REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 532 of 2004

AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES …..… PLAINTIFF/APPLICANT

versus

NATIONAL BANK OF KENYA LIMITED ……..…. DEFENDANT/RESPONDENT

RULING

What is before me is a Notice of Motion dated 16th March 2006 filed by the Plaintiff praying for orders that:-

"1. The Honourable Court be pleased to enter judgment for the Plaintiff against the Defendant for the sum of KShs.38,279,117.99 as pleaded in the plaint."

The application is based on the grounds stated on its face as supported by the affidavits of Hassan M. Lakicha dated 16th March 2006 and 12th May 2006. The Respondent filed grounds of opposition dated 12th May 2006, a replying affidavit also dated 12th May 2006 and a Notice of Preliminary Objection dated also 12th May 2006 and notice of additional preliminary objection dated 14th June 2006. Mr. Ahmednasir is representing the Plaintiff/Applicant while Mr. Kibet is representing the Defendant/Respondent and I prevailed upon Mr. Kibet to argue his preliminary points during the hearing of the Notice of Motion.

An otherwise simple and straight forward case instituted by way of a plaint in which the Plaintiff Advocate is claiming costs from his former client, is turning into a complex, confusing and may soon become a confused long litigation. Unfortunately circumstances are created whereby the case has to pass through the hands of a number of different judges when it could perhaps have been handled better by one judge throughout and that would also have had the advantage of restraining the parties from taking advantage of the changes to complicate the simple case to the point of losing the course of justice. With what I am saying in mind, I had decided to be brief in this ruling, not withstanding the long hearing in which a lot of material was drawn to my attention, and I hoped this ruling would remain brief despite my response to Mr. Kibet's preliminary points in his objection that this court has no jurisdiction to hear the Notice of Motion before me and also no jurisdiction to hear the main suit in which the Notice of Motion is filed. I had decided to be brief because it would appear to me that the lengthy rulings the parties have been getting in this matter, however well reasoned, instead of having the effect of moving the parties nearer to the end of their litigation, are only assisting the parties to move further away from that end when the parties unnecessarily question those rulings sometimes fighting bitter battles over interpretation of certain phrases or sentences in the said rulings as we deal with one application after another while others remain pending yet more and more are still being filed as hearing of the main suit through examination

and cross-examination of witnesses in the witness box is ignored.

But the examination and cross examination of those witnesses in the witness box may be the surest, cheapest and shortest way of getting at the court's final decision in this litigation to enable the parties see what to do next to get to the end of this litigation and do it precisely to reach the ends of justice.

However since none of those things can be done without the court having the jurisdiction to do so and since the Defendant who admitted and to-date admits the jurisdiction of this court in all the defences so far filed in this matter starting with the original defence dated 5th November 2004 through the amended defence dated 12th November 2004 up to the Further Amended Defence and counter-claim dated 6th July 2007, is to-day, on the contrary, saying the same court has no jurisdiction, I have first to look at that preliminary point of law to decide whether this court has the jurisdiction to determine not only the Notice of Motion before me to day but also the main suit. Unfortunately doing so has made my effort to write a short ruling fail as the preliminary objection has turned out to be involving, but I will still try to be brief. I cannot have jurisdiction to hear the application when the court has no jurisdiction to hear the main suit and here is what the Defendant is saying in the Notice of Preliminary Objection dated 12th May 2006:

"1. The Honourable Court has no jurisdiction to entertain the present application and/or the suit for the following reasons:

(i) The Certificate of Taxation dated 12th August 2004 is a nullity by virtue of its failure to comply with the mandatory statutory requirement of Section 51 (2) of the Advocates Act, Chapter 16;

(ii) The entire taxation proceedings in High Court Miscellaneous Civil Case No. 195 of 2004 – Ahmednasir, Abdikadir & Co. –versus – National Bank of Kenya Limited and the ensuing Certificate of Taxation dated 12th August 2004 are a nullity and void *ab-initio* by virtue of the decision of this Honourable Court rendered in this suit on 15th March 2006 as read with the mandatory provisions of Section 45 (6) of the Advocates Act, Chapter 16;

(iii) The present suit and entire proceedings relating thereto are a nullity and void *ab-initio* by virtue of the decision of this Honourable Court rendered on 15th March 2006 as read with the mandatory provisions of Section 45 (6) of the Advocates Act, Chapter 16;

2. The application is in any event fatally defective."

To that the Defendant on 14th June 2006 added what he called additional preliminary objection which looks like more particulars relating to objection number 2 above mentioned but which the Defendant likes to call "additional," saying:

"The Defendant will argue the following further preliminary point of law at the first hearing of the Notice of Motion dated 16th March 2006;

1. The Certificate of Taxation dated 12th May 2006 is fatally defective and incapable of constituting the foundation of either the suit or the Notice of Motion dated 16th March 2006."

After all that having been stated in the Notice of Preliminary Objection and substantially the same grounds in the replying affidavit and in the grounds of opposition, during the hearing of the Notice of Motion Mr. Kibet, who submitted on the preliminary points and on the Notice of Motion generally, urged me to dismiss the Notice of Motion to let the case proceed to full trial including the issue of jurisdiction. I could not understand him because if the court has no jurisdiction to try the case, how does the same court proceed to try the case? How do I decide, to-day, that there are triable issues and proceed to dismiss the Plaintiff's Notice of Motion to pave the way for a full trial when I have no jurisdiction to do so and the court at the full trial will also have no jurisdiction?

I would have understood Mr. Kibet had he asked me to let the case go to a full trial only after I have ruled on the issue of the jurisdiction against him and his client. This is because in this Notice of Motion, though I should let triable issues, if any in the suit, go to a full trial without expressing my opinion on them, the manner in which Mr. Kibet has raised the issue of jurisdiction makes it necessary for me and forces me to make my decision on that issue in this Notice of Motion notwithstanding that the issue of jurisdiction is a triable issue appropriately canvassable at the full trial if not disposed off earlier.

Such an issue should normally be raised at the very early stage of a suit, properly to be disposed off alone without bringing in other issues. Unfortunately the Defendant in this suit does not see it that way and therefore in a suit filed on 1st October 2004, he decided to file original defence, amended defence and further amended defence with a counter-claim, all through admitting the jurisdiction of the court and therefore went on to engage in a line of resulting interlocutory applications all on the basis of admitted jurisdiction, only to wake up on 12th May 2006, and that was because he had been served with the Plaintiff's Notice of Motion herein dated 16th March 2006, to claim that the court has no jurisdiction to entertain and determine this suit. That conduct, in my view explains the Defendant's unsteady stand before me, raising the issue of jurisdiction in the manner he has raised while at the same time saying it is a triable issue to be tried at the full trial, which I am not of course conducting in this Notice of Motion.

But the Notice of Motion before me is asking me for a judgment against the Defendant thereby determining this suit. What is before me is a trial though not a full trial. If I do not pronounce my decision on the issue of the jurisdiction the Defendant is only waiting to attack my decision on the ground that I acted without the jurisdiction to do so. I must therefore pronounce my decision on that issue to-day, and at this point, before I may move further, if I have to, to either grant or not grant the judgment asked for in the Notice of Motion. Otherwise why were the preliminary objections raised before me if the issue of jurisdiction did not concern entertaining and determination of the Notice of Motion and therefore did not require my decision?

I have already set out the preliminary objections containing the points raised by Mr. Kibet and to my mind the issue of lack of jurisdiction on the part of this court is being argued under two limbs.

One limb is that this court has no jurisdiction in this matter because the suit is based on a certificate of taxation which is a nullity. That is derived from Preliminary Objection I point (i) and also from the only point (that is 1) in the Additional Preliminary Objection.

The second limb is that this court has no jurisdiction because of the decision of this same court dated 15th March 2006. That is derived from Preliminary Objection 1 points (ii) and (iii).

That leaves Preliminary Objection 2 which claims that the application, that is the Notice of Motion before me, is defective. That objection does not allege lack of jurisdiction and I hope the Objector understands, as I do, that that Objection 2 is not under Objection 1 which alleges lack of jurisdiction. Concerning Objection 2 therefore, I may just state briefly here that defects in the application, if any, may be dealt with later in this ruling - as their presence or otherwise do not affect or concern the jurisdiction of this court.

Going back to Preliminary Objection 1 as read with the Additional Preliminary Objection, I prefer to start with the second limb argument on the lack of jurisdiction. The basis is this court's decision dated 15th March 2006, "as read with the mandatory provisions of Section 45 (6) of the Advocates Act."

The decision dated 15th March 2006 is found in this same case and was made by Justice Fred Ochieng in an application by the Defendant herein seeking to strike out the plaint on the ground that the same is an abuse of the court process, having, essentially been founded on a claim which offends public policy in that the agreement upon which the claim is founded was an illegal act because it amounted to under cutting: Justice Ochieng having stated the Defendant's contention, remarked as follows:

"One might then ask why the defendant should be allowed to get away without paying any fees for

work which the plaintiff had performed, simply because the contract which formed the foundation of the Advocate/Client relationship was illegal. It certainly looks very unreasonable that the defendant should dictate the terms upon which it is ready to give work, then have the work done; thereafter decline to pay any fees for the work already done, on the grounds that by accepting the defendant's said terms, the plaintiff was in breach of the law."

That was in this matter after the Plaintiff had filed this suit claiming KShs. 38,279,117.99 which the Defendant in the application before Ochieng, J. was saying was undercutting and therefore illegal and criminal.

The learned Judge, after looking at various authorities and provisions of the law including Sections 36, 44, 45 and 46 of the Advocate's Act and paragraph 3 of the Advocates (Remuneration) Order, concluded his ruling as follows:

"I therefore hold the considered view that although Section 36 (1) of the Advocate's Act appears to outlaw undercutting, the said statutory provision then pegs the definition of what may be deemed to be undercutting to that which is prescribed in the Advocates (Remuneration) Order. That order then, expressly, authorises advocates to negotiate with clients, any fee which was in excess of Kshs.10,000/=. And Section 45 (1) of the Advocates Act, further fortifies the advocate's entitlement to negotiate either a fee or an agreement fixing the amount of the advocate's remuneration.

I believe that the rationale for allowing advocates the opportunity to negotiate fees with their clients, if such fees would be in excess of KShs.10,000/= (in the event that they were assessed under the Advocates Remuneration order) is that the clients who could afford to pay fees in excess of that sum, were in a position to negotiate appropriate fee structures.

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I also believe that if the legislative arm of government did not intend to authorise the advocate to negotiate any fee with his client, it would not have enacted the provisions of Section 45 of the Advocates Act. But, having expressly authorised advocates to negotiate fees with their clients, the Advocates Act cannot then be taken to have criminalised such agreements. Indeed Section 45 (1) stipulates that such agreements would be valid and binding on the parties, provided that they are in writing and signed by the client or his agent duly authorised in that behalf.

Perhaps there might be a case of completely outlawing all agreements which amount to undercutting. If it already exists in our statute books, the same was not drawn to my attention and I also failed to trace it. But for now, all I can say is that some measure of UNDERCUTTING or OVERCHARGING would be permissible, if the client signed an agreement agreeing to the same, in litigation matters, which could otherwise attract fees, in excess of KShs. 10,000/=.

For all those reasons, I find no merit in the application dated 18th November 2004."

The Judge had noted earlier that

"In this case, the taxed costs are in excess of KShs.38 million."

From the foregoing, it can be seen that Justice Ochieng was simply interpreting the relevant provisions of the Advocates Act as read with paragraph 3 of the Advocates (Remuneration) Order. The learned Judge did not make any specific reference to the pleadings then before him although he must have had them in his mind. That ruling did not therefore mention the certificate of taxation dated 12th August 2004 or any other. That ruling did not say anything about the taxation proceedings that led to the issuance of the certificate of taxation in this matter. That very ruling having dismissed the Defendant's application to dismiss or strike out this suit, the Defendant has not shown how the very same ruling is now turned round

to render this suit and the entire proceedings a nullity and void. The Defendant has not shown how that ruling now turns round to render the taxation proceedings in this matter a nullity and void *ab-initio*. The learned Judge's mere interpretation of provisions of the Advocates Act and Advocates (Remuneration) Order permitting agreements under Section 45 did not establish or decide that indeed there was a binding agreement between the Plaintiff and the Defendant in this matter under Section 45 to make Sub-section (6) of Section 45 apply in this matter. Had that ruling found or decided so, it is unlikely that the Defendant's application dated 18th November 2004 could have been dismissed as it was dismissed.

In fact the Defendant would not have had cause to file the subsequent review application they prosecuted before Lady Justice Okwengu which application was also dismissed. The Defendant's Notice of Motion before Okwengu, J. was under Section 80 of the Civil Procedure Act and Order 44 rule 1 of the Civil Procedure Rules seeking to have the orders made on the 15th March 2006 reviewed and the order of dismissal of the Defendant's Chamber Summons dated 18th November 2004 substituted with an order striking out the plaint and dismissing the Plaintiff's suit. Those were far reaching orders to the extent of requiring the exercise of judicial powers by this court which the Defendant is now saying the same court is not in possession of, yet the same Defendant did not mention lack of that jurisdiction at that time. The learned Judge refused to grant the application holding, in part, that she found nothing to review in the court ruling dated 15th March 2006.

The ruling which was so bad to that extent that the Defendant wished to have it completely replaced with another one saying the opposite, is to-day so useful to the Defendant that its existence has rendered the Plaintiff's suit herein, and the Plaintiff's taxation of costs thereon before, a nullity and void *ab-initio*. That is difficult to comprehend.

Now going back to the first limb, argument on the court's lack of jurisdiction, it is that this court has no jurisdiction to entertain and determine this suit and the Notice of Motion dated 16th March 2006 because the suit is based on a certificate of taxation which is a nullity. That is derived from preliminary objection 1 point (i) and also from the only point in the Additional Preliminary Objection.

It would appear to me the Defendant is saying one thing twice using different words – because in his submissions all that Mr. Kibet has been saying has been that the certificate of taxation upon which this suit is based was not signed by the Taxing Officer by whom the bill of costs was taxed and that it was therefore signed on a date other than the date on which the bill of costs was taxed. Mr. Kibet also pointed out that a second certificate, this time signed by the Taxing Officer by whom the bill of costs had been taxed, has been filed also having a date other than the date on which the taxation was done and he submitted further that by the time the Taxing Officer signed the second certificate, he was *functus officio*.

Two assumed contradictory High Court Rulings have been cited. One is **D. NJOGU & COMPANY ADVOCATES –V- KENYA NATIONAL CAPITAL CORPORATION** in H.C. Misc. Application No. 21 of 2005, Milimani Commercial & Taxation Division, cited and relied upon by Mr. Kibet; and the second one is **AHMEDNASIR ABDIKADIR & COMPANY –V- NATIONAL BANK OF KENYA LIMITED** in H.C. Misc. Civil Case No. 753 of 2004, Milimani commercial & Taxation Division, cited and relied upon by Mr. Ahmednasir.

Each case was based upon an assessed or taxed Advocate/Client costs whereby the resultant certificate of taxation was not signed by the Taxing Officer by whom the taxation was done. Thereafter the Advocate in each case filed a Miscellaneous Civil Application said to be under Section 51 (2) of the Advocates Act praying for judgment in the sum taxed by the Taxing Officer. When faced with that application by Notice of Motion, the Respondent/Client in the case of D. Njogu And Company Advocates, which was before Justice Fred A. Ochieng, filed a Notice of Preliminary Objection raising the following two points:

"1. The Certificate of Taxation dated 6th February 2006, upon which the Applicant relies is a nullity.

2. Consequently, there is no valid Certificate of Taxation before the court, and the Honourable Court has no jurisdiction to Exercise the discretion vested under Section 51 (2) of the Advocates Act, Chapter 16."

The Respondent supported those two points of preliminary objection by submitting that pursuant to the provisions of Section 51 (2) of the Advocates Act, the only person who was authorised to issue a valid Certificate of Taxation was the taxing officer. Yet in that case the taxing officer was Miss N. Maina, whilst the Certificate of taxation was signed by J. M. Were, a Deputy Registrar. The Respondent therefore contended that in so far as the certificate was not issued by Miss N. Maina, that certificate was a nullity.

The applicant on the other hand said that the role of the Taxing Officer is to render a decision on the bill being taxed. If thereafter, any party to the taxation should require the reasons for the decision, the taxing officer would be obliged to give his reasons. Having given his decision or reasons therefore, the Taxing Officer was not obliged to execute the certificate of taxation. He submitted that the process of signing and issuing a certificate of taxation was like that of issuing a Decree. The Applicant submitted that that being the position, any judicial officer who has jurisdiction may sign a certificate of taxation, much in the same way a Deputy Registrar issues a Decree in respect to a judgment which has been pronounced by a judge of the High Court. In that case, the certificate of taxation was executed by Mr. Were, a Deputy Registrar who the Applicant thought, had not been shown to lack the requisite jurisdiction to sign the certificate of taxation. It is necessary to quote the whole of Section 51 (2) which states as follows:

"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."

Justice Ocheing having quoted Section 51 (2) considered the matter further referring to relevant authorities in relation to what he was told during the hearing and ended up stating that he held the view, which, with respect, I agree with, that a certificate of taxation cannot be compared to a High Court Decree because such a Decree is drawn up in accordance with the provisions of Order XX rule 7 of the Civil Procedure Rules which spells out the steps to be taken in the preparation and dating of decrees and orders. He included:

"Where in a rule spells out the procedure for the execution of any order, pleading or judgment, the validity thereof stems from the compliance with the said rule."

He gave the example of Election Petitions where Rule 4 (3) of the Rules thereon under the National Assembly and Presidential Election Act stipulates that petitions "shall be signed by the petitioners", and when Mr. Adambesa as a petitioner's advocate signed the petition in the case of **JAHAZI V CHEROGONY** (1964) KLR 814, the court dismissed the petition holding that the provision that the petition shall be signed by the petitioner was mandatory and that therefore the petition signed by Mr. Adambesa was not properly before the court.

Similarly the learned Judge held that in Section 51 (2) of the Advocates Act, the only certificate which would be final as regards the amount of costs covered thereby would be

"of the taxing officer by whom any bill has been taxed."

The Judge concluded:

"It is on such a certificate that can form the foundation upon which the court can 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.

As the certificate herein was executed by Mr. were, who did not tax the bill herein, it cannot form the foundation for any further court order. Therefore, the application before me is a non-starter. Accordingly, it is hereby struck out, with costs to the respondent.

However, it must be emphasized that this decision is not a bar to the issuance of a certificate by the taxing officer by whom the bill herein was taxed."

I note that although the points of objection specifically claimed that the certificate of taxation was **"a nullity"** and that therefore the **"court had no jurisdiction to exercise the discretion vested under Section 51 (2) of the Advocates Act,"** the learned Judge said nothing about those two issues that is

(a) "**nullity**"

(b) "**jurisdiction**".

But Mr. Kibet relying on that Ruling, dated 17th May 2006, would speak as if the judge in that ruling decided that such a certificate was **"a nullity"** and that therefore the court over which the learned Judge was presiding in the matter had no **"jurisdiction".** Did that court, therefore, uphold the preliminary objection to the extent of striking out the Notice of Motion dated 23rd February 2006 **when that court had no jurisdiction to do so?**

I now move to the second case **AHMEDNASIR ABDIKADIR & COMPANY** which was before Lady Justice Mary Kasango. It was similar to the one before Justice Ochieng also being a Miscellaneous Civil Case and therefore presumably within the case file in which the taxation had taken place. The taxation of the bill of costs by Mrs. Ongeri on 11th July 2005. Signature of the certificate of taxation again by Mr. Were on 15th July 2005. Thereafter an Application by Notice of Motion dated 9th February 2006 under Section 51 (2) of the Advocates' Act for judgment in favour of the Applicant/Advocate in terms of the taxed amount KShs.9,916,802/=. At the hearing, the Respondent raised a preliminary objection in the following terms that

"The applicants have not brought themselves within the purview of Section 51 (2) of the Advocates Act, Chapter 16 and the Honourable Court has no jurisdiction to entertain the Notice of Motion dated 9th February, 2006."

The argument in support of the objection were that the objection went to the jurisdiction to entertain the Applicant's application; that Section 51 (2) required that there be a certificate of taxation signed by the taxing officer who has taxed the bill of costs and that that provision did not offend the court discretion in view of the clear words; that the certificate having failed to comply with Section 51 (2) the same was a nullity.

The learned Judge in that case also quoted Section 51 (2), considered cited authorities in relation to submissions before her and noted that the Advocates Act does not define what constitutes "a certificate" under Section 51 (2) and she went on looking for the meaning of the word "certificate". She could not find the meaning or format, whether in the Interpretation And General Provision Act, or in The Advocates Act or elsewhere. She therefore took the position that the certificate of costs which is ordinarily issued by the court may very well have been formulated from years of practice. She looked at meanings in dictionaries and found definitions like:

"a written assurance"

"a writing made in court to give notice to another"

"official document attesting or recording a particular fact or event."

Compared those definitions with what the Taxing Officer in this matter said after carrying out the taxation

stating:

"I tax the bill of costs at KShs.9,916,802".

and posed a question whether that was not a certificate of costs.

She expressed the view that it was not necessary to have the word

"certificate"

as she thought it sufficed if what the Taxing Officer wrote in his decision gave a **"written assurance"** or is **"attesting or recording a particular fact or event."** She remarked that perhaps to ensure there is no confusion the taxing officer on completion of the taxation ought to state

"I hereby certify that the bill of costs is taxed at …"

I must comment here that that is a very good suggestion and I wish it were straight away simply adopted by our Taxing Officers country wide to avoid more of this kind of preliminary objections; since the Advocates Act has no format and there is no format anywhere else in the law of this country. Judge Kasango's suggestion is simply for adoption by Taxing Officers and that will have dealt a death nail to this kind of preliminary objections based upon the absence of the signature of the Taxing Officer in the certificate of taxation relied upon to obtain court orders under Section 51 (2) of the Advocates Act. That will also remove doubt where a statement like the one the learned Judge came to rely on in that case is used. She stated as follows:

"I find and I hold that the statement of Mrs. Ongeri made on 11th July 2005 qualifies as a certificate of costs. The issuance of a typed certificate which was signed by Mr. Were is superfluous. To the extent of that finding I am respectfully not persuaded by the finding of Justice Ochieng on this point in HCC MISCELLANEOUS APPLICATION NO. 21 OF 2005 D. NJOGU & CO. ADVOCATES –V- KENYA NATIONAL CAPITAL CORPORATION.

If I was to go further on this though I am of the view that paragraph 11 of The Advocates (Remuneration) Order if the court is moved there under, the court would need to set aside the handwritten certificate of costs, if the objection to taxation was successful that indeed then ought to be one of the prayers sought when a party seeks to challenge taxation.

So does the applicant's application fail for having a typed certificate of costs signed by Mr. Were. My response is an emphatic NO. Why, the court's duty is always to try to sustain an action, and in any case the applicant attached to its application the typed ruling of Mrs. Ongeri which contains a certificate of the taxed costs.

I am aware that the finding hereof will seem to throw into disarray the previous rulings of passing of judgment on Section 51 (2) Cap. 16. But I say that it does not because the 'certificate of costs' would have been contained in the handwritten ruling of the taxation.

In view of this finding the respondent's objection must and does fail. The said objection dated 13th March 2006 is dismissed with costs to the Applicant hereof."

Like the ruling in Njogu's case, in this ruling Justice Kasango did not also deal with the issue of **"a nullity"** and the issue of **"lack of jurisdiction."** Of course from the fact that she dismissed the Respondent's preliminary objection, the certificate signed by Mr. Were was merely **"superfluous"** and there would have been no question of lack of jurisdiction on the part of her court. Up to this point therefore I am still left with those two issues unresolved for I thought the Defendant came up with those issues in this matter because the case of Njogu and the case of Ahmednasir aforesaid established that a certificate of taxation not signed by the Taxing Officer is a nullity and that when it is such a nullity then the High Court has no jurisdiction to entertain and determine a case founded on such a certificate of

taxation. But before I go further concerning those two issues let me first say the following on the two rulings just discussed above.

I used the words **"assumed contradictory"** when I started referring to those two cases. In fact Mr. Kibet and Mr. Ahmednasir each sees the two rulings as contradictory. That is why each has chosen the ruling he thinks supports his case.

My humble view is this: Both were High Court Miscellaneous Civil Applications by Notice of Motion filed in the case file in which the taxation by the Taxing Officer had been done. In each case the case file which was before the Taxing Officer during the taxation proceedings, was the same case file which was before the Judge in the High Court during the proceedings by a Notice of Motion praying for judgment in favour of the Applicant, in the Notice of Motion, in the sum of money which constituted the taxed costs. Perhaps it is not appreciated that under such circumstances, and not withstanding the wording in Section 51 (2), the case file before the Judge handling the Notice of Motion has the actual decision of the Taxing Officer as well as the certificate, if any, of taxation thereon. Normally the certificate is typed and signed. The decision of the Taxing Officer may or may not be typed but the untyped one is normally signed by the Taxing Officer personally.

A CERTIFICATE OF TAXATION.

Section 51(2) of The Advocates Act

The certificate of taxation comes to exist only after the decision of the Taxing Officer exists, for it is that existence of the decision of the Taxing Officer which produces the existence of the certificate of taxation and not vice versa. The certificate does not produce the decision.

Those two things were before each of the two learned judges when each was wrestling with the preliminary objection raised before her or him by the Respondent in respective cases. The problem is that parties will always speak as if it is the certificate of taxation only which exists before the Judge in the High Court and they are encouraged in doing so by the wording in Section 51 (2). But the question is, how can the certificate of taxation be, properly in law, set aside or altered without first setting aside or altering the decision of the Taxing Officer on the basis of which that certificate of taxation was issued? That decision must be set aside or altered first before the affected certificate of taxation is correspondingly set aside or altered. True Section 51 (2) does not say as much but that must be the legal implication.

Both Judge Kasango and Judge Ochieng were fully aware of that fact and that is why Kasango, J. said what I have quoted above and even Ochieng, J. said:

"However, it must be emphasized that this decision is not a bar to the issuance of a certificate by the taxing officer by whom the bill herein was taxed."

The taxing Officer's decision remained existing even after the Applicant's **"non-starter"** application by Notice of Motion before Ochieng, J. had been struck out together with the then existing and offending certificate of taxation. Because that decision remained existing, Ochieng, J. said the Taxing Officer could go ahead and issue a valid certificate of taxation and I emphasise the fact that that issuance could be done on any date following the existence of the Taxing Officers decision as the law does not specify the time when the certificate of taxation should be issued. If it happens to be the date on which the Taxing Officer taxed the bill of costs, so much the better. Otherwise any date thereafter is acceptable provided the certificate is signed by the Taxing Officer personally.

It follows that the only difference between the two learned judges is that while Ocheing, J. looked at the certificate of taxation and could not think the decision of the Taxing Officer in taxing the costs could constitute a certificate of costs, Kasango, J. was more outward looking and able to see that the decision of the Taxing Officer could constitute and in fact constituted the certificate of taxation. It must however be appreciated that both judges were infact unanimous that it was the Taxing Officer personally to sign the

certificate of Taxation and that was why Kasango, J. described the certificate issued by Mr. Were as **"superfluous".** Mr. Were was not the Taxing Officer by whom the costs had been taxed.

From the two rulings therefore, and I respectfully agree, the certificate of taxation has to be signed by the Taxing Officer by whom the bill of costs has been taxed. Presently, usage and practice has resulted in the filing of the type of certificates now being issued, but since the law does not prescribe a format, the suggestion by Kasango, J. that the Taxing Officer on completing the taxation ought to state:

"I hereby certify that the bill of costs is taxed at …",

and append his signature before he rises, is a very good practical suggestion which ought to be implemented forthwith to avoid future preliminary objections of the type that was before Kasango, J., Ochieng, J., and now before me in this suit, and in general, has been before judges, many times. Perhaps that is something the Committee on the Expeditious Disposal of Cases can consider, in consultation with the Hon. The Chief Justice, for a working circular to issue through normal channels to all Taxing Officers in the country as no formal rule is really necessary in this situation where there is no format for the relevant certificate and no timing as to when such certificate should be issued, although a relevant rule may later be made if desired.

I should explain that the only difference between what is before me on the one hand and what was before the other two judges on the other, is that the Notice of Motion I am hearing is filed in a substantive Civil Suit and not in a Miscellaneous Civil application like those two others were. Otherwise the Defendant in this suit is subjecting me to a preliminary objection similar to the ones the other two judges were subjected to. A typed copy of the Taxing Officer's decision in his assessment or taxation of costs dated 5th August 2004 is filed but is unsigned. It was filed together with the certificate of taxation which the Defendant is saying is null, dated 12th August 2004. But by a supplementary affidavit dated 12th May 2006 and filed 15th May 2006, the certificate of taxation signed by the Taxing Officer, I. P. Wekesa on 12th May 2006 was filed and from what I have been saying above, that certificate is valid and properly within the terms of Section 51 (2) of the Advocate's Act. From what I have said earlier, the question of the Taxing Officer being *functus officio* in signing the certificate of taxation on a date subsequent to the date of the taxation does not arise. If as a result of the filing of that certificate of taxation, as the Defendant contends, the plaintiff now has two certificates of taxation upon which he is relying for his suit, that is a triable issue to be decided in a full trial.

I will now go back to the question of **"nullity"** and the question of **"lack of jurisdiction".** I have already said that a certificate of taxation is issued on the basis of an already existing decision of the Taxing Officer in taxation or assessment of costs. Without the existence of such a decision, no certificate of taxation will issue. Section 51 (2) says the certificate has to be signed by the Taxing Officer by whom the taxation was done. Parties in this suit are referring to such a certificate as **"valid"** but Section 51 (2) does not use the words **"valid"** or **"lawful".** It does not also use the words **"null"** and **"void".** In the language of that Section, **"The certificate … shall be final."** That finality is **"as to the amount of the costs covered thereby."** That simply means that the certificate which is not so signed **shall not be final** and Section 51 (2) does not specifically rule out the issuance of such certificate. It could and may be issued; only that once issued, it shall not **"be final"**. But when that happens, it does not affect the legality and the binding legal force contained in the relevant Taxing Officer's decision in the taxation which gave rise to the issuance of that certificate. That decision in that taxation remains a legally binding decision of the Taxing Officer and that is why it has been said another certificate, this time signed by the Taxing Officer, may be issued subsequently on the basis of that decision.

It follows from my reasoning above, and this is with all due respect, that it is erroneous to describe a certificate of taxation not signed by the Taxing Officer as being **null** and **void**. Its proper description is that **it is not final**. Where another certificate signed by the taxing officer who taxed the costs is not forthcoming in the conventional form therefore, other evidence proving the taxation and the taxed costs claimed, may be adduced and ought to be adduced not only to support the "**non final certificate**" of taxation already on record but also to support the Applicant's claim under Section 51 (2) **"and the court may make such order in relation thereto as it thinks fit."** In that respect, I see no other evidence

better than taxation proceedings containing the decision of the Taxing Officer and signed by the Taxing Officer in whatever form they may be, where such a decision has not been used as a certificate of taxation.

A case should not and ought not be declared a nullity simply because it was based on a certificate of taxation not signed by the Taxing Officer who taxed the relevant bill of costs. Where a certificate is so signed, that is a mere mistake albeit, a common mistake incapable of making that certificate, let alone the proceedings on the basis of which that certificate was issued, a nullity. That is so because even though the assessment of costs or the taxation of costs is not a judgment, it is a binding judicial decision under Section 51 of the Advocates Act as read with Rule 13 of the Advocates (Remuneration) Order, lawfully and properly scrutinizeable or questionable or challengeable only through a special procedure by way of reference under rule 12 of the Advocates (Remuneration) Order in the High Court, or by way of Objection in the High Court and in an appeal to the Court of Appeal both under Rule 11 of the Advocate's (Remuneration) Order. Rule 12 states as follows:

"12 (1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.

(2) The procedure for such reference shall follow that of a case stated but shall be to a judge in chambers."

Rule 11 on the other hand states as follows:

"11 (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub-paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal."

Subrule (4) of Rule 11 is for the extension of time by the High Court in favour of the aggrieved person who wishes to file appeal under subrule (3) aforementioned.

Otherwise the decision of the Taxing Officer, where there is no objection under Rule 11, remains binding to the parties with or without the relevant certificate of taxation having been issued as the non issuance of such a certificate, just as the issuance of the same by a taxing officer who did not tax the relevant bill of costs, does not undo the already lawfully done assessment or taxation and a final certificate may be issued at any time from the date of the said assessment or taxation - provided it is signed by the taxing officer by whom the bill was taxed. Provisions of the Advocates Act and its rules do not specify the time of such signature and do not, for any specific reason, (including signature of such certificate by a person who did not tax the relevant bill of costs or non issuance of the relevant certificate) nullify the relevant taxation or assessment of costs already lawfully done.

Going further a little, supposing it were held that indeed the taxation proceedings were a nullity because the certificate of taxation were a nullity and that therefore this suit is also null and void, would that deprive this court of its jurisdiction to entertain and determine this suit and the Notice of Motion dated 16th March 2006? If the answer were in the affirmative, then who would be there to let the parties know that the taxation proceedings and therefore this suit were a nullity and void *ab-initio*? In my view, a court has to be there clothed with the jurisdiction to entertain and determine the suit in order for the parties to be told by that court the legal position and that court is the trial court which, in this matter, is

this High Court. A defect or defects in a party's case in matters where the law, as in this matter, gives the court jurisdiction to entertain and determine, do not take away the court's jurisdiction aforesaid. That is so even if one party took the other party to the court in violation of Section 45 (6) of the Advocate's Act. Otherwise, where is substantive justice?

It follows from what I have been saying above that I do not accept the view that this court does not have jurisdiction in this matter and do hereby rule that the High Court is properly seized of this matter and has jurisdiction not only to entertain but also to determine this suit as well as the Notice of Motion dated 16th March 2006.

To wind up the preliminary objection raised by the Defendant/Respondent therefore, I will refer to the following useful passage I found in **MUKISA BISCUIT MANUFACTURING LTD –V- WEST END DISTRIBUTORS LTD** (1969) E.A. 696, where Sir Charles Newbold, then the President of the East African Court of Appeal, said at page 701 letter B as follows concerning what a preliminary objection is:

"It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

On that note I do hereby reject the Preliminary Objection raised by the Defendant against the Plaintiff's Notice of Motion dated 16th March 2006.

I now turn to consider merits in the said Notice of Motion dated 16th March 2006 with a view to determining it. That Notice of Motion is said brought under Section 51 (2) of the Advocates Act, Cap. 16, Laws of Kenya, Order L Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law which I have been told, verbally, include Order XXXV Rule 1 of the Civil Procedure Rules. The said Notice of Motion is filed in a pending suit which was properly filed on 1st October 2004 after the Plaintiff had had his Advocate/Client bill of costs taxed by the Taxing Officer of this court and a certificate of taxation issued thereafter as herein earlier stated.

When the parties went before the Taxing Officer in their High Court Miscellaneous Civil Case No. 195 of 2004 without having first filed a suit in the High Court based on a bill of costs under Section 48 of the Advocate's Act, the parties did so or went before the Taxing Officer under Section 51 (1) of the Advocates Act as read with Paragraph or Rule 13 of the Advocates (Remuneration) Order and, in my view, there was nothing wrong with that. Of course as I have indicated, the parties could as well have started by filing suit under Section 48 of the Advocate's Act (herein also referred to as the Act) so that the issue of taxation could have been referred subsequently to the Taxing Officer at the appropriate time. But that was only an alternative method so that the parties having gone before the Taxing Officer under Section 51, proceedings under Section 48 were ruled out.

As stated earlier, proceedings before the Taxing Officer, though necessary and important, are not a substantive suit and they fall under Section 51 (1) of the Act as read with Paragraph or Rule 13 of the Advocate's (Remuneration) Order. In those proceedings, the Advocate does not claim his costs from his client. The Advocate is there merely to have his costs taxed or assessed and the decision of the Taxing Officer is not a judgment and cannot therefore be executed as such. That remains the position even if that decision is upheld by the highest court in the land following an appeal under Rule 11 of the Advocates (Remuneration) Order, that decision remains an assessment of costs or taxation of costs. It is not a judgment. It only certifies the costs due.

That is why the Taxing Officer is required to issue a certificate of Taxation which Section 51 (2) says is final **"unless it is set aside or altered by the court."** It is 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."

It means that taxation or an assessment of an advocates bill of costs is done before the Taxing Officer where Section 45 of the Act does not apply and in this suit I have seen that the question whether Section 45 applied was raised in the Defendant's Chamber Summons dated 18th November 2004, heard and dismissed by Justice Ochieng on 15th March 2006 as mentioned earlier and I should not be made to revisit that question in this application as that will be improper although the same question may be included among triable issues to got to a full trial of this suit as the trial judge will know how to handle it.

Another thing to note is that the wording of Section 51 means that the decision of the Taxing Officer can be questioned with a view to having that decision set aside or altered. As already also seen, that is done in the High Court before a judge from whose decision, the aggrieved party may appeal to the Court of Appeal as can be seen in Rule 11 of the Advocates (Remuneration) Order. From the proceedings before me, it is clear that that Rule was never invoked in this matter.

A third thing to note is that the Taxing Officer may tax costs as between advocate and client without any order for that purpose and without any suit for the recovery of the costs having been filed. As far as I can gather, that was and is the position in this matter. There was no suit under Section 49 as read with Section 45 of the Act. There was also no suit under Section 49 as read with Section 48 of the Act. There was no suit under Section 49 as read with any other provision under the Advocate's Act.

The primary objective of Section 51 (1) of the Act as read with Rule 13 of the Advocates (Remuneration) Order is different from the primary objective of Section 45 or Section 48 as Section 45 deals with situations where there is an agreement between an Advocate and his Client as to the remuneration to be paid while Section 48 deals with a situation where a suit based on an untaxed bill of costs is filed. The suit involving Section 48 is based on a bill of costs not yet taxed.

A suit connected with or involving Section 51 (2) should therefore be based upon costs taxed by the Taxing Officer who should, in a certificate signed by him, certify those costs. I am aware of the practice whereby applications for judgment based on the costs already assessed by the Taxing Officer are made under Section 51 by successful advocates who file notices of motion inside High Court Miscellaneous Application case files in which the assessment of costs had been made. Those applications are not uncommon. Parties read sub-section (2) of Section 51 and go ahead, and the two miscellaneous cases I have been discussing above, one before Ochieng, J. and the other before Kasango, J., where the validity of the certificate of taxation was considered, are good examples.

But before they go ahead, parties, especially intending Applicants, need to realize that what they are relying upon is a mere assessment of costs between them and that there may be need for them to have a suit filed by a plaint to claim the assessed costs. That means that an advocate armed with a certified taxed or assessed costs should first make a formal demand for payment of the assessed amount from his client and whatever amount the client fails to pay (if there is failure) the advocate should proceed to sue for the unpaid amount. If he, foresees no defence or dispute forthcoming, he may go ahead and file the application for judgment, for that is one of the situations envisaged in sub-section (2) of Section 51 of the Advocates Act. In such a situation, Section 51 (2) is being used, before a judge, only for the purpose of obtaining (a judgment) an executable court order for costs. For that purpose only, and if there is no defence or dispute, I do not think the applicant concerned has to go beyond Section 51 to get the court order he wants. On the other hand if there is a defence or dispute or as in the words of sub section (2) a dispute over **"the retainer"**, then the Applicant has to go beyond Section 51 as indicated under.

While at this stage of this ruling, perhaps it is better to look more closely at Section 51 (2) of the Advocates Act to appreciate what I am saying. The full subsection states as follows:

"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 relation to that subsection Justice L. Njagi pointed out as follows in HCCC No. 416 of 2004, **NYAKUNDI & COMPANY ADVOCATES –V- KENYATTA NATIONAL HOSPITAL BOARD** (unreported):

"There are three limbs to this subsection. The first one relates to the certificate of costs per se the second one to the jurisdiction of the court in relation to that certificate; and the third one the circumstances in which the court may exercise its discretion to enter judgment in terms of the certificate of costs."

I entirely agree with what the learned Judge said except that in relation to the second limb, I would prefer to use the word "power" where he has used the word "jurisdiction" in the passage to read as follows:

"There are three limbs to this subsection. The first one relates to the certificate of costs per se; the second one to the" power "of the court in relation to that certificate; and the third one the circumstances in which the court may exercise its discretion to enter judgment in terms of the certificate of costs."

Replacing the word "jurisdiction" with the word "power" therefore, I do concur with what the learned Judge subsequently said when he stated as follows:

"In so far as the certificate of costs is concerned, the words of the subsection are very clear. Unless and until that certificate is set aside or altered by the court, it is final and conclusive as to the amount of the costs covered thereby. On that ground, the subsection empowers the court to make any order in relation thereto as it thinks fit. The power of the court includes the making of an order that judgment be entered for the sum certified to be due with costs. However, the court can exercise that power only in a case where the retainer is not disputed."

I think that is correctly stated and I would like to emphasise the last sentence in the passage by repeating it hereunder in that:

"However, the court can exercise that power only in a case where the retainer is not disputed."

It means that where "the retainer" is disputed the Applicant has to file a substantive suit by plaint under Section 51 (2) as read with Section 49, in order to obtain **"a judgment for the sum certified to be due with costs."**

Another ideal situation where the Applicant may not have to go beyond Section 51 to get the order he wants is in a situation where a matter is heard, or sometimes by consent, an order is made in favour of a party plus costs. 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 assessment is done, the order is complete and can be executed. I think this is one of the most suitable situations in which to apply Section 51 (2) without going beyond that Section 51.

Otherwise Section 51 (2) will have to be used together with Section 49 of the Advocate's Act where taxed or assessed costs are being claimed so that a substantive suit is filed. That gives the client the opportunity to raise such matters, if any, as he would like to raise in defence, such as retainer or whether any deposits had been paid against such assessed costs or whether there was a counter-claim or set off.

Njagi, J. in the case of **NYAKUNDI & COMPANY ADVOCATES** (Supra) gave the definition and form of retainer from Halsbury's Law of England, 4th Edition, Re Issue at paragraph 99, page 83 where it is stated:

"The act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitor's

retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment …"

Njagi, J. pointed out that in the same work, it is further explained that a retainer need not be in writing, unless, under the general law of contract, the terms of the retainer or the disability of a party to it make writing requisite. It is then further stated, the Judge added, at paragraph 103:

"Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case …"

In that respect, Section 51 (2) gives the message that the issue of the retainer is not an issue necessarily determined during the taxation proceedings where no witnesses give evidence and produce exhibits available for scrutiny through cross-examination and canvassing for better and informed evaluation and determination thereon; a procedure only available during proceedings in a substantive suit. However, that is not to say that the issue should never be determined during the taxation proceedings. It may be determined during the taxation proceedings, and if that is done, so much the better as relevant evidence, as to that determination, will be available, in the substantive suit in case the dispute over the retainer is renewed.

It is important to note that the suit will be a fresh and substantive suit originally instituted in the High Court by a plaint to obtain a court order or judgment for the payment of the assessed or taxed costs or the balance thereof where part payment had been made. It is not a suit to assess the costs or to tax a bill of costs; and here I am talking about a suit filed under Section 51 (2) as read with Section 49 of the Advocate's Act. It means therefore that properly in law, issues which were or ought to have been raised and determined upon objection in the High Court and/or appeal in the Court of Appeal under ruler 11 of the Advocates (Remuneration) Order, ought not be raised in such a suit, for example the validity of the relevant certificate of taxation or the validity of the assessed costs thereon as well as the validity of the taxation proceedings. **Such issues if brought ought to be regarded as *res judicta* or estopped or collateral attack because taxation proceedings are separate and distinct from proceedings in a suit to claim costs filed under Section 49 as read with Section 45 or filed under Section 49 as read with Section 48 or filed under Section 49 as read with Section 51 (2) of the Act, and that is why the law has opened a parallel channel which is, a reference under Rule 12, or an objection to the High Court and an appeal to the Court of Appeal under Rule 11 to finally determine taxation proceedings in that manner and in that manner only.**

I should emphasise that Sections 45, 48 and 51 of the Advocate's Act, each deals with a special situation relating to advocate/client remuneration. Section 51 (1) operates together with Rule 13 of the Advocates (Remuneration) Order. But above all those provisions, there is Section 49 as the general provision for filing substantive suits in matters under the Advocates Act because, for example, 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. In other words whether using Section 45 or Section 48 or Section 51 (2), each one of them ought to be used together with Section 49 to file a substantive suit. Those are three categories of cases under the Advocates Act and in each of those three categories, once the suit has been filed, 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. From what I am saying therefore, this suit before me ought to be said filed pursuant to Section 49 and based on already taxed/assessed costs under Section 51 (2) of the Advocates Act and in my view, there is absolutely nothing wrong with that. That is; it is Section 51 (2) as read with Section 49.

That being so, my concern is that the application for summary judgment in this suit is brought under Section 51 (2) of the Advocate's Act. From what I have said above, this is not the type of cases which can stand under Section 51 alone because Section 51 even if read together with Rule 13 does not talk of filing suit. It is Section 49 which talks of filing suit and here it is meant a substantive suit. It follows that to file a suit Section 51 (2) has to be used together with Section 49 which clearly allows a defence to be filed

and such defence was filed in this suit raising a number of triable issues so that even if Order XXXV Rule 1 of the Civil Procedure Rules is called in to assist, that remains the legal position; and in those circumstances the question of a collateral attack arises only when issues which were or ought to have been raised before the Taxing Officer, and under Rule 11 of the Advocate's (Remuneration) Order, were or ought to have been raised subsequently in the High Court and the Court of Appeal, are instead raised in the suit filed in the High Court under Section 51 (2) as read with Section 49. As I have said elsewhere, such collateral attack ought not be allowed by the trial court as they are at that stage *res judicata* or estopped. But that is an issue for the trial court in the main trial and it is an issue shown to exist in this suit fit to go to the main trial or hearing of the main suit where what is a collateral attack will be separated form what is non collateral attack and handled appropriately; litigants being told, right from the time of cross examination up to the judgment, that the two procedures are separate and distinct and ought not be mixed or confused. Let them face the rigour of cross examination to see whether they can justify their claims in respect of those issues.

Procedurally, the Plaintiff had two options before he filed this suit. One option was to confine himself within Section 51 and file an application for judgment within the miscellaneous case file where the taxation of the bill of costs had been done. That application would have been under Section 51 (2) without having to require any other provisions of the Advocates Act and that would have been proper. In my view, such an application, usually by Notice of Motion, would have been, in itself, summary enough because it ought to have been filed only in a situation where the Applicant was sure there was going to be no opposition or defence against his claim in the application so that no such opposition or defence is filed. In those circumstances therefore he would not have felt the need of filing another application in the same proceedings to ask for summary judgment. In fact it seems to me that filing such other application would have been irregular and improper. Under which provision of the Civil Procedure Act and Rules is the filing of an application within another pending application permitted? Provisions of the Civil Procedure Act and rules relating to summary judgment will not in fact be applicable because they apply only in a pending substantive suit where the defendant has the opportunity and is expected to file a defence.

The second alternative the Plaintiff had was the filing of a substantive suit. This is what he elected to do and therefore filed this suit, in effect and in law, bringing himself under Section 49 as read with Section 51 (2) of the Advocates Act. In an application for summary judgment therefore the Plaintiff ought to have specifically relied on the relevant provisions of the Civil Procedure Act and rules and ought not, in any event, to have again used Section 51 (2) or even Section 51 of the Advocates Act which has to remain with Section 49 to sustain the main suit. Otherwise under which provision of the law is the suit herein filed?

The Plaintiff/Applicant ought to have adopted the procedure similar to the one employed in the case **of NYAKUNDI & COMPANY ADVOCATES** (Supra) which the Plaintiff himself cited before me. That was a civil suit based on taxed costs and field in the same way the Plaintiff's case herein was filed. When the Plaintiff in that case wanted summary judgement, he applied for it relying specifically upon Order XXXV Rule 1 of the Civil Procedure Rules, apparently without more, and Justice Njagi, exercising his discretion, had no problem granting the application.

The application for summary judgment in that case having been brought in a pending substantive suit, could not be defeated by the fact that the retainer was disputed. In fact the disputed retainer appears to have been the only ground of defence in that suit and the learned Judge in his discretion elected to decide that dispute on the basis of affidavit evidence containing annextures having stated, among other things, as follows:

"Whereas Mr. Wandabwa contends that the retainer is disputed, Mr. Gatonye maintains that the question of the retainer cannot be in any doubt. The issue before this court is whether there was a retainer. In other words, were the Plaintiffs/Applicants duly instructed in the matter in dispute?"

In the instant suit therefore, reliance upon Section 51 (2) of the Advocates Act in the Notice of Motion introduces what I may call an irregularity in the whole proceedings thereby making the said Notice of

Motion improper and the inclusion of the words

"and all other Enabling Provisions of the Law"

does not, in my view, remove that impropriety as the unmentioned order XXXV of the Civil Procedure Rules, for example, cannot come in and remove that impropriety in case the rule is applicable. But I have already held that it is not applicable following the manner in which the Notice of Motion has been brought.

However, in case it is held there is no impropriety, what is the legal position? Under Section 51 (2) without moving further, there is no dispute concerning the retainer in this suit. What the Section says has already been quoted in this ruling. It remains to see what Order XXXV Rule 1 of the Civil Procedure Rules says as follows in so far as it is relevant in this suit:

"1. (I) In all suits where a plaintiff seeks

judgment for -

(a) a liquidated demand with or without interest:

…….

…….

Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, …"

Rule 2 subrules (1) and (2) state as follows:

"(1) The defendant may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit.

(2) Any set-off or counter-claim may entitle a defendant to defend to the extent of such set-off or counter-claim."

Since it talks of leave to defend, Order XXXV Rules 1 and 2 were meant to be applied before the Defendant files his defence. Where the Defendant has filed a defence therefore, the filed defence falls under the third alternative by which the Defendant may show he should have leave to defend the suit. That is where the rule says "or otherwise that he should have leave to defend the suit."

The other two ways by which the Defendant may show he should have leave to defend are "by affidavit, or by oral evidence."

It has been stated many times that the object of Order XXXV Rules 1 and 2 is to enable a Plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. Otherwise the court should not grant an application for summary judgment where there is a reasonable ground of defence. That was said by Sir Charles Newbold, P. in the case of **ZOLA AND ANOTHER –V- RALLI BROTHERS LIMITED AND ANOTHER (1969) E.A 691** at page 694**.** Madan J. A. in **SHAH –V- PADAMSHI (1984) KLR 531** at page 535 said:

"Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial."

Ringera, J., as he then was, said in **NATIONAL INDUSTRIAL CREDIT BANK LTD –V- RAPHAEL OBONYO OKELLO, H.C.C.C. No. 1186 of 2000, MILIMANI** that:

"It is well settled that the procedure for summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the defendant is truly and justly indebted to the plaintiff and there are no *bona fide* triable issues raised by the proposed defence or the defence already filed …"

In **GUPTA –V- CONTINENTAL BUILDERS LTD (1978) KLR 83,** Madan J.A at page 87 seems to have been holding views stronger than the views he came to hold later in the case of **SHAH –V- PADAMSHI** (Supra). In Gupta the learned Judge stated as follows:

"If a defendant is able to raise a *prima facie* triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no *prima facie* triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. *Prima facie* triable issues ought to be allowed to go to rail, just as a sham or bogus defence ought to be rejected peremptorily."

Emphasis by underlining are mine. The learned judge went on to state that:

"In any given case it is the duty of the court to examine with minute care the documents and facts laid before it. In this case there is a complaint made that this was done instead of paying a compliment to the court's assiduity for doing so. If it had not been done, there would be some cause for making a complaint that the court failed in its task to do so, thereby possibly causing a failure of justice. A minute and careful examination of documents and facts laid before the court is carried out by the court as part of the daily task in the performance of its judicial duty and understandably (even inevitably), it may lead to both the acceptance or rejection of some documents and some facts which some people, in the case of an application for summary judgment, may construe, albeit incorrectly, as an actual trial. There is no more in it except the process of determining the judicial verdict to be delivered. The merits of the issues are investigated to decide whether leave to defend should be granted; but the case is not tried upon affidavits, it is that this is the procedure in the main provided for this purpose. Sometimes the *prima facie* issues which are proferred are rejected as unfit to go to trial being, by their very nature as disclosed to the court, incapable of effectively resisting the claim. The court does not thereby shut out any genuine defences of a defendant, as it is the only proper order to make if no reasonable grounds of defence are disclosed, even as only *prima facie* triable issues, at this stage. What happens is that the court merely does not accept the prima facie issue offered as genuine. This is exactly the task which the court is required to perform on an application for summary judgment."

Compare that with what Sellers LJ said in **WENLOCK –V- MALONEY AND OTHERS (1965) 1 WLR 1238** at page 1242 as follows:

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Of course that case was for summary dismissal of the Plaintiff's plaint but what was said is relevant to this application. I should add that in the case of **ZOLA AND ANOTHER –V- PALL BROTHERS LIMITED AND ANOTHER** (Supra), Sir Charles Newbold also said:

"The mere right of the defendant to be indemnified by, or to have a claim over against, a third party in respect of the defendant's liability to the plaintiff, or to recover from a third party or from

the plaintiff by way of counter-claim, a sum of money which does not directly reduce the liability of the defendant to the plaintiff, does not entitle the defendant to prevent the plaintiff from obtaining a summary judgment."

A further addition from the case of **GUPTA** where it was stated:

"An application may be made under order XXXV, rule 1, for summary judgment on a debt or liquidated demand, even though the plaint also includes other claims which are outside the terms of rule 1."

From the authorities I have referred to in relation to Order XXXV Rules 1 and 2 therefore, the case of **ZOLA**, requires that the defendant has to show he has **a reasonable ground of defence;** the case of **GUPTA**, requires that the defendant has to show that he has ***prima facie* triable issue or issues**; while in the case of **NATIONAL INDUSTRIAL CREDIT BANK LTD**, the defendant has to show that he has ***bona fide* triable issue or issues**; and in the case of **SHAH**; the defendant has to show that he has **a triable issue or triable issues**. The case of **SHAH** comes out more liberally than the other cases and the passage I have quoted is from the judgment of Madan J.A who also wrote the judgment in **GUPTA's** case from which the passage quoted is taken. In fact in **SHAH** the learned Judge was so liberal to the extent of saying that:

"A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial."

In view of the above, how should the Plaintiff's submissions on triable issues be treated? This is what he said before me:

"The Plaintiff has never said that the Amended further Defence does not raise triable issues. We concede it raises triable issues due to the human ingenuity. It raises a number of points of law. What we are saying is there is not one *bona fide*, honest or genuine triable issue. The court should not allow a party to be creative or renovative in pleadings when facts and the law are clear."

The response from the Defendant's counsel was that in this application, it is the duty of this court to find out whether there are triable issues. Once the court finds that triable issues exists, even if it is only one triable issue, the case must go to trial because it is the trial court, and not the court in this application, that has the duty to decide whether the triable issues in this suit are *bonafide*, honest or genuine.

In the circumstances of this case, that argument by Mr. Kibet, the Defendant's counsel, persuades me firstly, because even before the learned Plaintiff's counsel conceded that there were triable issues, I was already seeing some of those issues. I have even mentioned one or two in this ruling and indicated they are issues to go to the full trial of this suit. Secondly, there is no dispute now that there are triable issues in this suit. One or two of them may not be *bonafide*, honest or genuine triable issues, but definitely not all are like that. In any case the law as seen from case authorities is that a single triable issue is sufficient to take a case to a full trial.

Thirdly, and this is something I did not find decided in the authorities I am using, that the Defendant in this suit filed a defence long before this Notice of Motion was filed and that defence has to-date been amended twice. Following the filing of this Notice of Motion, the Defendant filed a replying affidavit. The Defendant is relying on both, that is the defence with a counter-claim and the affidavit, to show that he should have leave to defend the suit. This Notice of Motion having been filed when the Defendant has been lawfully defending this suit for almost one and half years, how does the court turn round to lawfully and fairly tell the Defendant that he has lost the right to defend this suit and therefore now requires leave of the court to defend the suit? Is it not proper to tell the Plaintiff that he is too late to move the court under Order XXXV Rule 1 of the Civil Procedure Rules? Has the Plaintiff not inordinately delayed in filing this apparently after thought application which therefore defeats the purpose for Order XXXV rule 1 which is clearly expounded in the authorities referred to above; namely to obtain **"a quick judgment**

without being subjected to a lengthy, unnecessary trial"?

They are already deep in a lengthy and unnecessary trial for one and a half years now. I have considered all the circumstances of this suit fully and adopting the fitting words of Waki J. A. in **ISHMAEL KAGUNYI THANDE –V- HOUSING FINANCE OF KENYA LIMITED, CIVIL APPLICATION NO. NAI 157 OF 2006** (UR.91/06); …… **"I think it is regrettable that the progress in the hearing and determination of"** the main suit herein **"has been delayed by what are clearly dilatory manouvres ……. A party who seeks discretionary favours"**, as an applicant or a respondent or otherwise, **"from the court, must endear itself to the court by coming before it with clean hands"**, for such should be the credit of an advocate of the High Court; so that a simple suit which should, for example, be finally determined within six months does not degenerate into a suit taking years with huge volumes of unnecessary documents to finally determine it even if the court, the scapegoat, is always there for every blame that arises concerning delayed justice.

On the whole therefore, I hold the view that this is not a case for summary judgment. Accordingly, this Notice of Motion dated 16th March 2006 be and is hereby dismissed with the further order that each party bears its own costs because the Respondent, having raised the type of preliminary objection it raised in this matter, stands in no better position than the Applicant regarding the award of costs.

DATED this **26TH DAY** of **SEPTEMBER 2007**.

J. M. KHAMONI

JUDGE

Present

Mr. Hassan Lakicha for the Applicant.

Mr. Kibet for the Respondent

Mr. Kipkurui – Court Clerk

Further Order:

Upon oral application by Mr. Hassan M. Lakicha, leave to appeal is hereby granted.

J. M. KHAMONI

JUDGE

26.9.2007