



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 109 of 2011**

**COMMERCIAL BANK OF AFRICA.....PLAINTIFF**

**VERSUS**

**LALJI KARSAN RABADIA.....1<sup>st</sup> DEFENDANT**

**CHANDRAKANT LALJI RABADIA.....2<sup>ND</sup> DEFENDANT**

**PRAVIN JADVA RABADIA.....3<sup>RD</sup> DEFENDANT**

***(Being a Preliminary Objection to filing of the Bill of Costs dated 27<sup>th</sup> July 2012)***

**RULING**

By a Preliminary Objection dated 20<sup>th</sup> September 2012, the Defendants seek orders to strike out the Bill of Costs dated 27<sup>th</sup> July 2012 filed by the Plaintiff or in the alternative an order staying its taxation on following grounds:

- 1. That the Bill of Costs is premature.**
- 2. A Substantial portion of the Plaintiff's claim is yet to be tried and decided upon and taxation should therefore await final determination of the remainder of the suit.**
- 3. Costs should not be taxed piecemeal.**
- 4. Taxation of costs at this stage will be prejudicial to the Defendants who have appealed against the decision giving rise to the Preliminary decree.**

The Parties' Bill of Costs presented for taxation by the Plaintiff arose from summary judgment given in this Court in respect of part of a liquidated claim against the Defendants. The Defendants thus claim that the case has not been disposed of in its entirety.

The Defendants filed their submissions arguing that the order for costs given by the Court in the ruling dated 6<sup>th</sup> February, 2012 was given in an interlocutory application which ruling did not specifically direct that costs be paid forthwith or that taxation and payment of costs be immediate. They thus submit that the costs should await the final determination of the entire suit. They refer to **Uchurangrai Keshavrai Oza vs New India Assurance Co. Ltd [1936-37] 17 KLR 73** where the Registrar refused to tax costs of an interlocutory application prior to the final determination of the suit unless the judge directed the immediate taxation and payment of costs of an interlocutory application. The Judge upheld the decision of the Registrar on appeal. They relied on **Homi Dara Adrinwalla v Jeanne Hogan and Another [1966]**

**E.A** where **Mustafa J** held that there should be one taxation of costs in an action and costs of an interlocutory application should be held over until the final determination of the suit. They further quote **Judicial Hints on Civil Procedure** by **Richard Kuloba** at **Pages 156-157** to advance their position. They assert that the taxation is bound to cause embarrassment to the parties and the taxing officer due to duplication of charges and it may be difficult to distinguish whether the fees charged relate to the amount for which judgment has been given or to the amount pending for hearing. They pray that the Preliminary Objection be upheld and the Bill of Costs be either struck out or stayed pending final determination of the suit.

On behalf of the Plaintiff it is submitted that the Plaintiff applied for summary judgment on the whole claim and while the Defendants were granted leave to defend to the extent of Kshs. 240,000,000, the application succeeded with costs. In a subsequent ruling on whether the ruling gave rise to an order or a Decree, the Court held that it was a Decree both preliminary and final for payment of moneys and costs. Further, the Defendants' application for stay of execution in the Court of Appeal was dismissed on the grounds that there was no prejudice to the Defendants in execution proceedings being issued. The plaintiff quotes **Abdi Nvri v BEA Corporation & Rukinya (1909)3 EALR 12** in which it was held that if there had been a decree then the costs could have been taxed. On the authorities quoted by the Defendants, it is contended that they are based on interlocutory orders, which did not result in a decree. It is thus submitted that there is nothing, which prevents or delays the taxation of costs on a decree. Moreover, it is argued that the Court of Appeal has stated that there will be no prejudice to the defendant in execution proceedings, which can only be done after completion of taxation. The plaintiff thus prays that the Preliminary Objection be dismissed with costs and that the Deputy Registrar be directed to proceed with the taxation.

The general rule in taxation of costs in an application is provided for under Order 51 rule 11(2) which provides:

***Unless the court otherwise orders for special reasons to be recorded, costs awarded upon an originating summons, applications or other process shall be taxed only at the conclusion of the suit.***

From the foregoing it is clear that even in cases where the costs are awarded on an Originating Summons which is a suit, the same are, unless otherwise provided, only to be taxed at the conclusion of the suit. In this case it is, however, argued that the Court entered a summary judgement which gave rise to a decree. It is however not contended that the Court decreed that the costs be taxed forthwith. The decision whether or not to direct that the costs be taxed forthwith is an exercise of the Court's discretion which must be exercised on circumstances depending on the facts and the circumstances of each case and good sense of the trial court. In the exercise of the discretion the Court is now enjoined to give effect to the overriding objective as provided in section 1A in the exercise of its powers under the Act or in the interpretation of any of its provisions and under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

What would be effect of proceeding with taxation of costs at this stage? It would imply that the Court may find itself in a situation in which it would have to conduct at least two sets of taxation in respect of the same suit. Whereas there is nothing inherently wrong about that under the overriding objective of civil litigation, the Court is required to aim at the efficient disposal of the business of the Court as well as the efficient use of the available judicial and administrative resources. In order to achieve this, the Court ought to ensure that litigation is reduced to a minimal. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, the Court of Appeal held *inter alia* that:

**“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory**

**applications and instead to adjudicate on the principal issues in a full hearing if possible”.**

The overriding objective, in my view, is tailored to enable the court deal with cases justly and includes allotting cases their appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

In my view the rationale for taxing the costs at the end of the trial is to avoid multiplicity of proceedings in form of taxation which may lend themselves to references. The Court ought to avoid the possibility of entertaining multiplicity of similar legal proceedings since such multiplicity has the effect of allotting a case more judicial time and resources at the expense of other cases. Again in cases where the case is yet to be finally determined the taxation of costs arising from interlocutory proceedings has the effect of interfering with the orderly conduct of litigation as the file has to be shuttled from the Taxing Master to the Judge. To paraphrase the decision in **Stephen Boro Gittha vs. Family Finance Building Society & 3 Others** (supra) the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining, unless absolutely necessary, to direct taxation of costs during the pendency of the suit and instead to tax the costs at the conclusion of the suit. Unless, therefore, the delay in taxing the costs arising from interlocutory orders or preliminary decrees will have the effect of rendering the enjoyment of such orders and decrees a mirage, taxation ought to await the final determination of the suit.

The plaintiff has however contended that since Court of Appeal has stated that there will be no prejudice to the defendant if the decree is executed, which execution can only be done after completion of taxation, there is nothing, which prevents or delays the taxation of costs on a decree.

In this case, it is clear that the plaintiff has succeeded in part of its claim and unless that success is set aside on appeal or review, the plaintiff ought to be able to enjoy that fruits accruing therefrom without any unnecessary delay. A court in exercising discretion ought to take into account the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

If the plaintiff in this case had no option available to it of securing the sum already decreed in its favour I would have had no hesitation in holding that a procedure that bars a litigant from accessing the sum decreed to it is unjust. However our rules of procedure adequately make provision for such circumstances and the remedy is to be found under section 94 of the Civil Procedure Act which provides:

***Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.***

In the foregoing premises I hold that, in light of the available options to the plaintiff, it would not constitute an optimum utilisation of the limited judicial time and contrary to the aims of the overriding objective to allow the taxation of costs to proceed piecemeal. Accordingly, as the mere fact that taxation has not been undertaken does not bar a party from moving the Court to execute for the principal sum I allow the preliminary objection herein and direct that the taxation await the determination of the pending issues or further orders.

The costs of this objection will be in the cause.

**Dated at Nairobi this 13<sup>th</sup> day of December 2012**

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of Mr Fraser for the Plaintiff and Mr Amuga for the Defendants