



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**MISCELLANEOUS APPLICATION 278 OF 2008**

**DALY & FIGGIS & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**KARUTURU NETWORKS LTD.....1<sup>ST</sup> RESPONDENT**

**FLOWER XPRESS FTZE.....2<sup>ND</sup> RESPONDENT**

**RULING**

The applicant and the respondents have or had an advocate – client relationship. The applicant and the respondents had a disagreement regarding the legal fees that is payable to the applicant. The applicant filed its bill of costs in court. The said advocate – client bill of costs was filed pursuant to the **Advocates Remuneration Order**. The respondents filed an application seeking to strike out the said advocate – client bill of costs. The application, dated 7<sup>th</sup> April 2008, was purportedly brought under the provisions of **Sections 44(4), 45(6) of the Advocates Act, schedule V part 1(2) of the Advocates (Remuneration) (Amendment) Order, Section 3A of the Civil Procedure Act and Order VI Rules 13(1)(b) & (d) and 16 of the Civil Procedure Rules**, was placed before Kihara Kariuki J for hearing. The applicant raised preliminary objection to the application.

In his considered ruling delivered on 28<sup>th</sup> July 2008, the learned judge declined to hear the application and directed that the same be placed before the taxing officer of the court, who, in his opinion, had the requisite jurisdiction to hear the matter. On the material part of his ruling, he observed as follows:

*“For the reasons I have given, I direct that the preliminary objection raised by the advocates by notice filed on the 11<sup>th</sup> April 2008 together with the clients’ chamber summons and notice of motion respectively filed on the 8<sup>th</sup> and 15<sup>th</sup> April 2008 respectively be and are hereby respectively referred back to a taxing officer who is seized of jurisdiction in this matter for hearing and determination.”*

Pursuant to the said direction of the court, the parties appeared before the taxing officer and argued the said application filed by the respondents that is dated 7<sup>th</sup> April 2008. The taxing officer delivered her ruling on 6<sup>th</sup> January 2009 dismissing the said respondents’ application that sought to strike out the applicant’s advocate – client bill of costs. The respondent was aggrieved by the decision of the taxing

officer and duly filed an appeal to this court pursuant to provisions of **Order XLVIII Rule 5(5)** of the **Civil Procedure Rules**. The rule that allows a party who is aggrieved by the decision of a deputy registrar to appeal against his decision to this court by way of chamber summons.

Pending the hearing and determination of the said appeal, the respondents filed an application pursuant to the provisions of **Order XLI Rule 4** of the **Civil Procedure Rules** seeking to stay the taxation of the advocate's bill of costs pending the hearing and determination of the said appeal. In the application, the respondents reiterated that the taxing officer did not have jurisdiction to assess the costs due to the advocate in the said advocate – client bill of costs. The respondents were of the view that if taxation proceeded before the appeal is heard, they would be prejudiced since the appeal would be rendered nugatory. In response to the application, the advocate argued, *inter alia*, that the application could not be granted as this court lacked jurisdiction to consider an appeal from a decision of a taxing officer by way of appeal as provided by **Order XLVIII** of the **Civil Procedure Rules**.

The respondents filed another application pursuant to the provisions of **Order XLIV Rule 1(1)** of the **Civil Procedure Rules** seeking to review and set aside the ruling and order of Kihara Kariuki J made on 28<sup>th</sup> July 2008. The respondents further prayed for an order of this court for the chamber summons dated 7<sup>th</sup> April 2008 be re-listed afresh before a judge of the High Court for it to be heard and determined. The grounds in support of the application were essentially to the effect that the taxing officer did not have jurisdiction to hear and determine applications brought under the provisions of **Order VI Rule 13** of the **Civil Procedure Rules**. The respondent contended that, although the taxing officer had heard and dismissed the application dated 7<sup>th</sup> April 2008 by its ruling delivered on 6<sup>th</sup> January 2009, they were of the view that the same was of no legal consequence. They contend that the application dated 7<sup>th</sup> April 2008 remained unheard by a court of competent jurisdiction. To safeguard their interest, the respondents had taken the precaution of appealing against the said decision of the taxing officer to this court. The advocate, as expected in the circumstances, opposed the application. They filed notice of preliminary objection to the application.

Prior to the hearing of the application, the parties agreed by consent for the two applications to be heard and disposed off at the same time. The respective counsel for the advocate and for the clients filed written submissions in support of their respective opposing positions. At the hearing of the applications, I heard submissions made by Mr. Gachuhi for the respondents and by Prof. Githu Mungai for the applicant. Having considered the rival arguments made by the said counsel, this court is of the view that the issue for determination by this court is essentially whether there is a competent appeal before this court to clothe this court with jurisdiction to grant the application staying taxation of the advocate's bill of costs pending the hearing and determination of the said appeal. The other issue for determination is whether the respondents established sufficient grounds in their application for review to entitle this court review the ruling and order of Kihara Kariuki J and as a result thereof allow the respondents' application and set aside the said order.

As stated earlier in this ruling, the proceedings herein were provoked by the filing by the applicant of its advocate – client bill of costs. From my perusal of the pleadings filed by the respondents, the respondents are contending that the applicant was not entitled to file his advocate – client's bill of costs by reason that the advocate and the clients had reached an agreement in respect of the legal fees that was to be paid to the advocate. It is on that ground that the respondents moved the court and sought to strike out the said advocate – client's bill of costs. As earlier observed, the matter was placed before Kihara Kariuki J who ruled, correctly in my view, that he had no jurisdiction to hear a matter emanating from questions regarding taxation if the same was not preferred to the High Court by way of reference from a decision of a taxing officer as provided under **paragraphs 11(1) & (2)** and **12** of the **Advocates Remuneration Order**.

The learned judge quoted in extenso the decision of the Court of Appeal in **Sharma vs Uhuru Highway Development Ltd [2001] 2EA 530** where at page 537 Akiwumi JA made the following observations:

“...O'kubasu J, not being seized of the taxation itself, and there being no appeal or reference to him as

*provided for by paragraphs 11(1) and 2 and 12 of the Order, from a decision of the Taxing Officer who was dealing with the taxation, and the taxation not begin 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 cause. This by itself, makes his hearing of, and his ruling of 19 May 2000, on the Respondent's application, a nullity from the word go. It would have been different if the appellant had brought a suit in the High Court by way of a plaint, for the recovery of costs due to him, under section 48 of the Advocates Act hereinafter referred to as "the act" This not having been the case, O'kubasu J lacked jurisdiction to entertain the Respondent's application and which lack in my view, vitiates the whole of the proceedings before the learned judge."*

The learned judge directed the respondents to canvass their application before the taxing officer who had the requisite jurisdiction to deal with the issues raised by the respondents in their application.

Under **paragraph 13A** of the **Advocates Remuneration Order**, the taxing officer, for the purposes of any proceedings before him relating to taxation, has power and authority to summon and examine witnesses, administer oaths, and direct the production of books, papers and documents and adopt all such other proceedings as may be necessary for determining any matter in dispute before him. In my considered opinion, the determination on the question whether the advocate and the client had made an agreement in regard to the payment of legal fees is squarely within the jurisdiction of the taxing officer. The respondents did not appeal against the said decision of Kihara Kariuki J. They in fact abided by the directions of the court and appeared before the taxing officer who heard the respondents' application, considered it, and rendered a ruling dismissing it with costs. This court is of the view that the respondents cannot purport to apply to this court to review the said decision of Kihara Kariuki J when they have already acted pursuant to the direction thereby issued by the court. In my opinion, the order became spent, and not liable to be reviewed, when the respondents submitted to the directions of the court and argued their application before the taxing officer. There is nothing to be reviewed when the order to be reviewed has already been complied with and its effect taken place. I therefore find no merit with the respondents' application seeking to review the ruling and order of Kihara Kariuki J. I proceed to dismiss it with costs to the applicant.

As regard whether this court can stay taxation pending the hearing and determination of the appeal which the respondents have filed against the said decision of the taxing officer, I hold that for the respondents to persuade this court to exercise discretion in their favour, they must satisfy the court that they have a competent appeal that is pending before this court. As stated earlier in this ruling, the respondents were aggrieved by the decision of the taxing officer in dismissing their application seeking to strike out the advocate – clients' bill of costs filed by the applicant. Under **paragraph 11** of the **Advocates' Remuneration Order**, where a party is aggrieved by the decision of a taxing officer, he is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to this court.

In the present application, it is apparent that the respondents were objecting to the validity of the entire bill of costs on the ground that the respondents had previously reached settlement with the applicant in regard to the legal fees to be paid. The respondents, in my view, were required to file reference to this court to challenge the decision of the taxing officer. Instead, the respondents filed an appeal to this court under **Order XLVIII Rule 5(5)** of the **Civil Procedure Rules**. According to the respondents, they were entitled to exercise their right of appeal from the decision of the taxing officer (*in her capacity as the deputy registrar of this court*) by appealing to this court as provided under the said rules. The respondents would have been so entitled to appeal to this court from the decision of a deputy registrar if they were able to satisfy the court that the decision rendered by the taxing officer was the kind of decision that can be appealed to this court as provided under **Order XLVIII Rule 5(1)** of the **Civil Procedure Rules**. Under the said rule, an appeal against the decision of a taxing officer in a taxation is not provided for. The only procedure provided for an appeal against the decision of a taxing officer is by way of reference as provided under **paragraph 11** of the **Advocates Remuneration Order**.

The respondents cannot invoke the **Civil Procedure Act** and the **Rules** made thereunder to circumvent the procedure provided under the **Advocates Act** and the **Advocates Remuneration Order** in regard to

an appeal from a decision of a taxing officer. I hold that in assessing an advocate-client bill of costs, the taxing officer is exercising jurisdiction conferred upon him or her under the **Advocates Remuneration Order** and not in his or her capacity as the deputy registrar of this court. A deputy registrar exercises his or her jurisdiction in accordance with the powers given to such deputy registrar under the **Civil Procedure Act** and the **rules** made thereunder. The two roles of the said officer of the court are separate and distinct. The two jurisdictions and their separate procedures are mutually exclusive. One procedure cannot be substituted for the other. The procedure adopted by the respondents in seeking to strike out a bill of costs filed under the **Advocates Remuneration Order** by invoking the procedure under the **Civil Procedure Rules** was therefore an abuse of the procedure and the process of the court.

Further, an aggrieved party may not invoke this court's jurisdiction as provided under the **Civil Procedure Rules** to agitate a complaint in relation to a decision made by a taxing officer exercising her jurisdiction under the **Advocates Remuneration Order**. As was held by Ringera J in **Machira and Co. Advocates vs Magugu [2002] 2 EA 428** at page 433:

*“First, the **Advocates Remuneration Order** is a complete code and there is no provision for the invocation of the **Civil Procedure Rules**. It does not provide for an appeal from any sort of decision by the taxing officer and indeed **Order XLII of the Civil Procedure Rules** is clear that appeals lie either as of right or with leave from orders made under the **Civil Procedure Rules**. No mention is made of order made under the **Advocates Remuneration Order**. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, as I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with **paragraph 11 of the Advocates Remuneration Order**.”*

Similarly, **Donholm Rahisi Stores (suing as a Firm) vs East Africa Portland Cement Limited [2005] eKLR**, Waweru J held at page 2 of his ruling as follows:

*“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 **Advocates (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.”*

It is therefore clear that for the respondents to succeed in the application seeking to stay the taxation of the advocate-client bill of costs, they must establish that they have lodged a competent appeal which is pending determination before this court.

In my considered opinion, the respondents have no competent appeal pending before this court. The appeal that they have purported to file from the decision of the taxing officer by way of an appeal by chamber summons as provided under **Order XLVIII Rule 5(5) of the Civil Procedure Rules**, is not contemplated by the **Advocates Remuneration Order**. It is therefore, on the face of it, incompetent and a nullity in law. There is no reference as contemplated under **paragraph 11 of the Advocates Remuneration Order** filed before this court challenging the decision of the taxing officer that would grant this court jurisdiction to hear and determine the application seeking to stay the taxation of the advocates bill of costs pending the hearing of such reference.

In the circumstances, this court cannot exercise its discretion in favour of the respondents who have not lodged a competent reference to this court from the decision of the taxing officer. The application seeking to stay the taxation, as the previous application for review, lacks merit and is hereby dismissed with costs to the applicant.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY 2009**

**L. KIMARU**

**JUDGE**