



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CAUSE 377 OF 2007**

**WILLIS O. NYENDE t/a NYENDE & CO. ADVOCATES ..... APPLICANT/ADVOCATE**

**Versus**

**KARIUKI & GATHECHA RESOURCES LTD ..... RESPONDENT/CLIENT**

**RULING**

From what has been brought to my attention during the hearing of this Notice of Motion dated 1<sup>st</sup> August 2007 in the light of filed pleadings, the said Notice of Motion is hereby granted as prayed and since the Respondent in opposing the notice of Motion has raised a number of issues, reasons for my decision herein be given on 22<sup>nd</sup> October 2007.

Dated this 16<sup>th</sup> day of October 2007.

**J. M. KHAMONI**

**JUDGE**

**REASONS FOR THE DECISION DATED 16<sup>TH</sup> OCTOBER 2007**

**On the 16<sup>th</sup> day of October 2007 I heard and decided the Notice of Motion dated 1<sup>st</sup> August 2007 in which Willis O. Nyende t/a Nyende & Company Advocates, prayed for judgment in "the sum of Kshs.200,846/= as per the Certificate of Taxation herein with interest at a rate of 14% per annum from the date of taxation" – which was 26<sup>th</sup> July 2007. In that decision I said will give my reasons for the decision on 22<sup>nd</sup> October 2007 and now these under are the reasons:**

**Firstly, the Applicant filed and prosecuted his bill of costs before the Taxing Officer in this same capacity in which he has filed this Notice of Motion. The Respondent participated fully in the taxation proceedings up to the end without raising the issue of a retainer.**

**Secondly, while accepting that the essence of an application for judgment under Section 51 (2) of the Advocates Act is to confirm whether judgment should be entered in the sum of the taxed costs, the question whether the Applicant Advocate is entitled to those costs is a question which properly should start before the Taxing Officer for a decision by the Taxing Officer in order to be one of the issues in an objection which may be raised under paragraph 11 of the Advocates (Remuneration) Order, and ought to be raised before the Taxing Officer if the retainer is being disputed.**

**Thirdly, the finality of the Certificate of Taxation as to the amount of the costs covered thereby should be respected especially in circumstances like in this case where no objection has been raised under paragraph 11 of the Advocates (Remuneration) Order and the relevant certificate of taxation has neither been set aside nor altered; as properly in law, and as I recently said in this Court's Civil Case No. 532 of 2004, "Ahmednasir Abdikadir & Company, Advocates, -vs- National Bank of**

**Kenya Limited;" (unreported), mid page 50 to top page 51, 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 paragraph 11 of the Advocates (Remuneration) Order, ought not be raised in proceeding for judgment under Section 51 (2) as read with Section 49 of the Advocates Act. Such issues if brought ought to be regarded as *res judicata* or estopped or collateral attack because taxation proceedings are separate and distinct from proceedings in a suit to claim costs and that is why the law has opened a parallel channel which is followed by way of a reference under paragraph 12 or by way of an objection to the High Court and an appeal, where necessary, to the Court of Appeal under paragraph 11 of the Advocates (Remuneration) Order, to finally determine issues arising from taxation proceedings in that manner and in that manner only.**

**Fourthly, the fact that the Respondent in this case has filed HCCC No. 312 of 2007 against the Applicant in this case alleging negligence and other allegations should not cause confusion in these proceedings and a pending application in that suit for stay of this sit without there being an actual stay order is no stay order against these proceedings.**

**Dated this 22<sup>nd</sup> day of October 2007.**

**J. M. KHAMONI**

**JUDGE**