REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Miscellaneous Civil Application 35 of 2009

ODHIAMBO OWITI AND COMPANY

ADVOCATES …… APPLICANT

VERSUS

BLUESHIELD INSURANCE COMPANY LIMITED ……..RESPONDENT

CORAM

J. W. MWERA J.

OWITI FOR APPLICANT

MBIGI FOR RESPONDENT

COURT CLERK/INTERPRETER/SWAHILI/ENGLISH/LUO

R U L I N G

The applicant – firm of advocates came to this court on 20th February 2009 seeking leave to have its one – hundred and ten (110) bills of costs listed and taxed between it and its client, the respondent. The other prayer was that upon such taxation a certificate of costs for each bill be deemed to be a decree of this court. All the above was said to be laid under paragraph 13(1)(3) of the Advocates (Remuneration) Order and section 51(1)(2) of the Advocates Act (Cap 16).

Mr. Owiti, Advocate, who argued the motion swore an affidavit in support thereof.

Mr. Mbigi, Advocate for he respondent, filed grounds of opposition to the motion and also filed a chamber summons under Order 6 rule 13(1)(b)(d) Civil Procedure Rules and section 3A Civil Procedure Act plus sections 48(1), 49(a) of the Advocates Act. Both the grounds in opposition and the chamber summons had in essence similar thrust in that the jurisdiction of the court to entertain the advocates' motion was doubted and that the advocate could not seek leave to tax bills and in the same motion pray that each certificate issued after such taxation, right away becomes a judgment in each cause. The other aspects raised by the respondent are to be found in the submissions of counsel presently. The court considered it convenient to hear the applicant on its motion while also remarking on the grounds of opposition and the chamber summons at the same time. On its part the respondent would essentially use its grounds along the chamber summons, in opposition. Mr. Owiti did reply to the chamber summons.

Mr. Owiti told the court that his firm was instructed to render legal services to the respondent insurance company and he was given the 110 files which he started to work on in various causes and courts. A retainer by the respondents' letter of 19th June 2008 was not disputed. All, if not most, of the causes are still pending. The applicant then rendered notes to be paid interim charges in order to continue working on the respective files, but the respondent failed or neglected to honour them. So it came to court to seek the orders referred to above. It was said that procedurally a fee ought to be paid at the time of taking instructions and not on completion of a given case and so paragraph 13(1)(2) (above) fell to be invoked. The issue that the applicant ought to have rendered its bills in accordance with section 48, Advocates Act, did not arise because this was not a case of recovery of a taxed bill of costs and the case of Sharma versus Uhuru Highway Development Limited {2001} EA 530 was cited in that regard. Mr. Owiti saw nothing wrong with bringing 110 bills under one application, instead of filing a separate miscellaneous application for each bill because there was no law barring such a move and in any case the course taken by the applicant, not only saved the parties costs, but it also saved time. No prejudice or confusion was occasioned to any party.

Further, that no law barred an advocate to seek to tax his costs with the client whom he was still representing. The court heard that in fact, the respondent was initially agreeable to make interim payments. It asked the applicant to avail its bank account details which was done.

Mr. Mbigi's position was that the relationship between the applicant and the respondent was on a trial basis, to be followed later with a comprehensive agreement. That stage was never reached, as the relationship seemed to have soured.

It was argued that paragraph 13 cited by the applicant was merely a procedural provision by which a party goes to the taxing officer to tax its bill. Such course did not require any leave as the one the applicant is now seeking. Thus prayer (a) should fail. This court's leave to tax is unnecessary.

As for the prayer (b), that the certificates of costs anticipated be made decrees in each cause, Mr. Mbigi found that untenable. The bills must first be taxed then followed by seeking the result to be made a decree of the court. The first is assessment while second is recovery under section 48 Advocates Act. The two cannot be sought at one and the same time, counsel submitted. After taxation the party to pay must have a notice of 30 days before recovery begins. The applicant was still on record for the respondent and so should not tax costs. And that it was frivolous and prejudicial to lump 110 bills in one application. It ran contra paragraph 13(above) and 69 through the 73 of the Advocates Remuneration Order Mr. Owiti refuted Mr. Mbigi's position adding that it was only a good practice that leave of court be obtained before a bill is taxed as in this case.

In the motion before us the provisions of law whose powers were invoked, read thus:

"13(1). The taxing officer may tax costs as between advocate and client without any order for the purpose upon theapplication 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 summarised or block form the taxing officer shall give the advocate an opportunityto submit an itemized bill of costs before procee-ding with such taxation, and in such event the advocate shall not be bound or limited to the amount of the bill rendered in summarised or block form. (2) Due notice of the date fixed for taxation shall begiven to both parties and both shall be entitled to attendand be heard." (underlining supplied)

Subparagraph 3 mandates that the bill of costs shall be filed in a miscellaneous application and an advocate shall not raise an instruction fee for it.

As for section 51(1)(2), Advocates Act we have this:

"51(1) Every application for an order

of taxation of an advocate's bill or for

the delivery of such a bill and the

delivering up of any deeds, documents

and papers by an advocate shall be made

in the matter of that advocate.

(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 case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

In this court's mind Mr. Mbigi appears right in arguing that the paragraph reproduced above does not provide for leave of this court to be obtained before

an advocate or his client moves the taxing officer by way of a miscellaneous application to have his/her costs taxed. Mr. Owiti posted that it is only a good old practice that leave be obtained before one's bill is taxed but this court does not see the foundation of that. And if it may be added without prejudice to any party, the undersigned in his experience in the office of taxing officers (M. F. Patel, M. J. Bhatt, both since departed) and as a Judge at Nairobi, Machakos, Nyeri and Mombasa, has not come across applications for leave to tax a bill. It is only at Kisumu that this practice has been encountered. It may have acquired some antiquity at Kisumu and even earned a description as of good order but it no basis in law or in countrywide practice. Without authority and or that this practice should continue, and none was placed before this court, applications for leave to tax appear to unnecessarily consume time and funds. Unless for any good cause or authority, it ought to stop.

And in so stating reference is had from paragraph 13 itself as underlined above:

"……..without any order for the purpose upon the application of the advocate or upon the application of theclient,……"

The above simply means that an advocate or a client needs no order before filing an application to tax a bill.

And moving to section 51 (above), the understanding of this court is that after the parties have been heard, **ex parte** or otherwise by the taxing officer under paragraph 13(above), a consequent certificate of costs that issues, if not set aside or altered by the Court, is considered final in the sums it bears and where retainer is not disputed, the order of taxation as evidenced by the certificate, can be made a judgment for the sum certified. The taxation is carried out by the taxing officer – a ministerial duty done on behalf of the judge in the High Court. It is only the Court itself, not the taxing officer, to make the order of taxation a judgment. Accordingly, this court cannot give leave to tax a bill, which process has been found not tenable, and before taxation it orders in advance that the anticipated order of taxation be a judgment/decree in the matter. The neat, orderly and practised course which seems to accord with the law is that the taxing exercise precedes, and order is made, a certificate of costs issues, then if not altered or set aside, a move is made to make it a judgment in the cause. Costs, if not paid, could then be recovered by way of execution of decree. (see section 48 Advocates act).

So all in all the two prayers in the present motion cannot be granted. There is no requirement that leave be obtained before an advocate – client bill of costs is taxed and therefore this court shall not give such leave. And the proper course should be to get a bill taxed, then the taxed sum be made a judgement later. In this cause the court is being asked to anticipate that the taxing officer will find in favour of the applicant and so the applicant should get judgment in advance. That will not be. In the circumstances of this matter the court will not grant orders probably lying in the future.

Having expressed itself as above, it is added that the number of bills the taxing officer must consider

to consolidate and tax together, is a matter in that officer's sole and wide discretion. And the cause she/he takes will be determined by the reasons put forth, for or against. Otherwise generally there should be no bar to consolidating or having as many bills as possible in one miscellaneous application. So the aspect of confusion or prejudice, in the event several bills are dealt with together, ought to be left to the decision of the taxing officer in the first place.

It is also observed that attacking this court's jurisdiction even on aspects of civil nature being handled by a taxing officer, with respect, appeared misplaced. The taxing officer taxes costs on behalf of a judge as an administrative role, otherwise the Judge himself should do it. His jurisdiction in matters criminal and civil is unlimited (see section 60 of the Constitution). And it was not demonstrated to this court that a lawyer can only apply to tax a bill with his/her client after ceasing to act for that client – hence no finding is made on that point. There was no law or authority put forth on that account.

In sum this application is dismissed with costs.

Ruling delivered on 27th May 2007.

J. W. MWERA

J U D G E

JWM/mk.