

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

Misc Appli 999 of 2005

KAMUNYORI & COMPANY ADVOCATES.....APPLICANT

VERSUS

CANNON ASSURANCE (K) LIMITED.....RESPONDENT

RULING

The respondent to the bill of costs has brought a Notice of Motion brought under Section 51 (2), Rule 3 of The Advocates (Remuneration) Order.

The application seeks the setting aside the certificate of taxation dated 27th February 2006 and that the respondent be given an opportunity to be heard on the advocate client bill of costs dated 15th November 2005.

The application is supported by a short but to the point affidavit of Musembi Ndolo.

He deponed that he has the conduct of this matter on behalf of the Respondent. That on 18th January 2006 he received notice of taxation, which was a day after taxation, had taken place. That he had instructions from the Respondent to object to the bill of costs. In submissions counsel for the Respondent stated that the amount taxed was excessive.

The application was opposed by the applicant with the bill. He argued that the application is frivolous, scandalous, misconceived and incompetent. He stated that he served the notice of taxation through registered post, which was sent on 10th January 2006. That the respondent had six clear days from the date of postage to the date of taxation, that is 17th January 2006. That accordingly the Respondent had not been denied an opportunity to oppose the bill of costs. Applicant with the bill faulted the Respondent's application on the basis that it ought to have been brought under paragraph 11 of the Advocates (Remuneration) order.

I have considered the application before court and I have also considered the arguments of counsels. The Respondent on alleging that they did not receive the taxation notice within time, by registered post placed on themselves evidential burden of proof to prove that they received that notice on 18th January 2006, a day after taxation. It was not enough to simply state in the supporting affidavit that receipt was on that date. Having so placed themselves with that burden, the Respondent failed to satisfy it. On that score alone the Respondent's application fails.

The Applicants argument that the Respondent's application having been brought under the wrong provisions of the law must fail is not correct. I am of the view that such failure cannot defeat an application, the application would have to be such that what it seeks is incomprehensible or was to cause prejudice to the opposing party for the court to hold that it must fail.

The end of the matter is that the Respondent having failed to prove on a balance of probability that they received the taxation notice late, the Notice of Motion dated 14th March 2006, does and must fail. The same is dismissed with costs to the Applicant with the bill of costs.

MARY KASANGO

JUDGE

Dated and delivered this 8th June 2006.

MARY KASANGO

JUDGE