REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA
AT KITALE.

CIVIL SUIT NO. 49 OF 1997.

ANDREW ACHOKI MOGAKA :::::::::::::::::::::::::: PLAINTIFF/RESPONDENT.

VERSUS

SAMSON NYAMBATI NYAMWEYA):::::::::: 1ST DEFENDANT/APPLICANT.
DION MARANGA NYASAE):::::2ND DEFENDANT/RESPONDENT.

R U L I N G.

1. The chamber summons dated 11th March, 2010 is brought under provisions of rule 11 (2) of The Advocates Remuneration Order. The applicant is seeking to set aside the order by the taxing officer Mrs. P.N. Gichohi – PM. The order sought is to set aside in particular items 1, 2, 3 and 4 of the Bill of Costs dated 6Th August, 2003. Alternatively the bill of costs be submitted for taxation before a different taxing officer. This application is predicated on the grounds stated on the body of the application and the supporting affidavit sworn by **Alice Nyamati** on 11th March, 2010.

2. Briefly stated, the applicant is aggrieved by order of taxation which was made on 11th February 2009, in which the plaintiff's party and party bill of costs was taxed at Ksh. 1,699,767.10. On 19th February 2009, the applicant applied for the reasons and the taxing officer endorsed on the file on 27th February 2009, that the reasons are contained in the ruling which she delivered on 11th February, 2009. The applicant had issued a notice seeking for the reasons in respect of items 1, 2, 3 and 4. The applicant now contends that they were granted leave by the ruling **Ombija – J** in the Judge's ruling dated 3rd March, 2010 to file a reference out of time. The applicant is also challenging the award of costs which is claimed to be excessive and not founded under The Advocate's Remuneration order. The taxing officer is also faulted for taking into consideration extraneous matters.

3. This application was opposed by the plaintiff/respondent. **Mr. Samba** learned counsel for the respondent relied on the Notice of Preliminary objection on points of law as well as the replying affidavit sworn by him on 18th November, 2010. It was submitted that this application is incompetent and an abuse of the court process. He annexed a decree issued pursuant to the judgment of **Nambuye – J**. on 6th November, 2003. The certificate of costs was issued on 20th February, 2009 after the bill of costs had been taxed twice. The applicant filed another application dated 13th October, 2009 in which they sought for orders of the enlargement of time within which the applicant could file the reference to the High Court

which order of extension of time was refused by the ruling of **Ombija –** J. dated 3rd March, 2010.

4. The only reason why the warrant of execution was set aside in that ruling is because the respondent had overlooked to issue the requisite notice to show cause. The respondent subsequently issued the notice to show cause which was scheduled for hearing on 24th November, 2010 before the Deputy Registrar. This application just like the previous applications was brought at the threshold of the hearing of the Notice to show cause so as to scuttle execution. This suit has had a long history.

5. It was filed in 1994 at High Court in Eldoret when the sub registry was opened in Kitale in 1997; the file was transferred to the High Court Kitale. Judgment was entered in October, 2002. The bill of costs was taxed in 2003, and the applicant has used every trick to defeat the cause of justice by filing a multiplicity of applications. It was submitted further that the applicant also filed another suit in the **High Court at Kisii being No. 263 of 2009** and an application for injunction which was also dismissed. The applicant filed an appeal in the **Court of Appeal in Civil Appeal No. 9 of 2010** which was also dismissed. Counsel urged the court to dismiss this application with costs.

6. Under the Advocate Remuneration Order, rule 11 prescribes how a reference should be filed. The applicant contends that he sought leave to file the reference out of time and such leave was given by the ruling of **Ombija – J**. dated 3rd March, 2010. I have gone through that ruling and in my own understanding, the order for leave was not granted. This is because the Judge posited as follows on page 8:-

"The objector complied with Rule 11 aforesaid by giving a notice dated 19th February, 2009 and filed on 14th October, 2009. From annexture "AN1" of the applicant it is common ground that this Registry minuted the notice of objection to the Deputy Registrar on 24th February, 2009. it is equally common ground that on 27th February, 2009 the Deputy Registrar endorsed on the notice thus:-

"Find reasons in the ruling, no further reasons available."

"*On the basis of the foregoing, by 27th February, 2009 the applicant was aware that the Deputy Registrar had given her reasons. Even though she appears uncooperative. The applicant should have taken steps to file an appropriate application to force the Deputy Registrar to give reasons in line with Rule 11 of the Advocate (Remuneration) Order. The applicant took eight (8) months to file the current application. The delay in this particular instance is disturbing. It is inordinate and unexplained. I would be failing in my duty if I were to extend or enlarge time for the applicant after such a prolonged and unexplained delay. In this regard I call in aid the bind authority of* ***DEVSHI VS. DIAMOND CONCRETE CO. LKTD (C.A.) CIVIL Application No. 16 of 1974."***

7. In my own understanding of the above ruling, the order of leave to file reference out of time was not granted. The court noted and rightly so, that from the 27th February, 2009 the applicant was aware of the reasons for the award of costs for each of the items. It is not clear and the applicant did not explain what prevented them from filing the reference. Even if I were to go with the submissions by counsel for the applicant that leave was granted on 3rd March, 2010 this application was filed on 25th August, 2010 which is also after the 14 days period provided for under the Advocate Remuneration Order. It is not also lost to me that the application is dated 11th March, 2010 which in my view is merely contrived and meant to confuse the matter as one will wonder why a document will be dated but filed 4 months later.

8. Apart from this application being incompetent, I will go further to examine the merits of the application. The application seeks to set aside the order of taxation in particular the award of costs in items 1, 2, 3 and 4 which are said to be excessive and outside the provisions of the Remuneration Order. The principles to bring to bear on whether or not the taxing master erred in the assessment of costs, have been settled in a long line of authorities in particular the case of ***PRIMCHAND RAICHAND LTD***

AND ANOTHER VS. QUARRY SERVICES OF EAST AFRICA LTD AND OTHERS EALR [1972] E.A. ***The court of Appeal in that case held that;***

"(1) The court must consider the following principles:

(a) That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) That successful litigant ought to be fairly reimbursed for the costs he has had to incur;

(c) That the general level of Remuneration of advocates must be such as to attract recruits to the profession; and

(d) That so far as practicable there should be consistency in the awards made;

(e) The court will only interfere when the award of the taxing officer is so high

(f) Or so low as to amount to an injustice to one party;

(g) In considering bills taxed in comparable cases an allowance may be made for the fall in value of money;"

9. Bearing in mind the principles cited above, I have gone through the ruling of taxing officer especially the reasoning for the awards of the items complained about. I wish to reproduce that reasoning here below:-

" In item 1 there is a valuation report on record showing the value of the property as Ksh. 60,850,000/= under paragraph 1 (b) of the schedule, the fees provided for Ksh. 55,000/= plus an additional 1.5% of Ksh. 60,850,000/= which equals to Ksh. 912,750/=. The fees he is entitled to is Ksh. 967,750/= but he has asked for less which is allowed as drawn.

On item 2 he is entitled to 1/3 of the fees allowed in item 1 and therefore the fees drawn on item 1 are allowed.

In the counter claim the defendant was asking for a share of 184 acres. From the valuation report the value of the 4461 acres was Ksh. 60,000,000/= giving an average of Ksh. 130,151/90 per acre. The share claimed was Ksh. 23,947,949/60. The plaintiff is entitled to Ksh. 55,000/= plus an additional 1.5% of Ksh. 23,947,949/60 which equals to Ksh. 414,293/30.

He has asked for less in item 3 and therefore the fees are allowed as drawn.

Consequently he is entitled to 1/3 of the fees allowed in item 3. I therefore allow item 4 as drawn."

10. Taking into account, the above reasoning coupled with the fact that the counsel for the applicant did not at all make any submissions to support the contention that the award was so high. I am not able to depart from the findings of the taxing master which is founded from the pleadings and a valuation report. The upshot of the above analysis is that I find no error in principle and having found the application incompetent, it is hereby dismissed with costs to the respondent.

Ruling read and signed on 9th December, 2010.

MARTHA KOOME.
JUDGE.