



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
Civil Suit 542 of 2000**

**BETH WANJIRU MULINGE.....PLAINTIFF**

**VERSUS**

**JAMES MUTONGA MULINGE .....DEFENDANT**

**R U L I N G**

This is a reference against the decision of the Taxing Master Hon. Mr. H. Njiru, under the provisions of paragraph 11(2) of the Advocates Remuneration Order in respect of Advocate/Client Bill of Costs dated 12<sup>th</sup> February 2003. The reference is dated 1<sup>st</sup> September 2003.

At the hearing before me, I perused the Ruling being challenged by the defendant and noticed that in response to a Preliminary Objection on a point of Law raised by the plaintiff, the Taxing Master stated as follows:

“.....

**Finally, I believe that it is my duty to point out that the application was brought before the Court unprocedurally. The same ought to have been brought under separate Miscellaneous Application under the provisions of the Advocate (Remuneration) order. The present application has been filed in the main suit between the Respondent (Defendant) and his wife the plaintiff who was not even a party to the taxation of this**

**bill. The bill of costs is therefore mischievous and incompetent. See the Court of Appeal decision in the case of M. G. SHARMA V/S UHURU HIGHWAY DEVELOPMENTS LIMITED Civil Appeal No. 133/2000.**

**While I have the discretion i.e. inherent power as provided under Sections 3A Civil Procedure Act to strike out this Bill *suo motu*, I decline to do so for the sake of fairness and considering the fact that this issue was never raised. Orders accordingly.”**

In view of the import and ramifications of the said statement and decision I directed while the dismissal of the Preliminary Objection of law on this ground was not raised as a cross-reference or cross appeal, the question of *stare decisis* and precedent was important and *suo motu* ordered that it be decided as a preliminary point of law in the reference.

In the said Court of Appeal case, the court interpreted the interplay and application of Section 48 of the Advocates’ Act and Rules 13 (3(1) and (3) of the Advocate. Rule 13 (1), (2) and (3) of the Advocates’ (Remuneration) order provides that:-

**“13 (1) the taxing officer may tax costs as between advocate and client without any order for the**

**purpose upon application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer, shall give the advocate an opportunity to submit, an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.**

**(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.**

**(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.”**

Applying the said mandatory provision a Court of appeal unanimously held that the correct procedure for assessment or taxation of Advocate/client bill of costs was by way of a miscellaneous application under Rule 13 (3) of the Advocates (Remuneration) Order. However, one was obliged to file a plaint for recovery of costs under section 48 of the Advocates Act.”

Justice of Appeal Hon. Ole Keiuwa held:

“ .....

**I will now deal with the substantive arguments regarding the application to have the miscellaneous case struck out. The application was made on the ground that there was no cause of action disclosed in that the miscellaneous case had been brought prematurely without compliance with section 48 of the Advocates Act. That section, it was urged before the learned judge makes it mandatory that proceedings for the recovery of costs by an advocate from a client must be by plaint. The learned judge upheld the respondent’s contention that the miscellaneous case had been filed prematurely and struck it out. In his view, it was only by plaint filed pursuant to section 48, that an advocate may receive costs.**

**Arguments before us, centered on whether paragraph 13(3) of the Advocates (Remuneration) Order is in conflict with Section 48 of the Advocates’ Act. It appears to me that these two provisions cannot be in conflict. In so far as paragraph 13 (3) of the Advocates (Remuneration) order, made pursuant to section 44 of the Advocates’ Act is concerned, it deals with the subject of taxation of costs while section 48 of the Act is concerned with the recovery of costs and that much is quite clear from the marginal note to that section which is “action for recovery of costs” while the marginal notes to section 44 of the Act and that to paragraph 13 of the said order are respectively:**

**“Chief Justice may make orders prescribing remuneration and Taxation of costs as between advocate and client on application of either party.”**

In my judgment, the appellant having already approached the matter by means of a miscellaneous cases as authorized by paragraph 13 (3) of the Advocates (Remuneration) order, itself an off-shoot of section 44 of the Act, there was therefore no more legal obligations on the part of the appellant to comply with section 48.”

Justices of Appeal Gicheru (as he was then) and Akiwumi reached the same conclusion. The upshot of the said decision was that an advocate/client bill of costs can only be assessed or taxed by filing of a miscellaneous cause i.e. a separate proceeding from the one in which instructions was given and where the parties are litigating or have litigated.

It is absolutely certain that in fact the decision was only applying statutory provisions which are mandatory i.e. Rule 13(B) of the Advocates (Remuneration) Order. It was not one based on ratio *decidendi per se*. “but the interpretation and application of statutory or written law. “Ratio decidendi” has inter alia been defined in **HALSBURY’S LAWS OF ENGLAND 4<sup>TH</sup> EDITION VOLUME 26, PARAGRAPH 573.**

.....

**This underlying principle is called the ratio decidendi, namely the general reasons given for the decision or the general grounds upon which it is based, detached or obstructed from the specific peculiarities of the particular case which gives rise to the decision. What constitutes the binding precedent is the ratio decidendi and is almost always to be ascertained by analysis of the material facts of the case for judicial decision is often reached by a process of reasoning involving a major premises consisting of a pre-existing rule of law, either statutory or judgmental and a minor premise consisting of the material facts of the case under immediate consideration.”**

This shows that not only did the Taxing Master disregard the express provisions of the law but threw out through the window ratio decidendi of the Court of Appeal in the **UHURU HIGHWAY CASE**.

Applications of written or statutory provisions that are mandatory cannot be the subject of discretion. The court must apply written or statutory law as its core function and duty. Secondly, a court of law is bound by the doctrines of precedent and *stare decisis*. In the Kenyan context the Magistrates’ courts are bound to follow and apply the decisions of the High court. On its part the High court is bound and must follow and apply the decisions of the Court of Appeal. There is no two ways about

this. It is not a matter of discretion. The only exception is where the inferior court to the other is able to distinguish the facts when applying the law.

In the case of **MWAI KIBAKI –VS- DANIEL TOROITICH ARAP MOI & TWO OTHERS** Civil Appeal No. 172 of 1999 the Court of Appeal asserted:

- (i) That the High Court has no power to overrule the Court of Appeal.
- (ii) The High court has no jurisdiction to flout the first principles of precedent and *stare decisis* and
- (iii) That the High Court; while it has the right and indeed the duty to critically examine the decisions of this court must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that obiter dictum if applicable.”

The foregoing demonstrates the strictness of the principles of

precedent and *stare decisis*. If the High Court cannot do the aforesaid what can it be said of a Taxing Officer in a Taxation matter assessing costs?

The irony in this case is that the Taxing officer indeed held that

the application was brought to court before it “unprocedurally ... and the same ought to have been brought under separate miscellaneous application.” He went to say that the bill of costs was “...therefore mischievous and incompetent”. He correctly cited the Court of Appeal decision in **UHURU HIGHWAY CASE** and out of the blue delivers a thunderbolt that:-

**“... while I have the discretion i.e. inherent power as provided under section 3A of the Civil Procedure Act to strike out the Bill *Suo Motu*, I decline to do so for the sake of fairness and considering the fact that the issue was never raised.”**

First and foremost, the Respondent here had raised the issue as a Preliminary Objection on a point of law. That is why he was making a decision on it. Secondly it was not a matter of discretion either way, the Taxing Master was under a duty to strike out the incompetent application which he himself called “mischievous” and “unprocedurally” filed. The Taxing Officer could not deal with the matter *suo motu* since it was brought before him and he had to make a decision.

I do find that:-

1. The Taxing Master purported to over-rule the Court of appeal.
2. The Taxing Master flouted the first principles of precedent and the doctrine of *stare decisis*.
3. The Taxing Master had no jurisdiction to do so.
4. The Taxing Master acted without and/or in excess of its jurisdiction and powers.

Lord Hailsham of St. Marylebone L.C. in an appeal against the decision of Lord Denning in **BROOME – V- CASSEL & CO. LTD (1971) 2 ALL ER. 187**, - the Lord Chancellor in a rare dressing down of the eminent Lord Denning observed:-

**“The fact is and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifesting conflict, the decision in YOUNG –V- BRISTOL AEROPLANCE CO. LTD offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom ...”**

In the present case, there was no conflict of decisions but is a case of astounding assumption of jurisdiction not donated or conferred by the law.

In exercise of this courts inherent jurisdiction and supervisory powers under section 65 of the Constitution I do hereby:-

- 1) Dismiss the Appeal/Reference herein with no order as to costs.
- 2) Set aside the taxation and Ruling Delivered on 6<sup>th</sup> March 2003.
- 3) Strike out the Amended Advocate/Client Bill of Costs amended on 12<sup>th</sup> February, 2003 with costs to the Respondent/Defendant.
- 4) Grant leave to the Applicant/Advocate to file his Advocate/Client Bill of Costs in a Miscellaneous Cause in terms of Rule 13(1) (2) and (3) of the Advocates (Remuneration) Order.

**Dated and delivered at Mombasa on this 1<sup>st</sup> day of October 2009.**

**M. K. IBRAHIM**

**J U D G E**