



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

Civil Case 430 of 2002

RUAHA CONCRETE CO. LTD;.....1ST PLAINTIFF

MANJIT SINGH SETHI:.....2ND PLAINTIFF

PERMINDER SINGH SETHI;.....3RD PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LTD:...1ST DEFENDANT

KIRITI KHARKAR.....2ND DEFENDANT

MUSA SAID HASSAN.....3RD DEFENDANT

R U L I N G

This is the Chamber Summons dated 6th December 2007 brought under Rule 11(2) of the Advocates Remuneration Order and Section 3A of the Civil Procedure Act, that is now under consideration herein. It prays for Orders, inter alia, that this Honourable court be pleased to stay execution of the ruling and order dated 16th November 2007 of the Deputy Registrar and any other consequential proceedings; review and set aside that decision of the Deputy Registrar and that this court do refer the bill of costs back to the Deputy Registrar with the necessary directions on taxing or this court do tax the said bill. There is also an alternative prayer that judgment be entered for the first Defendant's costs at the sum of Kshs.250, 000/= said to be the balance as on a consent entered between the parties. It is opportune to mention at this early stage that this last prayer was abandoned at the hearing of the application on 4th March 2008. The summons also prays that the costs of the application be provided for. The application is based on some thirteen grounds and supported by the sworn affidavit of Manjit Singh Sethi the 2nd Plaintiff herein which principally attacks on oath the Deputy registrar's taxation of the Bill of costs.

The application is opposed and a lengthy affidavit sworn by **Peter Kaluma** the advocate for the 1st Defendant/Respondent is filed in that opposition. Among other things this Replying Affidavit attacks the application under consideration as incompetent and that this court lacks power to review the decision of the Deputy Registrar as sought in the application under consideration.

This was a most contentious matter with lots of bad blood between the advocate appearing for the

Plaintiffs and that appearing for the 1st Defendant with all manner of accusations against each other. The court and the advocate for the 2nd and 3rd Defendants were left to watch the ugly exchange between counsel both of whom appeared not to hasten to heed the court's direction that they cool tempers and concentrate on the central issues in the application. There were lengthy submissions by all three counsel appearing for their respective clients which submissions took many hours of some three hearing dates.

After counsel for the Plaintiffs/Applicants analysed his application to show why the Taxing Deputy Registrar had erred in her taxation, counsel for the Defendants both submitted in turn that the application is incompetent and bad in law as the same does not comply with the Rule it is brought under. They also proceeded to submit on why on their part they thought that the Taxing Deputy Registrar made no error in her taxation.

On the assertion by counsel for the Respondents that the application is incompetent and bad in law for having been filed before receipt of the taxing master's reasons, counsel for the Plaintiffs/Applicants submitted that when the taxing master gives written reasons in the taxation it is not necessary to ask for more reasons as that would be duplicity. For this he placed reliance **on HC.CC.NO.658 OF 2004 (OS) Postal Corporation of Kenya –vs- Donald Kipkorir & 3 others as well as on Kipkorir titoo & Kiara Advocates –vs- Deposit Protection fund Board Civil appeal No. 220 of 2004.**

For me it is necessary to set out the provisions of the relevant rules. Rule 11 (1) of the Advocates Remuneration order reads:-

“Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects”

Rule 11 (2) reads:-

“The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, sitting out the grounds of his objection.”

The procedure to be followed in these matters is set out above. In my humble view to adhere to that procedure is anything but a mere ritual, it is the obligation of the party who wishes to benefit from it. That obligation is set by statute. Where a rule of procedure prescribes a mode of doing a thing, I understand it to mean that not complying with that procedure renders the thing done incompetent.

In the matter under consideration the Plaintiffs being not satisfied by the Taxation, did on the 22nd day of November, 2007 file a Notice of Objection to item No.1 on the bill. In that objection the Plaintiffs/Applicants asked to be furnished with the reasons for the taxation. That was in compliance with rule 11(1) of the Advocates Remuneration Order. The applicants then proceeded to file the Reference before receipt of the reasons they sought on 22nd November 2007 and hence the attack on that reference as being incompetent.

My understanding of Rule 11(2) of the Advocates Remuneration Order is that reasons for taxation must be provided by the taxing officer before any reference is filed. That is a mandatory requirement and until the rule is amended it will remain so. It is a totally different matter to state that the reasons are already in the taxation. And I do not deny that there could indeed be reasons in certain taxations. However if in this case those reasons were in the taxation then there was no need to seek them from the Deputy Registrar on 22/11/2007. And as they were sought and they were not received before filing the Reference there was no compliance with the rule. I further understand this court's jurisdiction to investigate the taxing officer's taxation to come to existence upon the taxing officer giving reasons as required under rule 11(2) of the Advocates. The 2nd and 3rd Defendants/Respondents attacked this application on the grounds that the same is misconceived, incurably defective, and bad in law and that the court lacks the requisite jurisdiction to entertain the application. I am inclined to agree for the reasons I have given above. I have

considered it necessary to deal with this aspect first as it touches on the competence of the application as well as the jurisdiction of the court to hear the same. Rule 11(2) has not been complied with. The provisions are mandatory in nature. To give the said rule any other meaning would be to give it a meaning and scope flying in the face of its plain wording. To my mind procedural lapses which go to affect the jurisdiction of the court are fatal to an application. I have restrained myself from referring to anything touching on the merits or demerits of the substantive application as in my view that is not necessary because, for all the reasons given above, I do find and hold that this application is premature and incompetent as having been brought before reasons were given in contravention of the mandatory provisions of Rule 11(2) of the Advocates Remuneration Order. In the result I strike out the application dated 6th December 2007 with costs to the Respondents.

There will be orders accordingly.

DATED AT ELDORET THIS 11TH DAY OF MAY, 2009.

P.M.MWILU

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2009.

J.W.LESIIT

JUDGE

IN THE PRESENCE OF:-

.....Court clerk

.....Advocate for the Plaintiff/Applicants

.....Advocate for the 1st Defendant/Respondent

.....Advocate for the 2nd & 3rd Defendants/Respondents