



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

Civil Case 1142 of 2005

KENYA PIPELINE COMPANY LIMITEDPLAINTIFF

-VERSUS-

NYAMOGO & NYAMOGO ADVOCATESDEFENDANT

RULING

**A. IMPROPER STAY OF EXECUTION OF TAXED BILL OF COSTS? —APPLICATION,
PRAYERS, DEPOSITIONS**

The defendant's application by Notice of Motion dated 31st October, 2005 and filed on even date was brought under Order L, rule 17 of the Civil Procedure Rules and ss.6 and 63(e) of the Civil Procedure Act (Cap. 21). The prayers set out in the application were as follows:

- (a) *that, the Court be pleased to set aside the ex parte orders of 26th October, 2005*
- (b) *that, the Court be pleased to stay the proceedings herein;*
- (c) *that the costs of this application be provided for.*

The grounds in support of the application are as follows:

- (i) *that, the ex parte orders of 26th October, 2005 were obtained without disclosing all the material facts to the Court;*
- (ii) *that, the said orders offend the cardinal rules of natural justice;*
- (iii) *that, the said orders if implemented, will interfere with the rights of other persons who are not parties to the suit;*
- (iv) *that, the matters in issue herein were also directly and substantially in issue in H.C. Misc. Application No. 995 of 2004 in which the parties were the same and which has been heard and determined.*

Evidence in support of the application is in the affidavit of **Nyamodi Ochieng Nyamogo**, a partner in the defendant firm of advocates, sworn on 31st October, 2005.

It is deponed that on 25th October, 2005 the plaintiff's application which had been listed for hearing, was stood over generally. On that occasion, the Court declined to extend the orders of stay in favour of the plaintiff which had been granted earlier. As there was thus no operative stay of execution, it was averred, the defendant instructed auctioneers to proceed and realise the taxed costs in *High Court Misc. Application No. 995 of 2004*. Then, come 26th October, 2005 the plaintiff returned to Court, "in the absence of the [defendant] and without filing any application", and "urged the Court to issue certain orders which are the subject of the [instant] application".

It is deponed that when the plaintiff appeared before the Court *ex parte* on 26th October, 2005 the plaintiff obtained restraining orders by concealing material facts. It is averred that counsel for the plaintiff had, on that occasion, misled the Court to believe that counsel for the defendant was to blame for the orders issued by the Court on 25th October, 2005 when stay orders had not been extended. It is deponed that in those circumstances, the defendant was condemned without being heard.

It is deponed that the matter in issue in the present suit was directly and substantially in issue between the same parties in *H.C. Misc. Cause No. 995 of 2004* which has since been heard and determined – and the plaintiff did not appeal against the Court's decision.

To the deponent's affidavit is annexed the Court's orders issued on 26th October, 2005; and they read thus:

"Upon reading the amended application presented to this Court on 30th September, 2005 by counsel for the plaintiff ... under section 63 of the Civil Procedure Act ... Order XXI, rule 25 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all other enabling provisions and [the affidavit of] John Muindi sworn on 28th September, 2005 and upon hearing counsel for the [plaintiff] it is ordered:

.....

2. **THAT, the interim orders granted on 29th September, 2005 and extended on 6th October, 2005 are hereby reinstated;**
3. **THAT, any and all of the [plaintiff's] goods and/or motor vehicles as may have been seized by the respondents be returned to the [plaintiffs] forthwith;**
4.
5. **THAT, interim orders do remain in place."**

These *ex parte* orders were accompanied with a "Notice of Penal Consequences" in the following terms:

"If you, Nyamogo and Nyamogo Advocates, or any of your agents including Whitestone Auctioneers and any and all of its employees disobey this Order or neglect to obey this Order you and each of you will be liable to the process of contempt and execution for the purpose of committal or compelling each of you to obey the same."

B. DETERMINATION TO AVERT EXECUTION OF TAXED BILL OF COSTS – PLAINTIFF/RESPONDENT'S ANSWER

Counsel for the plaintiff, **Paul Lilan**, swore a replying affidavit on 7th November, 2005 which was filed on even date.

The deponent averred that on 25th October, 2005 when the *plaintiff's* application was called out for hearing, counsel for the defendant asked the Court to permit him to call for the production of the Court

file in *H.C.C. Misc. Cause No. 995 of 2004*. The Judge, consequently, placed the file aside to allow a few minutes for consultation ? it was averred. The said consultation by counsel on both sides led to a consensus in the following terms: the file in this matter was to be placed before the Duty Judge, and the interim orders extended in the interim period. This point of agreement was then placed before the Judge in Chambers, it was averred; but learned counsel **Mr. Nyamogo** who then addressed the Court, omitted mention of the *extension of the order* – and this “left the Judge with [the] impression that the matter was no longer urgent, to the extent that she did not accept my plea for extension of the interim orders when it came to my turn to speak”.

When the two counsel left the Judge’s chambers, it was averred, **Mr. Nyamogo** had suggested that the matter go to the Duty Judge for extension of interim orders by consent; and he “also assured me that he would not do anything adverse within the two days, to give me ample time to follow up on the suggested mention”. On that assurance, it was deposed, **Mr. Lilan** wrote a letter forwarding the draft consent to the defendant; and he thereafter called **Mr. Nyamogo** requesting him to execute the consent; but **Mr. Nyamogo’s** word was that he was still consulting his partner. It was not possible for the two counsel to communicate subsequently, as had been agreed. This made **Mr. Lilan** uneasy, and so he immediately drew a certificate of urgency; and even as he awaited a hearing of the same at the Court, on 26th October, 2005 he received word that M/s Whitestone Auctioneers had already seized the plaintiff’s properties. The deponent avers that when the Judge granted him audience on 26th October, 2005 he moved *under an already existing application* (filed under an earlier suit *H.C. Misc. Cause No. 995 of 2004*) – and he did not file a fresh application. The same learned Judge (**Mugo, J.**) who had heard both counsel on 25th October, 2005 also heard the deponent on 26th October, 2005 and she could very well recall the matter; the deponent avers that he did not conceal any matter from the Court and did not mislead the Court.

It is deposed that instant service of the Orders of 26th October, 2005 was effected and M/s Whitestone Auctioneers obliged and returned the seized motor vehicles, Nos. KAH 185F and KAG 178F.

C. TAXATION WAS BASED ON CONSENT ORDER, AND JURISDICTION RESTED WITH TAXING OFFICER – SUBMISSIONS FOR THE DEFENDANT/APPLICANT

The Notice of Motion of 31st October, 2005 first came up before me

for hearing on 1st December, 2005 and on that occasion learned counsel **Mr. Nyamogo** and **Mr. Lilan** represented the defendant/applicant and the plaintiff/respondent respectively.

Mr. Nyamogo presented the gravamen of this application as centred on an *Advocate-Client bill of costs* of 27th July, 2004, taxed on 16th September, 2004. The plaintiff had then filed an *application by Notice of Motion*, dated 20th September, 2004 seeking to have the *taxation as effected set aside*. The taxation was effected pursuant to a “consent order” recorded on 16th September, 2004; and the plaintiff contended that the consent “was not authorised, approved or even contemplated by either the respondent or counsel instructed in the matter.” The plaintiff further took the position that “the respondent stands to lose Kshs.6,610,477/50 which is basically public funds through the unauthorised consent”.

Mr. Nyamogo stated that the plaintiff’s Notice of Motion had not been entertained before **Mugo** and **Kihara Kariuki, JJ.**, both of whom declined jurisdiction and directed that the matter be referred to the *taxing officer*. The matter was heard by the taxing officer who gave her ruling on 21st February, 2005. On that occasion, the Principal Deputy Registrar **Mrs. Oseko** recorded: “**Both counsel were present and proceeded by consent to have the bill taxed at a specific agreed amount. A certificate of taxation was subsequently prepared and was duly signed**”.

Mrs. Oseko went on to rule:

“On the 20th September, 2004 the respondent/applicant filed an application dated the same day before the High Court which application was listed before a Judge in chambers, seeking orders that the consent order of the 16th September, 2004 be reviewed. They also sought a stay of execution of the said order. That application again by consent was ordered to be heard and determined by the Deputy Registrar...

“Having considered the arguments by both counsel ... it is not in dispute that a consent order on taxation was entered by both parties which consent was duly recorded by the Deputy Registrar.

“It was not a blanket consent. It was a consent whose specific items were indeed taxed off as agreed between the two parties. Subsequent to this taxation a dispute has now arisen wherein the respondent/applicant is now questioning the authority of the advocate he sent to hold his brief. In this application for review counsel for the respondent/applicant now says that he did not authorise the said advocate to enter into any consent in the terms that he did. He is saying that the Deputy Registrar was not aware of this lack of authority but now that he has raised it the entire taxation should be reviewed.”

When the taxation dispute was referred back to the taxing officer, what she did was to give a detailed ruling in which she held, I think quite correctly, that she lacked jurisdiction, unless first there was a *taxation reference* to a Judge in Chambers by virtue of the Advocates (Remuneration) Orders, and then the Judge took a decision to remit the matter to her with directions to undertake a *fresh taxation*.

In the absence of a re-taxation by the taxing master, learned counsel **Mr. Nyamogo** submitted, the original taxation as duly effected stood, and the plaintiff had to pay costs in accordance with the certificate of costs as originally issued. In the words of learned counsel, *“That ruling now stands undisturbed, as there was no appeal therefrom”*.

Although the Deputy Registrar had stated, correctly I believe, that she would only be seized of the same taxation matter on a repeat basis if a Judge in Chambers, by virtue of the Advocates (Remuneration) order referred it to her, the *same* Notice of Motion of 20th September, 2004 was later brought before **Ransley J** – and naturally, the learned Judge expressed surprise. This, learned counsel **Mr. Nyamogo** submitted, led the plaintiff to withdraw the Notice of Motion and to file in its place a *Chamber Summons* by virtue of rule 11(4) of the *Advocates (Remuneration) Order*. In the meantime, the learned Judge had granted a *conditional stay of execution* of the taxed bill of costs. There was, however, no compliance with the condition, and so on 31st March, 2005 **Ibrahim, J** made orders granting the defendant *liberty to execute*, in recovery of the taxed costs.

At this stage, **Mr. Nyamogo** noted, the plaintiff made a change of advocates, and the new advocate *withdrew the Chamber Summons* which the plaintiff had substituted for its original Notice of Motion (of 20th September, 2004); the new advocate filed a *new Notice of Motion*, of 10th June, 2005 under Order XLIV of the Civil Procedure Rules. This Notice of Motion was heard by **Ransley, J** who gave his ruling on 19th September, 2005. He stated:

“In his replying affidavit Mr. Nyamogo referred to a Notice of Motion of the 20th September, 2004 in which the present applicant also sought to have the consent reviewed on terms similar to the present application – indeed identical to it. In that case the learned Deputy Registrar [Mrs. Oseko] held that [she] had no jurisdiction to review [her] own order and declined to deal with the matter on its merits.

“There was therefore no determination of the issues raised in that application before the Registrar, which were heard and finally decided [see section 7 of the Civil Procedure Act]. In my view *res judicata* does not apply.”

Mr. Justice Ransley went on to hold:

“In this case the present application for review is based on the ground that the consent order was not authorized, approved or even contemplated by either the respondent or counsel instructed in the matter. *These are not matters that can be dealt with in an interlocutory application. The only remedy is for the applicant to file a suit to set aside the consent order [on] any of the grounds which would entitle a Court to set aside a contract.*”

Hence it is to be taken as an ascertained fact that the several applications which the plaintiff has brought in the last two years, seek the *same object*; and learned counsel **Mr. Nyamogo** submitted that the same, too, is the purpose of the *substantive suit*, HCCC No. 1142 of 2005 – **Kenya Pipeline Co. Ltd. V. Nyamogo & Nyamogo Advocates**. The object sought has two elements: *stay of execution* (referred to as stay of proceedings in HCCC No. 1142 of 2005); and *stay of issuance of orders of attachment*.

Mr. Nyamogo submitted that the notion of “stay of issuance of orders of attachment” was a strange concept, quite unknown to the Civil Procedure Rules; and he contended that “stay of execution” was improperly before this Court, and ought to have come before the *Deputy Registrar* instead. This same point had also been brought before **Ransley, J** in *HCMCA No. 995/04*, and he declined to issue any stay orders – and his refusal orders were not set aside and were not contested on appeal. Learned counsel submitted that it was improper to “walk out” of *HCMCA No. 995/04* so as to launch a new claim under *HCCC No. 1142/05*. The new suit was now the umbrella for the latest Notice of Motion applications by the plaintiff.

Is Taxation of Costs a Special Regime? Does it Preclude the Application of the Normal Rules of Civil Procedure?

On the basis of the foregoing argument, **Mr. Nyamogo** now submitted that this Court lacks jurisdiction to entertain the new suit or any application such as may be filed under the same. Counsel submitted that the Court’s jurisdiction in matters of taxation is donated by *rule 11 of the Advocates (Remuneration) Order*, and so the plaintiff’s Notice of Motion which was filed under Order L rules 1 and 12 of the Civil Procedure Rules, and ss.3A, 27 and 63 of the Civil Procedure Act (Cap.21) did not properly invoke the Court’s jurisdiction; those provisions had no bearing on a complaint arising out of taxation.

Learned counsel relied on the Court of Appeal decision in **M.G. Sharma v. Uhuru Highway Development Ltd**, Civil Appeal No. 133 of 2000 in which the following passage (**Keiwua, J.A.**) occurs:

“In my judgement both the miscellaneous case embodying the bill of costs for taxation together with the application to stay that case, ought in the first place to have been placed before the Deputy Registrar of the superior Court and the prayer for stay urged and if granted it was only then, the balance of the application to have the case struck out, should have been referred to the learned Judge. In the absence of such an order from the Deputy Registrar, steps taken to have the file placed before the learned Judge, were in my judgement ineffective to divest the Deputy Registrar of jurisdiction to have the bill of costs taxed or to confer jurisdiction [upon] the learned Judge because what had been done appears to me to have been a nullity.”

And **Akiwumi, JA** pronounced himself:

“The application then came before him on 2nd December, 1999 which he proceeded to hear and concluded with his ruling of 19th May, 2000. [The learned Judge] not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and (2) and 12 of the Order, from a decision of the taxing officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the respondent’s application to strike out the cause. This by itself, makes his hearing of, and his ruling of 19th May, 2000, on the respondent’s application a nullity from the word go.”

In **Machira and Co. Advocates v. Magugu** [2002] 2 EA 428, on a related point, **Ringera, J.** (as he

then was) thus remarked (p.433):

“As regards the point that the client’s objections to the taxation itself having been overruled, the proper remedy to adopt was an appeal to the High Court and not a reference under paragraph 11 of the remuneration order, I have the following to say.

“First, the Advocates (Remuneration) Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer and indeed Order XLII of the Civil Procedure Rules is clear that appeals lie either as of right or with leave from orders made under the Civil Procedure Rules. No mention is made of orders made under the Advocates (Remuneration) Order. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, as I understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates (Remuneration) Order.”

Mr. Nyamogo submitted that the general law of civil procedure would not apply to a matter such as taxation, for which a *special regime* has been provided by law; and he invoked in this regard the judicial review matter, ***Republic v. C. Lutta Kasamani t/a Kasamani & Co. Advocates, ex parte United Insurance Co. Ltd.*** Misc. Civ. Appl. No. 1047 of 2004 (***Makhandia, J***):

“To my mind, therefore, although the Court in judicial review proceedings would be exercising a civil jurisdiction, it is a special jurisdiction which in itself does not mean that the Civil procedure Act (Cap.21) and the rules made thereunder are applicable. To this extent I would agree with Mr. Ombwayo’s submission that the Law Reform Act and Order LIII give this Court [a] special jurisdiction; and where an Act of Parliament confers special jurisdiction, [the] Civil procedure Act and the rules made thereunder do not apply.”

Learned counsel submitted that the Advocates Act (Cap. 16) was a special enactment and it created a *special jurisdiction* in the matter of *bills of costs*. Hence a recourse to the Civil Procedure Act (Cap.21) as was attempted by the plaintiff herein, would be lacking the warrant of the law.

And in any case, ***Mr. Nyamogo*** submitted, s.34(1) of the Civil Procedure Act (Cap. 21) itself would bar the filing of a new suit dealing with a question of taxation in an earlier suit. That section provides:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

Learned counsel submitted that the correct procedure for proceeding on a tax matter had been recognized and established, and so the plaintiff could not be heard to maintain that there was an *alternative avenue*. For this principle had been clearly expressed by the Court of Appeal in ***Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others v. David Njeru Njogu***, Civil Appeal No. 181 of 1994:

“It is, therefore, obvious that the application was brought under an incorrect provision of the law. Although the principles upon which the Court acts in an application under O.IXA rule 10 and O.IXB rule 8 of the Civil Procedure Rules, respectively, are the same we do not consider that both provisions are interchangeable. If the Rules Committee had so intended there would have been no necessity for having both provisions, and it would have expressly said so.”

By analogy learned counsel submitted that in the instant matter “a litigant was moving out of one statute, and seeking a remedy under a different statute.”

Mr. Nyamogo submitted that the plaintiff was obligated to pay the costs which had already been

determined as payable by a competent Court which had issued a *certificate of taxation*, a certificate which had not been set aside. It had been held by the Court of Appeal, in **Francis Kabaa v. Nancy Wambui and Jane Wanjiru**, Civil Application No. Nai 298 of 1995 that there would be no basis for stay orders against costs, once they were properly taxed. In the words of the Court:

“Before us the applicant says that what he wants is a stay of an order that he should pay costs.... In any case...the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”

Mr. Nyamogo submitted that the Court was entitled to inquire into the merits of the intended suit: are there any triable issues, as between the parties? He contended that the new plaint contained “not one single paragraph in which the plaintiff finds fault with the defendant; the complaint of the plaintiff is [simply] that their [own] lawyer did not carry out their instructions; they are not going further to say the defendants were privy to the instructions between them and their lawyers; they are not saying the defendants did subvert their instructions.”

Learned counsel contested the plaintiff’s motions for being an affront to the lawful process of taxation of costs by the taxing officer. In his words:

“How does taxation proceed in Court? The taxing officer asks a first question: Are there any items upon which you agree? And the answer is recorded. That is what transpired before the taxing officer on 16th September, 2004.”

The taxation proceedings are attached to the plaintiff’s supporting affidavit of 20th September, 2005. The record shows that *the parties had agreed on most of the heads in the bill of costs*; and in regard to those where there was no agreement, such as advocate’s instruction fees, the listed amounts were *taxed downwards*. Counsel wondered: “How can they now say even the items taxed off are no good for them?”

Mr. Nyamogo submitted that as the plaintiff was represented at the taxation hearing by a qualified firm of advocates of their own choice, any wrong suffered must be attributed to their own advocates, and “if there is any remedy they want to seek, then they should proceed against their own advocates.”

Consent Judgements, and the Advocate’s Ostensible Authority

The Court of Appeal had held in **Flora N. Wasike v. Destimo Wamboko** (1982 – 1988) KAR 625 that a *consent judgement* can only be set aside on the same grounds as would justify the setting aside of a contract, for example *fraud, mistake, or misrepresentation*. In **Kenya Commercial Bank Ltd. V. Specialized Engineering Company Ltd.** [1982] KLR 485 it had been held that the advocate acting for his client in arriving at a consent with the other party, is vested with *ostensible authority* so to act. In the words of the Court of Appeal which “adopted” the judgement of **Harris, J** in the High Court (p.486):

“We can see no reason for interfering with the learned Judge’s exercise of discretion in refusing to set aside the consent order of November 9, 1979, and we agree with him that [learned counsel], who appeared as the appellant’s advocate when that order was made, after obtaining a week’s adjournment in which to get instructions, had both implied and ostensible general authority in the circumstances of this case to bind his client in effecting the compromise. We order that this appeal be dismissed, with costs.”

Orders of Stay of Execution — Not Founded on

Taxation-of-Costs Regime

Mr. Nyamogo submitted that neither the plaintiff’s new suit, *HCCC No. 1142 of 2005* nor the

plaintiff's several *applications* ? all of which have the single object of *challenging the taxation of bill of costs made by consent*, on 16th September, 2004 – has a valid basis in law. Learned counsel urged that there could be no *stay* of the payment of costs, as they had been properly determined and a certificate of taxation had been duly issued. He urged that the temporary stay on execution which the plaintiff had enjoyed, had been *improperly obtained*, through non-disclosures before the Court. **Mr. Nyamogo** submitted that the plaintiff had sought stay of execution of the costs orders relying on the *Civil Procedure Rules*, but the same were inapplicable in respect of taxation of costs.

Learned counsel submitted that the defendant's instant application, by Notice of Motion of 31st October, 2005 cuts across all the plaintiff's motions and in particular the Notice of Motion of 20th September, 2004 by virtue of which orders of stay of the taxation orders had been secured – and that there was no basis for maintaining such orders of stay. The sum total, counsel urged, was that the plaintiff's several proceedings should be brought to a halt. Had the plaintiff a good case by the new suit and by its various motions, counsel submitted, *a preliminary objection* would have been brought in respect of the instant application.

D. A DUAL FRAMEWORK EXISTS IN LAW FOR DEALING WITH BILLS OF COSTS – SUBMISSIONS FOR THE PLAINTIFF/RESPONDENT

In his submissions made on 13th February, 2006 **Mr. Lilan** for the plaintiff contended that the Advocates (Remuneration) Order was not the only framework for contesting a taxation matter. In learned counsel's words: "It is possible to challenge taxation orders through *action* or *applications* brought under the Civil Procedure Act and Rules." He gave as an example of situations in which taxation could be contested under the Civil Procedure Rules, consent reached between parties on bills of costs. He submitted that a consent operates like an *agreement*, and so, it was urged, its incidents can properly be addressed within the terms of the Civil Procedure Act (Cap. 21) and the rules made thereunder. On this point counsel further submitted that a Court which has recorded a consent – and this includes a taxing officer – "would become *functus officio*, and therefore paragraph 11 of the Advocates Remuneration Order would not apply." I would, however, have expected learned counsel to demonstrate this point with concrete argument and validating authority. He left it, regrettably, at the level of hypothesis – and this cannot provide any guidance in decision-making.

Mr. Lilan submitted that since the taxing officer had, on 16th September, 2004 only recorded the *consent* of the parties, she would have *no reasons* to give if a party were minded to prepare to lodge a challenge; and therefore rule 11 of the Advocates (Remuneration) Order would be inapplicable and this necessitated the filing of a *fresh suit* – hence HCCC No. 1142 of 2005.

Learned counsel relied on a decision of the High Court (**Azangalala, J**) for the proposition that taxation proceedings could be stayed: **The Board of Trustees, National Hospital Insurance Fund v. Kipkorir, Titoo & Kiara Advocates**, HCCC No. 154 of 2004. The learned Judge thus remarked:

"The merits or ...demerits of the plaintiff's allegations cannot be determined in this application. That will be left for the Judge who will try the action. I am however certain that the said allegations cannot be determined by the Deputy Registrar during taxation of the defendant's bill of costs. Which way then should my discretion be exercised? Should I let the taxation...proceed where the very basis of the bill of costs is being challenged or should I stay the taxation to await an adjudication over the complaints by the plaintiff? In my view the interests of justice lean in favour of granting a stay of taxation. The reason is that taxation determines the quantum payable. It does not address the issue of whether or not any fees has been earned. Taxation can therefore wait. The main adverse consequence is that the defendant will be delayed in realizing the fruits of its labour."

Mr. Lilan sought to rely upon the foregoing authority for the additional reason (apart from the staying of taxation) that it exemplifies the filing of a *separate suit*, where an earlier suit has been concluded.

Learned counsel urged that no sharp distinction is to be drawn between the High Court's jurisdiction

in civil matters, by virtue of the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules, and in the taxation of costs, by virtue of the Advocates Act (Cap. 16) and the Advocates (Remuneration) Order. In this regard counsel cited the ruling of *Azangalala, J* in *Ochieng, Onyango, Kibet and Ohaga Advocates v. Kenya Pipeline Company Limited*, High Court Misc. Appl. No. 507 of 2005 in which the learned Judge, in relation to the Court of Appeal decision in *Sharma v. Uhuru Highway Development Ltd* [2000] LL.R. 2404, thus observed:

“The Court of Appeal Judges were not united on this issue... “In my view therefore [the Sharma case] is not a clear authority for the proposition that an application such as the one under consideration is incompetent...”

Azangalala, J was, it was urged, of the view that an application could be brought under O. VI, rule 13 to strike out a bill of costs. And so, counsel submitted, it was in all respects proper to resort to the civil procedure rules when dealing with a taxation matter.

Stay Orders Be Maintained to Serve Transitional Cause

Between Two Suits

Mr. Lilan explained the basis of the stay orders on taxed costs in favour of the defendant, as justified by the fact that the plaintiff was going through a *transitional process*, from *High Ct. Misc. Application No. 995 of 2004 to HCCC No. 1142 of 2005*; he urged that “the Court still has a discretion to retain the orders which were obtained.”

Res Judicata?

Mr. Lilan submitted that the matters the subject of litigation in HCCC No. 1142 of 2005 are not *res judicata*: because for that concept to come to bear, it has to be shown that *the issues had been heard and determined*. Counsel urged that “the plaintiff’s claim for setting aside the bill-of-costs consent has never been determined on the merits; all previous attempts led to withdrawal, or were determined on preliminary points; merit has not been dealt with.”

Or was this an abuse of the appellate process? No, according to learned counsel: “We are only saying that a consent be *re-evaluated, varied, set aside*. This can only be done in a fresh suit; for a consent has the effect of a contract: *Flora N. Wasike v. Destimo Wamboko* (1982 – 88) KAR 625.”

Merits of New Suit?

Learned counsel contested the submission made for the defendant – that this Court do consider the *merits* of the new suit in *HCCC No. 1142 of 2005*. It was urged that such an assessment of merits ought to come *during the main hearing*. Since the defendant has filed replies to the plaintiff’s several motions, *Mr. Lilan* urged, “those should be given a chance to be tested at the various hearings.”

Mr. Lilan restated the essence of his client’s gravamen: there was no *authority for the advocate to record the consent*, and so the client could not be bound. He urged that “where the client comes up and disputes the authority of the advocate to reach a consent, the Court ought to look at the matter.” He went on to contend that the bargain embodied in the said consent was “oppressive, exorbitant...”

E. ANALYSIS OF PERTINENT ISSUES

Soon after the taxing officer, by virtue of the Advocates (Remuneration) Order, taxed the bill of costs in *H.C. Misc. Appl. No. 995 of 2004* the defendant in that cause (now the plaintiff) filed an application by

Notice of Motion under Order XLIV, rules 1 and 2 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap.21) dated 20th September, 2004. The prayers were that the taxation be (i) *reviewed and set aside*; (ii) *stayed in its execution*.

The record shows clearly, however, that the taxing officer had before her the attendance of *counsel on both sides*, and that nearly all the bill-of-costs items had been adopted by *consent*. The taxing officer's work was, hence, reduced to a bare formality. She completed her task, and duly issued a certificate which, as is trite law, therefore became *enforceable* and was *set for execution*. The beneficiary of that certificate, it may be stated, became in law, *entitled to the fruit of the judgement* in question. The said beneficiary could not, in those circumstances, become disentitled from the benefits of the taxation of costs, unless the certificate was altered or set aside. It is the general position in law that such a certificate of taxed costs could only be varied through a *reference to a Judge in Chambers*, by virtue of paragraph 11 of the Advocates (Remuneration) Orders.

The respondent herein did not follow the established procedure thus outlined. The respondent began challenging the taxation of costs (albeit indirectly) through the *Notice of Motion* of 20th September, 2004; then later filed a *Chamber Summons* as contemplated by the Advocates (Remuneration) Order; then *withdrew* it and replaced it with a *fresh suit*, HCCC No.1142 of 2005 as well as a new *Notice of Motion*. Somehow, during this period of hesitancy the respondent was able to secure a *stay of execution* of the taxed costs, even though the prescribed condition was not honoured, and so **Ibrahim, J.** on 31st March, 2005 granted the applicant leave to execute. In spite of this leave to execute, and despite the settled law that costs once taxed and certified may be executed (**Francis Kabaa v. Nancy Wambui and Jane Wanjiru**, Civil Appeal No. Nai. 298 of 1995), the respondent *has had* orders barring the applicant from execution of the taxed costs. Since the applicant's rights to execute on taxed costs are not, in law, to be doubted, it follows that it is not but for *weighty cause*, adjudged such by the Court, that such execution may be stayed; and such exceptional cause will be dependent on the special circumstances of a particular case. In this matter the respondent did not, with respect, place before me any material or submission which I would consider makes such special cause for orders restricting the applicant's right to execute for the duly-taxed costs.

As already remarked, the respondent herein has been *uncertain* as to whether its grievance about the taxation of the bill of costs ought to be pursued as a Chamber Summons *reference* by virtue of the Advocates (Remuneration) Order, or as a *motion* brought under the Civil Procedure Rules. Would this irresolution suggest want of serious purpose, in the respondent's several attempts to move the Court? Possibly. But I have to state that judicial time is a commodity in grim shortage; and so motions conceived frivolously are apt to be annulled, or refused, in exercise of the Court's discretion conferred by s.3A of the Civil Procedure Act (Cap. 21). This would operate against the respondent who has been able, by invoking a series of *motions*, to secure stay orders against execution by the applicant herein, of the taxed bill of costs.

It was urged for the respondent that case authority exists favouring challenge to taxation of costs by way of ordinary rules of civil procedure – rather than by way of the Advocates Act (Cap.16) and the Advocates (Remuneration) Order. The main authorities brought to my attention in this regard are decisions of this Court: **The Board of Trustees, National Hospital Insurance Fund v. Kipkorir, Titoo & Kiara Advocates**, HCCC No. 154 of 2004; and **Ochieng, Onyango, Kibet and Ohaga Advocates v. Kenya Pipeline Company Ltd**, H.C. Misc. Appl. No. 507 of 2005. The illuminating decisions in the two cases by my brother, **Azangalala, J** are, however, at variance with the well-focussed decision of **Ringera, J** (as he then was) in **Machira and Co. Advocates v. Magugu** [2002] 2 EA 428. In this latter case the learned Judge left no doubts at all that taxation of costs is the responsibility of the *taxing officer* whose decision is subject to challenge only within the terms of the Advocates Act (Cap.16) and the Advocates (Remuneration) Order. Although the Court of Appeal has adverted to this question in **M.G. Sharma v. Uhuru Highway Development Ltd.**, Civil Appeal No. 133 of 2000 not all the Judges in that case did commit themselves to the proposition that taxation of costs is subject exclusively or dominantly to the regime of the Advocates Act and the Advocates (Remuneration) Orders (two Judges, **Keiwua** and **Akiwumi, J.J.A.** were of that opinion).

In addition to the opinion I have already expressed on that issue, I would also draw inspiration from the opinion expressed by my brother, **Makhandia, J** in a judicial review matter: **Republic v. C. Lutta Kasamani t/a Kasamani & Co. Advocates ex parte United Insurance Co. Ltd**, Misc. Civ. Appl. No. 1047 of 2004: “...where an Act of Parliament confers special jurisdiction, [the] Civil Procedure Act and the rules made thereunder do not apply.” Although I would not go so far as opining that the Civil Procedure Act (Cap. 21) would not apply to taxation of costs, it is my view that the *primary avenue* for resolving grievances related to the taxation of costs is the Advocates Act (Cap.16) and the Advocates (Remuneration) Order. For it is that special legal regime that enables a party to move, in a *reference*, from the taxing officer to the Judge in Chambers; and the Judge is thereby empowered to refer a matter back to the taxing officer, or to vary the decision of the taxing officer; and it is by virtue of this *special regime* that an appeal on taxation of costs may be taken forward to the Court of Appeal. A legislative framework so comprehensive and so practice-oriented, could not have been established in vain; it ought to be regarded as the normal path where a party is aggrieved on bill-of-costs matters.

However, I would be mindful of the fact that taxation of costs comes at the conclusion of a normal process of hearing, conducted by virtue of the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules. There may, therefore, be taxation-of-costs matters which are so enmeshed in the motions of the trial process itself, that it would not be out of order to raise issues about them within the framework of normal civil procedure; and in any case, any meet directions on the hearing of suits and applications may be made by the Court, by virtue of the broad discretions created by the Constitution of Kenya and the Civil Procedure Act (Cap. 21).

Although the stay to execution of taxed costs which has been enjoyed by the respondent herein, ought to have been a matter belonging to the regime of the Advocates Act (Cap.16) and the Advocates (Remuneration) Order, the respondent maintains that what it is directly challenging is the *consent* (which led to the taxation of costs in respect of which objection is raised).

On the facts brought before me, both parties in the earlier suit *H.C. Misc. Appl. No. 995 of 2004*, had given their *free consent* to the taxation, acting through their *duly instructed counsel* who, as is to be assumed under the law, were vested with *implied* and *ostensible* authority (**Kenya Commercial Bank Ltd. V. Specialized Engineering Company Ltd** [1982] KLR 485). It is not possible in these circumstances, for the respondent to resile from the consent orders duly made by the taxing officer. I am aware that the respondent herein, on 20th September, 2005 filed suit to challenge the consent in respect of the said taxation of costs; and that the applicant herein has filed a statement of defence dated 15th November, 2005.

I would hold, however, that the respondent’s suit in *HCCC No. 1142 of 2005*, firstly, cannot change the basic law on taxation of costs which is embedded in the Advocates Act (Cap.16) and the Advocates (Remuneration) Order; secondly, that suit is not to be allowed to contradict the law on the *ostensible authority of advocates* to reach consents on behalf of their clients; thirdly, that suit is about *consent in general*, but is conceptually remote from the *bill of costs* as agreed and taxed by the taxing officer.

I also note that the stated grievance of the respondent, which includes possible unjust enrichment to the applicant if the bill of costs as taxed is executed, and the claims of public interest, can be easily redressed by *suit against the respondent’s advocates*. This, indeed, should be the respondent’s first recourse; and the attempt to stop execution of the taxed costs is, in my view, extravagant and borders on abuse of the regular process of the law. As was remarked by the Court of Appeal in **Francis Kabaa v. Nancy Wambui and Jane Wanjiru**, Civil Application No. Nai 298 of 1995, even were the respondent’s new suit (*HCCC No. 1142 of 2005*) to turn out in their favour and against the applicant herein, the fact that a refund of paid-up costs would be necessary is no reason in law to justify stay on execution of costs at this stage.

F. ORDERS

On these lines of reasoning and on the basis of my findings herein, I will now make orders as follows:

1. *that, the ex parte orders of 26th October, 2005 be and are hereby set aside;*
2. *that, the defendant/applicant's costs in this application shall be borne by the plaintiff/respondent.*

DATED and DELIVERED at Nairobi this 5th day of May, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For the Defendant/Applicant: Mr. Nyamogo, instructed by M/s. Nyamogo & Nyamogo Advocates

For the Plaintiff/Respondent: Mr. Lilan, instructed by M/s. Kipkenda, Lilan & Co. Advocates