REPUBLIC OF KENYA

COURT OF APPEAL AT KISUMU

CIVIL APPEAL 35 OF 2007

GEORGE ARUNGA SINO T/A JONE BROOKS CONS ULTANTS LIMITED.....APPELLANT

AND

PATRICK J.O. & GEOFREY D.O. YOGO T/A ATIENO, YOGO & CO. ADVOCATES.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Warsame, J) dated 22nd November, 2006

in

H.C. MISC. APPL. NO. 150 OF 2006)

****

JUDGMENT OF THE COURT

We have before us an appeal dated 24th January, 2007 filed on 5th July, 2007, by ***GEORGE ARUNGA SINO T/A JONE BROOKS CONSULTANTS LIMITED*** (hereinafter referred to as the appellant) against ***PATRICK J. O. OTIENO AND GEOFFREY D. O. YOGO,*** both trading as ***OTIENO YOGO & COMPANY ADVOCATES*** (hereinafter referred to as the respondent). We also have a notice of cross appeal filed by the respondents against the appellants. As is the law, both were heard together and this judgment has considered grounds raised in both the memorandum of appeal and grounds of cross appeal.

The record shows that *George Arunga* who had practised as a licensed auctioneer since the year 1998 under the name of ***Jone Brooks Consultants Limited***alleged in an affidavit sworn in support of a notice of motion filed on 2nd August, 2006, that he had rendered services at Co-operative Bank of Kenya in his capacity as an auctioneer since 1999. He claimed to have received and executed various instructions from the same bank but for which he had not been paid. He also contended that the bank had directed him to identify and market subject properties prior to making any advertisements. As a result of the bank's failure to pay for his services, he had compiled bills due and that necessitated typesetting services at a further cost of Kshs.50,000/-. He instructed the respondent to apply to the court presumably under the Advocates (Remuneration) Order Party and Party Costs. We say "presumably" because, although the notice of motion filed to that effect dated, 16th August, 2005 and filed one year later on 2nd August, 2006 does not cite the provisions under which it was filed but it is clearly seeking the court to order that the appellant's costs against the respondent be taxed by the Deputy Registrar and that the amount found due after taxation be adopted as the judgment and decree of the court. Be that as it may, the respondent

prepared documents and the notice of motion we have alluded to above as **Miscellaneous Application No. 263 of 2005** was filed by them. However, thereafter, although the record is not clear, the respondent ceased acting for the appellant before that bill was taxed. In the bill, that was presented for taxation as against the bank; the appellant was seeking a sum in excess of Kshs.41 million.

Having been replaced by another advocate, the respondent naturally demanded advocates fees for the services that were already rendered to the appellant by the time they ceased acting for him. They could not agree on that and the respondent moved to the court for taxation of that bill which was an Advocate/Client Bill of Costs. Miscellaneous Application No. 91 of 2006 was filed by the respondents against the appellant. In that bill, the respondent claimed a total of Kshs.1,197,401,162/- of which Kshs.656,858/- was claimed as instructions fee for:

"Instructions to lodge a claim for recovery of the sum of Kshs.41,123,878.15 to looking up the law on the contract between the client as an auctioneer and its adversary being the revenue authority for the Republic of Kenya, the said authority's powers under the Act and to coming up with the strategy on the claim used generally considering the complexity of the matter and the attendant risks of reprisal by the authority."

As the other parts of the bill are not in dispute, we will not discuss them in this judgment.

The notice of motion filed by the respondent in that miscellaneous application (in some parts of the record referred to as Misc Suit No. 91 of 2006) was filed under ***Rule 13 (1), (2) and (3)*** of the Advocates Remuneration Orderand ***Order 1 rule 1*** of the Civil Procedure and it sought orders:

"1. That the Deputy Registrar be pleased to tax the costs as between the Applicant/Advocate and Respondent/Client arising out of the following case: KISUMU HC MISC.APPL NO 263 OF 2005 JOHN BROOKS CONSULTANTS LTD VS THE CO-OPERATIVE BANK OF KENYA LTD.

2. That the costs of this application be provided for."

The grounds that were advanced in supporting that application were:

"(i) That the applicants were instructed by the respondents upon which instructions they represented the client/respondent in the foregoing suit.

(ii) The client did withdraw and requested by the applicants for a fee note which the applicants/advocates have since forwarded for payment but the client/respondent has failed, refused and or neglected to pay hence this application.

(iii) That the applicants/advocates now seek the courts determination in the amounts payable in fees to enable it recover the same from the client/respondent and the leave of the court is mandatory to proceed to taxation."

That taxation proceeded before the Deputy Registrar (Mrs Mokaya) who after hearing both parties, in a ruling delivered the same day allowed the bill at Kshs.1,170,756/-. The appellant felt aggrieved and in a letter dated 6th July, 2006, addressed to the Deputy Registrar by his firm of advocates, Mwamu, Nyanga & Company, he sought reasons for taxing the bill at that amount. This was pursuant to Rule 11(1) of the Advocates (Remuneration) Order.

In that letter, the appellant sought to know how the figures of Kshs.656,858/- allowed as instructions fee and KShs.9,360/- allowed as the amount for drawing the application and bill of costs 312 folios were arrived at. In a letter dated 13th July, 2006, addressed to the appellant's advocates in response to their letter, the learned Senior Resident Magistrate stated and we quote:

"Your letter dated 6/7/02 refers. On item 1, the amount claimed in the notice of motion was Kshs.41,123,978 under schedule 6 (1) (b) which the applicant was entitled to claim was

KShs.6,090,000/-. However, since they asked for a lesser amount, I allowed it. Item 2 was allowed based on the folios.

The sum of KShs.5,190/- was subtracted form [sic] the amount payable, this was conceded and it was taken into account in the calculations.

After adding up all the items, the sub total comes to Kshs.675,523. A half of this sum is KShs.337,761.50 VAT at 16% adds to Kshs.162,125.52. Once these figures are added and KShs.5,190/- is subtracted the total sum comes to KShs.1,171,260.02."

On receipt of the reasons from the learned Senior Resident Magistrate, the appellant then moved to the High Court Judge pursuant to ***Rule 11(2)*** of the Advocates Rules by way of a reference before a certificate of costs dated 17th August, 2006, had been issued. He filed chamber summons dated 31st July, 2006. In that chamber summons he sought the following orders.

"1. That the honourable Judge be pleased to set aside the Deputy Registrar Ruling on assessment of Advocates fees payable delivered on 4th July, 2006.

2. That the Honourable court be pleased to refer the matter back to the Deputy Registrar with directions on proper manner of assessment of advocates fees.

3. By way of an alternative, this Honourable court be pleased to tax the costs in accordance with the law.

4. Costs of the reference be awarded to the applicant."

That chamber summons was premised on grounds that the learned Deputy Registrar did not appreciate the applicable law under which the assessment should have been based in view of the nature of the transaction which was a matter of taxing a bill of costs between an auctioneer and an advocate; that as the learned Deputy Registrar had committed errors in the applicable principle, the High Court was entitled to interfere with her exercise of discretion and to set aside the result of that taxation. The appellant cited other complaints in addition to what we have stated herein but which we feel would make little impact on our decision much as we have considered them as well.

The chamber summons was heard by *Warsame J*. who, after full hearing, in a ruling delivered on 22nd November, 2006 set aside the amount allowed by the Deputy Registrar and substituted it with the amount of Kshs.300,000/=. In doing so, he addressed himself thus:-

"The court must take into consideration that the bill is still pending for taxation. And that the amount is still subject to proof and determination by the discretion of the court. However, it must be borne in mind that there must have been research put in place into the success of the claim. That research, drawing of the bill and preparation must have been enornous. In any case the reward of a brief is usually based on the amount of work involved in preparing for the hearing, the difficulty and importance of the case and the amount involved. I have already discounted many of these issues in this decision but it suffices to say that the respondent must get some fees for the work done.

After weighing all these considerations, in particular the time involved and/or expended in drawing the bill of the auctioneer, the amount appropriate is Kshs.300,000/= under instruction fees. Since the other items were not contested, I make no decision but allow them. In consequence the decision of the taxing master is set aside on the issue of instruction fees and substituted with a figure of Kshs.300,000/=. Each party to shoulder its own costs."

That is the decision that attracted the appeal before us and the cross appeal. The appellant challenges the decision on three grounds in the main grounds of appeal and on six grounds in the supplementary ground of appeal. The grounds in the main grounds of appeal are:-

"(1) The learned Judge erred by exceeding his jurisdiction to tax the bill yet he had no power on taxation as the same rests with the Deputy Registrar.

(2) The learned Judge erred by awarding excessive amount in the instruction fee even when he had no jurisdiction to do so and his figure was simply plucked off from the air.

(3) The learned Judge erred in law and fact by wrongly exercising his discretion by failing to remit the matter to the Deputy Registrar for retaxation as required by the law."

Those in the supplementary grounds are:-

(1) ***The learned Superior High Court Judge (sic) erred in law in failing to realize that the original application giving rise to the reference was by Jone Brooks Consultants limited ~Vs~Co-operative Bank of Kenya (Misc. Application No. 263 of 2005) and not George Arunga Sino T/a Jone Brooks Consultants Limited ~Vs~ Co-operative Bank.***

(2) ***That the learned trial Judge failed to analyze the evidence and realize that Jone Brooks Consultants Limited had no capacity to trade in auctioneering business being a limited liability company and hence was incapable of being sued as such and in trading in auctioneering business.***

(3) ***That the learned Superior Court Judge erred in law in failing to find that the application filed by the respondent for taxation before theSuperior Court was actually a nullity ab initio.***

(4) ***That the learned trial Judge had no jurisdiction to make a finding on an illegality and further that the respondent was not entitled to any fees and should have paid cost for filing a defective application.***

(5) ***The learned Superior Court Judge was completely biased towards appellant.***

(6) ***The learned Superior Judge did not appreciate the fact that there was decree and it was a simple miscellaneous cause whose value had not been determined.***

In that supplementary memorandum of appeal, the appellant, while praying that the court do set aside the entire taxation and dismiss it with costs, also prays that the court adopts its ruling of 21st March, 2007 and 22nd June, 2007 which rulings we note, were in a different matter between one of the parties here and another party, though admittedly that matter was the origin of the entire saga. We shall discuss this hereafter. The appellant also prays that we expunge the name of *George Sino Arunga* from the records. We observe that it was the appellant who came to this Court with that name in this appeal. Thus this prayer appears to us odd as it is the appellant asking us to expunge its name from the record. Again that will be visited later in this judgment.

As we have stated above the respondents also felt aggrieved and filed notice of cross appeal. They raised three grounds in that cross appeal which were that:-

(1) ***The learned Judge erred in law in taxing the bill of costs in the reference by awarding figures that had no basis in law and no grounds in his own ruling.***

(2) ***The learned Judge wholly misdirected himself on finding that the sum claimed in the original suit was a mere claim not to form the basis of instructions fees when indeed that is the law as enacted.***

(3) ***The decision was contrary to the law under the Advocates Remuneration Rules and the remuneration order then in force, contrary to the*** *stare decisis* ***cited, the submission offered and was thus arbitrary.***

Mr. Mwamu, the learned counsel for the appellant addressed us at length in support of the appellant's stand and of course also in respect to the cross appeal. Briefly, he submitted that though the learned Judge of the High Court relied on the correct principles on the issue of taxation in respect of advocate/client Bill

of Costs, he nonetheless failed to apply the same principles and hence arrived at a wrong figure. In Mr. Mwamu\'s view, the much that the respondent did was only to prepare and file an application for seeking taxation of the Bill of costs but after that the advocate did nothing as he was out of the matter. Further, Mr. Mwamu contended that as a limited liability company could not be licenced to practice as auctioneer, the application that was filed was not valid and hence the advocates costs could not be validly pursued. He maintained that in that scenario, the respondents are entitled to nothing so that even the amount awarded of Kshs.300,000/= should not have been awarded. He added that this was a matter in which **Rule 106** can be evoked as in his mind that rule was introduced to take care of such matters. He further submitted that the matter that was before the Deputy Registrar and the learned Judge was not a suit. It was a miscellaneous application where there was no plaint and defence and so the taxing officer and the learned Judge should have relied on schedule 6 part 8 of the Advocates Remuneration Order as it was an application not provided for. He referred us to decided cases in support of his submissions.

In response, *Mr. Onsongo,* the learned counsel for the respondent opposed the appeal submitting that what was before the court was advocates professional fee in respect of services rendered to a a client by an advocate. In that respect, it was neither here nor there that the client was a limited liability company incapable of suing as an auctioneer or an individual doing the same work. In his view, the appellant was estopped from relying on the allegation that he was not in law capable of being licenced as an auctioneer as he had given the respondents instructions upon which the same respondent had acted to its detriment. He referred us to the provisions of ***Section 2*** of the Civil Procedure Act and maintained that all Civil proceedings commenced in whatever manner qualified as suits. This matter was commenced by way of a notice of motion and therefore was a suit in law. In support of that argument, Mr. Onsongo referred us to the Remuneration Order and particularly to schedule 6 of the same order and submitted that the work done was not light at all. He further stated that the amount that was involved was Kshs.41,000,000 and the court erred in failing to appreciate that amount for purpose of taxing the bill. In *Mr. Onsongo\'s* view, the Deputy Registrar was right as far as that aspect was concerned and his award should not have been disturbed as to do so amounted to disturbing discretion of the Deputy Registrar without showing that it was not properly exercised. He also referred us to certain decisions of this Court on the matter.

We have anxiously considered the two memoranda of appeal, the cross-appeal, the record, the submissions of the learned counsel, the authorities to which we were referred and the law. Mr. Mwamu submits that as the appellant was trading under the name of a limited liability company which could not be licensed to operate as an auctioneer, the respondent\'s advocates were not entitled to any fees for services rendered to the appellant. He referred us to two orders of this Court differently constituted made in ***Civil Appeal No. 308 of 2006*** ***JONE BROOKS CONSULTANTS LIMITED VS. CO-OPERATIVE BANK OF KENYA LTD*** which was the matter that gave rise to the saga now before us and which appeal was withdrawn on an issue that a Limited liability company could not be licenced to operate as a court broker and that issue was raised *suo moto* by the court. In fact these were two orders made on 21st March and 22nd June, 2007 and not rulings. *Mr. Onsongo\'s* response to that submission is that the respondent was instructed to carry out certain legal services to the appellant by the appellant and whether or not the appellant was ***Jone Brooks Consultants*** or ***George Arunga*** did not vitiate that contract between the parties. He referred us to the licence in the supplementary record and contended that it was issued to ***George Arunga Sino***and thus he cannot run away from representations he made to the advocates. In our view, and with respect, we do not find the appellants contention in this respect tenable. First, this matter is raised in the supplementary grounds and is not in the main memorandum of appeal filed by the appellant in support of his appeal. We note that it is also not in the grounds for cross appeal. However, whether it was raised as an afterthought or not is not important as it had earlier in another relevant matter, been raised by the court *suo moto.* We note further that in that other appeal the court was plainly right in raising it and the appellant in that other appeal was also perfectly right in withdrawing that other appeal because in that appeal, the same company *Jone Brooks Consultants Ltd* which could not in law be licensed to trade as a court broker being a Limited Liability Company is the one which wanted to benefit from its own wrong doing in seeking and obtaining a licence when in law it could not be licensed. Thus whether it was the licensing officer who made the mistake in licensing it or not, the fact remained that it was seeking payment from Co-operative Bank for the work it should not have done in the first place.

In this appeal the appellant ***George Arunga Sino t/a Jone Brooks Consultants Limited*** gave certain

instructions to the respondent to carry out and the respondent duly complied and rendered services to the appellant. That was not denied by the appellant before the taxing officer of the court when the matter came up for taxation. The appellant\'s contention then was that the work the respondent was instructed to do could not attract the fees that the respondent was seeking. Indeed, the appellant made some payment which it felt was sufficient and later made certain further offers. The appellant thus recognized that it instructed the respondent to pursue its fee from Co-operative Bank and that the respondent filed a notice of motion and a Bill of Costs in pursuit of the same. In that scenario, for the appellant to renege on that and attempt to hide under the legal provisions that he was not authorized to be licensed as an auctioneer and therefore the instructions he gave and the services rendered to him were null and void in law and would not be paid for, is, in our view clearly untenable. In our view, equity demands that he pays for the services he was rendered at his own request. It is even worse when the appellant, having received the services and having itself surrendered to the Deputy Registrar and to the High Court in respect of taxation for the same services, to now turn around and seek that his name be expunged from the record it prepared itself. In our view, he presented himself to the respondent as an auctioneer and he cannot now turn around to say he was not legally bound to pay for the services rendered to him as a result of his presentation and request for same services.

Further, the copy of the licence exhibited in the supplementary record filed by the respondent on 28th May, 2012 and which has not been challenged shows that the licence was in the name of ***George Arunga Sino*** and that the B***rooks Consultant Ltd w***as only a business name and was not the owner of the licence. In our view, from what we read in the licence No. 0191, we accept that the appellant was trading under the firm name of ***Brooks Consultant Limited*** but he was the one licenced to carry out Auctioneers Business. His affidavits in the supplementary record filed by the respondent tells it all. If Brooks Consultant Limited sued Co-operative Bank as such and claimed to be an auctioneer, that was a different matter and the orders in that matter take care of it. In this matter, we do not find it fair and just to allow him to go scotfree on services rendered to him at his request, part of which he had paid and has proposed a further figure. We say no more on this complaint.

The next complaint raised by *Mr. Mwamu* is that there was no pleading in the matter that were before the Deputy Registrar and as such the Deputy Registrar and the High Court applied wrong principles in taxing the bills as the matter was not originated by a suit. In effect, he was stating that a matter started by a notice of motion and, this was so started is not a suit.

Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya defines a suit as follows:-

"suit means all Civil Proceedings commenced in any manner prescribed."

As to taxation, **Schedule VI(1)(a**)of the ***Advocates (Remuneration) (Amendment) Order,*** 1997 which was in place at the relevant time provides for "costs of Proceedings in the High Court" and states:-

"(a) To sue in any proceedings (whether commenced by plaint, petition originating summons or notice of motion in which ….....

and schedule VI(1)(b) of the same order states:-

(b) To sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and --------"

These provisions, both the definition of suit a in Section 2 (supra) and the parts of the remuneration order we have reproduced above do persuade us and we are persuaded that matters commenced by way of a notice of motion as the matter before us was, is in law a suit. We thus cannot accept *Mr. Mwamu\'s* contention that what was before the taxing master of the High Court was not a suit.

Having dealt with the above two matters, we now turn to the other aspects of the appeal and to the

judgment of the learned Judge. But first, the Deputy Registrar\'s reasons for arriving at the figure of Kshs.1,171,260/62. The reason for doing that is contained in a short letter addressed to the advocates of the appellant by the learned Deputy Registrar who was also Senior Resident Magistrate, Kisumu, in response to a letter from the same advocates who sought the reasons pursuant to the requirements of ***Rule 11(1)*** of the Advocates (Remuneration) Order. We have reproduced the same letter above.

That letter provided the main reasons behind the figures that were found due and awarded by the learned Deputy Registrar. It is against that award that the appellant sought a reference to the High Court vide chamber summons dated 31st July, 2005 and filed on 1st August, 2005, we have reproduced above and was dealt with as stated above.

In our considered view, the learned Judge was plainly right in his holding that in a reference such as was before him, he could only interfere with the discretionary powers of the Deputy Registrar if the same Deputy Registrar erred in principle by failing to consider matters she should have considered, or if the Deputy Registrar considered matters she should not have considered or if looked at as a whole her decision was plainly wrong and thus called for intervention by the High Court. He was also on point in his view that instructions fee is assessed on the basis of the legal complexity of the case, the labour required, the importance of the matter and the amount or value of the subject matter involved. That, in our view is all, for after that, we find it difficult to appreciate the learned Judge\'s approach to the issue that was before him particularly when he stated:-

"Let me state that as a fundamental principle, we owe a duty to the public to see that costs are not allowed to rise to such level as to deprive access to the courts all but wealthy and powerful."

and immediately thereafter proceeds to say:-

"In my view a party who instructs an advocate to recover and prepare for taxation of an amount in excess of Kshs.40 million must be prepared to pay him costs commensurate to the services rendered. The proper remuneration of advocates is pursuant to the administration of justice."

1. These two statements are in our view contradictory, particularly when one considers that the Advocates Remuneration Order is specific in that minimum amounts to be recovered as costs are stated and the taxing master can only exercise his discretion in respect of any increase over and above that minimum specified such that if the party and for that matter, the advocate seeks what is the minimum amount allowed by the order then the taxing master has no discretion to exercise for he cannot increase that minimum amount claimed as to do so would mean introducing his own figure not spelt out in the Bill of Costs presented for taxation. In our view, the Remuneration Order enacted by Parliament, in which the public is represented, and which presents the minimum allowed costs cannot be said to allow such high costs as would affect the public in their quest for justice. Again the statements are contradicting in that having said the costs should not be too high, the learned Judge proceeds to state that those who seek services from advocates must be prepared to meet the costs occasioned presumably however high. Further, the learned Judge was of the view that the amount of Kshs.41,000,000 upon which the taxing officer based the taxation was not a proper figure for it was a mere proposed figure for purposes of taxation. In our view, that approach meant that the taxing officer and for that matter, the advocate who had ceased acting in the subject matter had to wait for the outcome of the taxation of the bill he prepared to be able to know the figure upon which he could base the claim for his fee. We, with respect, do not think that would be just and fair. The Remuneration Order is clear, it provides in Schedule VI for "COSTS OF PROCEEDINGS IN THE HIGH COURT" and part A is providing for party and party costs. On instructions fee the provision is:-

"The fee for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided), reduce it."

and in paragraph (a) it stated:-

"To sue in any proceedings, (whether commenced by plaint originating summons or notice of motion)

in which no defence or other denial of liability is filed; where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties.....”

In **paragraph (b)** the provision is as follows:-

“(b) To sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed------ where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties.”

From the above, we have no hesitation in our view that the Remuneration order provides that the value of the subject matter can be ascertained from the pleadings where no judgment has been delivered. The reason for these two sets of values is not difficult to fathom. In cases where the claim is known such as where agreed amounts are stated in a contract, the bill of costs can be based on that amount whereas in cases where general damages are claimed, the amount awarded in the judgment should be the basis for the claim .

In this case, what the applicant asked the advocate to claim for him by way of taxation of the bill of costs was Kshs.41 million. This is what the advocate was instructed to seek. This is what he had to apply his legal knowledge including research to achieve. This is what he had to go through all the fee notes sent to the Bank to ascertain whether the court could be persuaded to grant. This amount could be determined from the pleading in the case which was commenced by way of Notice of Motion which is one of the ways approved in law. This being the case, we find it difficult to appreciate the learned Judges finding that:-

“In essence the sum of Kshs.41, million (41,000,000) which is not a true representation of the subject matter. It is merely a claim or an assertion by the auctioneer of a right which has not matured.”

Surely if a client instructs an advocate to claim a certain amount from a defendant, is the advocate not expected to strive to have the client realise that amount? Whether he succeeds in doing so or not is another matter but that is what he is instructed to do and he cannot be denied the fact that he worked to realise that claim. In our view, his fee would be pegged on that amount and not on the amount that the court later finds due for it was the figure the auctioneer wanted him to get for him. If for example he is instructed to claim in contract a certain amount and he files papers claiming that amount, even if eventually the suit is dismissed, as between him and his client his claim will be based on that amount and not be rejected because he lost the suit.

We now proceed to consider whether the matter fell under ***Schedule 6 (1) (b)*** or not. The learned Judge had this to say on that:

“the other issue which also attracted my judicial attention is whether the case of the respondent falls within *schedule 6 Rule 1 (b)* ***of the Advocates Remuneration Order 1997. According to the taxing master the taxation was commenced by way of a notice of motion which is one of the ways recognised in the Advocates Remuneration Order..... First the Advocates Remuneration Order does not define what amounts to a suit. It also strictly and expressly does not qualify a miscellaneous application seeking taxation between an Advocate/Auctioneer as falling within a suit or notice of motion. In my view the miscellaneous application by the respondent is not the same as a suit and cannot qualify within the province of*** *Schedule 6 rule 1 (b)* ***of the Advocates Remuneration Order.”***

The learned Judge proceeds and says the foundation of a suit is that there ought to be pleadings where parties have to file documents within specific time limit, and on those grounds he finds that the matter falls within ***Schedule 6 Rule 1 (l)*** which is: -

“(l) To sue or defend in any case not provided for above.”

We have stated above what in law is a suit. We have also stated above that in this matter the amount in dispute was specifically provided for and it is clear to us that the rule provides for matters commenced by

way of Notice of Motion. These are matters provided for in our existing law and it would not matter what an individual Judge thinks. He has to be guided by the law. The matter before the court fitted the definition of a suit and cannot be relegated into any matter under ***Schedule VI 1(l).*** It had specific amount and in dispute and cannot be treated as any matter where the amount in dispute could not be ascertained either from pleadings or from judgment. We do not accept the learned Judge\'s approach on that issue.

Further, the learned Judge substituted the taxing master\'s figure with that of Kshs.300,000/= but he did not state how he arrived at that figure which to us looks arbitrary. There are guide lines in the Remuneration Order as to how a taxing master should arrive at a figure be it for instructions fee or any figure for any other services. The learned Judge did not appear to have appreciated this. Neither did he appreciate the legal proposition that where he differed with the taxation, the correct action to take is to refer the taxing part back to another taxing master with an order that the bill be retaxed afresh. In the case of ***JORETH LIMITED VS. KIGANO & Associates,*** civil appeal n o. 66 of 1999,this Court differently constituted stated inter alia as follows:-

"***Besides it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done."***

We are of the view, that apart from our view that the figure awarded by the learned Judge was arbitrarily arrived at without any supporting provisions, even if the Judge found that a different schedule was applicable and not Schedule ***6(b)*** the learned Judge should not have himself done the assessment of the award having found that the learned taxing master erred in principle in the award. He should have referred the matter back to another Taxing master or the same taxing master with directions on how the taxation could be done.

Lastly we are also of the view that the fact that the advocate did not continue with the case after he was given instructions and he prepared documents that were filed in court, could not in law have affected his entitlement to the instructions fee. Persuasive decision of the High Court on this aspect is found in the case of ***FIRST AMERICAN BANK OF KENYA VS. SHAH & OTHERS*** *, (2002) I EA 64* where *Ringera, J* (as he then was) held inter alia:-

"Though the issue of when an advocate became entitled to an instructions fee was the subject of apparently conflicting appellate decisions, the better position was that the instructions fee was an independent and static item, not affected by the stage a suit has reached..... The full instructions fee to defend a suit was earned the moment a defence was filed and the subsequent progress of the matter was not relevant."

In this case the instructions fee, was, in our view, earned immediately the advocate perused the various documents relating to the claim for his client\'s costs and filed the notice of motion seeking the costs. We feel fettered in this view on grounds that, thereafter, if for example he had to go to court to argue that matter, he would be entitled to claim getting up charges etc.

We think we have said enough to show that this appeal must be allowed. It is so allowed and the decision of the learned Judge of the High Court is hereby set aside. We remit the Advocates Bill of Costs to any taxing master other than *W.B. Mokaya (Mrs).* This judgment has specified under what schedule the taxation should proceed on instructions fee and the entire bill should be taxed afresh.

In the circumstances of the case, we order each party to meet its own costs of the appeal.

DATED and DELIVERED at KISUMU this 11th day of OCTOBER, 2012

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR