



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Miscellaneous Application 1665 of 2007**

**MARGARET ANINDO T/A IGARE AUCTIONEERS.....PLAINTIFF  
VERSUS  
HARAMBEE SACCO SOCIETY.....1<sup>ST</sup> RESPONDENT  
ALI NASHIR KURJI &  
RIAZ KURJI all t/a ELITE COMPUTERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling will also resolve the application in Nairobi Misc. No.1667 of 2007 which relates to the same parties and the same subject matter. The Applicant filed a Bill of Costs, and a certificate of cost dated 11<sup>th</sup> September 2009 was issued by the taxing officer for the sum Kshs.108,400/= in respect of both bills in this application as well in Misc. 1667 of 2007.
2. Immediately thereafter, the applicant filed the Notice of Motion dated 17<sup>th</sup> September 2009, seeking for an order that the certificate of costs issued by the taxing master be deemed the decree of this court. This is on the grounds that the costs were taxed and the certificate was issued. Secondly, the applicant is unable to carry execution process to recover the amount awarded by the court because there is no decree. Thirdly, the order by the taxing master has not been challenged as the Respondent has not appealed against it. The application is supported by the affidavit sworn by Mr. Ouma Mulanya the Advocate for the Applicant. They have also attached the certificate of taxation issued on 11<sup>th</sup> September 2009.
3. This application was opposed by the Respondent on the grounds that the application is fatally defective for failure to comply with **Order 50 Rule 15(2)** which requires the application to indicate the footnote in the following words:  
**“If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken at the court may think just and expedient.”**
4. This application was also faulted for relying on the provisions of **Sections 25, 30 and 34** of the **Civil Procedure Act** which are not relevant as the applicant was supposed to file a suit because a decree cannot issue on the basis of a miscellaneous application. The Applicant cannot obtain a decree in any other way apart from filling a suit.
5. The above are the salient matters raised in the application, the affidavits and the rival submissions. The costs payable to the Applicant were ascertained by the taxing officer who taxed the two Bills of costs and issued the requisite Certificates of Costs. Both parties participated in the taxation proceedings. Is it necessary for the applicant to file a suit for the recovery of the costs? Under the Advocates Act, as I understand it, there are circumstances under which a suit may be filed for recovery of costs due to an advocate, but that is before the Bill of Costs has been taxed. This is because under Section 48 (13) there is a proviso to the effect that a Bill of costs may be taxed notwithstanding a suit has been filed.
6. In this case a Bill of Costs was taxed, the law is somehow not very clear on the procedure to be adopted to recover the costs after the taxation, counsel also did not provide authorities but I am aware that there are two schools of thought where by the courts have ordered a declaratory suits be filled for the decree to issue after the taxation. In other cases, parties have moved the court in an application. Every case should be determined according to its own peculiar circumstances. For example where a bill of costs

is taxed exparte without the participation of the respondent, in my opinion, it would be necessary to file a declaratory suit.

7. In the present case, both parties participated in the taxation; the only avenue for the respondent to challenge the certificate is by way of filing a reference. Thus even if the applicant filed a suit, the Bill of Costs is taxed and a certificate issued, a defence by the respondent will be meaningless, will serve no useful purpose apart from adding to the costs, and prolonging the proceedings. In this regard it is not necessary to direct the Applicant to file a substantive suit when the court will do nothing but issue the decree according to the certificate of taxation.

8. The Applicant filed this application by way of notice of Motion as a miscellaneous application. The Respondent has had an opportunity to respond to this application and also participated during the taxation when the Bill of Costs was taxed. The Court has a duty to expeditiously dispose of the business of the court without undue delay and subjecting the parties to undue expenses. Taking into consideration all the circumstances of this case and the overriding objective in the administration of justice, I allow this application. The order of taxation issued by the Deputy Registrar is hereby made the decree of the court.

**RULING READ AND SIGNED ON 18<sup>TH</sup> JANUARY, 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**