



REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

MISC. APPL. NO. 741 OF 2004

KHAN & KATIKU ADVOCATE.....PLAINTIFF

VERSUS

CENTRAL ELECTRICAL INTERNATIONAL LTD.....DEFENDANTS

R U L I N G

The parties herein have sought directions on how to proceed with this matter. On 27th January, 2005 when the parties appeared before the taxing officer for taxation of the Advocates' bill of costs the Advocates raised objection to an affidavit sworn by one **JOHN NJAGI** and file don 10th December, 2004 in opposition to the Advocates' bill of costs. They wanted it expunged from the record. I have been told by the learned counsels appearing that that the preliminary objection was fully argued before the taxing officer, Mrs. Owino, who reserved her ruling to 3rd February, 2005. The taxing officer did not deliver her ruling as scheduled and further reserved it to 10th February, 2005. On that day she ruled that the issues raised in the preliminary objection ought to be raised before and be determined by a judge.

In the view of Mr. Masese, learned counsel for the Advocates, the matters deponed to in the challenged affidavit concern the issue whether or not there was a retainer which issue ought to be raised at the time of recovery of the taxed costs. It should not prevent the taxing officer from taxing the bill. On the other hand, the stand of Mr. Lwande, learned counsel for the Client, is that the issue of retainer will affect taxation of the instruction fee claimed in the bill of costs, it being the Client's stand that the Advocates acted without instructions in entering appearance and filing notice of admission in the suit, then instructions having been limited only to dealing with correspondence. Both learned counsels are, however, in agreement that the issues raised in the preliminary objection can be determined by the taxing officer under Rule 13A of the Advocates (Remuneration) Order. That rule provides;-

“13A. For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

It does appears that the taxing officer has wide powers and discretion under the abovequoted rule. But in my view that power and discretion must relate to the core business of the taxing officer, and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation. It is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a

situation may arise such as the present one, where the advocates instructions are only partly disputed. Here it is contended by the Client that the Advocates had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate's instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds.

I will therefore direct that the issue of the extent of the Advocate's instructions be first canvassed before and be decided by the court. Thereafter the taxation may proceed before the taxing officer with appropriate directions of the court regarding instruction fees. Order accordingly. There will be no order as to the costs of the proceedings leading to these present directions.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JUNE, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF JUNE, 2005.