



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GICHERU, OMOLO & OWUOR, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 59 OF 1996**

**BETWEEN**

**E.A. BUILDING SOCIETY LIMITED .....APPELLANT**

**AND**

**A.C.A. D'SOUZA**

**ABDULSHAKOOR KHANDWALLA .....RESPONDENTS**

**(Appeal from the ruling and order of the High Court of Kenya at Mombasa (Mbogholi Msagha J)  
dated 17th February, 1995 in**

**H.C.C.C. NO. 155 OF 1994**

**CONSOLIDATED WITH H.C.C.C. NO. 156 OF 1994)**

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**RULING OF THE COURT**

This is an application to the full court under sub-rule (5) of Rule 109 of the Court's Rules from the decision of a single Judge (Shah, J.A.). On the 31st January, 1998, the learned single Judge made an order which, inter alia, awarded VAT at 15% to the bill of costs which had been taxed by a Deputy Registrar of the court at Mombasa at the total sum of Shs.15,635/=. That sum had been awarded to A.C.A. D'Souza and Abdulshakoor Khandwalla who had successfully opposed an appeal filed against them by E.A. Building Society Limited, who has now made this application before us. We shall hereinafter refer to E.A. Building Society Limited as the applicant and D'Souza and Khandwalla as the respondents. The respondents were dissatisfied with the sum of Shs.15,635/= awarded to them as costs by the Deputy Registrar and they made a reference to the single Judge pursuant to Rule 109 (2) of the Court's Rules. Rule 109 is to the following effect:-

**"109 (1)Any person who is dissatisfied with the decision of the Registrar in his capacity as a taxing officer may require any matter of law or principle to be referred to a Judge for his decision and the Judge shall determine the matter as the justice of the case may require. For the purpose of this sub-rule, any decision extending or refusing to extend time for the lodging of a bill of costs or any exercise by the Registrar of the overriding discretion given him by paragraph 12 of the Third Schedule shall be deemed to involve a matter of principle.**

**(2)Any person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate may require the bill to be referred to a Judge and the Judge shall have power to make such deduction or addition as will render the bill reasonable."**

Sub-rules (3), (4) and (5) are not in issue before us, except probably sub-rule (5) which provides that a party dissatisfied with the decision of a single Judge may apply to the court to vary, discharge or reverse the decision.

The reference to the single Judge was made under Rule 109 (2) of the Rules. We have set out the provisions of that subrule and that being the position what the learned single Judge was entitled to consider was whether the sum of Shs.15,635/= awarded by the Deputy Registrar was, "in all the circumstances, manifestly inadequate" as to warrant his (the single Judge's) interfering with it by making such addition as would render the bill reasonable. The learned Judge did in fact make such an addition. The respondents had claimed in their bill of costs the sum of Shs.50,000/= as fees for instructions to oppose the appeal which the applicant had filed against them. The Deputy Registrar had allowed only Shs.10,000/= on that head. The learned single Judge set aside the sum allowed by the Deputy Registrar and substituted it with a sum of Shs.20,000/=. The learned Judge was entitled to do this and no complaint was made before us on that aspect of the matter.

The complaint raised before us was in respect of the imposition of VAT at 15% on the sum awarded. The complaint, as we understand it, is this. Though the respondents had claimed VAT at 15% in paragraph 11 of their bill of costs and though the Deputy Registrar had wrongly thought that that claim was not contested, he (Deputy Registrar) had not actually imposed VAT at 15% on the total sum he awarded. Mr. Anjarwalla, for the respondents, told us that the Deputy Registrar did not in fact award it.

The learned Judge, however, purported to award it, despite the fact that the respondents had not made any cross-reference to the single Judge on that issue. Whether VAT is or is not awardable is a question of law or principle. As far as we are aware no law specifically says that VAT is to be automatically awarded on the taxed costs. Had the respondents intended to raise that issue before the learned Judge, their reference would have been made under Rule 109 (1) and the single Judge would have had to decide that issue as one of law or principle. But since the reference to the Judge was confined to Rule 109 (2), all the Judge was entitled to decide was whether the bill as taxed by the Deputy Registrar was, "in all the circumstances manifestly inadequate" . The learned Judge decided in his ruling that VAT was payable, but we think he was not entitled to resolve that issue as it was not properly raised before him. We have said before that the powers exercised by a single Judge on an application such as this one are exercised on behalf of the court and the full court is not entitled to interfere with such exercise unless it be shown that the single Judge took into account an irrelevant fact, or failed to take into account a relevant fact, or that he misapprehended the law on some point - see for example ***SAMAKI INDUSTRIES (NAIROBI) LTD VS SAMAKI INDUSTRIES (K) LTD CIVIL APPLICATION NO. NAI 260 OF 1996 (98/96UR) [Unreported]*** . We think the learned single Judge here decided a matter which he was not required to decide and that must amount to either taking into account an irrelevant point or failing to take into account a relevant point. Whatever may be the correct view, that entitles us to interfere with the decision of the single Judge. We accordingly reverse his finding with respect to the imposition of 15% VAT on the taxed costs. We wish to make it abundantly clear that we are not saying that VAT is not payable on the taxed costs; nor are we saying that it is payable.

That issue must await a decision on another occasion when it is properly raised before the court. What we are saying is that in this particular application, the learned single Judge was not entitled to determine the issue as it was not validly raised before him. Our final order shall be that the application made to the full court under Rule 109 (5) of the Court's Rules is allowed and the order of the single Judge imposing VAT at 15% on the taxed costs is set aside. We award the costs of the application to the applicant.

**Dated and delivered at Nairobi this 28th day of August, 1998.**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**