REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIV. APPLI. 444 OF 2007 AND 443 OF 2007 AND 199 OF 2007 (CONSOLIDATED)

MOHAMMED & KINYANJUI ADVOCATES……..……...……..……...…APPLICANT

VERSUS

MUNICIPAL COUNCIL OF THIKA……..……..RESPONDENT

RULING

1. This ruling concerns a Point of Preliminary Objection dated 5/05/2008 raised against the applicant's application dated 19/02/2008. On the 6/05/08 the parties agreed by consent that the arguments put forth by themselves with regard to the Preliminary Objection raised in Misc. 444 of 2007 would also apply, mutatis mutandis to the applicant's Misc. Applications 443 of 2007. The parties in these two files are the same and were represented by the same firms of advocates.

2. The applicant's application is the Notice of Motion dated 19/02/2008 which was expressed to be brought under section 51(2) of the Advocates Act, Cap 16 Laws of Kenya, paragraph 7 of the Advocates (Remuneration) Order and all other provisions of the law seeking **ORDERS** ?–

(1) THAT this Honourable Court be pleased to enter judgment for the applicant as against the respondent for the sum of Kshs.47,719 together with interest thereon at the rate of 9% per annum from 18th October 2001 until payment in full.

(2) THAT costs of this application be borne by the Respondent.

3. The application is premised on the grounds that (a) The Advocate-Client bill of costs lodged herein has been taxed and allowed as against the respondent in the sum of Kshs.47,719/= and a Certificate of taxed Costs herein has neither been set aside nor altered by the court whereas the retainer herein is not denied and that the respondent who is truly and justly indebted to the plaintiff for the sum claimed has refused, neglected and/or refused to settle the taxed costs. The application is also supported by the sworn affidavit of **JAMILA MOHAMED** sworn on the 19/02/2008 and the annextures thereto. Of particular interest are paragraphs 4, 5, 6 and 7 of the affidavit in which it is deponed that

(a) judgment in Thika CMCC No.597 of 1999 – Francis Ndungu Maina –vs- Consolata Wanjiru & Municipal Council of Thika was entered on 22/03/2000 and thereafter the applicant billed the respondent for services rendered vide its (applicant's) bill dated 17/09/2001;

(b) vide its letters dated 25/02/2004, 31/08/2004 and 27/06/2006, the applicant reminded the respondent to settle the outstanding bill but the effort was to no avail;

(c) vide its letter dated 11/08/2006, the respondent acknowledged receipt of the applicant's previous correspondence and advised the applicant that the costs payable to the applicant were paid on 17/03/2005 and asked the applicant to treat the matter as closed;

(d) vide its letter dated 25/04/2007 the applicant again requested the respondent to settle the pending bill, but to no avail.

4. It was after the deadlock reached between the applicant and the respondent, culminating in the applicant's letter of 25/04/2007 that the applicant proceeded to have the Bill of Costs taxed on 16/07/2007 at Kshs.47,719/= and a certificate of taxed costs issued to that effect.

5. On the 5/05/2008, the Respondent filed a Notice of Preliminary Objection of the same date in Misc. 443 of 2007 in which the respondent contends that

(i) The application as drawn and filed is incompetent and/or bad in law as the prayers therein sought cannot lie in the circumstances herein obtaining.

(ii) The interest and value added tax (VAT) prayed for are not payable in the circumstances obtaining and/or at all.

6. Mr. Kahonge of Macharia Kahonge & Co. Advocates for the respondent contended that section 51(2) of the Advocates Act (the Act) under which the application is brought only applies if the retainer is not disputed and when the judgment relates only to the sum that has been taxed. He said that in the instant case, the applicant seeks not only judgment of the taxed amount but also of interest at the rate of 9% per annum from the date of instruction. It is to be noted that in these two matters, the applicant was instructed around 21/06/1999.

7. In Mr. Kahonge's view, the request for payment of interest is outside the ambit of section 51(2) of the Advocates Act. Further, Mr. Kahonge contended that under paragraph 7 of the Advocates (Remuneration) Order (the Order) the interest sought by the applicant ought to have been asked for before taxation and not afterwards; that the same should have been asked for under Rule 13 of the Order. He also said that the interest allowed under Rule 7 of the Order must follow taxation. Rule 13 of the Order provides as follows:-

"***13 (1)The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.***

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a Miscellaneous Cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof."

8. In his further submissions, Mr. Kahonge submitted that the power to tax bills is given under Section 44(3) and (4) of the Act and that it is only under that provision that interest can be allowed. The relevant subsections provides as follows:-

44(3) An order made under this section may authorize and regulate –

(b) the taking of an advocate from his client of security for payment of any remuneration to be ascertained by taxation or otherwise, which may become due to him under any such order; and

(b) the allowance of interest

(4) So long as an order made under this Section in respect of non-contentious business is in operation taxation of bills of costs of advocates in respect of non-contentious business shall, subject to Section 45, be regulated by that order".

9. Mr. Kahonge also submitted that if the application is allowed as prayed then the respondent is likely to suffer prejudice because there will be two rates of interest, namely the 9% asked for by the applicant and the normal rate of 14%, Mr. Kahonge referred the court to **Court of Appeal Civil Appeal No. 133 of 2000 – M.G. Sharma and Uhuru Highway Development Limited** and contended that the applicant threw away the opportunity to get interest when it failed to raise the same at the time of taxation and that to allow interest to be levied at this point in time would indeed deprive the respondent the opportunity to be heard on the same. In the **Uhuru Highway Development Limited** case (above), the appellant submitted his itemized Bill of Costs vide Misc. Civil Case No. 81 of 1999 to the taxing officer for taxation as between himself and his client on 29/01/1999. The amount charged in that bill, apart from V.A.T at 16% and disbursements, was Kshs.865,654,448/=. After he was duly severed with the notice of taxation and itemized bill of costs, the respondent applied by way of Chamber Summons dated 1/10/99 and taken out under Order VI rule 13(1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Sections 48 and 49 of the Act and all other enabling provisions of the law to have the appellant's miscellaneous cause struck out for the reason that there was no compliance with section 48 of the Act which required the appellant to commence his proceedings in this regard by way of plaint, a procedure which the appellant had not followed. The respondent argued that the itemized bill of costs disclosed no reasonable cause of action against the respondent and that the same was an abuse of the court process. The respondent succeeded on his application and the appellant's Miscellaneous Civil Case No. 81 of 1999 was struck out with costs to the respondent.

10. The appellant appealed, arguing that sections 48 and 49 of the Act did not apply to his case and that only rule 13 of the Order was applicable. Section 48(1) and (2) of the Act provides that:

"***48 (1) Subject to the Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in a summarized form, signed by the advocate or a partner in his firm has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court's jurisdiction in which event action may be commenced before expiry of the period of one month.***

(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

In his judgment, Ole Keiwua JA (as he then was) said in part,

"***Arguments before us centred on whether paragraph 13(3) of the Advocates (Remuneration) Order is in conflict with Section 48 of the Advocates Act. It appears to me that these two provisions cannot be in conflict. In so far as paragraph 13(3) of the Advocates (Remuneration) Order, made pursuant to section 44 of the Advocates Act is concerned, it deals with the subject of taxation of costs while section 48 of the Act is concerned with the recovery of costs and that much is quite clear from the marginal note to that section which is "Action for recovery of costs" while the marginal notes to section 44 of the Act and that to paragraph 13 of the said order are respectively:-***

"***Chief Justice may make orders prescribing remuneration" <u>and</u> "Taxation of costs as between advocate and client on application of either party."***

In my judgment, the appellant having already approached the matter by means of a miscellaneous case as authorized by paragraph 13(3) of the Advocates (Remuneration) Order, itself an off-shoot of section 44 of the Act, there was therefore no more obligation on the part of the appellant to comply with section 48."

11. The learned JA concluded that the superior court's finding that there was no cause of action in the Miscellaneous Case because it had been commenced without a plaint was not legally tenable since paragraph 13(3) had nothing to do with the recovery of costs which is what section 48 of the Act deals with.

12. Mr. Kahonge also referred the court to a number of other authorities:- (i) ***Nrb Misc. Application No. 867 of 2005 – Kantai & Co. Advocates –s Kenya Bus Ltd***., (ii) ***Nrb Misc Application No. 444 of 2004 Musyoka & Wambua Advocates –vs- Rustam Hira Advocate***, (iii) ***Nrb Misc. Application No. 60 of 2006 – Kemunyori & Company Advocates –vs- Cannon Assurance (Kenya) Ltd***. and (iv) ***Misc. Application No. 1458 of 2003 – Mbigi Njuguna & Co. Advocates –vs- Nairobi City Council.*** The only issue as far as Mr. Kahonge is concerned is the question of interest at 9% from the date of instruction and the other rate of interest which would begin to run from the date of judgment. In the **Mbigi case**, the court awarded 9% interest from date of taxation of the bill and 14% from the date of taxation. In the **Kalonzo & Wambua case** the court awarded interest on the taxed bill at the rate of 9% from the date of taxation of the bill, while in the **Kantai case** the court awarded interest at the rate of 9% in accordance with rule 7 of the Order.

13. Mr. Ngugi duly instructed by the firm of Mohammed & Kinyanjui Advocates opposed the Preliminary Objection is arguing that the purported Preliminary Objection does not meet the test of what constitutes a Preliminary Objection as set out in the **MUKISA BISCUIT MANUFACTURING CO. LTD. VS- WEST END DISTRIBUTORS LTD. [1969] EA 696**, namely that a Preliminary Objection must be capable of disposing of a case by way of pure points of law. Mr. Ngugi submitted that the fact that the respondent is unhappy with the issue of interest does not in itself make the application incompetent since the application has been filed under the correct provisions of the law, and that if the respondent is so aggrieved, he should convince the court during the hearing of the application that upon consideration of all the circumstances of the case, the interest that the applicant seeks is not chargeable. In any event, Mr. Ngugi argued, the interest being sought by the applicant is not from the date of instruction but from a date one month after the delivery of the bill of costs to the respondent. He also contended that it is erroneous for counsel for the respondent to contend that any interest chargeable ought to have been asked for at the stage of taxation and not after. I have elsewhere in this ruling set out the provisions of section 48 of the Act and also paragraph 13 of the Order the latter of which provides for "***Taxation of costs as between advocate and client on application by either party***."

14. Mr. Ngugi further contended that the respondent is under a grave misapprehension when it says through its counsel that the applicant is seeking two rates of interest and that in any event, such an issue does not amount to a pure point of law and that even if such was the applicant's prayer, the same would still be allowed as was held in the **Mbigi Njuguna** case (above). As to whether or not the applicant should have come to court by way of plaint or not, Mr. Ngugi contended that this is not a must. Relying on **Nrb Misc. Application No. 680 of 2006 – A.M. Kimani & Co. Advocates –vs- Kenindia Assurance Co. Ltd.** in which the learned Judge entered judgment for the applicant upon the taxed costs and also allowed interest at the rate of 9% from a date that was more than a month from the time the applicant's bill of costs was delivered to the respondent for payment, Mr. Ngugi urged the court to find that the respondents preliminary objection lacks merit, is misconceived and raised solely for the purpose of delaying the hearing of the application.

15. In reply, Mr. Kahonge submitted that the point raised by himself was a proper point of law as per the **Mukisa Biscuit** case. He conceded that the respondent does not dispute any of the facts pleaded save the point of interest and that section 51(2) of the Act supercedes all other subsidiary legislation such as rule 7 of the Order.

16. The real issue for determination by the court is whether in light of the **Mukisa Biscuit** case, the point raised by the respondent is a pure point of law in the nature of a demurrer. I have carefully considered the submissions that were made to me and all the authorities cited and note that apart from the **Mukisa Biscuit** case, all the other authorities deal with effective date of interest. In my view, I find that the Preliminary Objection raised by the respondent herein is a matter that can be taken up during the hearing of the application itself. I do not agree with counsel for the respondent that the application as filed is

incompetent by and/or bad in law for any reason whatsoever. It is not true that the prayers sought cannot be granted. These prayers are validly made, and if supported, same can be granted. Counsel for the respondent conceded that the respondent has no dispute with the entry of judgment *perse*, and that the only concern is the payment of interest at the rate of 9% from the date of instruction or such other date as the respondent perceives it in its mind. I would agree with Mr. Ngugi that the respondent's Preliminary Objection is not a Preliminary Objection as defined in the Mukisa Biscuit case. It is a point that can be taken up at the hearing of the application. The respondent will be heard on these issues as indeed it is entitled to be heard.

17. In the result, I would disallow the Preliminary Objection as being misconceived and based and gross misapprehension of the law. The same is hereby dismissed with costs to the applicant who may now proceed to set down its application for hearing and final determination. I hasten to add that the Preliminary Objection was needless and has taken up much judicial time which could have been used for the determination of the application at hand.

18. It is so ordered.

Dated and delivered at Nairobi this 8th day of October 2008.

R.N. SITATI

JUDGE

Delivered in the Presence of:

Mr. Ngugi (present) For the Applicants

Mr. Rogo holding brief for Mr. Kahonge For the Respondent