



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS APPLICATION 835 OF 2006**  
**IN THE MATTER OF THE ARBITRATION ACT (CHAPTER 49) LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF AN ARBITRATION**  
**BETWEEN**  
**INSURANCE COMPANY OF EAST AFRICA ..... APPLICANT**  
**VERSUS**  
**NYAMONDI OCHIENG - NYAMOGO ..... RESPONDENT**  
**RULING**

Before the court is a reference by way of a Chamber Summons dated 28<sup>th</sup> May, 2009 brought under the provisions of paragraph 11(2) of the Advocates Remuneration Order. The application is seeking for the setting aside of the taxing officer's ruling of 8<sup>th</sup> May, 2009. The application is supported by the affidavit of the Respondent *Nyamondi Ochieng - Nyamongo*.

The Applicant vehemently objected to the application.

The Respondent contends that the taxing master did not apply correct principles of law and failed to take into account applicable schedules hence awarding excessive figures. Further that the taxing officer applied the wrong scales.

The Respondent submitted further that the bill of costs was defective and listed several grounds namely:-

1. That the bill of costs lumped together separate proceedings which was not proper
2. That items 1-171 related to services rendered before an arbitrator and not the High Court. That the Taxing Officer erred in applying the scale applicable to proceedings in High Court

3. That the High in its ruling did not grant the costs.
4. That the taxing officer took into account irrelevant and extraneous matters not brought forth by any of the parties thus awarding excessive figure.

At the hearing of the application the counsel for the Respondent **Mr. Oginde** conceded to the reference in relation to items 79, 80, 82, 83, 135, 141, 142, 143, 144, 151. He however contends that the Taxing Officer was right in awarding costs of the arbitration, and that the taxing officer used the correct schedule & scale in arriving at his ruling.

I have considered the pleadings before me, submissions by both learned counsels and case law cited. The issues as I see them are -

1. Whether or not the Judge awarded costs.
2. Whether the Taxing Master applied the correct principles and scale and schedule in awarding the costs.

On the issue of costs the Respondent has submitted that the court did not award the costs. On their part the Applicant argue that the costs follow the event whether the court pronounces the same or not and that Section 27(1) of the Civil Procedure Act is applicable here. He relied on the proviso to the section which allows the costs of any cause or matter to follow the event. The Section 27(1) provides as follows:-

**“Subject to such conditions and limitation as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have the full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary direction for the purpose aforesaid, and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of these powers.**

**Provided that the costs of any action, cause of other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”**

I decline to be persuaded that order XXXVI Rule 11 requires that the Judge must specifically make orders for payment of costs.

Order XXXVI Rule 11 provided-

**“If an originating summons be adjourned into court, the Judge may, if he thinks the questions to be determined is of sufficient importance, order the costs be fixed on the scale applicable to suits. In all other cases the Judge may make such order as to costs of the parties as he considers to be just” (emphasize issue).**

The emphasized portion of rule 11 is clear that the Judge has an option of making such order as to costs. In my view where the Judge does not make such an order the S.27 is applicable as it does in this instance.

On whether the taxing officer erroneously applied similar scale for the High Court and the arbitration proceedings. The arbitration Act, 1995 which came into force on 2<sup>nd</sup> January, 1996, is the applicable law currently. The Originating Summons before the High Court and the bill of cost herein were filed after the Commencement of the said Act.

The Arbitration Act rules, 1997 S. 10(1) provides that all fees for any proceedings under the Act shall be calculated with the scale of fees applicable in the High Court, and as such I am persuaded that the Taxing Officer was not erroneous on this score.

In regard to the scale applied I find the Taxing Officer erred by applying the 1997 scale where services

were rendered in between 1993 and 1997 before the said scale came into force.

I therefore allow the reference only to the extend -

1. That items 79, 80, 82, 83, 135, 141, 142,143,144,157, as conceded by the respondent be taxed a fresh.
2. That the Taxing Officers do apply the relevant scales and tax affected items a fresh.
3. Costs in the cause.

Dated and delivered at Nairobi this 23<sup>rd</sup> July, 2009

**ALI- ARONI**

**JUDGE**