



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc. Civ. Case 456 of 2007**

**WAMAHIU KIMERIA t/a WAMAHIU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**NORDIC DEVELOPMENT LIMITED.....RESPONDENT**

**JUDGMENT OF THE COURT**

1. By a Notice of Motion dated 25/06/2008 and filed in court on the same day the Advocates/Applicants pray for ORDERS:?

1. ***THAT Judgment be entered for the sum of Kshs.361,672/= taxed and certified by the Deputy Registrar as due to the Plaintiff Applicant together with interest thereon.***

2. ***THAT the Plaintiff Applicant be at liberty to execute against the Respondent.***

3. ***THAT the cost of this Miscellaneous Application be quantified by the Honourable Court and borne by the Defendant Respondent in any event.***

2. The application which is said to be brought under Order 52(2) (sic) of the Advocates Act, Sections 3 and 3A of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules Cap 21 Laws of Kenya and all other enabling provisions of the Law is premised on grounds:?

1. ***THAT the Applicant received instructions from the Defendant to institute proceedings seeking for injunctive orders restraining the Defendant from unlawfully selling their land in HCCC 272 of 2006.***

2. ***THAT an Advocate – Client Bill of Costs in respect of the Applicant’s costs in the sum of Kshs.361,672/= has been taxed by the Deputy Registrar.***

3. ***THAT a Certificate of Taxation has been issued in respect of the Applicant’s costs in the sum of Kshs.361,672/= which has not been satisfied.***

4. ***THAT the Defendant is capable of paying the sum of Kshs.361,672/= being of able means but have made it a habit of tricking and making false promises to pay engaged Advocates the costs incidental thereto and the Advocates fee for work undertaken only for such Advocates to discover that a Notice of Change of Advocates has been filed.***

5. ***Further grounds to be stated at the hearing hereof.***

and it is also supported by the sworn affidavit of **FRANCIS WAMAHIU KIMERIA**, the Applicant herein dated 25/06/2008. The deponent says that he was instructed by the Defendant herein to institute proceedings against one **Mohammed alias Wariahe** and **Jeremiah alias Maploti** seeking for injunctive orders vide HCCC No.1093 of 2006 at Nairobi as per annexure marked “**FWK 1**” which is a true copy of the Chamber Summons Application, Certificate of Urgency, Plaint and Verifying Affidavit. He also says that on 17/10/2006, Hon. Mr. Justice P. Kihara Kariuki granted injunctive orders as can be seen from annexure marked “**FWK 2**” to the affidavit and further that on 16/01/2006, (sic) the Applicant secured an interlocutory judgment against the Defendants in HCCC No.1093 of 2006. The deponent says

further that after obtaining interlocutory judgment, the Defendant instructed **M/s Kimaiyo & Munya** Advocates to take over the conduct of the case on his behalf and the Applicant was duly notified of that fact vide a Notice of Change of Advocates filed by the new firm of advocates.

3. It was after the change, Mr. Kimeria says, that his firm prepared and filed an Advocates-Client Bill of Costs in respect to its fees and that on 15/05/2008, the Bill of Costs was taxed by Hon. Muya, SPM in the sum of Kshs.361672/= . Annexure marked "**FWK 5**" attests to this fact. The deponent says that there is no dispute at all that his firm was duly instructed by the Defendant herein in respect of Nairobi HCCC No.1093 of 2006 and that the costs having been taxed as shown the amount is due and payable to him by the Defendant. He says that despite correspondence to the Defendant to pay the taxed amount, the Defendant has ignored and/or failed to pay the aforesaid sum, hence this application.

4. The application was served upon the Defendant and also upon his advocate. Service upon the Defendant was by registered post sent to the Defendant itself on 18/09/2008. The Defendant has not answered the Applicant's claims against him.

5. Section 51(2) of the Advocates Act, being the main provision under which this application is brought provides?

***"51(2) The Certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed an order that judgment be entered for the sum certified to be due with costs."***

The Applicant has cited the erroneous S.52(2) of the Advocates Act which does not exist.

6. In the instant case, the Applicant avers that his firm was duly instructed to act for the Defendant in Nairobi HCCC No. 1093 of 2006 and has produced evidence to that effect. The Defendant has not disputed this fact either by way of a Replying Affidavit or grounds of objection. The Applicant also avers that after the Defendant withdrew instructions from his firm, the firm proceeded to prepare and file an Advocate-Client Bill of Costs which Bill was duly taxed by the taxing officer on 15/05/2008 in the sum of Kshs.361 672/= . The Applicant has availed evidence in the form of the Certificate of Taxation to prove that fact. The Applicant has submitted that the said taxation has neither been set aside nor altered by the court. The Defendant has not adduced any evidence to the contrary.

7. In light of the above findings, I do find and hold that the Applicant's application which is not contested by the Defendant who though duly served failed to appear, has merit. Accordingly I allow the same and make the following orders:?

1. ***That judgment be and is hereby entered for the Plaintiff as against the Defendant in the sum of Kshs.361 672/= being the amount taxed and certified by the Deputy Registrar as due to the Plaintiff/Applicant together with interest thereon.***
2. ***That the Plaintiff/Applicant be at liberty to execute against the Respondent.***
3. ***THAT the costs of this application, be paid to the Plaintiff/Applicant in accordance with the Advocates (Remuneration) Order.***

Orders accordingly.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of November, 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

.....For the Plaintiff

.....For the Defendant