



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 170 of 2012

CHRISTOPHER HAPPE.....PLAINTIFF

VERSUS

STEPHEN ODDIAGA.....RESPONDENT

Coram:

Mwera J.

Kibe for Plaintiff

Mkan for Respondent

Furaha Court Clerk

RULING

In the notice of motion dated 17th September, 2012, the plaintiff sought prayers under Order 52 rules 4, 5, 10, Order 40 and 51 of Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act that:

- (i) pending determination of this suit the defendant do deposit Shs. 13,062,500/= in court which sum was received by the defendant between February and March, 2010 as alleged security in MBA HCCC 16/10;
- (ii) the defendant also deposit in court Shs. 1.2 million he received from M/S Anjarwalla & Khanna Advocates on behalf of the plaintiff; and
- (iii) the advocate/client bills of costs in five listed cases, be stayed.

There were some twenty grounds filed as to why the foregoing prayers should issue, followed by the plaintiff's supporting affidavit of some 38 paragraphs. On 20th September, 2012 the court gave an order to stay the taxation of bills. The defendant/respondent filed a total of twelve grounds of opposition on 1st October, 2012 and a replying affidavit on 3rd October, 2012 with 25 paragraphs. Before hearing the motion itself the defendant filed a notice of preliminary objection on seven grounds: that the motion contravened the provisions of the Advocates Act; section 45 of that Act was applicable in one of the suits and the client had withdrawn instructions and so the advocate was entitled to immediate payment of his fees. The other ground was that Order 52 rule 4(3) of Civil Procedure Rules was applicable presupposing that both sides be heard before the court makes any order. That with bills totaling over Shs. 50 million prepared and served on the plaintiff, the defendant had a lien over the files and any money due to the plaintiff. Such lien required protection since there was a claim for the unpaid advocates costs and fees. It was desired that the order to stop taxation be lifted. Each side submitted after the plaintiff filed a

supplementary affidavit.

After considering the facts and provisions of law alluded to, the court was inclined to the position that in the manner of these proceedings, the parties can still put forth points of law as they argue the merits of the present application with a view to get one composite ruling. As to the taxation there is no denial that costs are due to the plaintiff; they are contested or if not, that remains so. This court therefore lifts the order not to proceed with taxation on the basis that moving through the taxation proceedings cannot prejudice the plaintiff at all. This is so because certificates of taxation could be held in abeyance as other related aspects are addressed e.g. to pay up or set-off against any sums the plaintiff may be entitled to.

Accordingly, parties are directed to argue the preliminary objection along with the merits of the application. Such course cuts down on time, costs, etc. The subject application should thus be set down for hearing in twenty eight (28) days. The order barring taxation is lifted.

Orders dated 22nd November, 2012. Costs in the cause.

J. W. MWERA
JUDGE