



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

MISC APPLICATION NO. 834 OF 2009

KHADIJA NAJMUDIN JIWAJI GANIJEE.....PLAINTIFF

VERSUS

WARUHIU K'OWADE & NGANGA ADVOCATES.....DEFENDANT

RULING

By a Plaint dated 12th November, 2009, and filed in court on 13th November, 2009, the Plaintiff sought judgment against the Defendant herein for orders –

- (1) That the Advocate/Client Bill of Costs be stayed as no instructions were given by the Plaintiff to the Defendant to render the professional services for which the alleged payment is claimed.**
- (2) That the issues raised in this suit cannot be determined by the Taxing Officer.**
- (3) That the suit will be rendered nugatory unless the stay of proceedings sought herein is granted.**
- (4) Costs of this suit.**
- (5) Any other or further relief that this Honourable court may deemed just and fit to grant.**

The Plaint was filed contemporaneously with an application by Notice of Motion also dated 12th November, 2001, and taken out under Section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules. The Plaintiff/Applicant thereby seeks two substantive orders –

- (a) That all the proceedings and taxations in High court Misc. Civil Application No. 147 of 2009 be stayed pending the hearing and determination of this suit.**
- (b) That the costs of this application be provided for.**

The application is supported by the annexed affidavit of Khadija Najmudin Jiwaji Ganijee, the Applicant herself, sworn on 12th November, 2009, and is based on the grounds that the Bill of Costs for taxation should be stayed as no instructions were given to the Defendant by the plaintiff herein. Furthermore, the issues herein cannot be determined by the Taxing Officer, and the suit will be rendered nugatory unless the stay of all proceedings and taxation sought herein are granted.

Opposing the application, the Respondents filed a replying affidavit sworn by Job Mwangi Thiga, an Advocate having the conduct of this matter, on 21st January, 2010. His main point in the said affidavit was that under Paragraph 13A of the Advocates (Remuneration) Order, the Taxing Officer had jurisdiction to determine the issues raised. On the date appointed for the hearing of the application, Ms

Lubanyo appeared for the Plaintiff/Applicant but there was neither appearance by, nor representation for, the Respondent. Since the hearing date had been given in open court, the court proceeded *ex parte*.

In her oral submissions, Ms Lubanyo argued that the Applicant seeks a stay of proceedings in **High Court Misc App No. 147 of 2009** (supra) in which the Taxation proceedings against Glass East Africa Ltd sought to enjoin the Plaintiff. She further stated that it should be noted that those proceedings arose from what was done by the Defendant's Advocate in High Court Civil case No 254 of 2004. The Defendant's Advocate represented Glass East Africa as well as the Plaintiff herein. However, the Plaintiff's position was that the joinder was wrong as no letters of Probate were taken out in her name and therefore it was improper to join her. Secondly, she argued that the Applicant was not a client within the Advocates (Remuneration) Order and therefore she could not be compelled to pay. Consequently, she brought this suit for determination of whether there was a retainer to make her liable and this was the matter which she sought to be determined by way of the suit.

Reacting to the Respondents' allegation that this court had no jurisdiction to grant the orders sought, she cited **SINGH v RUNDA COFFEE ESTATES** [1966] EA 262 where it was held that the court had jurisdiction to order a stay; **HARNANN SINGH & ORS v MISTRIS** [1971] EA 22 where it was held that the court has inherent power to grant a stay of proceedings as well as a stay of taxation proceedings; and **ROSETTA v GERALD NEVILL** [1959] EA 731 for the proposition that the power of the court is not restricted and each case has to be determined on its own peculiar facts. She finally referred to **HASSAN AHMED HAFIDH v MOHAMED & LETHOME ADVOCATES, NAIROBI** (Milimani) **HCCC No. 642 of 2004** in which the facts and circumstances were very similar to those in this case, and stay of proceedings pending determination of the issues raised in the plaint was granted. She thereupon requested the court to grant the stay as prayed, and for the interim orders to be extended.

After considering the pleadings, Ms Lubanyo's submissions, Mr Thiga's replying affidavit and the authorities cited by Ms Lubanyo, I take the view that taxation determines the quantum payable, and this is based on the assumption that fees have been duly earned. If no fees have been earned and the matter proceeds to taxation, there is a danger that the client may be saddled with fees for which he may not be liable. The determination of liability is, therefore, a condition precedent to the determination of quantum, and that precedence demands that liability be determined first. Where no instructions have been given by a client for rendering professional services for which payment is sought, the client's remedy lies in filing a suit. And since the Applicant herein alleges that she did not give the Respondent any instructions in the matter, it is fair and proper that her matter be handled, first, through the suit which she has filed. Thereafter, it will be up to the trial Judge to determine whether any such instructions were given or not. In my view, such allegations do not fall within the purview of Paragraph 13A of the Advocates (Remuneration) Order, and therefore the taxing officer cannot determine them in the cause of taxing a Bill of Costs.

For these reasons, I take the further view that the taxation should await the outcome of the suit for the determination of the liability to pay any fees. In the wider interests of justice, it will be better to delay the taxation in order to allow for determination of liability, so that after that determination, we can march forward with confidence that we shall not look backwards. But if we proceed with taxation, and the trial court thereafter finds that there were no instructions given to the Respondent to render the professional services for which the alleged payment is claimed, then it would be prejudicial to the client who may already have paid out that money out of fear of execution proceedings. The delay in getting paid, on the other hand, might no doubt cause anxiety to the Advocates. However, if their cause is a just one, they need not fear as they would stand the chance to be awarded costs of the suit as well. In the final analysis, the reward would be even bigger.

On account of the foregoing, I find that the application succeeds and I accordingly make the following orders –

- (i) That all the proceedings and taxations in High Court Misc. Civil Application No. 147 of 2009 be and is hereby stayed pending the hearing and determination of this suit.**
- (ii) The costs of this application shall be in the cause.**

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 31st day of March, 2011

L. NJAGI
JUDGE