REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 33 OF 2006

JOHN MARK NYAGA KAMUNYORI

t/a KAMUNYORI & CO. ADVOCATES ….....
PLAINTIFF/RESPONDENT

versus

DEVELOPMENT BANK OF KENYA LTD …… DEFENDANT/APPLICANT

R U L I N G

The Defendant, now Applicant, filed this Chamber Summons dated 22nd January 2007 seeking orders that the Plaintiff's suit herein be struck out because the suit is improperly before this court and is otherwise an abuse of court process. The Applicant gives the reasons that on 28th November, 2003, the Plaintiff, now Respondent, filed Milimani High court Miscellaneous Application number 975 of 2003 which was and Advocate/Client bill of costs between the Plaintiff and the Defendant in this matter.

From what the parties are saying in their respective affidavits as well as through their respective advocates in submissions, the sequence of events is not clear. But what I can gather is that following the filing of that High Court Miscellaneous Application No. 975 of 2003 by the Plaintiff, the advocate/client bill of costs was taxed on 8th July 2005 by the Taxing Officer of this Court at Kshs.14,045,854/= and on 13th July 2005, a Certificate of Taxation thereof was issued certifying the amount taxed.

On 14th July 2005, the Plaintiff wrote to the Defendant demanding payment of the taxed costs aforesaid. The Defendant failed to pay and the Plaintiff as a result filed this suit on 1st February 2006. At the same time, the Defendant was applying to the High Court to set aside the said taxation and on 12th June 2006, the Defendant's application was successful and the taxed or assessed costs were set aside.

The Plaintiff being aggrieved gave his intention to appeal to the Court of Appeal against that decision. He has not shown this court that he has now appealed, as it appears he has not yet appealed. But has said in this application that having given his intention to appeal, this suit is now deemed by him stood over pending the outcome of the appeal.

He does not therefore agree that the suit is not properly before this court. But the Defendant says the suit is improperly before this court because having opted to file the miscellaneous application aforesaid, the Plaintiff cannot now purport to file a civil suit and this suit is therefore an abuse of court process and should be struck out.

Mr. Kamunyori appeared for the Plaintiff while Mr. Kiura appeared for the Defendant Applicant and

he continued to argue that the proper procedure would have been for the Plaintiff to apply for judgement in the court case file for High Court Miscellaneous Application No. 975 of 2003 and Mr. Kiura thinks that would have been in accordance with Section 51 of the Advocate's Act which he says the Plaintiff has breached. He says the position in Section 51 is not the same as the position in Sections 48 and 49 of the Advocate's Act (the Act).

From what Mr. Kiura and Mr. Kamunyori are saying I gather that the dispute is whether the judgment, based on assessed costs by the Taxing Officer, should be obtained in the Miscellaneous Application case file in which the assessment of costs was done, or should be obtained in a fresh suit separate from the Miscellaneous Application proceedings the way Mr. Kamunyori is handling the matter in this suit.

I am aware of the practice whereby applications for judgment based on the costs already assessed by the Taxing Officer are made by successful advocates who file notices of motion inside Miscellaneous Application case files. These are not uncommon and, in fact, cases of the type the Plaintiff filed in this matter are few. That, in my view, explains why Mr. Kiura is differing from Mr. Kamunyori on that issue in this matter.

Since the Plaintiff was not moving the court to prosecute this suit and Mr. Kamunyori acknowledges that since he is appealing to the Court of Appeal against the High court's setting aside of the assessment of costs, he should leave this suit stayed until the appeal in the Court of Appeal is decided, there is no problem that the Plaintiff is proceeding with prosecution of the case in the High Court when he should not be doing so. Indeed the Defendant does not show any concern over that aspect of the case.

Going back to the issue between the parties therefore, what is the correct position? I think I should look at Sections 45, 48, 49 and 51 of the Act as well as Rule 13 of The Advocates (Remuneration) Order to see if I can find out the correct position, that is the correct procedure.

Starting with Section 45 of the Act, it provides for an agreement between an advocate and his client concerning remuneration in a case the advocate is handling for the client. Of course Section 45 operates subject to Section 46 which forbids certain types of agreement the section calls **"invalid agreements".** But once a valid agreement is in place, Section 45 says that such an agreement

"shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

The section, while allowing disputes in the agreements to go to court for a solution, concludes with sub-section (6) which states that:

"Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48."

Section 45 does not therefore concern this case as it rules out cases where taxation has been done as in this case and also rules out the application of Section 48.

I now move to Section 51 (1) which states as follows:

"(1) Every application for an order for 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."

Rule 13 of the Advocates (Remuneration) Order comes in to amplify sub-section (1) of Section 51 by stating that

"(1) The taxing officer may tax costs as between advocate and client <u>without any order for that purpose</u> 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."

Sub-rule (2) provides that due notice of the date fixed for such taxation must be given to both parties and that both parties shall be entitled to attend and be heard. Sub-rule (3) of Rule 13 adds that:-

"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."

I should remark here that the emphasis in the quotation in Sub-rule (1) are mine to focus on the fact that under this rule, the advocate and his client need not necessarily obtain a court order for taxation of their costs before the Taxing Officer taxes costs between them. The Plaintiff and the Defendant in this suit were in that position when the Taxing Officer taxed costs between them on 8th July 2005 and there was nothing wrong with that. On the other hand it is not wrong obtaining such an order before taxation, as can be seen in the procedure under Sections 48 and 49 of the Act..

I am through with Rule 13 of the Advocates (Remuneration) Order and should now go back to Section 51 where sub-section (2) states as follows:

"(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."

In the instant suit, the Taxing Officer's certificate was issued and was subsequently set aside under Rule 11 after the Plaintiff had filed this suit praying for an order that judgment be entered for the sum certified to be due. The Plaintiff is saying he brought this suit under Section 48 of the Act but I think he should be saying he bought it under Section 49 of the Act. In any case, the Defendant's Counsel says the suit should have been brought under Section 51 of the Act which he says should have been effected through an application in High Court Miscellaneous Applications No. 975 of 2003. Rule 11 is not applicable as this is not an objection against the decision of the Taxing Officer on taxation.

Section 51 comes after Sections 48 and 49 and was therefore inserted with Sections 48 and 49 in mind and though Section 51 mentions the nature of the orders the court may make in relation to the certificate of the Taxing Officer, it does not show the procedure to be followed by an advocate who wants to recover costs due to him as a result of his having obtained the relevant certificate of taxation. The same can be said about Rule 13 aforesaid. But as seen earlier Section 51 as read with Rule 13 are concerned with the filing of the bill of costs including the procedure thereof before the Taxing Officer. That makes the primary objective of Section 51 as read with Rule 13 to be different from the primary objective of Sections 45 and 48 as Section 45 deals with situations where there is an agreement between an advocate and his client about the remuneration to be paid while Section 48 deals with a situation where a suit based on an untaxed bill of costs is filed. Sections 48 and 49 are specific about recovery of costs by an advocate against his client but I am leaving Section 49 last because it is general in application. Starting with Section 48 it states as follows:

"(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 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."

Sub-section (2) says that subject to sub-section (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

Sub-section (3) extends and strengthens the aforesaid Rule 13 (1) of the Advocates (Remuneration) Order when sub-section (3) says that a bill of costs may be taxed even when no suit to claim the costs has been filed. Rule 13 (1) in its opening statement says that

"The taxing officer may tax costs as between advocate and client without any order for the purpose …."

Sub-section (3) of Section 48 of the Act is strengthening and extending Rule 13 (1) above mentioned by stating as follows:

"Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."

One important condition must be noted in that the suit under Section 48 can only be filed one month after a bill for such costs, which may be in summarized form, signed by the advocate or his partner in his firm, has been delivered or sent by registered post to the client, unless it is shown the party chargeable is about to quit Kenya or abscond, in which event action may be commenced before expiry of the period of one month.

It means therefore that Section 48 is not relevant in the suit before me because it applies in a situation where the Plaintiff has to rely on **a bill of costs** and not **on a certificate of costs or assessed or taxed costs**. The said **bill of costs has to be served one month before the suit is filed**. That is not the situation in this suit with already assessed costs which is no longer a mere bill of costs.

That leaves me with Section 49 of the Advocates Act. It states as follows:

"Where, in the absence of an agreement for remuneration made by virtue of Section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof: -

(a) no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer."

Paragraph (b) is about the need to itemize the bill of costs upon which the suit may be or may have been based and how it should be done. That is done where the suit is not based on taxed or assessed costs. Paragraph (c) provides for non-payment or for payment of court or filing fee when such a suit is filed.

Paragraph (d), like paragraph (a), is important for the purpose of this ruling. It states as follows:

"(d) at anytime after the bill of costs has been filed, and before the suit has been set down for hearing, any party to the action may take out a summons for directions as to whether such bill should be taxed by the taxing officer before the suit is heard."

More closely, it means that under Section 49 if no defence is filed, or if one is filed but does not dispute the reasonableness or quantum in the plaint, the requirements in paragraphs (a) to (d) are not necessary. It also means that Section 49 covers all suits including those where the subject matter fall inside Section 45, that is where there is agreement for remuneration and the advocate wants to enforce that agreement, for example. Section 49 therefore covers cases falling under Section 48 provided that cases falling under Section 48 must also fulfill the requirements in Section 48 such as service of the bill of costs to the client one month before filing the suit. Section 49 is therefore the one under which the instant suit should be said filed; because pursuant to Section 49, an advocate's suit for payment of costs may be based on the full amount of his untaxed bill of costs under Section 48, or be based on already taxed/assessed costs under Section 51 (2), or be based on an agreement under Section 45. Those are three categories of cases under the Advocates Act and in each of those three categories, once the suit has been filed, and I mean a substantive suit instituted by a plaint, the Plaintiff therein may apply for summary judgment in the normal manner under relevant provisions of the Civil Procedure Act and its rules where such an application is

justified for the normal handling under the Civil Procedure Act.

In general, when a bill of costs is filed for taxation by the taxing officer, that does not amount to a suit for the recovery of costs against the Respondent. That is a mere application for the taxation or assessment of costs between the advocate and his client. The taxation and issuance of a certificate of taxation thereof only amounts to assessment of the amount which under the Advocates Act the advocate should, after that taxation, demand from the client.

That taxation does not amount to an order of the Court to the effect that the client is ordered to pay the said amount so that if he fails to pay, execution can issue.

That situation should be distinguished from a situation where a matter is heard, or sometimes by consent, an order is made in favour of a party and costs ordered in favour of the same party. In such a case, because the court has made an order for costs, immediately such costs are taxed, the successful party can seek the execution thereof because there is already in existence (an executable) court order for the payment of the same costs and only assessment of the costs ordered to be paid remained so that once the assessment is done, the order is complete and can be executed, and this is the most suitable situation where applications for such execution could be made in the same case file under Section 51 (2) without using Section 49 of the Advocate's Act.

Otherwise it appears to me that even after taxation of an advocate's bill of costs and possession of the certificate of taxation thereof, an application by Notice of Motion (as it is always done) for judgment for payment of costs based on the taxed costs should be made under Section 51 (2), without filing suit by plaint pursuant to Section 49, only where there is no dispute over that payment so that Section 51 (2) is used for the sole purpose of obtaining an executable court order. In my view, that procedure is in itself, summary enough and therefore when adopted, no other application for summary judgment is properly available to the same Applicant. That is because he will have filed his Notice of Motion under Section 51 (2) in the Miscellaneous Application Case file where the taxation was done. To file a subsequent application under provisions of the Civil Procedure Act and rules would mean filing an application within another application without enabling provisions of the law to do so. Alternatively it means filing two parallel applications for summary judgment, maintaining both and prosecuting both under the guise of prosecuting only one of them. In each case the proceedings will not be in accordance with the present law, will not only be irregular but will also be improper and therefore not maintainable in law.

Properly therefore, an advocate armed with taxed or assessed costs and the relevant certificate of taxation should make a formal demand of the assessed amount from the client and whatever amount the client fails to pay, the advocate should proceed pursuant to Section 49 and Section 51 (2) of the Advocates Act to sue for the amount due, as up to that point, the assessed or taxed amount has not yet been ordered payable. That gives the client the opportunity to raise such matters, if any, as he would like to raise such as retainer or whether any deposits had been paid against such assessed costs or whether there was a counter-claim or set off against such costs. The suit to be filed should be a substantive suit by a plaint like the one the Plaintiff herein filed.

To conclude this ruling, I will state that I find Sections 45, 48 and 51 of the Advocates Act, each, dealing with a special situation relating to advocate client remuneration and that Section 51 (1) operates together with Rule 13 of the Advocates (Remuneration) Order to obtain taxed or assessed costs. I further find that above all those provisions, Section 49 is the general provision for filing substantive suits in matters falling under the Advocates Act so that where applicable, Section 49 may be read together with Section 45, or Section 49 read together with Section 48, or Section 49 read together with Section 51 (2) as the case may be.

I find that the instant substantive suit falls under Section 49 as read with Section 51 (2) of the Act as the suit is founded upon assessed or taxed costs of an advocate who also obtained the relevant certificate of taxation before filing the suit. As I find that the suit was properly instituted, I have no reason to-day to interfere with its existence. Accordingly, the Defendant/Applicant's Chamber Summons herein dated 22nd January 2007 be and is hereby dismissed with costs to the Plaintiff/Respondent.

DATED this **23RD** day of **JULY 2007.**

J. M. KHAMONI

JUDGE

Present:

The Respondent

Emilly – Court Clerk

J. M. KHAMONI

JUDGE