



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

Civil Suit 2335 of 1997

§ *Order XLIX Rule 5 Civil Procedure Rules*

§ *Rule 11(1) & (4) Advocates (Remuneration) Order*

§ *Section 3A Civil procedure Act*

§ *Extension of time to object to taxation by Deputy Registrar*

§ *Stay of execution pending hearing*

MOTICHAND VIRPAL SHAH.....1ST PLAINTIFF/APPLICANT
RAMJI VIRPAL SHAH.....2ND PLAINTIFF/APPLICANT
DHARMESH KUMAR RAMJI.....3RD PLAINTIFF/APPLICANT
VIRPAL SHAH.....4TH PLAINTIFF/APPLICANT

VERSUS

INVESTMENT & MORTGAGES BANK LTD..... 1ST DEFENDANT
SHAH MOTORS LIMITED (IN RECEIVERSHIP).....2ND DEFENDANT
HARIT SHETH.....3RD DEFENDANT

RULING

This is an Amended Chamber Summons brought under order XLIX rule 5 of the Civil Procedure Rules, rule 11(1) and (4) of the Advocates (Remuneration) Order and section 3A of the Civil Procedure Act. The application is dated 5th May, 2009 and it seeks the following prayers.

3A. That this Honourable Court be pleased to extend time within which the applicants herein may object to the taxation made by the Deputy Registrar of this court on 3rd December, 2008.

4. That this Honourable Court be pleased to stay execution of the 3rd Defendant's taxed costs pending the hearing and determination of this application.

5. That if prayer 3A above is granted this Honourable Court be pleased to stay execution of the 3rd defendant's taxed costs pending the hearing and determination of the intended reference objection

5A. That in alternative to 5 above Honourable Court be pleased to set aside the Certificate of Taxation dated 19th December, 2008 and the taxed costs thereunder.

6. That the costs of and incidentals to this application abide the result of the said reference objection.

The grounds in support of the application are on the face of it as follows:

(a) The delay in filing the reference objection is excusable and has been occasioned by factors beyond the control of the applicants.

(b) The applicants learnt about the taxation of the 3rd defendant's Bill of Costs herein after the 14 days had expired.

(c) That although the applicant's advocates were served with a notice of taxation, they did not attend court due to inadvertent mistake on their part.

(d) That the applicants and their advocates on record were not served with the notice of delivery of the ruling on taxation.

(e) The applicants only learned from the 3rd defendant's advocates of the ruling on taxation on 19th December, 2008.

(f) The applicants have a reference with good chances of success.

(g) The figure allowed by the Deputy Registrar contradicts her ruling delivered on 3rd December, 2008.

(h) The respondents will not suffer any prejudice if the above orders are granted.

(i) That this application has been made without undue delay.

The application is supported by an affidavit sworn by Mr. Motichand Virpal Shah, the 1st Plaintiff/Applicant herein dated 23rd December, 2008.

The application has been opposed. Mr. Antony Nahashon Ngunjiri, an Advocate with the conduct of the suit on behalf of the Defendant/Respondent swore a replying affidavit in opposition dated 26th January, 2009. The gist of that affidavit is that the Applicants admitted they were served and were aware of the hearing date.

This application seeks to extend time to file an objection to the taxation of a Deputy Registrar or alternatively to set aside the certificate of costs.

I have carefully considered this application and submissions by Mr. Gacheru for the Applicant and Ms. Chege for the Respondent. It is not disputed that the Taxation of the Bill of Costs in this case proceeded even though it was not listed in the days cause list. Mr. Gacheru admits that his firm did not appear for the taxation due to inadvertently omitting to diarize the matter. He however submitted that the matter was in any event not listed in the cause list of that day.

Ms. Chege admits that the matter was not listed on 26th September 2008. That however contradicts

paragraph 8 of the replying affidavit sworn by Ngunjiri Advocate in which he avers that the matter was listed. The Advocate deposes further that they were not heard on that day but were directed to file submissions on the taxation for consideration by the Deputy Registrar. There is no evidence anywhere on record or in Mr. Ngunjiri's affidavit to show that the Applicant's Advocates were served with a notice of the new date for highlighting of the submissions by counsel or notified of the requirement to file their submissions.

It was irregular for the learned Taxing Master to proceed with the matter when it had been omitted from the day's cause list especially in absence of one party. It does not matter that the dates had been taken by consent. That irregularity could have been cured, since the matter was adjourned to a new date, if the Applicants were informed of the new date. Since the Applicants were not informed of this new development and since matter proceeded exparte, that is sufficient ground to allow this application.

There are other issues which arise from this matter but I do not wish to delve into them as they may preempt the intended objection.

In conclusion, the Applicants amended Chamber Summons dated 5th May, 2009 is allowed as follows:

1. Time within which the Applicant may file its objection to the taxation made on 3rd December, 2008 be and is hereby extended by 14 days from date hereof.
2. There be a stay of execution of the 3rd Defendant's taxed costs pending the hearing and determination of the intended objection.
3. If no objection is filed as in (1) above the orders made herein will lapse immediately.
4. Each party to bear own costs.

Dated at Nairobi this 26th day of June, 2009.

J. LESIIT,

JUDGE

Read and signed in presence of:

Ms. Mwangi holding brief Mr. Gacheru the Applicant

Ms. Chege for the Respondent/3rd Defendant

Dated at Nairobi this 17th day of July, 2009.

J. LESIIT,

JUDGE

Ms. Chege: I apply for leave to appeal.

J. LESIIT,

JUDGE

Court: The Respondent/3rd Defendant is granted leave to appeal against today's ruling.

J. LESIIT,

JUDGE