



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Akiwumi & Keiwua JJ A)

CIVIL APPEAL NO 133 OF 2000

M.G. SHARMAAPPELLANT

VERSUS

UHURU HIGHWAY DEVELOPMENT LIMITEDRESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (O’Kubasu J)

dated 19th May, 2000 in H C Misc Case No 81 of 1999)

JUDGMENTS

Gicheru JA. Section 44(3) and (4) of the Advocates Act, Chapter 16 of the Laws of Kenya (1992 Revised Edition), hereinafter called the Act, is in the following terms:

“44 (3) An order made under this section may authorize and regulate-

(a) the taking by an advocate from his client of security for payment of any remuneration to be ascertained by taxation or otherwise, which may become due to him under any such order; and

(b) the allowance of interest.

(4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order.”

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 the 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.”

By a Miscellaneous Cause intituled:

“Misc Civil Case No 81 of 1999

In the Matter of: The Advocates Act

And

In the Matter of: The Taxation of Costs between Advocate and client.

Versus

Uhuru Highway Development Limited Client”,

the appellant submitted his itemized bill of costs to the taxing officer for taxation as between himself and his client, the respondent herein, on 29th January, 1999. The amount charged in that bill, besides VAT at 16% and disbursements, was Kshs 865,654,448/-. After service of the notice of taxation and itemized bill of costs in the miscellaneous cause referred to above, the respondent by a Chamber Summons dated 1st October, 1999 and taken out under order VI rule 13 (1) of the Civil Procedure Rules, section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, sections 48 and 49 of the Act and all the other enabling provisions of the law sought to have the said miscellaneous cause struck out for the reason that there was no compliance with section 48 of the Act which required the appellant to commence his proceedings in this regard by way of plaint. This, the appellant had not done. Hence, his miscellaneous cause in which he submitted his itemized bill of costs to the taxing officer for taxation as between him and the respondent, according to the respondent, disclosed no reasonable cause of action and was an abuse of the process of the Court.

Proceedings relating to the respondent’s Chamber Summons were concluded in the superior court on 19th May, 2000 culminating in the appellant’s Miscellaneous Civil Case No 81 of 1999 being struck out with costs to the respondent herein. In striking out the appellant’s miscellaneous cause, the superior court observed that taking into account the provisions of sections 48 and 49 of the Act, before any bill of costs is filed by an advocate, the latter must first file a plaint against his client who then shall be given an opportunity to file a defence and thereafter directions may be sought from the Court whether the bill of costs may be filed before or after the determination of the suit and subsequent thereto, the provisions of rule 13 of the Advocates Remuneration Order would come into operation as the said rule cannot stand alone. Aggrieved by the decision of the superior court, the appellant appealed to this Court putting forward 30 grounds of appeal which in the main gravitates on the non-applicability of sections 48 and 49 of the Act to his Miscellaneous Case No 81 of 1999 which according to him, was correctly filed under rule 13 of the Advocates (Remuneration) Order. The submission of counsel for the respondent was that rule 13 of the aforesaid Order was inconsistent with the Act and the non-compliance with section 48 of the Act in particular by the appellant laid bare his miscellaneous cause for striking out Section 48(1) and (2) of the Act provides that:

“48 (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.”

And section 49 of the Act provides that:

“49 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 is 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 a fully itemized bill of the 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.”

I have deliberately set out in full the provisions of the aforesaid sections to demonstrate that those sections relate to the bringing of a suit for the recovery of costs by an advocate against his client. As is evident from the title to the appellant’s Miscellaneous Case No 81 of 1999 together with the itemized bill of costs thereto, the appellant was not suing for the recovery of costs against the respondent but was applying for taxation of his bill of costs as between him and the respondent in terms of rule 13 of the Advocates (Remuneration) Order which he was legitimately entitled to as is set out at the beginning of this judgment. That rule is not in conflict with sections 48 and 49 of the Act as its objective is different from that of the aforesaid sections. The superior court cannot have been right in striking out with costs the appellant’s Miscellaneous Case No 81 of 1999 as is indicated above. I would therefore allow this appeal, set aside the order of the superior court dated 19th May, 2000 striking out the appellant’s miscellaneous cause aforementioned and order that the same be reinstated and the bill of costs in respect thereof proceed to taxation by the taxing officer of the superior court. I would also award the costs of this appeal and of the application in the superior court to the appellant. As Akiwumi and Keiwua, JJ A agree, it is so ordered.

Akiwumi JA. The appellant, M G Sharma, Esq, who was at one time, the advocate of the respondent, Uhuru Highway Development Ltd, filed in pursuance of paragraph 13 of the Advocates (Remuneration) Order, which I shall hereinafter refer to as "the Order", by way of a miscellaneous cause as provided in that paragraph: Misc Civil Case No 81 of 1999, for taxation by the taxing officer of the High Court, his advocate and client bill of costs which was not only, in respect of matters in the High Court but also, of matters in this Court. The total amount charged in the bill of costs was the enormous sum Ksh 865,654,448.00. By consent of the advocates of the appellant and the respondent, the bill of costs was fixed for taxation on 13th October, 1999. This did not take place as on that date, without it being included in the cause list for that day, as a matter before the taxing officer, rather, an application by the respondent to strike out the appellant's Misc Civil Case No 81 of 1999, which I shall hereinafter referred to as

"the cause", was fixed for hearing not before the taxing officer as should have been the case, since the taxation was pending before him, but before O’Kubasu J as he then was. He adjourned the hearing of the application to a date to be taken at the registry. The application then came before him on 2nd December, 1999, which he proceeded to hear and concluded with his ruling of 19th May, 2000. O’Kubasu J, not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and (2) and 12 of the Order, from a decision of the taxing officer who was dealing with

the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the respondent's application to strike out the cause. This by itself, makes his hearing of, and his ruling of 19th May, 2000, on, the respondent's application, a nullity from the word go. It would have been different if the appellant had brought a suit in the High Court by way of a plaint, for the recovery of costs due to him, under section 48 of the Advocates Act hereinafter referred to as "the Act". This not having been the case, O'Kubasu J lacked jurisdiction to entertain the respondent's application and which lack in my view, vitiates the whole of the proceedings before the learned judge. Although this was not raised before O'Kubasu J, it is a fundamental matter which this Court can consider *suo moto*, and I will on this ground alone, allow the appeal.

The appellant has appealed to this Court against this null and void ruling and it would have been unnecessary for me to deal any further with the appeal, except that since it raises important legal issues, I feel obliged to make a few comments thereon.

As already adverted to, the appellant's bill of costs had been brought under paragraph 13 of the Order, the side note to which paragraph, is in the following significant terms:

"Taxation of costs as between advocate and client on application of either party."

Consistent with this side note, sub paragraph (1) of paragraph 13 empowers the taxing officer only to tax costs and nothing else:

"... as between advocate and client without any order for the purpose upon the application of the advocate ...",

which as I explain later, he can do. Sub paragraph (2) then provides that notice of the date fixed for the taxation, as occurred in this case, shall be given to the advocate and his client. Sub paragraph (3) then goes on to stipulate how a bill of costs shall be filed namely, that:

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

It was in pursuance of the provisions of paragraph 13 of the Order, that the appellant filed the cause which runs into seventy three pages, and due notice of the date of its taxation given in accordance with paragraphs 70 and 72 of the Order.

However, an issue which I think convenient to deal with now relates to the ambit of the Order itself. In paragraph 2 of the Order, it is provided that:

"This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in the subordinate courts (other than Muslim Courts), in a tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a tribunal established under the Rent Restriction Act."

Although the paragraph clearly covers issues relating to the taxation of an advocate's bill of costs, a question that arises from this paragraph, is whether the seventy three pages of the cause, should have included as they did, the appellant's bill of costs in respect of matters which he handled on behalf of the respondent in this Court. The answer to this question, in my view, is, yes! Rule 108 of the Rules of this Court deals with the question as follows:

"108 (1) The Registrar shall be a taxing officer with power to tax the costs as between party and party of or arising out of any application or appeal to the Court.

(2) Such costs shall be taxed in accordance with the rules and scale set out in the third schedule hereto.

(3) The remuneration of an advocate by his client in respect of any such application or appeal shall be subject to taxation in the superior court of the partner state in which he was retained and shall be governed by the rules and scales applicable to proceedings in that Court."

Other paragraphs of the order which should be borne in mind and which limit the jurisdiction of a judge of the High Court and also define his appellate jurisdiction in respect of the taxation of costs, which was the only issue before the taxing officer, are paragraph 10, and the pertinent parts of paragraphs 11 and 12 already alluded to, which are as follows:

"10. The taxing officer for the taxation of bills under this Order shall be the Registrar or District or Deputy

Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule IV the taxing officer shall be the Registrar of Trade Marks or any Deputy or Assistant Registrar of Trade Marks.

11 (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

12 (1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court."

Now to the respondent's application to strike out not the cause, but what was incorrectly described as: "... the advocates/respondents Misc Civil Application ...".

The main ground on which the application to strike out was founded and indeed, the one on which the learned judge based his ruling striking out the cause, was that the appellant should have abided by the provisions of sections 48 and 49 of the Act, whereby, the appellant could only file his bill of costs which was not done, in a suit after such a suit for the recovery of any costs, as opposed to the taxation of a bill of costs, had been instituted by means of a plaint. The appellant's bill of costs should also be served on the respondent one month before proceedings under the plaint could commence. But was the appellant's bill of costs intended to be filed in a suit before it had been taxed? I would say, no! And that being the case, could the appellant file a miscellaneous cause for the taxation of his bill of costs? I would say, yes! However, the learned judge, taking into account only when a suit for the recovery of costs has been instituted and not giving proper consideration of the mere taxing of bills of costs, expressed his view this way:

"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."

The provisions of section 48 of the Act which must now be set out, are as follows:

"48 (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."

The phrase "Subject to this Act", appearing in section 48(1) of the Act, which is concerned with the recovery of costs by advocates, is the same phrase employed in section 68(1) of English Solicitors Act, 1957, from which the Act is derived, in respect of actions to recover solicitors' costs. In my view, this phrase applies as it does, to section 63 of the Solicitor's Act in respect of a remuneration agreement between a solicitor and his client, in the same way as it does to section 46 of the Act which also deals with an agreement between an advocate and his client with respect to remuneration, and both of which relate to circumstances excluded from the ambit of sections 48(1) and 68(1) respectively, of the Act and the Solicitor's Act. (See *Halsbury's Statutes of England*, Third Ed Solicitors' Act 1957, s 68 notes, p 71). Paragraph 13 of the Order is not affected by section 48(1) of the Act and vice versa.

But how then does paragraph 13 of the Order come into play? Under section 48 of the former Advocates Act 1961, which was repealed and replaced by the Act, the Chief Justice by virtue of the wide powers conferred on him by that section, promulgated the Order, which has in pursuance of section 24 of the Interpretation and General Provisions Act, survived the repealed Advocates Act 1986. This section provides that:

"Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder."

The Order has not only, survived the repealed Advocates Act, but also, the all embracing words of its section 48(1) under which the Order was promulgated and which words have been maintained in section 44(1) of the Act. Section 48(1) of the repealed Advocates Act, is as follows:

"The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or noncontentious."

And now, if I may go back to section 48(1) of the Act, it is clear from its wording, that it only relates to proceedings for the recovery of costs. Paragraph 13 of the Order on the other hand, does not deal with the recovery of costs, but only with the taxation of costs the result of which could be the basis of a suit for the recovery of costs. And nowhere does, section 48 of the Act which deals with actions for the recovery costs, forbid the taxation of costs before any action for the recovery of costs can be instituted; and in any case, the taxation of costs under paragraph 13 of the order does not by itself, amount to a judgment. What was before the taxing officer was a taxation of costs which can be undertaken as it was done, under paragraph 13 of the order and which step is in no way inconsistent with, or forbidden by, sections 48 and 49 of the Act. In any case, the cause was not, and cannot even be said, was purported to have been, brought under section 48 of the Act. Indeed, all that section 48(1) of the Act requires to be done before a suit for the recovery of costs, is instituted, relates to the prior service of the bill of costs and not its taxation, on the client by the advocate, and not at all, to the taxation of his bill of costs. This interpretation of section 48(1) of the Act, applies with equal force to section 49 of the Act which is derived from section 48 of the Act, and which comes into play only where a suit has already been brought by way of a plaint, by an advocate for the recovery of any costs and a defence is filed disputing its reasonableness or quantum. The learned judge erred in holding in his ruling that in accordance with sections 48 and 49 of the Act, there can be no taxation of costs before a suit for the recovery of costs can be instituted.

For the foregoing reasons, I will allow the appeal with costs for the appellant.

Keiwua JA. The appellant appeals from the decision of the superior court, O’Kubasu J (as he then was) delivered on May 9, 2000 in which the learned learned judge found that:-

“Having considered the submissions made and particularly the provisions of sections 48 and 49 of the Advocates Act, I am satisfied that Mr Sharma did not comply with these mandatory provisions of the

Advocates Act and hence Misc Civil Case (application) No 8, of 1999 was certainly brought to Court prematurely. It therefore follows that the advocates/ respondent’s Misc Civil Case (application) No 81 of 1999 is hereby struck off (out). It is further ordered that the advocate respondent do pay the costs of this application to the client/applicant. Order accordingly.”

The learned judge had before him an application brought by the respondent for stay and striking out of the said Miscellaneous Civil Case No 81 of 1999, which had been instituted by the appellant under paragraph 13(3) of the Advocates (Remuneration) Order, for the taxation of the appellant’s bill of costs as against the present respondent, for whom the appellant had acted as its advocate in the same suit. Paragraph 13 of that order is as follows:-

“13(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applied 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 itemised 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.

13(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and to be heard.

13(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.”

The learned judge had this to say in relation to paragraph 13 of the Advocates (Remuneration) Order:

“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 no plaint had been filed as there was no suit before the Court. Mr Sharma found this to be a very strange proposition and 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 a Miscellaneous (case) 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 a way of plaint. Even Mr Sharma conceded he had not filed a plaint.

In this matter, Mr Sharma contends that rule 13 of the Advocates (Remuneration) Order allows him to proceed the way he did while Mr Imanyara contends 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.”

The learned judge also set out section 48 of the Advocates Act which reads as follows:-

“48(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 so far as section 48 (1) of the Act requires an advocate to allow the expiry of thirty days after the bill of costs had been delivered to the client, before the institution of a suit for recovery of such costs, the learned judge observed:-

“With reference to the service of the itemized bill of costs dated 6th January, 1999, it should be pointed out that all attempts to serve this document occurred well after the said bill had been filed on January 29, 1999, and consequently did not comply with the provisions of section 48 (1) of the Advocates Act.”

The basis of this appeal is a letter dated December 18, 1997. That letter was from the appellant to the respondent and had enclosed the appellant’s fee note in the sum of Kshs 500 million. That letter made it clear that if no payment is received within thirty days thereof proceedings for the recovery thereof would be instituted by the appellant. The respondent having not complied, the appellant filed the bill of costs in High Court Miscellaneous Civil Case No 81 of 1999 in terms of paragraph 13 (3) of the Advocates (Remuneration) Order, which case, according to the record of proceedings of that case, was variously due for taxation before the Deputy Registrar of that Court on April 27, 1999, when the notice of taxation was to issue and on May 11, 1999, when the bill was by consent listed to come for taxation but nothing appears to have happened that day. The next recorded event was on May 24, 1999, when the bill was by consent of the parties fixed for taxation for October, 13, 1999. Before that date arrived, the respondent on October 4, 1999, filed its application dated October 1, 1999 for stay of the taxation and for striking out the miscellaneous case and that application had been listed for hearing on October 13, 1999, the date the bill was due for taxation. The next recorded event was on October 13, 1999 when the file was in that Court’s daily cause list listed before the learned judge and with no indication as to what happened with the taxation which had been set to begin before the Deputy Registrar on that same date.

I think that approach was quite irregular. The taxation date had, long before the application to stay and strike out the miscellaneous case, been fixed before the Deputy Registrar. In my judgment both the miscellaneous case embodying the bill of costs for taxation together with the application to stay that case, ought in the first place to have been placed before the Deputy Registrar of the superior court and the prayer for stay urged and if granted it was only then, the balance of the application to have the case struck out, should have been referred to the learned judge. In the absence of such an order from the Deputy Registrar, steps taken to have the file placed before the learned judge, were in my judgment ineffective to divest the Deputy Registrar of jurisdiction to have the bill of costs taxed or to confer jurisdiction to the learned judge because what had been done appears to me to have been a nullity.

I will now deal with the substantive arguments regarding the application to have the miscellaneous case struck out. That 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 recover his costs.

Arguments before us, centred 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 case 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 obligation on the part of the appellant to comply with section 48.

Accordingly, the finding by the learned judge that there was no cause of action in the miscellaneous case because it had been instituted without a plaint, cannot be correct because the miscellaneous case filed under paragraph 13 (3) of the Advocates (Remuneration) Order had nothing to do with the recovery of costs which is what this section 48 of the Act is all about. I would therefore set aside that finding and would allow the appeal with costs and costs of that case in the superior court. I would reinstate the bill of costs filed in the superior court on January 29, 1999, so that it can proceed to taxation by the Deputy Registrar of that Court.

Dated and Delivered at Nairobi this 16th day of February, 2001

J.E. GICHERU

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JUDGE OF APPEAL

A.K. AKIWUMI

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL