



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA Miscellaneous Civil Application 80 of 2009**

**IPAPU P. JACKAH & CO. ADVOCATES.....APPLICANT**

**~VRS~**

**CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT**

**IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER**

**AND**

**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**IN THE MATTER OF LEASE NO.SOUTH TESO/ANGOROM/1615**

**RULING**

This is a ruling on the Defendant's application dated 6<sup>th</sup> July 2009 brought under Order 50 Rule 1 of the Civil Procedure Rules, section 48 and 51 of the Advocates Act, paragraph 11 (4) of the Advocates Remuneration Order and section 3A of the Civil Procedure Act and Inherent Powers of the court.

The application has the following prayers:

- 1. The final judgment and/or decree entered against the Respondent herein on or about 19.6.2009 be set aside ex debito justitiae;*
- 2. The certificate of taxation issued herein by which the advocate/client bill of costs dated 20.5.2009 be set aside.*
- 3. Alternatively, the time within which the respondent may give notice for the taxing officer of its objection to the decision on the taxation be enlarged.*

The grounds in support of the application are that the firm of Ipapu & Jackah Advocates who are hereinafter referred to as the Respondents for purposes of this application has caused proclamation of the goods of the Applicant/Bank – Co-operative Bank of Kenya on 19<sup>th</sup> June 2009 for recovery of costs on taxation. The deponent of the supporting affidavit is the Legal Officer of the bank. According to him the notice of taxation was served on the Busia Branch Officer on 21<sup>st</sup> May 2009 and forwarded to the Head Office. The summons were not received by the Head Office and thus the failure to instruct their lawyer in this matter. The bank did not participate in the taxation for that reason. It is denied that, the advocate's

firm rendered any professional services to the Bank. The only thing the advocate's firm did was to attest to the lease.

The taxation was opposed on grounds that it did not comply with the law. The advocate acted for the estate of the late Said Ahmed Ali. The subject lease was prepared by the deponent and not the advocate's firm. There was a clause no.2 (ff) which specifically indicated that the advocate's firm was not to be paid by the bank.

It is also contended that it was irregular for the Deputy Registrar to enter a final judgment based on the request for judgment filed by the advocate. Judgment was entered in default of appearance for Ksh.237,750/=.

The application was opposed by the Advocates/Respondent's firm relying grounds of opposition filed on 30<sup>th</sup> September, 2009 and dated the same day.

Mr. Ipapu for the Respondent took the court through the grounds. He submitted that the application is incurably defective. Being an application for setting aside orders, ought to have been brought under Order IX A rule 10 of the Civil Procedure Rules. The other provisions used by the Applicant/Bank are Order 50 rule 1 which provides that the application be ought to be brought by way of chamber summons and not notice of motion. It is only where the procedure is not stated that notice of motion is used. The counsel took issue with the service in respect of which he said was not denied. Judgment was entered by the court after it was satisfied as to service. The lease clause 2 stipulates that the advocates were to be indemnified by the bank of all the expenses incurred.

I will first deal with the provisions of the law under which the application is brought. Order L rule 1 of the Civil Procedure Rules relates to all applications. It provides that all applications shall be by Notice of Motion except where it is expressly provided. Order XXI deals with execution of decrees. It was argued by Mr. Ipapu that it was relevant under which the Applicant's application should have been brought. The order provides that all applications be brought by way of chamber summons. The Applicant also uses section 48 and 51 of the Advocates Act which deals with taxation of advocate - clients costs.

The Applicant chose Order L rule 1 as his main rule for presenting his application. I agree with Mr. Ipapu that Order IX A rule 10 which deals with setting aside *ex parte* judgment would have been the most appropriate legal provision. The reason is because the Deputy Registrar purported to enter interlocutory judgment on request. The order provides that all applications under that order be brought in way of chamber summons. Does this omission to use Order IX A make the application fatally defective? The applicant relies also on section 48 and 51 of the Advocates Act. These sections are relevant to the subject of taxation but do not provide for any procedure. This may have influenced the Applicant to use Order L rule 1 which provided the basis for using a notice of motion. The Applicant has used other relevant provisions under the Advocates Act but omitted to use Order XI A for purposes of the prayer of setting aside judgment. In my view, this omission does not make the application fatally defective for the reason that this court is more concerned with the contents more than the form of the application.

The Applicant's Branch Manager was served with the taxation notice on 21<sup>st</sup> May 2009 which fact is not disputed. The explanation given for failure to attend taxation is that the notice was sent to the Head Office for action but was never received. Due to this communication failure which is not deliberate, the Applicant prays to be allowed the orders sought. The Head of Legal Services depones that he would have taken the necessary action had he received the said notice. The bill of costs involved is quite a substantial amount which the Applicant Bank would be required to pay the firm of advocates if the orders herein are not granted. This is a matter that the Bank would not have left to chance and I am persuaded that the failure to attend the taxation of the bill by the bank was not deliberate. By such non-attendance, the Applicant Bank would suffer the consequences which were in the knowledge of the deponent of the supporting affidavit given his legal background. I find the explanation plausible in the circumstances.

Each of the parties cited clause 2 of the lease agreement on who was to meet the expenses of the lease agreement. The Bank denies that it ever hired the Respondent's firm of advocates to represent them. It

was averred that the advocate represented the administrators of the deceased's estate who were the proposed land lord. The bank was the proposed tenant in the subject premises upon which the lease was founded. It is contended that it was the estate of deceased which was to pay the legal fees of Ipapu Jackah & Co. Advocates because they hired them. Mr. Ipapu argues that the bank was to indemnify the advocates for any expenses incurred.

Clause 2 (ff) is the relevant clause which provides that the tenant shall pay all costs in connection with the preparation and completion of this lease and a counter part excluding the landlord advocate's costs. The Bank (tenant) avers that the lease was drawn by their Head of Legal Services and sent to the landlord for revision of conditions. The administrator S. A. Ali of P. O. Box 40, Busia (K) sent it back to the Bank's Head Office on 22<sup>nd</sup> May 2008. The last paragraph of the forwarding letter requests the Bank to prepare the final draft of the lease and send to the administrator for signature. This annexure confirms the Applicant's contention that its Head Office drafted the lease and sent it direct to the administrator. The Bank sent no communication to Ipapu Jackah and Company to do any work for them. If it had done so, some documentary evidence would have been availed. It appears that this firm acted for the landlord. The lease agreement does not contain any clause that the bank will indemnify the lawyers of the landlord. Clause 2 (ff) actually excludes any payment to the landlords lawyers. I do not know which clause Mr. Ipapu was reading when he submitted that the bank was to indemnify his firm.

The Respondent's firm filed only grounds of opposition which dwelt on the procedure of moving the court used by the Applicants. It would be expected that the weighty issues raised in the supporting affidavit would be answered in a replying affidavit.

The bill of costs filed in court and in respect of which interlocutory judgment was entered has no supporting documents for appointment of the Respondent's firm to act for the bank. This being the position, such a bill has no legal basis. The entry of interlocutory judgment in a bill of costs by the Deputy Registrar is also unprocedural rendering such judgment *void ab initio*. Any consequential orders for execution or any other matter related hereto are also void.

For the above reasons, I allow the application dated 6<sup>th</sup> July 2009 in terms of prayer 3, 4 and 6.

**F. N. MUCHEMI**

**JUDGE**

*Dated, Delivered and Signed at Busia*

*This 3<sup>rd</sup> day of November, 2009 in the presence of Mr. Ipapu for applicant and Mr. Okutta for Ochieng Ohanga for respondents.*