



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Misc Civil Appli 40 of 2007

BEHAN & OKERO ADVO. APPLICANT

-VERSUS-

NATIONAL BANK OF KENYA LTD RESPONDENT

R U L I N G

Coram:

J. Mwera Judge

Odunga for the plaintiff/applicant

Ojiambo for the respondent

CC. Raymond.

On 24.10.2008 the client bank filed a chamber summons under paragraph 11(2) of the Advocates (Remuneration) Order (Cap. 16) pursuant to this court's order of 24.9.2008 wherein it was given leave to proceed with such a reference. The main prayer was:-

(i) That the award of Ksh 16,892,372/= made on 21.2.2008 be set aside. Without going into the grounds on which this prayer was predicated suffice it to remark that on the said 21.2.2008 A. El-Kindy esq Principal Magistrate and taxing master of this court, taxed a bill of costs allowing the sum stated above. Being dissatisfied with the award the bank preferred the reference under review.

On 28.10.2008 the firm of advocates/applicant filed a notice of motion citing SS. 3, 3A CPA for orders that:

(i) The chamber summons dated 23.10.2008 be struck out and the reference therein be dismissed with costs.

The two reasons Mr. Odunga presented were that that reference was filed out of time – more than 14 days after time was enlarged to do so and that it was prematurely filed because even up to the time of arguments, Mr. Ojiambo for the bank had not obtained Mr. El-Kindy's reasons in writing as to how he

went about taxing the bill now disputed. While Mr. Odunga argued that filing a reference without the taxing officers written reasons for taxation meant the reference was invalid or premature, Mr. Ojiambo countered that Mr. El-Kindy had retired from the court service and it was not expected that he will ever render the reasons in writing as to how he went about the disputed taxation. So the reference should go on as it is for the sake of justice.

Paragraph 11 reads as follows:

“ 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 of which he objects.

(2) The taxing officer shall forthwith record and forward the reasons for his decision on those items and the objector may within fourteen days from the 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.”

On 24.9.2008 this court remarked when dealing with an application to certify taxed costs as a judgment:

“Nonetheless, it is considered fair that the bank do take up to the end of October 2008 to file and possibly prosecute its intended reference.”

The intended reference, it has been said above, was filed on 24.10.2008 i.e in time. But the directions to file the reference in time did not dispense with such a reference being accompanied with a copy of the taxing officer's reasons for taxing the items objected to. Paragraph 11 (2) above is mandatory. Such reasons must form the basis of the chamber summons for a reference. Mr Ojiambo pleaded, and the court did not doubt him, that those reasons in writing cannot and will never come from the taxing officer who has since retired. That sounds plausible indeed but then the bank cannot proceed with a reference without these reasons. Thus the reference filed here on 24.10.2008 is as good as invalid *ab initio*. It is defective in all respects and cannot proceed. So why Mr. Ojiambo insists that it should remain on the record and be proceeded with is truly unclear.

In NRB (MIL) HC MISC. APP. 202/05. Kerandi Manduku & Co. –VS- Gathecha Holdings Ltd [*See (2006) e KLR 1*] the learned Justice Ochieng, came across a situation quite close to what we have now. His lordship remarked, *inter alia*:

“ Finally, two parties herein need to give careful consideration to their respective positions, in the light of the fact that the taxing officer is no longer in the Judiciary. Obviously, nobody else can give reasons on behalf of the said taxing officer. At the same time, there ought to be serious implications were he to give reasons after he had ceased to be a judicial officer.

This is the kind of scenario that I have never come across ever before. It may therefore become an opportunity to the parties herein to give rise to emerging jurisprudence. The challenge is at their footsteps. Will they pick up the gauntlet”.

In this court's humble opinion a situation obtaining in Kerandi Manduku's case has arisen but it will not be left for the litigants. Nothing will happen. It will be a stalemate, with one desiring to get the taxed costs made a judgment, while the other is expressing an intention to file a reference yet he will never file a competent one because the reasons for the taxation will never be forthcoming from a taxing officer who has retired.

In doing its best in the circumstances, the parties should go back and start all over with filing a fresh bill of costs and having it taxed by an officer of this court. Each party to bear its own costs.

Ordering accordingly.

Delivered on 15.12.2008.

J. W. MWERA

JUDGE

JWM/ha



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