



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc. Civ Appli. 371 of 2005

CHINESE CENTRE FOR THE PROMOTION OF INVESTMENT, DEVELOPMENT AND TRADE

**IN KENYA LIMITED.....APPLICANT/
CLIENT**

VERSUS

GEORGE NDUNG’U KIMANI t/a GEORGE N. KIMANI

**& CO. ADVOCATE.....
RESPONDENT/ADVOCATE**

R U L I N G

This is an application by the Client (by chamber summons dated 28th November, 2005) under paragraph 11 (4) of the Advocates (Remuneration) Order for enlargement of time within which to give notice of objection to taxation and to file reference to the High Court challenging taxation under sub-paragraphs (1) and (2) of the same paragraph. Temporary stay of execution of the taxation is also sought. For this, rule 22 of Order 21 of the Civil Procedure Rules is quoted. Section 3A of the Civil Procedure Act, Cap. 21 and all other enabling provisions of the law are also invoked. The grounds for the application can be paraphrased as follows:-

- (i) that the Client is dissatisfied with the decision of the taxing officer;**
- (ii) that the decision of the taxing officer by which he taxed the Advocate’s bill of costs at Kshs.528,741/44 is unfair and unjust as the Advocate did not render any legal services to the Client that would warrant payment of that sum as legal fees;**
- (iii) that the justice of the case requires that the Client be allowed to challenge the taxation;**
- (iv) that the bill of costs was improperly taxed and contained fundamental errors;**
- (v) that the Client has good case in the intended reference against the taxation; and**
- (vi) that unless stay of execution of the certificate of costs and/or of any judgement entered in pursuant thereof be granted the Client will be prejudiced in its intended reference against the taxation.**

There is a supporting affidavit sworn by one QIN MINXUE, the Deputy General Manager of the Client.

The Advocate has opposed the application upon the various grounds set out in the lengthy replying affidavit sworn on 1st December 2005 by him. One of the grounds for objection to the application is that it is an abuse of the process of the court.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing. Finally, I have perused the court record. The Client had filed an application by chamber summons dated 8th November, 2005 in which it had sought main orders which were similar to the ones sought in the present application. Those orders were, one, that leave be granted to it to give notice to the taxing officer of objection to the taxation of 14th October, 2005, and two, that leave be granted to it to file objection to the taxing officer's decision out of time. That application came up for hearing before Ochieng, J. on 18th November, 2005 when counsel for the Advocate raised a preliminary objection to the application on a point of law. In the course of her reply learned counsel for the Client sought adjournment in order to bring herself properly on record. Adjournment was granted and the application was stood over to 29th November, 2005 for hearing. The Client then filed a document titled "Notice of Withdrawal of Applications dated 28th October, 2005 & 8th November, 2005" dated 23rd November, 2005. By that notice the Client purported to withdraw the two applications quoted therein pursuant to Order 24, rule 1 of the Civil Procedure Rules. That notice was filed on 29th November, 2005, the very day the application dated 8th November, 2005 was coming up for hearing. On that day also the Client filed the application at hand, the chamber summons dated 28th November, 2005.

Could the Client withdraw the application dated 8th November, 2005 as it purported to do? Rule 1 of Order 24 is in the following words:-

"1. At any time before the setting down the suit for hearing the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action."

The definition of the term "suit" as found in section 2 of the Civil Procedure Act is that it means all civil proceedings commenced in any manner prescribed. So, the application dated 8th November, 2005 was a suit for the purposes of rule 1 of Order 24. But the application had already been fixed for hearing on 29th November, 2005. So, the Client could not withdraw it under that rule as it purported to do. The notice of withdrawal dated 23rd November, 2005 is thus void and of no effect as far as that application is concerned. It remains on record.

That being the case, the present application, which seeks the same orders sought in the earlier application dated 8th November, 2005, is not properly before the court. I respectfully agree with learned counsel for the Advocate that the application is an abuse of the process of the court. That being the case, I need not consider the merits of the application. It is hereby struck out with costs to the Advocate. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF MARCH, 2006.