



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

**Miscellaneous Case 719 of 2009**

**LUBULLELLAH & ASSOCIATES ADVOCATES .....ADVOCATE/RESPONDENT**

**VERSUS**  
**NASSER AHMED t/a**

**AIRTIME BUSINESS SOLUTIONS ..... CLIENT/APPLICANT**

**RULING**

1. This application was filed by the client/applicant under rule 61 and 79 of the Advocates Remuneration Order. The applicant is seeking for two principle orders. Firstly there be a stay of taxation of the Bill of Costs dated 18<sup>th</sup> August 2009 pending the hearing and the determination of this application. Secondly, the court do certify that the firm of **Lubullelah & Associates** is not entitled to full advocates/clients costs in **Milimani HCCC NO. 661 OF 2007** and the taxing officer should allow 1/3 of the Advocates clients cost on taxation.
2. This application is based on the grounds that the firm of **Lubullelah & Associates** failed to act on the client's express instructions thereby compelling the client to instruct another counsel. Special circumstances and reasons exist as to disentitle the advocate to full instructions fees for failure to represent the client's interests. The advocates are also not entitled to full advocate's fees because they have not prepared the suit for hearing or completed the pre-trial steps since they were instructed in 2007. Thus the advocate should not be allowed to benefit from the breach of instructions by its clients. The application is supported by the affidavit of **Nassir Ahmed** sworn on 26<sup>th</sup> October 2009.

3. According to the applicant, the advocate failed to act on its express instructions in an interpleader application filed by Fidelity Commercial Bank regarding the directions on how a sum of Ksh.10 million in the possession of Inter Pleader should be disposed of. According to the applicant Mr. Mutumbwa who was acting for him did not oppose the application which was against the express instructions of the applicant. As a result of the failure the retainer was withdrawn, Counsel urged the court to direct that the advocate is not entitled to full costs. The advocate has not taken any steps to prepare the suit for hearing and under the provisions of rule 61 of the Advocates remuneration order, the court can give directions as to how the taxing master should proceed with the taxation.
4. Formidable opposition was put forth by counsel; Mr. Mutumbwa relied on his replying affidavit. It was argued that this court has no jurisdiction to stop taxation before a taxing master. Taxation of Bills of Costs is a special jurisdiction provided for under rule 11 of the Advocates Remuneration Order and it is a preserve of the taxing master. The court can only stay the outcome of the taxation after a reference has been filed but the court cannot enter the realm of taxation and interfere with the jurisdiction of the taxing master. Counsel cited the case of **Donholm Rahisi Stores (SUING AS A Firm) vs. East African Portland cement Limited [2005] eKLR**. In which Waweru J. held that:

*“Taxation of costs, whether those costs be between party and party or between Advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocate (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the advocates (Remuneration) Order.”*

The Court of Appeal, while dealing with an almost similar set of facts in the case of **Sharma vs. Uhuru Highway Development Limited (2001) 2 EA 530**. Held as per Akiwumi, J.A;

***“ . . . (the High Court judge) not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and 12 of the Advocates (Remuneration) Order from a decision of the taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent’s application to strike out the (application for taxation). This by itself makes his hearing of and his ruling of 19<sup>th</sup> May 2000, of the Respondent’s application a nullity from the word go. . . ”***

5. I wholly adopt those words by Waweru J and their Lordships of the Court of Appeal. In this case all I can only add that the Courts in Kenya are hierarchical, the jurisdiction of taxation of costs is vested upon the taxing master who should evaluate the matters placed before him/her and should do so independently. The jurisdiction that is vested in the High Court on the other hand is to deal with a reference emanating from the decisions of the taxing master. The issues of the amount of work done or not done by the advocate which were so eloquently presented by Mr. Issa should be presented to the taxing master. In other words, when defending his client, Mr. Issa should be able to argue the proportionate costs that should be paid to the advocates for the work which was done and which was not done. The high court should not micro manage the taxing master. Accordingly this application is for dismissal for lacking in merits with costs to the respondent.

RULING READ AND SIGNED ON 19<sup>TH</sup> FEBRUARY 2010 AT NAIROBI.

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