



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Misc. 12 of 2005

L. N NGOLYA & CO. ADV.....:APPLICANT

VERSUS

JACKSON MUIITHI KILANGO.....:RESPONDENT

RULING

1. This Application dated 26.9.2005 raises only one issue; whether, upon taxation of costs, an advocate can recover those costs by direct execution or by filing suit, obtaining judgment and executing for the same in case of default
2. Mr. Kamanda, advocate for the Applicant takes the view that under section 48 and section 49 of the Advocates Act, a suit ought to be filed. Mr. Ngolya, advocate for the Respondent takes the contrary view.
3. The background to the issue at hand is this; M/S L.N. Ngolya & Co. Advocate were the ones who represented Jackson Muithi Kilango in CMCC No. 188/2003. After the close of the matter, the said advocates taxed their Bill of Costs which was allowed at Kshs. 41,130/=. The advocates then obtained a certificate of Taxation dated 6.9.2005 and used it as a basis to apply for warrants of attachment and sale of their former client's properties. The present Application was then filed and the specific orders are that the Ruling on taxation be set aside but more fundamentally, that the warrants of attachment and sale be set a side, cancelled and /or recalled.
4. On my part, the law on the subject at hand, so far as I know, was laid down in the case of M.G. Sharma vs Uhuru High Development Limited C.A.133/2000 and Akiwumi,J.A. in interpreting section 48 and section 49 aforesaid, stated as follows:-

*“The provisions of section 48 which must be set out as follows:-*

**48. (1) Subject to this 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 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 a 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 the expiry of the period of one month.***

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

The phrase “**subject to this Act**”, appearing in section 48(1) of the Act, which is concerned with the recovery of costs by advocates, is the same phrase employed in section 68(1) of the English Solicitors Act 1957, from which the Act is derived, in respect of actions to recover Solicitor’s Costs. In my view, this phrase applies as it does, to section 63 of the Solicitor’s Act in respect of a remuneration agreement between a Solicitor and his client, in the same way as it does to section 48 of the Act which also deals with an agreement between an advocate and his client with respect to remuneration, and both of which relates to circumstances excluded from the ambit of sections 48(1) and 68(1) respectively, of the Act and the Solicitor’s Act. (See **Haisbury’s Statutes of England, Third Ed. Solicitors’ Act 1957, section 68 NOTES, p. 71**). Paragraph 13 of the Order is not affected by section 48(1) of the Act and vice versa.

But how then does paragraph 13 of the Order come into play? Under section 48 of the former Advocates Act 1961, which was repealed and replaced by the Act, the Chief Justice by virtue of the wide powers conferred on him by that section, promulgated the Order, which has in pursuance of section 24 of the Interpretation and General Provisions Act, survived the repealed Advocates Act 1986. This section provides that;

**“Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain enforce, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder”**

The Order has not only, survived the repealed Advocates Act, but also, the all embracing words of its section 48(1) under which the Order was promulgated and which words have been maintained in section 44(1) of the Act. Section 48(1) of the repealed Advocates Act, is as follows:-

**“The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of Advocates, and the chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or no contentious.”**

And now, if I may go back to section 48(1) of the Act, it is clear from its wording that it only relates to proceedings for the recovery of costs. Paragraph 13 of the Order on the other hand, does not deal with the recovery of costs, but only with the taxation of costs the result of which could be the basis of a suit for recovery of costs. And nowhere does section 48 of the Act which deals with actions for the recovery of costs, forbid the taxation of costs before any action for the recovery of costs can be instituted; and in any case, the taxation of costs under paragraph 13 of the Order does not by itself, amount to a judgment. What was before the Taxing Officer was a taxation of costs which can be undertaken as it was done, under paragraph 13 of the Order and which step is in no way inconsistent with, or forbidden by, sections 48 and 49 of the Act. In any case, the cause was not, and cannot even be said, was purported to have been, brought under section 48 of the Act. Indeed, all that section 48(1) of the Act requires to be done before a suit for the recovery of costs, is instituted, relates to the prior service of the Bill of Costs and not its taxation, on the client by the Advocate, and not at all, to the taxation of his Bill of Costs. This interpretation of section 48(1) of the Act, applies with equal force to section 49 of the Act which is derived from section 48 of the Act, and which comes into play only where a suit has already been brought by way of plaint, by an Advocate for the recovery of any costs and a defence is filed disputing its reasonableness of quantum. The learned Judge erred in holding in his Ruling that in accordance with sections 48 and 49 of the Act, there can be no taxation of costs before a suit for the recovery of costs can be instituted.”

2. Gicheru J .A. similarly found as follows:-

“I have deliberately set out in full the provisions of the aforesaid sections to demonstrate that those

sections relate to the bringing of a suit for the recovery of costs by an advocate against his client. As is evident from the title to the appellant's Miscellaneous Case No. 81 of 1999 together with the itemized bill of costs thereto, the Appellant was not suing for the recovery of costs against the Respondent but was applying for taxation of his bill of costs as between him and the respondent in terms of rule 13 of the Advocates (Remuneration) Order which he was legitimately entitled to as is set out at the beginning of this judgment. That rule is not in conflict with sections 48 and 49 of the Act as its objective is different from that of the aforesaid sections. The superior court cannot have been right in sticking out with costs the Appellant's Miscellaneous Case No.81 of 1999 as indicated above.

5. In the matter before me, what M/S L.N. Ngolya & Co. Advocates did was to file this Miscellaneous Cause with the Advocate/Client Bill of Costs as the originating pleading and this is proper under – paragraph 13 of the order. The Taxing Master taxed the Bill of Costs and rendered his Ruling on 17.7.2005. A certificate of Taxation of Costs was then issued and again all those procedures were proper. Things went awry thereafter. As Akiwumi J.A. stated, in Sharma (supra, “***the taxation for costs under paragraph 13 of the order does not by itself amount to a judgment.***” The issuance of warrants for attachment and sale is only done upon a judgment and decree being obtained. It is the decree that leads to execution including by way of warrant of attachment and sale. A certificate of taxation is therefore neither a judgment nor a decree capable of being executed.

6. It is my view that once costs were taxed, then section 48 and section 49 of the Act then became operational and the advocate then should have followed the steps for instituting a suit for recovery of costs and thereafter proceed to obtain a judgment and decree capable of being executed. I also understand the judges in Sharma (ibid) to be saying that a suit can be filed for recovery of costs under section 48 without a certificate of taxation and there is no conflict between Paragraph 13 aforesaid and either section 48 or section 49 as interpreted.

7. Turning back therefore to the Application before me, the only order to grant is this;

8. The warrants of attachment and sale issued unlawfully and irregularly in this matter be set aside and cancelled. Costs thereof to Respondent/Applicant

9. Orders accordingly.

Dated and delivered at Machakos this 2<sup>nd</sup> day of December 2008

Isaac Lenaola

**Judge**

In the presence: Mr. Ngolya for Applicant.

**Isaac Lenaola**

**Judge**