

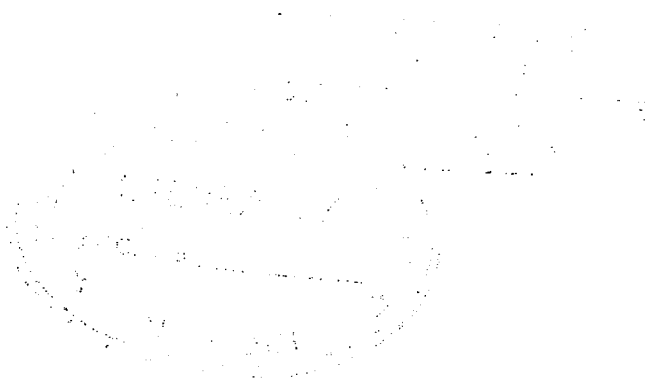
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THE EAST AFRICA LAW REPORTS

[2003] VOLUME 1



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Oruko and Associates v Brollo Kenya LtdMILIMANI COMMERCIAL COURTS OF KENYA AT NAIROBI
NYAMU J

Date of Ruling: 14 MARCH 2003

Case Number: 1465/02

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SUMMARISED BY A MWANZIA

[1] *Advocate - Costs - Recovery - Certificate of taxation issued - Whether certificate final as to entitle applicant to judgment - Whether an action for recovery necessary where there is no undisputed retainer - Sections 45(6), 48 and 51(2) - Advocates Act (Chapter 16).*

Editor's Summary

The Applicant, a firm of advocates, filed application in court seeking judgment for costs pursuant to section 51(2) of the Advocates Act (Chapter 16) and an order that they be at liberty to execute against the Respondent. The Appellants had an advocate client bill of costs taxed by the deputy registrar, and on the basis of certificate of taxation brought the application. The Applicants contended that a certificate of the taxing master was final and they were thus entitled to judgment under section 51(2) of the Advocate Act. The Respondents opposed the application contending that recovery should have commenced by way of a suit pursuant to section 48 of the Advocates Act.

Held - Under section 51(2) of the Advocates Act, a certificate of the taxing master is final, but only as to the amount of costs.

An action for recovery ought to have been commenced as provided in section 48 of the Advocates Act since there was no undisputed retainer under section 45(6) of the Act. *Sharma v Uhuru Highway Development Limited* [2000] LLR 2404 (CAK) applied.

Application dismissed.

Case referred to in ruling

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

Sharma v Uhuru Highway Development Limited [2000] LLR 2404 (CAK) - AP

Ruling

NYAMU J: The Applicant which is a firm of advocates has filed a notice of motion dated 20 December 2002 seeking two substantive orders:

"(1) That judgment for costs be entered in the Applicant favour pursuant to section 51(2) of the Advocates Act (Chapter 16).

(2) That the Applicant be at liberty to execute against the Respondent".

The application is supported by an affidavit sworn on 20 December 2002 which attaches a certificate of taxation in the sum of KShs 46 975. This was a certificate of taxation issued after an advocate client bill of costs had been taxed by the taxing master or deputy registrar.

a The Applicant contends that they are entitled to judgment under section 51(2) of the Advocates Act (Chapter 16) and need not bring action as contemplated under section 48 of the Advocates Act. He has argued that the Certificate is final and there is nothing further to be done.

b The Respondent has opposed the application on six main grounds namely:
 "(1) The application is fatally defective in that it is based on a misapprehension of the law.

(2) The orders sought cannot be granted without proof of a retainer.

(3) Recovery should have commenced by way of a suit pursuant to section 49 of the Advocates Act.

c (4) The Applicant has failed to comply with the provisions of section 48(1).

(5) The order taxing the Applicant advocate/clients bill does not contain any reasons for the findings or award of costs.

(6) The application is frivolous".

d When the application came up for hearing grounds 5 and 6 were not pursued and the Respondent did cite the civil appeal *Sharma v Uhuru Highway Development Limited* [2000] LLR 2404 (CAK).

While I agree with the counsel for the Applicant that under section 51(2), a certificate of the taxing master is final, it is only final as to the amount of the costs.

e The wording of the subsection is clear as to when judgment can be entered by the court. Judgment under this section can only be entered where there is proof of a retainer and the retainer is not disputed.

The subsection does not in my opinion entitle an Applicant to a judgment in any other situation. This is clear from the reading of section 45 which deals with retainers. The section after dealing with situations where a retainer can, be challenged and the mode of challenge provides as under section 45(6).

f "Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48".

g Section 51 deals with situations where it is necessary to have an order for taxation of an advocate's bill or for the delivery of such bill or any deeds, documents and papers. The marginal note clearly states "general provisions as to taxation".

h It does not in my judgment confer on a party a right to enforce the recovery of costs other than in the single situation set out in the section. The Applicant has not exhibited any retainer in the application and they do not fall under the subsection.

i It is quite clear that there is need to separate taxation from recovery of costs. Section 48 deals with the recovery of costs by advocates in all other situations save the single situation exempted under section 51(2) where there is an undisputed retainer.

i Section 48(3) provides:

"Notwithstanding any other provisions of this Act a bill of costs between advocate and client may be taxed notwithstanding that no suit for recovery of costs has been filed".

j It is quite clear that taxation can precede the filing of suit which is the subject matter of the entire section 48.

I find that an action for recovery is necessary under section 48 and I am fortified in my view by paragraph 238 at 197 of *Halsbury's Laws of England* (4ed) which reads:

"A solicitor is entitled to maintain an action for the costs due to him at expiration of one month from the delivery of his bill of costs to his client or within the month if leave has been obtained ...".

This provision in *Halsbury's* concerning recovery of solicitors' fees is equivalent to our section 48(1).

Paragraph 239 of the same *Halsbury's* stipulates the option open to a solicitor in these words:

"In the High Court the solicitor may proceed by writ indorsed with a statement of claim claiming the full amount of his bill of costs or of taxed costs and may apply for summary judgment. If the client raised no defence judgment may be given for the full amount claimed without reference to taxation. If however the client disputes the amount of the bill, the bill may be referred to a taxing master for taxation; the plaintiff being given leave to sign judgment for the amount found due on taxation and the cost of the action".

Similarly further support for the view I have taken is derived from the ratio of the Court of Appeal decisions by all the three Judges of Appeal in civil appeal *Sharma v Uhuru Highway Development Limited* [2000] LLR 2404 (CAK), where the High Court had misdirected itself in confusing the right to file a bill of costs in a miscellaneous cause under rule 13 of the Advocate (Remuneration) Order and to have an advocate/client bill taxed with the right of recovery of advocates costs as set out in section 48. In all the three rulings there is a clear separation of the two provisions.

At page 5 of the ruling of JA Gicheru while dealing with section 48 and section 49, observed:

"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".

The end result is that I uphold objection 3 as raised by the Respondents and I find that the application before me is incompetent in that an action ought to have been commenced as provided in section 48 of the Advocates Act since there was no undisputed retainer under section 45(6) of the Act.

The application is accordingly dismissed with costs to the Respondent.

For the Applicant:

Information not available

For the Respondent:

Information not available

Priamit Enterprises Ltd v Attorney-General

SUPREME COURT OF UGANDA AT MENDO

ODOKI CJ, ODER, TSEKOOKO, KAROKORA AND MULENGA JJSC

Date of Judgment: 20 DECEMBER 2002

Case Number: 10/01

Sourced by: LAWAFRICA

SUMMARISED BY A MWANZIA

[1] Civil procedure - Pleadings - Cause of action - Plaintiff disclosing no cause of action - Whether sole shareholder of a limited liability company may be sued for the company's debt - Whether plaintiff discloses cause of action.