



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Misc. Appli. 452 of 2007

P.M. WAMAE & CO. ADVOCATES.....APPLICANT

VERSUS

REUBEN KIPLAGAT CHESIRE.....RESPONDENT

RULING

1. By a Chamber Summons application brought under Rule 11(2) of the Advocates (Remuneration Order), the Advocates Act, Chapter 16 of the Laws of Kenya and all enabling provisions of the law, the Respondent/Applicant/Client seeks the following orders from this court:-

1. *THAT there be a stay of taxation of this respondent's advocates-client bill of costs fixed for 3rd May 2008 pending the disposal of this application by the applicant/client.*

2. *THAT the Taxing Master's decision of 3rd April 2008 dismissing this applicant's preliminary objection dated 25th February 2008 be set aside.*

3. *THAT this applicant's preliminary objection dated 25th February 2008 be upheld.*

4. *THAT this respondent's advocates-client bill of costs dated 17th July 2007 be struck out.*

5. *THAT the costs of this reference be provided for.*

2. The application was premised on the grounds that:-

(a) *The discussions between advocates/client and confirmation thereof by the letter dated 20th March 2003 constituted a valid and binding agreement between parties hereof and ought to be held.*

(b) *The payment of the agreed amount by the applicant/client to the advocates fully discharged the applicant/client from further obligation to pay the advocates any more money to the advocates (respondent herein).*

(c) *The respondent/advocates are estopped from making further demands for fees from the applicant/client.*

(d) *In case this agreement is not compliant with the law same should be visited on the respondent/advocates on whom the applicant/client put his whole trust to do a valid and legally binding agreement.*

(e) *To allow taxation of the advocates-client bill of costs in these circumstances may amount to condoning a wrong on the part of the advocates who will thereby benefit from their own mistakes and unjustly enrich themselves.*

3. The application is also supported by a lengthy affidavit sworn by **Rueben Kiplagat Chesire** who was a candidate in the General Election of December 27, 2007 under the banner of the NATIONAL RAINBOW COALITION (hereafter

called "NARC") for the Eldoret North Constituency; and that it is the applicant herein who acted for him in the Election Petition Number 9 of 2003. Since it is not the application for which I am writing the ruling' I shall not say much more about the Supporting Affidavit, but the deponent says that the fee payable to the applicant herein Mr. P.M. Wamae advocate, was agreed and has since been paid in full.

4. The applicant filed his Bill of Costs which was taxed on May 13, 2008. The respondent objected to the taxation, but the objection was dismissed by the Taxing Master. Consequent thereto, the respondent gave his Notice of Objection to the Deputy Registrar informing him that he intended to apply to a JUDGE for reversal of the Taxing Masters Order of May 13, 2008; hence the instant application.

5. Before the application could proceed to hearing, the Respondent/Advocates filed a Notice of Preliminary Objection dated May 2, 2008. The grounds of the objection are that:-

1. *The application is bad in law and misconceived;*

2. *The application contravenes Rule 12 of The Advocates (Remuneration) Order under which it is purportedly presented;*

3. *That Rule 12 aforesaid applies only where the parties to a bill of costs have agreed that a matter in dispute therein be referred by the taxing officer "for the opinion of the High Court";*

4. *That there has been no agreement between the parties that any matter in dispute in the bill of taxation hereof be referred by the taxing officer for the opinion of the High Court;*

5. *That the application hereof is not a reference by the taxing officer to the High Court;*

6. *That in any event under Rule 13 of The Advocate (Remuneration) Order the Advocate is not bound by or limited by a bill rendered in a block form (even if annexure "RKC2" of the client/Applicants affidavit in support of the application hereof were to be treated a block form of a bill) to the amount of the bill so rendered;*

7. *That the basis of the application hereof is a letter dated 20th March 2008 a copy whereof is marked as "RKC2" as aforesaid which said letter if it amounts to an agreement at all, as alleged, which is denied, contravene Section 46 (c) and (d) of The Advocates Act Cap 16 Laws of Kenya.*

6. At the hearing of the objection, Mr. Wamae contended that the present reference is intended to stay the taxation of the Bill of Costs. He said that the application is not tenable because, the ruling of the Taxing Officer on the Preliminary Objection was not on item on the taxed bill as to bring it within the purview of Rule 11(2) of the Advocates (Remuneration) Order, Rule 11 generally deals with objection to decision on taxation and appeal to Court of Appeal. Rule 11) provides as follows:-

11 (1) *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.*

(2) *The taxing officer shall forthwith record and forward to the objector the reasons for his decision on these items and the objector may within fourteen days from the receipt of the reasons apply to the judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.*

(3) *any person aggrieved by the decision of the judge upon any objection to such judge under subparagraph (2) may, with the leave of the judge but not otherwise appeal to the Court of Appeal.*

(4) *the High Court -----"*

7. It is necessary at this stage to also set out the provisions of Rule 12 because it will feature later in this ruling:

"12 (1) *With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxing of a bill for the opinion of the High Court.*

(2) *The procedure for such reference shall following that of a case stated but shall be to a judge in chambers".*

During his further submissions and upon Mr. Adere's interjection Mr. Wamae conceded that though his Preliminary Objection cites Rule 12 of the Advocates (Remuneration) Order, he (Mr. Wamae) had not based his submissions on the

said rule but had made submissions as if it was Rule 11 that was the basis of the objection.

8. In response to the Preliminary Objection Mr. Adere relied on the case of Njogu and Company Advocates -vs- National Bank of Kenya Limited [2007]1 EA 296. As rightly pointed out by Mr. Adere, this case is relevant to the main application if eventually, I dismiss Mr. Wamae's Preliminary Objection, but it is important in the sense that it deals with the procedure for a reference under Rule 11. Mr. Adere urged the court to find that his client's application is properly before this court on the basis of the cited authority.

9. In reply, Mr. Wamae contended that the procedure adopted by the applicant herein is wrong and that the applicant has failed to annex both the proceedings and the order of the taxing officer. That the purported reference does not speak for itself. He also contends that the instant application should have been brought by way of Notice of Motion and not Chamber Summons. Mr. Wamae also distinguished the cited authority from the instant case and contended that whereas in the Njogu case there was agreement between the advocate and the client as to costs payable, there was no such agreement in the instant case and therefore that the advocate in this case cannot be said to be bound by terms of any agreement between him and the applicant herein, and further that unlike the Njogu case where the initial agreed amount had been paid it is not the position in this case. In brief, Mr. Wamae urged the court to dismiss the applicant's application at this stage for the reason that the application purports to be a reference when it is not.

10. Regarding the procedure, Mr. Adere points out that Rule 11(2) clearly provides that a reference to a judge is by summons in chambers and not by Notice of Motion. Mr. Wamae conceded to this argument by Mr. Adere. Mr. Adere further pointed out that Mr. Wamae, in his opening remarks clearly told the court that he was not pursuing grounds 4, 6 and 7 of the Preliminary Objection. Again Mr. Wamae conceded this point. Mr. Adere also contended that it was not necessary for the applicant to annex a copy of either the proceedings or the order of the Taxing Officer and that Rule 11(2) cushions the applicant against such a requirement. Mr. Adere urged the court to dismiss the Preliminary Objection.

11. After considering the submissions made to me by both counsels, I find that the real issue for determination is whether the Preliminary Objection raised by Mr. Wamae qualifies as such under the principles enunciated by the court in the case of Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd. [1969] EA 696. In that case, the hearing of the case was preceded by a "so-called preliminary objection" taken on behalf of the defendant, notice of which had been given to the plaintiff five days previously seeking to dismiss the suit for want of prosecution, "pursuant to the inherent and other powers of the court." After carefully considering all the arguments placed before it, the court said the following at page 701 of the judgment as to what constitutes a preliminary objection:-

"A preliminary objection is in the nature of what to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

12. It is my considered view that Mr. Wamae's preliminary objection does not meet the above test for the reason that the arguments put forward by Mr. Wamae dictate that I exercise my judicial discretion in making this ruling.

In any event, Mr. Wamae conceded that his major points raised such as lack of proper procedure for the application and whether it is rule 11 or 12 that is under attack could not stand because the application is properly before court as a Chamber Summons. I also find and hold that Mr. Wamae went completely off tangent when he based his submissions for the Preliminary Objection on a rule that was not cited in the Notice.

15 In the result, I find and hold that the Preliminary Objection lacks merit. The same is therefore dismissed with costs to the applicant.

It is so ordered.

Dated and delivered at Nairobi this 11th day of July 2008.

R.N. SITATI

JUDGE

Delivered in the presence of: