



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION 81 OF 1999**

**IN THE MATTER OF: THE ADVOCATE ACT**

**AND**

**IN THE MATTER OF: THE TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT**

**M. G. SHARMA.....ADVOCATE/RESPONDENT**

**VERSUS**

**UHURU HIGHWAY DEVELOPMENT LIMITED .....CLIENT/APPLICANT**

**MATTERS ARISING IN HIGH COURT CIVIL CASE NO. 29 OF 1995**

**and**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL NO. 126 OF 1995**

**and**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL NO. 36 OF 1996**

**RULING**

This is an application brought by the client/applicant by way of Chamber Summons under Order VI Rule 13(1) of the Civil Procedure Rules, Section 3A of Cap.21 and Sections 48 and 49 of the Advocates Act (Cap.16) and all enabling provisions of the law. The client/applicant is seeking the following orders:-

- "1. That the Advocates/Respondents Misc. Civil Application No.81 of 1999 be struck off.*
- 2. That the Taxation proceedings be stayed pending the hearing and final determination of this application.*
- 3. That the Respondent be ordered to pay the costs of this application and costs incidental to this suit to the Applicant/client".*

This application is grounded on the following facts:-

*"(a) The suit discloses no reasonable cause of action as it was filed prematurely before compliance with the provisions of Section 48 of the Advocates Act Chapter 16, Laws of Kenya.*

*(b) It is mandatory for the Advocate/Respondent to commence such proceedings by way of Plaint before filing of the bill of costs, which he has failed to do.*

*(c) As no plaint was filed, there is strictly no suit before this Honourable Court.*

*(d) The bill of costs is an abuse of the process of the court.*

*(e) No such bill of costs was served upon the Applicant/Client one month before the commencement of these proceedings contrary to Section 48(1) of the Advocates Act.*

*(f) For the purposes of Order VI Rule 13(1), (b), (c) and (d) the Applicant shall rely on the annexed affidavit of MUKESH VAYA and other reasons to be adduced at the hearing hereof".*

The advocate/respondent filed Grounds of Opposition which were as follows:-

*"1. The application is null and void as it does not comply with the provisions of Order L. R (2), The Civil Procedure Act.*

*2. The said application is misconceived, incompetent, frivolous and an abuse of the process of the Court.*

*3. The applicant is trying to put a cart before the horse by insisting on the respondent to file a plaint when costs have not yet been ascertained by the Taxing Master of the court.*

*4. The respondent has complied with the provisions of Section 48 of the Advocates Act.*

*5. The respondent has followed the right and correct procedure in his endeavour to recover his costs from the Applicant".*

The background to this matter is that on 29<sup>th</sup> January, 1999 Mr. M.G. Sharma the advocate/respondent instituted costs recovery proceedings against Uhuru Highway Development Limited the client/applicant in respect of his instructions to represent in respect of the matters referred to in the heading of this ruling. Accordingly, Mr. Sharma filed Misc. Civil Case No. 81 of 1999. The only document filed on behalf of the advocate/respondent in the case was a detailed Bill of costs running into 63 pages in which costs and disbursements amount to Kshs.865,689,823/-.

When Misc. Civil Case No. 81 of 1999 was served on Mr. Mugambi Imanyara for the client/applicant, Mr. Imanyara in his letter dated 27<sup>th</sup> May, 1999 to Mr. Sharma stated:-

*"RE: MISC. CIVIL APPLICATION NO. 81 OF 1999 M.G. SHARMA ADVOCATE VS. UHURU HIGHWAY DEV. LTD.*

*"Reference is made to the above - captioned in which you served us on 12<sup>th</sup> May, 1999.*

*We have carefully studied your application on behalf of Uhuru Highway Development Ltd., and we have to inform you that the said application is utterly incompetent, premature, unprocedural and misconceived, having been filed contrary to Sections 48 and 49 of the Advocates Act Chapter 16 Laws of Kenya. Accordingly we shall very shortly serve you with an application for striking out the entire suit with costs unless you confirm within 5 days from the date hereof that you will withdraw the suit.*

*Further, we are instructed that following our client's instructions that you act for it in the*

*suits the subject matter of the above - captioned application, you failed to exercise due diligence and demonstrate professional competence in carrying out your instructions as a consequence of which far exceeds your purported bill of costs.*

*For instance, your framing of the suit named Kamlesh Mansukhlal Pattni as a defendant, yet he was your instructing client!*

*As you failed your client in your professional duty, we are seeking further instructions and shall very shortly revert to you on what action our client wants to take in this matter which please note. In the meantime, we have instructions to demand which we hereby do, your admission of liability for professional negligence whereafter the quantum of damages due to our client will follow. Please let us have your response within seven days from the date hereof".*

There was a quick and sharp response to the above as Mr. Sharma in his letter dated 4<sup>th</sup> June, 1999 addressed to M/s Mugambi Imanyara & Co., Advocate stated inter alia:-

"Dear Sir,

*Re: Misc. Application No. 81 of 1999*

*M. G. SHARMA VS UHURU HIGHWAY DEVELOPMENT LIMITED*

*I refer to your letter dated 27<sup>th</sup> May, 1999 received by me yesterday the contents of which are ridiculous and do not warrant any response from me. The allegation made in your letter under reference are baseless and absolutely devoid of truth. I did much more than duty demanded of me.*

*I never thought even for a moment that your client and my friend Mr. Kamlesh Pattni would turn out to be an ungrateful creature and would bite the very hand which helped him so much. I pay God to instil 'Sat Budhi ' in your client and he is at liberty to do anything he likes.*

*I sincerely hope that this matter can be amicably settled and resolved but the choice is with your client".*

Mr. Sharma felt wounded and, he of course, did not withdraw the Misc. Civil Application No. 81 of 1999. Mr. Imanyara then proceeded with the application to strike out as threatened in his letter of 27<sup>th</sup> May, 1999.

Reading the two letters cited above one would expect acrimonious arguments in court during the hearing of the application but that was not to be so. In fact, when the matter came up for hearing, the advocates (Mr. M.G Sharma and Mr. Khan on one side and Mr. Imanyara on the other) were very friendly. Credit goes to the long experienced advocates of this Court Mr. Sharma and Mr. Khan. We cannot forget Mr. Imanyara who exhibited maturity in handling this matter.

Let us now come to the merits of the application before the court. This is the Chamber Summons filed by Mr. Imanyara seeking striking out of the Misc. Application No. 81 of 1999. The thrust of that Chamber Summons application is that Misc. Application No. 81 of 1999 ought to be struck out on the ground that it did not comply with Section 48 of the Advocates Act. Mr. Imanyara argued that Section 48 of the Advocates Act makes it mandatory for an advocate to first serve a duly signed bill of costs on the client at least 30 days before the commencement of any proceedings It was Mr. Imanyara's contention that the client (applicant had not been served with such bill of costs.

Section 48 of the Advocates Act states as follows:-

*"(1) Subject to this act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized*

*form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court's jurisdiction, in which event action may be commenced before expiry of the period of one month.*

*2. Subject to subsection (1) a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction".*

In his submissions Mr. Imanyara contended that no bill of costs had been submitted by the advocate to his client before the commencement of recovery proceedings as is required by Section 48 of the Advocates Act.

In his affidavit sworn on 17<sup>th</sup> November, 1999 Mr. Sharma goes to some length to show what efforts were made to serve the client applicant first with a block bill of costs and later with a copy of the bill of costs dated 6<sup>th</sup> January, 1999 and filed on 29<sup>th</sup> January. His statements are supported by affidavits of service sworn on 20<sup>th</sup> April, 1999 by one Vincent Achoki a process server and by one Richard Miheso a court clerk employed by Mr. Sharma sworn on 17<sup>th</sup> November, 1999.

Mr. Sharma states in his affidavit that before the filing of the Bill of Costs dated 6<sup>th</sup> January, 1999 he had prepared a block bill dated 18<sup>th</sup> December, 1997 and that the same was sent by registered post to the client/applicant's last known address but was returned to him unclaimed. He further states that his court clerk Mr. Miheso delivered the block bill to the client/applicant on 18<sup>th</sup> December, 1997 through the delivery book dated 18<sup>th</sup> December, 1997 and exhibits the relevant page of the said delivery book.

With reference to the service of the itemised Bill of Costs dated 6<sup>th</sup> January, 1999 it should be pointed out that all attempts to serve this document occurred well after the said bill had been filed on 29<sup>th</sup> January, 1999 and consequently did not comply with the provisions of Section 48(1) of the Advocates Act.

Mr. Imanyara submitted that it was mandatory for the advocate/respondent to commence proceedings by way of plaint before filing his bill of costs and that as no plaint had been filed there was no suit before the court. Mr. Sharma found this to be a very startling proposition as in his view Mr. Imanyara was not only wrong but rather digging his own grave and in any case what Mr. Sharma had done by filing Misc. Application No. 81 of 1999 was in accordance with Rule 13 of the Remuneration Order. Mr. Imanyara contends that the provisions of Section 48 are clear and unambiguous and hence in his view recovery of costs can only be commenced by way of a plaint. Even Mr. Sharma conceded that he had not filed a plaint.

In this matter, Mr. Sharma contends that Rule 13 of the Advocate (Remuneration) Order allows him to proceed the way he did while Mr. Imanyara contend that what Mr. Sharma did was not in compliance with the provisions of Section 48 of the Advocates Act. From what is before me it is not in dispute that there is no plaint filed. Mr. Sharma by his own admission did not file a plaint.

Mr. Imanyara further contended that under Section 49 of the Act to which Mr. Sharma also referred, any doubt as to whether a plaint is a mandatory requisite for recovery of costs is cleared. Section 49 of Advocates Act provides:-

*"Where in the absence of an agreement for remuneration made by virtue of Section 45, a suit has been brought by an advocate for the recovery of any costs and a defence has been filed disputing the reasonableness or quantum thereof-*

*(a) no judgment shall be entered for the plaintiff except by consent until the costs have been taxed and certified by the taxing officer;*

*(b) unless the bill of costs on which the suit is based is fully itemized, the plaintiff shall file fully itemized bill of costs within fourteen days from the date of service of the defence or such further period as may be allowed by the court and shall serve a copy thereof on the defendant, and, if the total amount of such bill exceeds the amount sued for, the prayer of the plaintiff shall, subject to the court 's pecuniary jurisdiction be deemed to be increased accordingly and all consequential amendments to the pleadings may be made;*

*(c) no court or filing fee shall be payable on filing a bill of costs required by this Section, but, if thereby the amount for which judgment is prayed in the plaint is deemed to be increased under paragraph (b) the plaintiff shall pay to the court such court or filing fee as may be appropriate to the increase; and*

*(d) At any time after the bill of costs has been filed and before the suit has been set down for hearing any party to the action may take out a summons for directions as to whether such bill should be taxed by the taxing officer before the suit is heard".*

Taking the two sections (48 and 49) together, it is obvious that any suit brought by an advocate for the recovery of costs against a client must be by way of a plaint. A client has the right to file a defence disputing quantum or reasonableness thereof. On the question of reasonableness, the client may wish to claim either that he has already paid the costs, or that as in this case, the advocate claiming his costs was negligent in the conduct of the case for which he claims payment.

It therefore, follows that it is only after the defence has been filed that an advocate can file his bill of costs in the suit. It is only thereafter that an advocate can take out a Summons for Directions as to whether his bill of costs should be taxed before the suit is heard.

Mr. Sharma relied on Rule 13 of the Advocates (Remuneration) Order made under Section 48 of the Act. In case of any inconsistency between the order and the Act, the provisions of the Act will prevail. To emphasize this point, I can do no more but cite the case of Emmanuel Karisa Maltha vs. Said Hemed Said & Kotham Nyange - Civil Appeal No. 292 of 1998 (unreported) in which Gicheru JA had the following to say:-

*"At page 302 of the 9<sup>th</sup> Ed. of the Construction of Deeds and Statutes by Sir Charles E Odgers, it is stipulated as follows in connection with interpretation of delegated legislation and in particular the rules made under an Act of Parliament:-*

*"Rules must be read together with their relevant Act; they cannot repeal or contradict express provisions in the Act from which they derive their authority"*

*"If the Act is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act". Where an Act passed subsequently to the making of the rules, inconsistent with them, the Act must prevail with them unless it was clearly passed with a different object and then the two will stand together".*

Taking into account the provisions of Sections 48 and 49 of the Act, it is clear that before any bill of costs is filed by an advocate he or she must first file a plaint against his or her client. The client then has an opportunity to file a defence and it is only after the filing of a defence that directions may be sought from the court whether the bill of costs may be filed before the determination of the suit. In the event that directions are given for the filing of the bill of costs either before or after the determination of the suit then the provisions or Rule 13 of the Advocates (Remuneration) Order come into effect in that they set out the procedure and manner of the taxation. Rule 13 does not and cannot stand alone.

It should be emphasized here that Section 49 (a) of the Act provides that no judgment shall be entered for the plaintiff except by consent until the costs have been taxed and certified by the Taxing Officer. The word until presupposes that the plaint has been filed before a taxed bill in existence otherwise, the Act would have used the word "unless" if there were circumstances in which an advocate could get his bill of

costs in any other way than by strict adherence to Sections 48 and 49 of the Act Subsection (c) was clearly intended to allay any fears that the filing fees would be an obstacle to following this procedure by way of plaint, and hence makes the provision that no filing or court fees are payable. It goes further, m that it only penalises an advocate by demanding payment of filing and court fees in the event that there is an increase between say a block bill on which the plaint may be founded and an itemized bill which may be substantially higher than what was originally claimed in the plaint.

Having considered the submissions made and particularly the provisions of Sections 48 and 49 of the Advocates Act, I am satisfied that as Mr. Sharma did not comply with these mandatory provisions of Advocates Act and hence Misc. App. No. 81 of 1999 was certainly brought to court prematurely. It, therefore, follows that the advocates/respondent's Misc. Application 81 of 1999 is hereby struck off. It is further ordered that the advocate/respondent do pay the costs of this application to the client/applicant. Order accordingly.

Delivered and dated at Nairobi this 19<sup>th</sup> day of May, 2000.

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**