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

Misc Appli 1417 of 2005

NDUATI CHARAGU & CO. ADVOCATES……..…..…PLAINTIFF

VERSUS

FOUNDATION CENTRE LTD & ANOTHER……..…DEFENDANT

JOINT RULING

This ruling is in respect of two applications as per consent of the counsels herein of 16.6.2007. The first application is by the applicant herein **MARK NDUATI CHARAGU T/A NDUATI CHARAGU & CO. ADVOCATES.** It is by way of notice of motion brought under Section 51 subsection 2 of the Advocates Act and Order L rule 1 of the Civil Procedure Rules.

The orders sought are:-

(1) That judgment be and is hereby entered in the sum of Kshs 3,231,209.00 as was taxed and a certificate of taxation duly issued by the registrar on the 19th November 2006 together with interest thereof at court rates from the date of filing the bill of costs till payment in full.

(2) That the Respondent be jointly and severally liable for the judgment herein.

(3) That the applicant be at liberty to execute against the Respondents both jointly and severally.

(4) That costs be provided for:

The application is dated 9th day of February, 2007 and filed on 12th February , 2007.

The second applications by the Respondents, Foundation Centre Ltd and Davy Koech is by way of chamber summons brought under rule 11 sub rules 1,2 and 4 of the Advocates Remuneration order pursuant to order 48 of the Advocates Act Cap.16 of the Laws of Kenya

ll the enabling provisions of the law. It seeks the following orders:-

1). That the honourable Court do hereby enlarge time for the Applicants notice of objection dated 27th October, 2006 and filed on 6th November, 2006 and hold that the same is duly filed within the stipulated period of fourteen (14) days from the date of taxation.

2). That the taxing officer and or the Deputy Registrar do record and forward to the Respondents (Objector) the reasons for his decisions on the objected items within fourteen (14) days from the date

hereof.

3). That further and or in the alternative to the above, the Applicants do and are hereby given leave to apply to a judge without the Deputy Registrars/taxing officers reasons for his decision on taxation herein.

4). That costs be provided for. It is dated 20.3.2007 and filed on 21.3.2007.

The applications were heard simultaneously. Counsel for the applicant in the first application presented submission in favour of his application and in opposition to the Respondents application. Likewise counsel for the Respondents presented submissions for their application and in opposition to the applicant's application. The major grounds relied upon by the applicants in the first application and in opposition to the 2nd application are as follows:-

(1). Since taxation has been done and a certificate issued the money has become due and payable and so judgment should be issued for execution purposes.

(2). That the amount has been outstanding since l999 and the Respondents have just woken up to pursue objection after an application for judgment was filed to execute the decree after taxation and that is when they filed an application for leave to file objection to the Registrars ruling out of them. They have therefore been indolent and are therefore guilty of laches and should not be indulged.

(3). That the applicant has been waiting for the fruits of taxation for a long time and this court should bring this litigation to an end so that the applicant can realize the fruits of taxation.

(4). Concerning the respondents 2nd application the same was filed as an after thought. No meaningful steps have been taken to seek setting aside of the taxation order and only one item was objected to. The application should be dismissed.

(5). Alternatively should the court be willing to indulge the respondents on their application, then ends of justice to both sides should dictate that the decretal amount be deposited in a joint interest earning account in the joint names of both Counsels until the respondents objection issue is sorted out.

The respondents on the other hand relied on the following grounds.

1). That after the bill was taxed they filed the notice of objection within the required 14 days and even followed up this by sending 2 reminders and instead of responding to their request the Registrar proceeded to issue a certificate of taxation.

2). They contend that once objection is issued the taxing officer is bound by it and should not have gone ahead to issue a certificate of taxation. He is required to give reasons and based on those reasons if not satisfied it is on the basis of those reasons, that the aggrieved objector can move to the High Court to seek a second opinion.

3). They maintain that they are not guilty of any laches or indolence as they had done what was expected of them in law and so they should not be penalized.

4). They have all along disputed the issue of instruction fee.

5). This court is urged to invoke its powers under rule 11 of the advocates remuneration rules to rectify and put things right or the proceedings on the right truck so that the same can be brought to a conclusion. They are hand capped as they can not file a reference to the High Court as reasons have not been given by the taxing master.

6) On that score the court is urged to allow their application as they moved to object with in the time stipulated.

The court was also referred to legal authorities. The case of **GRIND LAYS BANK INTERNATIONAL K LTD (NEW STANBIC BANK K LTD AND GRINDLAYS INTERNATION FINANCE LTD NOW STANBIC FINANCE KENYA LIMITED VERSUS GEORGE BAR BOUR NAIROBI C. APP. NO NAI 108 OF 1996(40/96 U.R)** which concerned an application to the Court of Appeal under rule 4 of the Court of Appeal rules for deeming notice of appeal to have been filed in time or alternatively for time to be enlarged for it to be lodged out of time. This has no bearing to the subject of inquiry herein. The case of **GATU VERSUS MURIUKI [1986] KLR 211** also concerned leave to appeal out of time. The holding therein is that the court ought to be inclined to exercise its discretion to enlarge the time to appeal where the applicant has shown prima facie that he has an arguable case for consideration. That the court should exercise its discretion to allow an application if it is satisfied that no harm wound result to the respondent or if it did the same was capable of being compensated in costs. This authority too save for the issue of the exercise of the courts, discretion has no bearing to the subject under inquiry.

In the third authority of **KERANDI MANDUKU AND COMPANY VERSUS GATECHA HOLDINGS LIMITED MISC.** application no 202 of 2005 which concerned an application under Section 51 (c) of the Advocates Act Cap.16 Laws of Kenya and paragraph 7 of the Advocates Remuneration order. Fred A. Ochieng J. had this to say at page 5 of the ruling paragraph 2 and 4 "*In the circumstances it would be wrong to fault the Respondent for the delay in filing a reference, whereas it is well known that it could not do so until and unless the taxing officer provides reasons for the decision which the respondent wishes to challenge ……in the circumstances prevailing, I hold that the respondent has demonstrated a desire to challenge the certificate of taxation. That desire has not materialized into a reference because the taxing officer has not yet provided the respondent with his reasons for the decision he arrived at. To my mind, these circumstances, for now dispel the presumption of finality as to the certificate of taxation, even though the certificate itself has not been varied or set aside by the court. For that reason alone I decline to grant judgment in favour of the applicant as it may ultimately turn out that such action was premature*".

This reason is relevant to the subject of inquiry herein in respect of both applications.

In the case of **OWINO OKEYO AND COMPANY ADVOCATES VERSUS MIKE MAINA AND MUTHINI INVESTMENTS CO. LTD NAIROBI MISC. APP.NO.651 OF 2004,** on application under Section 51(2) of the advocates Act Visram J. after reviewing the relevant law on the subject ruled at page 3 of the ruling last paragraph that "*Section 15 (2) aforesaid allows the client – the Respondent in this case to dispute the retainer meaning, to challenge the very instruction he is alleged to have given. And the onus to do so is on the client/respondent that onus cannot possibility shift to the applicant*".

In the case of **KALONZO MUSYOKA AND PAUL M. WAMBUA** practicing as Musyoka and Wambua Advocates Versus Rustam Hira practicing as Rustam Hira, Advocates Nairobi Commercial Court Milimani HCCC No. 444 of 2004 on an application under Section 51 (2) of the Advocates Act Cap.16 Laws of Kenya Waweru J. at page 7 of the ruling made observation at paragraph 2 that "*Section 51 of the Act makes general provisions as to taxation as the marginal notes indicates. One of those provisions is that the court has the discretion to enter judgment upon a certificate of taxation which has not been set aside or altered where there is no dispute as to retainer*". At paragraph 3 on the same page the learned judge stated "*in the present case there is no allegation that the Advocates had no instructions to act in the matter for the client. Indeed taxation was largely by consent except for the instruction fee so, there is not and there cannot be a dispute as to the retainer. As it stands now the certificate of taxation has not been set aside or altered. It has been submitted that the client has taken steps to challenge the award on instruction fee. If that be the case what the client should have done was to seek a stay of further proceedings until the challenge to taxation is disposed off there is no such application before the Court. In the circumstances I find no reason to deny the Advocate judgment as sought*".

In the case of NDERITU & PARTNERS ADVOCATES VERSUS MAMUKA VALUERS (MANAGEMENT LTD NAIROBI MULIMANI COMMERCIAL COURT HCCC NO. 463 OF 2004 WAWERU J. at page 1 of the ruling, in an application under Section 51 (2) of the Advocates Act it is stated "*under that subsection a certificate of taxation by the taxing officer who has taxed a bill of costs*

shall be final as to the amount of costs covered there by and the court may make such order in relation thereto as it thinks fit, including a case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due for costs" At page 3 of the said ruling quoting with approval Ringera J. in the case of HEZEKIA OGAO ABUYA (T/A ABUYA & COMPANY ADVOCATES VERSUS KIGURU FOOD COMPLEX LTD HC. MISC. APPL.400 of 2001 (Milimani) observed "*an advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute.…… It matters not that the instructions were given on behalf of some one else …. As the certificate of taxation has not been set aside or altered by court, and as there is no dispute with regard to the retainer, it is not necessary for ht advocates to file suit by plaint for recovery of his duly taxed costs".*

On the courts assessment of facts herein it is clear that there is no dispute that the applicant Nduati Charagu and Co. Advocates presented a bill of costs for taxation. The bill is dated 27th September, 2005 and it was filed the same date. A perusal of the Court record reveals that leave was granted to the second Respondent Dr. Davy Koech to file a replying affidavit to the said bill. Representations on both the bill and the replying affidavit were made by counsels of both parties on 26.9.2006. The taxing master reserved his ruling which was delivered on 25.10.2006. The Respondent was aggrieved by the outcome and sought leave to appeal to the Court of Appeal and applied for certified copies of the order as well as proceedings. Where upon the taxing master corrected counsel, and informed him that being a taxation matter the procedure to be followed was one of filing a reference to a judge in chambers in accordance with rule 11 of the Advocates remuneration rules. The Counsel was to indicate the items he was objecting to which the said taxing master will respond to probably by giving reasons as required by the rules and if not satisfied with the reasons given then the Counsel would file a reference to the High Court.

Annexture GMO2 annexed to the replying affidavit to the applicants application and GMO4 annexed to the supporting affidavit of the Respondents application filed on 21.3.2007 is a letter dated 27.10.2006 from the Respondents Counsel to the taxing master. A reading of the same reveals that in this letter the respondents were giving notice to the taxing master that they object to the decision to award instruction fees which is in items 1 to the Advocates clients' bill of costs filed in Court on the 27th September 2005. They also object to the 2nd Respondent being held liable when he was not a party to the transaction between the first respondent and the applicant. That the fact that the 2nd Respondent was a director of the first Respondent does not put the 2nd Respondent in the same position as the 1st Respondent. The last paragraph of the correspondence reads "*in terms of the Advocates (Remuneration) order rule 11 sub rule 2 we await to receive your reasons for your decision within fourteen (14 days from the date of receipt of this notice of objection".*

Rule 11 (1) of the Advocates remuneration order mandates the party objecting to the taxing officer's decision to object to the taxing officers decision within 14 days after the taxation. The notice is for items objected to. It reads "*11(1) should any party object to the decisions 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"* Since the taxation decision was given on 25.10.2006 and the letter is dated 27.10.2006 and received in court on 6th November 2006 the notice of objection was received within the Requisite 14 days stipulated by rule 11(1) of the remuneration rules.

Sub rule 2 of rule 11 of the Advocates remuneration order mandates the taxing master to forthwith record and forward to the objector, the reasons of his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chambers Summons which shall be served on all the parties concerned, setting out the grounds of his objection. It reads "*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'.* This court has been informed that sub rule 2 has not been complied with by the taxing master. There are two follow up correspondences marked GMO5 one is dated 1st December 2006. It reads "*we refer to the above and our notice of objection filed in court on the 6th November, 2006.*

It is over fourteen (14) days since we filed a notice of objection and to date we have not received your reasons for your decision. Our attempt to peruse the file on the 28th day of November, 2006 did not achieve much as the file was said to be in your custody.

Kindly let us have the reasons for your decision so that we can move to the next stage of filing our application.

Yours faithfully.

G.M. OTENYO"

The next correspondence is dated 15th January 2007 and it is received in Court on 16th January, 2007. It reads "***RE HCCC MISC. APPL.1417 OF 2005 NDUATI CHARAGU AND COMPANY ADVOCATES VERSUS FOUNDATION CENTRE LTD AND DR. DAVY KOECH.***

We refer to the above. We filed our objection on 6th November, 2006 and on the 1st day of December 2006 we did a reminder to you asking for your reasons for your decision so that we can file an application in the High Court.

Kindly but urgently let us have your aforesaid reasons for your decision herein so that we can act.

As it were we cannot file an application without first obtaining your reasons which puts us in an awkward position we wait to hear from you soon.

Yours faithfully,

G.M. OTENYO"

Un known to the Respondent the taxing master had issued a certificate of taxation dated 14th November, 2006 marked GMO.6. This is the certificate of taxation which prompted the applicant on to move to court to file the application of 9th February, 2007 seeking judgment in terms of the same. The issuance of a certificate of taxation usually brings to the fore the operation of Section 51(2) of the Advocates Act which states "*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 amounts of the costs covered there by and the court may make such orders in relation there to as it thinks fit including in a case where the retainer is not disputed or order that judgment be entered for the sum certified to be due with costs*" In this courts own decision in the case of **OTIENO ODEK & CO. ADVOCATES VERSUS ORBIT CHEMICAL INDUSTRIES LTD NAIROBI MISC. CIVIL CASE NO. 222 OF 2006** decided on 23rd of March 2007 at page 3 of the ruling line two (2) from the bottom the court observed "*the use of the ward "shall" in the said Section makes the provision mandatory for this court to enforce the order as presented in the certificate of taxation. It is therefore correctly submitted by the applicant's counsel that the respondents should have availed themselves of the provisions of rules 11 and 12 of the Advocates Remuneration rules". At page 4 of the ruling line 3 from the bottom this court observed. "* Applying the above provision to the facts of this application it is clear that the Respondent did not avail itself of that procedure. In the circumstances the matter in fore closed and there is no way this court can give a contrary opinion to that of the taxing master is it has not been invoked in terms of rule 11(2) of the Advocates Remuneration Rules".

The situation herein is distinguishable from that of the cited own case. No move had been made by the aggrieved party under rule 11 (1) of the Advocates remuneration rules. Herein that procedure was invoked on the advice of the taxing master but it is the taxing master who failed to respond and went ahead to issue a certificate 8 days after notice to object had been given to him instead of giving reasons for the taxation as required by the rules. Instead the taxing master issued a certificate thus fore closing the Respondents rights to challenge the taxation which rights had accrued and resorted to before the fore closure.

In a decision of a court of concurrent jurisdiction Waweru J. in the case of NDERITU & PARTNERS Advocates supra refused to acknowledge the right of the Respondent who had availed himself of that procedure and which process was pending and went ahead to enter judgment on the basis of the taxing masters certificate of taxation because there was no stay of proceedings. In another decision of another court of concurrent jurisdiction FRED A. OCHIENG in the case of **KERANDI MANDUKU & COMPANY supra** declined to enter judgment on the certificate because in the circumstances of that case it would be wrong to fault the respondent for the delay in filing a reference, where as it was well known that it could not do so until and unless the taxing officer provides reasons for the decision which the respondent wishes to challenge. The learned judge went further to hold that the respondent had demonstrated a desire to challenge the certificate of taxation. That desire had not materialized into a reference because the taxing master had not yet provided the respondent with his reasons for the decision he arrived at. To the learned judges, mind those circumstances went to dispel the presumption of finality as to the certificate of taxation even though the certificate itself had not been varied or set aside by the court. And for that reason alone the learned judge declined to grant an order for judgment. Both justices Waweru and A. Fred Ocheing's decisions are not binding on this court and this court is only required to be persuaded by them and is entitled to arrive at its own decision on the matter.

In another decision of this court in a situation where right to object ran out on the respondent because he was not aware of the taxation due to a wrong file being quoted on the papers served on him this, court went ahead to set aside the order adopting the taxing officers order as a judgment of the court**. IN NAIROBI HC.MIS. APPLICATION 477 OF 2006 JASON ONDABU T/A ONDABU & CO. ADVOCATES VERSUS KODECK NYAMWEYA OKWORO**. The decision was delivered on 29th June 2007. At page 12 of the said ruling paragraph 2 this court observed "*For purposes of this ruling it is the finding of this court that Civil Procedure Rules apply to the Advocates Act but it is limited to the adoption of the order arising or emanating from the Advocates Act as a judgment of the court and enforcement of the decree are concerned"* The issue of operation of the civil procedure provisions to the facts herein arises because of the prayers sought in the respondents application concurrently being considered in this ruling with the applicant's application for adoption. At page 14 of the same ruling paragraph 2 it is observed

"*It is enough to say that on the basis of annexture KNI and its accompanying bill with no case number is sufficient ground of reopening the matter for the applicant. Failing to reopen the matter would cause hardship and injustice in view of the attack made on the entire bill which can not be ignored. The intention to challenge the bill as presented is another sufficient ground. The net result of the foregoing assessment is that the applicant has shown justification for this court to exercise its discretion in his favour ……"At page 17 of the same ruling line 4 from the bottom it is observed* "Reopening the matter for the applicant under rule 11 of the Remuneration rules of Cap.16 laws of Kenya will ensure that ends of justice is met in this matter as that will give him an opportunity to question the basis for allowing amounts in the bill….." At page 19 of the said ruling line 8 from the top it is observed "*The only point that the court can use to hop from the Civil Procedure Act to the Advocates remuneration rules is Section 3 of the Civil Procedure Act. This Court does not think that it was the intention of the legislature in both processes to lock out a litigant from the seats of justice by providing no avenue through which to ventilate grievances if any, especially in circumstances where serious attack have been leveled and will be leveled against the taxed bill which attack go to the foundation of the bill"*

This courts own decision in the **ONDABUS** case and justice Fred S.A. Ochieng case of **KERANDI MANDUKU & COMPANY** supra demonstrate that section 51(2) of the Advocates Act is not full proof. It does not take away the unfettered discretion of the court to do justice to litigants as and when the situation demands where this idea is applied to the facts herein it is clear that the respondent has a desire to challenge the taxed bill.

(ii) They moved in time to lodge objection to the taxing masters decision and then sought reasons from the taxing master to enable them move to the next venue.

(iii) The taxing master has not given reasons for his decision.

(iv) The certificate of taxation was issued as reasons were being awaited by the Respondent.

As long as the reasons have not been given the 14 days do not run out on the respondent. The certificate of taxation was therefore issued in error and this is a proper case where this court can exercise it s unfettered discretion to do justice to both parties.

It is to be noted that the item objected to was `only item 1. The amount allowed under this heading is Kshs 2,782,450.00. The total amount in the taxed bill comes to Kshs 3,231.209.00 when reduced by the amount charged for item 1 it leaves a balance of Kshs 448,759.00 un contested. The uncontested amount can therefore be ordered to be executed had it not been that they seek to have it executed against the 2nd respondent for reasons given. This court has learned that one reason of objecting to item 1 is because of resistance of the 2nd respondent to meet that bill on behalf of the first respondent. Exploring that a relationship at this juncture and in this ruling will seriously prejudice the process of objection set in motion.

It will therefore be prudent not to mutilate the amount allowed but follow the advice given by the applicants counsel that the amount be safeguarded by having it deposited in an interest earning account in the joint names of both parties Counsels, as the parties await the conclusion of the objection proceedings. It is this courts view that the Respondent having earned the right to the objection process in seeking a second opinion on the amount charged on item 1, should not be denied that right by foreclosing it by allowing the bill and adopting it as a judgment. The applicant on the other hand having orders made in his favour should not be treated as if he does not deserve them. For as matters stand now he deserves them until upset by a higher court. The situation therefore calls for orders which would safeguard the interests of both parties as the remaining processes as gone into.

For the reasons set out in the assessment this court makes a finding on both rulings that interest of justice to both parties demand the following orders be made.

(1) The entire amount forming the taxed bill of Kshs 3,231.2009.00 be deposited in an interest earning account in the joint names of counsels of both parties within a period of 6o days from the date of the reading of this ruling

(2) Upon complying with no1 above the Respondent do serve this order as well as a further reminder to the taxing master of this court requiring him to respond to their objection notice vide their letter dated 27.10.2006 and filed in court on 6.11.2006 not later than 30 days from the date of compliance:-

(3) The said taxing master is required to comply with the said request as in no. 2 above forthwith.

(4) There after parties to proceed according to law.

(5) Since events herein were set in motion by the taxing master, not taking action in time as required by law, there is no need to penalize any party on payment of costs. Each party will bear own costs on all applications.

(6) There will be liberty to apply to either party.

DATED, READ AND DELIVERED AT NAIROBI THIS 21st DAY OF SEPTEMBER 2007.

R. NAMBUYE

JUDGE