REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COU

Misc Appli 69 of 2005

Muchagi Nduati & Co Advocates…….……APPLICANT

Versus

Kranga……...……RESPONDENT

RULING

The applicant / advocate following the taxation of this Advocate / client bill of costs filed a reference challenging taxation of various items.

One of the taxed items challenged was the instruction fees. The applicant had been based this item on the value disclosed in the affidavit sworn by the defendant, in HCCC NO 870 of 2002. The taxing master rejected reliance on the amount disclosed in that affidavit on the basis that the affidavit was not a pleading and proceeded to tax this item on the value disclosed in the plaint.

The application sought a reference under paragraph 11 of The Advocates (Remuneration) order on the ground that the taxing master was wrong in principle in placing reliance on the amount in the plaint, rather than relying on the amount disclosed in the affidavit or defence filed therein.

Part of the ruling on that reference is as follows:

"For our purpose pleadings would be the plaint and defence. The advocates submitted that the defence had the value of Kshs 4,808,748.45. I have perused the file in this matter and I was unable to find a copy of the defence to confirm the submissions of the advocate. The only pleading I was able to trace is the plaint and therein I confirmed that the subject matter is Kshs 1,753,119.75. I reject the advocate's submission that the figures in the replying affidavit can be used to determine the subject matter in view of the definition of pleadings herein before. The finding of the court therefore is that the taxing officer did not make an error of principle or otherwise in the taxation of item No. 1"

The applicant /advocate by the present application brought by way of chamber summons under Order 44 Rule 1 of the civil Procedure Rules and section 80 and 3A of the Civil Procedure Act seeks the review or settling aside of the ruling of the aforesaid reference.

The applicant has founded his application on the grounds that; there was in oversight where the applicant thought a copy of the defence head been attached as an annexture for the purpose of illustrating the actual value of the subject matter; the applicant thought that this file had been consolidated with HCCC NO 870 of 2002; it would be unjust if the contents of the defence forming part of the pleadings was not taken into account in adjudicating this matter and that there is sufficient reason to warrant a review.

The application is defeated by two fronts.

Firstly the Advocates (Remuneration) order does not envisage a review to be made in respect of a reference. Paragraph II (3) provides that by a decision of a judge they ought to appeal to the court of

appeal. There is no provision for review. The Advocates Act being a complete Act of parliament, the court cannot entertain the review sought under the Civil Procedure Act and Rules. On that ground the application will fail.

Secondly there are numerous authorities, which make it mandatory for a party who wishes to review an order to ensure that that order is extracted and once extracted it is attached to the application for review. The applicant failed to extract and to attached the extracted order to the application. On that basis too the application will fail.

The end result is that the chamber summons application dated 21st June 2006 is hereby dismissed with costs to the Respondent to the bill.

October 11, 2006

Kasango, J