



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (COMMERCIAL DIVISION, MILIMANI)
MISC. APP. NO. 975 OF 2003
KAMUNYORI AND COMPANY ADVOCATES.....PLAINTIFF
VERSUS
DEVELOPMENT BANK OF KENYA.....DEFENDANT

R U L I N G

On 26th October, 2004 it was ordered that the two applications, one by Chamber summons dated 24th September, 2004 filed by the Plaintiff, and the other by chamber summons dated 13th October, 2004 filed by the Defendant, be heard together. The Plaintiff's application, brought under Rule 11 of the Advocates (Remuneration) Order, challenges the taxing officer's decision disallowing entirely items 2 and 3 of the bill of costs dated 31st December, 2003. The Defendant's application, similarly brought under the same Rule, challenges the same taxing officer's decision allowing item 1 of the same bill of costs.

When the applications came up for hearing on 17th January, 2005 the Plaintiff raised a preliminary objection to the Defendant's application as per his notice thereof dated 3rd November, 2003. The preliminary objection is premised upon three grounds:-

- 1) That the supporting affidavit sworn by RIUNGA RAIJI, Esq., and dated 13th October, 2004, is incompetent, incurably defective and bad in law as it does not comply with the Oaths and Statutory Declarations Act, Cap. 15 and Order 18 of the Civil Procedure Rules, and should therefore be struck out in its entirety.**
- 2) That the same fate should also defall the supporting affidavit sworn by CELESTINE AOKO OTIENO dated 13th October, 2004 for the same reasons.**
- 3) That the application was filed out of time without leave of the court, which renders the application incompetent and bad in law and should therefore be struck out.**

I have read the two challenged affidavits. I have also given due consideration to the submissions of the Plaintiff, who is an advocate of this court, and those of the learned counsel for the Defendant. On the affidavits, the Plaintiff submitted that they offend Rule 5 of Order 18 of the Rules in that they are not drawn in the first person. He also submitted that they offend Rules 9 and 10 of the Oaths and Statutory Declarations Rules in that the annexures thereto have not been sealed and properly identified. The reply

of Mr. Raiji, learned counsel for the Defendant, in this regard was that there is no requirement under Rule 11(2) of the Advocates (Remuneration) Order for any affidavit to be filed in support of the chamber summons. So, even if the affidavits were defective and ordered struck out the validity of the reference would not be affected. In any event, further submitted Mr. Raiji, the Civil Procedure Rules have no application to matters of taxation, the Advocates (Remuneration) Order by itself being an independent and complete code of law as far as taxation of costs is concerned.

In furtherance of the ground that the Defendant's application was filed out of time without leave of the court, the Plaintiff submitted as follows:- Taxation was done on 2nd April, 2004. Counsel for the Defendant wrote to the Deputy Registrar on 7th of April, 2004 objecting to the taxation and requesting for reasons for the decision on the item in the bill objected to. On 25th June, 2004 the reasons were supplied, a fact acknowledged in the affidavit of Mr. Raiji dated 13th October, 2004. The application should therefore have been filed within 14 days from 25th June, 2004, that is on or before 9th July, 2004. The application was thus filed out of time on 13th October, 2004. The Plaintiff, while conceding that the ruling supplied to the Defendant was not complete, further argued that by a letter dated 19th July, 2004 the Deputy Registrar advised the Defendant that a complete copy of the ruling was ready for collection. The Defendant did not collect the complete copy until 1st October, 2004. No reasons for the delay are given. The complete copy should have been collected within 14 days of the Deputy Registrar's letter; therefore the reference was filed out of time.

Mr. Raiji counter-submitted as follows:- Reasons for the decision on the item in the bill of costs objected to were applied for in time. The ruling that was delivered in response to that application was not proper or complete as it was not signed or dated. The court acknowledged this fact. The proper ruling was not supplied until 1st October, 2004, and the reference was filed within time on 13th October, 2004. He further submitted that, as disclosed by his further affidavit dated and filed on 13th January, 2005, he did his best to obtain the correct ruling earlier, but in vain, without any fault on his part. In any event the facts pertaining to this particular issue are disputed, and therefore no proper preliminary objection on a point of law can be raised upon disputed facts.

Mr. Raiji also submitted that Rule 11 (2) of the Advocates (Remuneration) Order under which the reference was filed requires that there be a chamber summons; that the chamber summons must set out the grounds of objection to the taxation; and that the chamber summons must be served upon all parties concerned. As there is no allegation that any of these requirements was not met there cannot be a proper preliminary objection on a point of law upon the grounds urged by the Plaintiff.

Both sides quoted a number of decisions, and I have read them. I will refer to only one of them in this ruling.

In the case of **MUKISA BISCUIT MANUFACTURING COMPANY LTD. – VS- WEST END DISTRIBUTORS LTD. (1969) EA 696, Law, JA**, observed as follows in his judgment:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute t

o arbitration.

As correctly submitted by Mr. Raiji, subrule (2) of Rule 11 of the Advocates (Remuneration) Order does not require that a chamber summons filed thereunder be supported by an affidavit. The Defendant's application by chamber summons dated 13th October, 2004 is indeed accompanied by supporting affidavits. No doubt quite often it will be necessary that an application under the said subrule be accompanied by an affidavit setting out essential facts, for instance, date of notice to taxing officer under subrule (1) of the same rule and date upon which reasons for decisions on taxation were supplied by the taxing officer, in order to show that the chamber summons has been filed within time. On the other hand these are facts that can be easily gathered from the record of the court. The validity or otherwise of the chamber summons will not depend per se on whether or not it is accompanied by a supporting affidavit. Such validity will depend on whether or not the conditions prescribed in subrule (2) of Rule 11 aforesaid have been met. Those conditions are, that the objector do within 14 days of receipt of the reasons apply to a Judge; that the application be by chamber summons; that the chamber summons do set out the grounds of his objection to the taxation; and that the chamber summons be served upon all the parties concerned.

The affidavits sworn and filed in support of the Defendant's chamber summons are therefore a mere superfluity. Whether or not they are defective under Order 18 of the Civil Procedure Rules or under the Oaths and Statutory Declarations Act, Cap. 15, and even if they were to be struck out, will not affect the validity of the chamber summons. In my judgment therefore the first two grounds of the Plaintiff's notice of preliminary objection dated 3rd November, 2004 do not constitute a proper preliminary objection as their determination cannot dispose of the Defendant's chamber summons. I will not embark on an exercise in futility, and I will thus not determine them.

Regarding the third ground in the notice of preliminary objection, it appears not in dispute that the Defendant was initially supplied by the taxing officer with a defective ruling that had not been signed or dated, and that therefore the Defendant could not have acted upon it. It appears also not in dispute that a proper and complete ruling was supplied on 1st October, 2004, and the Defendants filed his chamber summons on 13th October, 2004. The Plaintiff submitted at length that the Defendant should have collected from court the proper ruling much earlier, by his reckoning within 14 days of being informed by the Deputy Registrar that it was ready. On his part Mr. Raiji has deponed that he collected the ruling as soon as he possibly could. It must be noted that subrule (2) of Rule 11 aforesaid places the onus upon the taxing officer to ***"forthwith record and forward to the objector the reasons for his decision."*** There is no certificate shown to court duly issued by the taxing officer that says that the reasons were forwarded to the Defendant on a date other than 1st October, 2004. The Defendants application filed on 13th October, 2004 was thus filed within time. There is no merit in ground 3 of the notice of preliminary objection.

For the above reasons the preliminary objection is overruled with costs to the Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF FEBRUARY, 2005.



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