



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 202 of 2005

KERANDI MANDUKU & COMPANY.....APPLICANT

VERSUS

GATHECHA HOLDINGS LIMITED.....RESPONDENT

RULING

The application is brought pursuant to the provisions of Section 51 (2) of the Advocates Act, and paragraph 7 of the Advocates (Remuneration) Order.

The application arises from the taxation of an Advocate/Client Bill of Costs, whose decision was delivered on 26th August 2005. After the learned taxed officer had taxed the bill, a certificate of taxation was issued on 31st August 2005. According to the said certificate of taxation, the costs awarded to the applicant herein is in the sum of KShs. 4,618,963/=.

When prosecuting the application, the applicant notified the court that the certificate of costs had not been varied or set aside by the court. He also stated that there was no dispute as to retainer. Therefore, the applicant believes that they are entitled to summary judgement, in accordance with the provisions of Section 51(2) of the Advocates Act.

But the respondent holds a contrary view, as relates to the finality of the certificate of taxation. It is said that the applicant could only have become entitled to summary judgement, under Section 51(2) of the Advocates Act, if there had been no challenge to the certificate of taxation.

In the case of **MAMICHA & COMPANY ADVOCATES V KENYA KNITTING & WEAVING MILLS LTD, MILIMANI HCCC No. 469 of 2004**, the Hon. AZANGALALA J. said;

“This Section gives the Court the discretion to enter judgement where a suit has not been filed for recovery of costs due to an advocate. This discretion is, however, only exercisable where there is no dispute as to retainer and a certificate of the taxing officer has been issued and has not been challenged.”

In this case, the applicant concedes that on 30th August 2005, the respondent herein did write to the Deputy Registrar, seeking the reasons for the ruling of the learned taxing officer.

The applicant however points out that the respondent had failed to pursue the Deputy Registrar, for the purposes of obtaining the reasons for the taxing officer’s decisions. It is said that the respondent has been

indolent, and cannot therefore expect that justice will come to his aid, whilst he sits on his rights.

The applicant said that it has been one whole year since the respondent asked for the taxing officer's reasons, yet there was no evidence that the respondent had made any follow-up.

Of course, if a party does not take an active interest in pursuing his legal rights, there is a very real risk that the court may decline to come to his aid. Therefore any party who files either a Notice of Appeal or gives a notice pursuant to the provisions of Rule 11(1) of the Advocates (Remuneration) Order is well advised to send reminders to the court for requisite documentation which is necessary to enable the party take the next step.

In this case, although there is no evidence that the respondent had sent any reminders to the Deputy Registrar for about eleven months, there is a letter from the Deputy Registrar dated 25th January 2006, promising that the respondent would be notified as soon as the reasons sought are ready. That letter is copied to the applicant's advocates. Therefore, the applicant is deemed to be aware that just about two months before they brought this application, the Deputy Registrar had promised to notify the respondent as soon as the reasons were provided by the taxing officer. In the light of that development, I hold the view that the applicant moved too soon, in seeking to get judgement, whilst, they were aware that the Deputy Registrar had just promised to provide the reasons for his decision.

The respondent also drew the court's attention to the fact that the learned taxing officer, Mr. Kaikai, had since left the Judiciary. That information, which was provided from the bar, was not challenged by the applicant. I therefore accept it as being factually correct. And if that be the position, there is a high probability of further delay in the provision of the reasons, for which the parties herein cannot be held responsible.

In the circumstances, it would be wrong to fault the respondent for the delay in filing a reference, whereas it is well known that it could not do so until and unless the taxing officer provides reasons for the decision which the respondent wishes to challenge.

On the other hand, it is equally prejudicial to the applicant to expect them to indefinitely withhold action intended to convert the certificate of taxation into a judgement, which could thereafter be executed.

In the circumstances prevailing, I hold that the respondent has demonstrated a desire to challenge the certificate of taxation. That desire has not materialised into a reference because the taxing officer has not yet provided the respondent with his reasons for the decision he arrived at. To my mind, those circumstances, for now, dispel the presumption of finality as to the certificate of taxation, even though the certificate itself has not been varied or set aside by the court. For that reason alone, I decline to grant judgement in favour of the applicant, as it may ultimately turn out that such action was premature.

The Notice of Motion dated 31st August 2005 is hereby struck out. However, the costs thereof shall be in the cause.

Finally, the two parties herein need to give careful consideration to their respective positions, in the light of the fact that the taxing officer is no longer in the judiciary. Obviously, nobody else can give reasons on behalf of the said taxing officer. At the same time, there might be serious implications were he to give reasons after he had ceased to be a judicial officer.

This is the kind of scenario that I have never come across ever before. It may therefore become an opportunity to the parties herein to give rise to emerging jurisprudence. The challenge is at their doorsteps. Will they pick up the gauntlet?

Dated and Delivered at Nairobi, this 25th day of October 2006.

FRED A. OCHIENG

JUDGE