not sow..... In conclusion therefore the plaintiffs failed to particularize damages and costs incurred and it therefore means that they will not be allowed to give evidence of it at the trial. The claim must therefore fail”.

The respondent indeed applied to the court and apart from other reasons the suit was struck out. It follows therefore that even while giving its opinion the advocate knew clearly that there was no basis for the claim of Kshs. 25 billion by the plaintiff.

In the same breath therefore they should not rely on the said figures. The principal of estoppel applies to them. The taxing master squarely fell into this trap. He relied basically on what was in the pleadings instead of asking himself if indeed there was such basis.

Having found that there was no basis for the award by the taxing masters what is the recourse for the advocate. They are entitled to their costs. This is his livelihood. He has worked. He has given a sound and credible opinion and as a result he succeeded in having the suit against the claimant struck out. He won the case.

The advocate’s pay however must be commensurate to his work otherwise it shall be what is termed as “unjust enrichment”. The same must be a reasonable compensation for professional work done. This court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances. Having carefully perused through the rival affidavits and submissions and taking into consideration the issues I have observed above I am inclined to set aside the taxing master’s certificate issued herein. The sum of Kshs. 278,466,690/= was manifestly excessive in the circumstances.

Having arrived at the said decision, I do not see any special reasons why I should refer this matter again to the taxing master. Before arriving at what figures I think it is appropriate, the applicant has argued that the amount due to the advocate was to be obtained from public funds and argued that I should consider it while arriving at my decision. This in my estimation is far fetched. Having instructed counsels to act for it the respondent should shoulder the costs of litigation. Advocates are professionals and they ought to be remunerated by whoever has sought their services and opinions.

In light of my above observation therefore I do find that although the suit was dealt a blow at a preliminary stage there was some adequate work and research undertaken by the advocates. In their earlier letter to the advocate dated 19-1-2011 the client proposed to pay them the sum of Kshs. 480,000/=. I do appreciate the nature of labour involved especially the earlier on opinion given by the advocate to the client.

Using my discretion therefore, I shall enhance the sum of Kshs. 480,000/= proposed by the client award the advocate the sum of Kshs 1.2 million taking into consideration the other relevant issues. The

respondent too shall have the costs of this reference.

**Dated, signed and delivered at Kisumu this 26th July, 2012.**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

.....for the applicant

.....for the respondent

HKC/va