

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS

Misc Civ Appli 162 of 2006

ORBIT CHEMICAL INDUSTRIES LIMITEDAPPLICANT

VERSUS

OTIENO-ODEK & COMPANY ADVOCATESRESPONDENT

RULING

The advocates Otieno Odek & company advocates had their bill of costs taxed on 21st July, 2006. The client came to court under certificate or urgency on 19th September 2006 seeking orders to temporary stay the ruling of that taxation and also to set aside the same. The advocates have pending before court an application for judgement to be entered for the taxed costs. When the matter appeared before court there was argument of which of the two applications should be proceed for hearing first. The court ordered that the application for stay and setting aside the taxation ruling be heard first. In that regard the advocate raised preliminary objection in the following terms:-

1. **THAT the applicant's said application contravenes the mandatory provisions of the Advocates (Remuneration) Amendment of 1997 of the Advocate's Act Cap 16 Laws of Kenya.**
2. **THAT Applicant's said application is an abuse of the court.**
3. **THAT the applicant's said application contravenes the mandatory provisions of the Civil Procedure Rules, and the Civil Procedure Act Cap 21 Laws of Kenya.**

In support of that preliminary objection the advocate argued that paragraph 11 of the Advocates (Remuneration) Order had not been complied in the client's application. He argued that the Advocates Act does not envisage the prayers that are sought by the present application and that further the Civil Procedure Rules cannot be evoked in the present application. He stated that under Order XXI Rule 22 of the Civil Procedure Rules, the court is granted power to stay execution of a decree. He stated that in this case there was no execution of a decree and as such this was an abuse of the court process. In regard to the client's amended chamber summons the advocate was of the view that it cannot lie under paragraph 11 of the Advocates (Remuneration) Order. The advocate was of the view that the client ought to have raised objection to the taxation and thereafter would have made an application to set aside the taxation. He therefore sought that the preliminary objection raised by the advocate would be upheld. In response the client stated that rule 11(1) and (2) provides for where a party objects to taxation. A party to objection is required to file a notice in that regard. That the advocates Act is silent whether such an application or objection would operate as a stay of execution or whether one would have to fall back on Civil Procedure Rules to obtain stay. He was therefore of the view that the preliminary objection raised by the advocate should fail and that the client should be allowed to proceed with this application.

I have considered the argument before me. It is correct that the Advocates Act does not provide for stay of taxed costs. That being the case this court ought not to grant such a stay. I am however, of the view that a party should immediately raise an objection as provided as under paragraph 11 and also seek reasons for the ruling of the taxation. With such an application before court, the court may be persuaded to invoke its inherent power to grant stay of execution of the taxed costs which prayer will be alongside with the prayers seeking to set aside the ruling of the taxation. I am of the view that a party cannot invoke the Civil Procedure Act or Rules for indeed the Advocates Act is a complete Act in itself. I am of the

view that the preliminary objection raised by the Advocate has merits. But over and above that I have looked at the client's amended Chamber Summons dated 19th September, 2006. I have also looked at the proceedings of the court and I find that the client was not granted by this court when it appeared ex parte an order to amend its Chamber Summons. The client appeared ex parte before court on 19th September, 2006 with a Chamber Summons dated 18th September, 2006. Interim stay was not granted but inter partes hearing was fixed on 21st September, 2006. It does now seem that the client on its own motion amended the Chamber Summons dated 18th September, 2006 without leave. That would be contrary to Order VIA of the Civil Procedure Rules for the client was required to obtain leave of the court. A Chamber Summons is not a pleading that it can be amended without leave. This was clearly the finding of the Court of Appeal in the case of **Board of Governors, Nairobi School v Jackson Ileri Geta** in the following passage:-

“Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil procedure Act and rules and made there under. The use of the term “summons” in the definition of the term “pleading” must be read to mean “Originating summons” as that is “a manner...prescribed” for instituting suits”.

That being the case and since the client has brought itself within the ambit of the Civil Procedure Rules the amendment done by the client was in breach of the Civil Procedure Rules and that on its own would make the Amended Chamber Summons dated 19th September, 2006 to be invalid. For that reason and in view of the preliminary objections raised by the advocate, I would dismiss the amended Chamber Summons dated 19th September, 2006 which is dismissed with costs to the advocate.

MARY KASANGO

JUDGE

Dated and delivered this 19th October, 2006.

MARY KASANGO

JUDGE