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

Misc Appli 750 of 2004

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

AHMEDNASSIR, ABDIKADIR & CO. ADVOCATES……...............................……..APPLICANT

AND

NATIONAL BANK OF KENYA LTD……………………………..........................RESPONDENT

ARISING FROM

HIGH COURT CIVIL SUIT NO. 857 OF 2001 AT NAIROBI

CHEMAGRO LIMITED

HENRY OGOLA

MERAB APUNDI OGOLA…………………………………..........................……….PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA……………………......................………………..DEFENDANT

R U L I N G

The client has filed a reference to this court, emanating from the decision by the learned taxing officer which was delivered on 17th May 2005. The said reference was brought pursuant to the provisions of Rule 11(2) of the Advocates (Remuneration) Order.

When the client commenced its submissions, they drew the court's attention to the fact that there had been two preliminary objections which had been raised during the process of the taxation.

At that point in time, the respondent raised an objection to the applicant making any reference to the

interlocutory applications or objections which had been dealt with by the taxing officer. The main reason for the objection is that the applicant had not filed any affidavit in support of the reference, and that it is therefore not open to the client to adduce any evidence.

The advocate further submitted that it was not open to the client to refer to the ruling of the learned taxing officer, as that ruling was not an authority. The ruling was described as evidence of what had transpired before the taxing officer.

Furthermore, the advocate made the point that pursuant to Order 50 rule 7 of the Civil Procedure Rules, an applicant would be limited to only arguing on points of law, without reference to any documents which were not annexed to the application.

In further emphasis on the issue, the advocate submitted that the reference was an interlocutory application; and that that being the position, the only way for the client to adduce evidence, was by way of an affidavit.

The advocate also said that the only other way of adducing evidence was through direct evidence, in accordance with the Evidence Act.

To support his propositions the advocate cited the case of **KENTAINERS LIMITED Vs V. M. ASSANI & 4 OTHERS, HCCC NO. 1625 of 1996.** According to the advocate, that case held that when an applicant had failed to file an affidavit, such as in this case, the applicant could only adduce real evidence.

The advocate also cited the case of **INTERMART MANUFACTURERS LIMITED V. AKIBA BANK LIMITED & 2 OTHERS HCCC NO. 619 of 2003,** to demonstrate that the court ought to strike out an affidavit which was not based on direct evidence.

Finally, the advocate relied on the decision in **SHAH & PAREKH V APPOLO INSURANCE CO. LIMITED, HIGH COURT MISCELLANEOUS APPLICATION NO. 263 of 2003,** in which the court is said to have struck out a reference which was not supported with an affidavit.

In response to the objection, the client submitted that the Advocates Remuneration Order is a complete code unto itself; so that the provisions of the Civil Procedure Act, and the rules made thereunder were not applicable to references.

Rule 2 of The Advocates (Remuneration) Order stipulates that the Order would apply to the remuneration of an advocate of the High Court by his client, in contentious and non-contentious matters; the taxation as between party and party in contentious matters in the High Court, in the subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act and in a Tribunal established under the Rent Restriction Act.

I believe that by virtue of the said section, if the court was inquiring into issues of taxation between an advocate and his client, as in the present case, the court ought to derive guidance from the Remuneration Order. I understand that to mean that if there were any other statutory provisions, which would otherwise be applicable to procedures and matters generally before the court, such provisions would be inapplicable to issues of remuneration of advocates, if the said provisions were inconsistent with the Remuneration Order. However I believe that it would be wrong to completely exclude the application of all statutory provisions, to issues of remuneration, even though they were compatible with the Remuneration Order. For instance, Rule 11(4) of the Remuneration Order states that an application for enlargement of time, shall be by chamber summons.

The question might arise about the format of the chamber summons contemplated under that rule, and whereat the application ought to be heard.

In my view as there is no express or implied guidance in the Remuneration Order, it would be proper

to resort to the provisions of Order 50 rule 7 of the Civil Procedure Rules, as the same are not inconsistent with Rule 11(4) of the Remuneration Order.

However, I also believe that just because a statutory provision was not necessarily inconsistent with the Remuneration Order, that alone would not warrant its importation to circumstances in which the Remuneration Order was applicable. If that were permitted, it may result in the importation of matters which were not intended to be part of the Remuneration Order.

In effect, it is best that the Remuneration Order be applied to the matters falling within its jurisdiction, with such minimal "**importation"** as the court may determine to be not only consistent therewith, but also due to necessity to fill a void.

Rule 11 (2) of the Remuneration Order states that an objector shall file his reference "**by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."** There is absolutely no requirement that the reference be supported by an affidavit. Therefore, I am unable to discern wherefrom the advocate derived the obligation that an applicant must file an affidavit in support of his application under Rule 11 (2) of the Remuneration Order.

In my considered view, as the rule does not stipulate that requirement, it is not right for the advocate to insist that an affidavit be filed herein. To that extent, if Order 50 rule 7 of the Civil Procedure Rules were deemed to impose an obligation on an applicant to have his chamber summons accompanied with an affidavit in support thereof, it would not be right to import such a requirement into the provisions of the Remuneration Order. To do so, may not be inconsistent with the terms of the Remuneration Order, but the importation thereof into the rules promulgated under the Remuneration Order, would be to impose on applicants, obligations which they would otherwise not have. That, in my considered view would be wrong.

Before moving on from that point, I wish to state that in my view, Order 50 rule 7 of the Civil Procedure Rules does not, in any event, require an applicant to always file an affidavit in support of his application. The only mandatory requirement is to "**state in general terms the grounds of the application being made**." However, as regards affidavits, the rule makes it clear that:

"**where any summons is based on evidence by affidavit, a copy of the affidavit shall be served.**

By necessary implication, where the summons was not based on evidence by affidavit, there would be no obligation to serve an affidavit.

And whilst still on the issue, I found myself enable to accept the advocate's interpretation of the decision in **SHAH & PAREKH V APOLLO INSURANCE CO. LTD** (supra). In my understanding, the HON. A. VIRSRAM J. did not strike out the application because it was not supported by an affidavit. He also did not hold that an application made under Rule 11(2) of the Advocates Remuneration Order had to be supported by an affidavit. This is what he said:

"**The application is not supported by an affidavit – at least there is none on file, and the Ruling outlining the reasons of the taxing master's decision has not been annexed. This is mandatory.**

Without the benefit of those reasons, I cannot make a fair determination of this matter. Accordingly, I will strike out this application as being incompetently before this court, with costs to the Respondent."

In my understanding, the learned judge held that it was mandatory for an applicant to annexe the ruling outlining the reasons of the taxing master's decision. It is for that reason that he went on to hold that without the said ruling, the court could not make a fair determination of the matter.

Even if there had been an affidavit in support of the application, but no ruling by the taxing officer, it would have been impossible for the court to make a fair determination.

Meanwhile, the client says that it did not intend to call any evidence in this matter. Its position is that the matters which were being challenged were already on the court record, and that it did not have to annexe the same to an affidavit. The client submits that the court did not need any evidence, so as to be in a position to determine the reference. All that the court needs to do is to peruse the record, said the client.

But the advocate submits that the court cannot conduct an inquiry into its records. It is the advocates case that if Rule 11 of the Remuneration Order wished to have the court inquire into its records, the rule would have expressly said so.

To my mind, the rules do not always spell out everything that ought to be done, in every scenario. Therefore, the fact that something was not expressly stipulated did not mean that it could not be done. If that were the case, the advocate's own submissions, to the effect that the reference had to be supported by an affidavit, would fail, because there is no such stipulation.

Having given due consideration to this matter, I find that the accuracy of the legal pronouncements in the two cases of; **KENTAINERS LTD Vs V.M. ASSANI & 4 OTHERS**; as well as **INTERMART MANUFACTURERS LTD V. AKIBA BANK LTD & 2 OTHERS,** are accurate. Therefore, there is no doubt in my mind, that;

"……… **facts are to be proved only by the direct testimony of the witnesses' own perception, or by his testimony of the admissible hearsay statements comprehended by the above-mentioned provisions of law, or by real evidence. Order XVIII permits a court to allow proof of facts by affidavit subject to the stricture that the deponent may be called for cross-examination. Such an affidavit should contain only such facts as the deponent is able of his own knowledge to prove except in interlocutory matters where it is permissible to adduce evidence of information received and belief entertained, provided the sources are stated."**

The client also concedes that the foregoing legal pronouncement is correct.

Therefore, the only question that I must now answer is whether or not, the applicant was violating that legal position.

In my considered opinion, as there is no legal requirement for the applicant to file a supporting affidavit, this court would be wrong to fault it for not doing so. To the extent that the applicant has set out the grounds of its objection to the taxing officer's decision, there has been compliance with the provisions of Rule 11 (2) of the Remuneration Order. It would be wrong of me to impose an extra burden on the applicant, in that regard.

And by asking this court to peruse the record of the proceedings, which I would be required to do in any event, I do not think that the client could be faulted for adducing evidence.

Accordingly, I find no merit in the objection raised by the advocate. It is therefore overruled, with costs to the client. And, I direct that the application dated 9th September 2005 may proceed to substantive hearing on a date mutually convenient to the court and the parties herein.

Dated and Delivered at Nairobi this 27th day of June 2006.

FRED A. OCHIENG

JUDGE