# THE DEMAND LETTER

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*"'Demand', demandum, is a word of art,*
*and in the understanding of the common law is of so large an extent,*
*as no other one word in the law is, unlesse . . ."*
*Coke on Littleton, 291 b.*

PART I

## INTRODUCTION

The demand letter is a more complex document than its size or its place prior to litigation indicates. It is in reality a composite of several elements of the action, and includes a statement of the cause of action, a demand for reliefs, the furnishing of time within which to comply, and a notice of intention to sue in the event of non-compliance.

This series of articles deals with this step, preliminary to the filing of a suit, and covers aspects of demand letters and statutory notices, that incorporate a range of statutory and common law requirements.

An important and often critical part of a suit, the demand letter tends to be lost sight of in court, in contrast to the more obvious significance of the plaint, the defence and the other pleadings. The practitioner also, too often pays to it less attention than it merits. Pro-forma demands, with names and amounts inserted as required, casually signed and sent out in bulk -- none of these suggest that the demand letter has been accorded any special attention or care. The importance however, of the demand letter or notice of intention to sue can be gauged from the number of statutes and procedural provisions that feature these foot soldiers of the vanguard of litigation.

The purpose of the demand letter and notices prior to litigation is to afford both parties an opportunity to avoid embarking on unnecessary litigation or incurring additional costs. These are real concerns in the context of overburdened courts and economic difficulties for all parties. The applicable provisions relating to the denial of costs examined further below, are a further deterrent to plaintiffs, or advocates, who choose to disregard the long-standing rules regarding demand letters.

## THE REQUIREMENT OF A DEMAND LETTER

A demand letter need not as a matter of law always precede the filing of a suit. But there *are* certain circumstances and certain causes of action where a demand *is* required to be first made as a matter of law. The first part of this series of articles deals with the necessity of a demand letter on general principles governing costs. Parts 2 and 3 will address the necessity of a demand letter where required by law or in order to take the benefit of a statute and where a demand is an ingredient of the cause of action relied on.

## ON GENERAL PRINCIPLES GOVERNING COSTS

The most common consideration in determining whether or not prior written demand should be made in respect of an intended suit, is that of costs. This arises by reference to the provisions of the Advocates (Remuneration) Order and to general principles relating to costs. In this category, the lack of a demand does not lead to the failure of the suit, but can lead to the successful plaintiff being deprived of his advocate's costs.

### A.1. DEBT COLLECTION

Debt collection and other money claims are not required by law to be preceded by a demand or a demand letter. However, considerations of costs determine whether a demand should or should not be made prior to filing the suit. The consequences of failure to give a (non-statutory) notice prior to action are set out below.

The choice is governed by the provisions of the Advocates (Remuneration) Order (K) and by the general principles regarding costs. These are dealt with below. The purpose of these provisions and principles is to discourage plaintiffs from rushing to court even in respect of claims that would be admitted had prior demand been made. This should reduce both the overburdening of courts with suits that could have been avoided, and suits that may be vexatious

or brought out of malice in an abuse of the process of the court.

Occasionally, it may be preferable not to give to the defendant the warning that the demand letter obviously also serves as. This would be relevant where it is feared that the defendant would leave the jurisdiction if he were faced with the prospect of the suit, or would hasten an already planned departure. A choice would then be made to omit the demand letter and obtain ex parte a warrant of arrest pending the provision of acceptable security (O.38, Civil Procedure Rules, (K)). See also the principles on costs in relation to notice of intention to sue considered below.

In those circumstances it is unlikely that the defendant is seen as a party likely to make full payment at the stage of 'first hearing', and therefore the chances of losing the costs by reason of full payment is remote. Rather, the chances of the defendant leaving the jurisdiction and therefore the plaintiff recovering nothing are higher. In such cases, no demand letter is sent. If however the defendant does make such full payment, the loss of the costs is a small price to pay to recover what might never have been retrieved at all. Before these aspects are considered in detail below, the demand letter itself is examined.

### THE FORM AND CONTENT OF A DEMAND LETTER

A demand letter in respect of debt collection or other money claim may be in the following form:

| | |
|---|---|
| *Authority to demand* | I am instructed by my clients Messrs ABC & Co., that the sum of Shs.250,000/- is owed by you to them in |
| *Cause of Action* | respect of goods sold and delivered by them to you at your request during the period June 20__ to November 20__, particulars whereof are well known to you. |
| *Demand* | I accordingly demand from you payment of the aforesaid sum of Shs.250,000/-. |
| *Time given* | Unless the said sum of Shs.250,000/- is received in my office within seven (7) days of the receipt by you of this letter, legal proceedings will be commenced to effect |
| *Notice of intention to sue* | recovery of the said sum, at your risk as to costs and consequences. |

## WHAT OUGHT TO BE INCLUDED IN A DEMAND LETTER

(a) The principles of a demand letter were succinctly set out in the Australian case of *Re Colonial Finance, Mortgage & Investment & Guarantee Corporation Limited* (1905) 6 S.R N.S.W.6 :

"There must be a clear intimation that payment is required, to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial, provided it has this effect." (at 9) The following points from the Law Society of Kenya *Digest of Professional Conduct & Etiquette* (1982 Edn., Revised 2000) should also be kept in mind :

(b) Paragraph 19 of the Digest deals with the period which a party must normally be given to respond to a letter of demand:

"19. (a) Letters of demand threatening proceedings in default of payment should, save in exceptional circumstances, allow –

7 days where the debtor resides in the same town as the advocate;

not less than 10 days where he resides in a different town in Kenya;

15 days where he resides outside East Africa."

In meeting these recommended periods consideration should also be given to the issue of when the demand letter would be received. In *Fidelity International Imports v. Central Bank of Kenya* (2003) 1E.A.56 the Court referred to 'the conventional four days to arrive' when sent by ordinary mail (at 59). In *Magon v. Ottoman Bank* (1968) E.A.156 (CA-K) the Court of Appeal considered the issue of whether the date on which receipt is to be counted is the date when the letter was actually received or the date when the letter might actually have been collected from the post office.

(c) "19.(c) ~~A creditor~~ is entitled to receive payment in full and, accordingly, should not suffer loss by deduction of Bank Commission where the debtor's cheque is drawn on a bank in a different town."

(d) The demand letter should be signed by an advocate. This is because it is a document that is chargeable under the Advocates (Remuneration) Order, and therefore attracts the prohibition under S. 34 and S.35, Advocates Act, Cap16, against it being drawn by any unqualified person, or remuneration therefor accepted by an unqualified person. Some advocates have tended to sign their demand letters with firm's name, "A & B", as opposed to the signature of one of the advocates in the firm. While there is some old authority permitting a pleading to be signed in the name of a firm (see *Singh v. Munshi Ram* (1937) 4 E.A.C.A. 9, where a pleading written in the name of a firm was held to be sufficient signature by an advocate), this is not a practice that is safe, and it may lay the demand letter open to challenge as not being given either by the party or by an advocate as his representative on his behalf.

## WHAT OUGHT *NOT* TO BE INCLUDED IN A DEMAND LETTER

(a) A threat that criminal proceedings would be initiated against the debtor in the event of non-payment, cannot be included in a demand letter. In *Khanbhai v. O'Swald* (1933) 15 K.L.R.53 the High Court held:

"There is no doubt that to invoke the criminal law for the purpose of recovering a civil debt is an improper motive." (at 59).

(b) The letter of demand may not demand from the addressee (the alleged debtor), the costs of the advocate giving the notice. There is both a professional and a statutory bar to the making of such a demand. Rule 13, Advocates (Practice) Rules (L.N.19/1967, subsidiary legislation to the Advocates Act, Cap.16 (Rev.1992) (K) provides:

"13. No advocate may request in a letter of demand before action payment from any person other than his client of any costs chargeable by him to his client in respect of such demand before action, or in respect of professional services connected with the demand."

The Law Society of Kenya *Digest of Professional Conduct & Etiquette* states in part of Paragraph 19.(b) that, "It is not, however, permissible to claim costs from the debtor in the original letter on behalf of a client."

This is an established position. Much older cases have held on the effect of such a demand for the advocate's costs:

"If such a demand is made by the creditor's solicitor for payment of a debt payable on demand, a tender may be made of the amount of the debt, without tendering the costs of the solicitor's letter." See *Kirton v. Braithwaite* (1863) 1 M.& W.310; 150 E.R.451; *Caine v. Coulton* (1836) 1 H.& C.764; 158 E.R.1092; and Bullen & Leake & Jacob, 12th Edn, 1314-15.

Thus a paragraph in the original letter of demand stating inter alia:

"We accordingly demand from you payment of the aforesaid sum of Shs.250,000/-, together with advocate's costs in the sum of Shs.8000/-, totalling Shs.258,000/=." would be contrary to law. But if, subsequent to the original letter of demand, the debtor requests to be allowed to make payment of the demanded sum by instalments, and these are accepted, then it is permissible to add the advocate's costs to the principal sum owing, and to make the total sum payable by those instalments. This must be done at the time of accepting the proposal of payment by instalments.

The Law Society of Kenya *Digest of Professional Conduct & Etiquette* sets this out in Paragraph 19.(b) :

"19.(b) There is no objection to requiring a debtor to pay the creditor's advocate's costs of collection in consideration of an agreement to accept payment of the debt by instalments if that condition is imposed at the time of the acceptance of the proposal."

This is permissible because fresh consideration is being given by the creditor for adding those costs to the principal amount. In consideration of the payment by the debtor of the creditor's advocate's costs, the creditor will accept repayment of the principal amount by instalments, this being the reciprocating consideration moving from the creditor. The quantum of the creditor's advocate's costs is no longer insubstantial. Debtor's disregarding demand letters or seeking to delay by offering instalments will find they have assumed an unexpectedly heavy burden, through the addition of the creditor's advocate's costs. These are now set out in the Advocates (Remuneration) Order, Schedule V, Paragraph 8. 'Debt Collection'. The latest scale is that inserted by the Advocates (Remuneration) (Amendment) Order, 1997, L.N.No.550/1997 published on 11 December 1997. The advocate's fee is not fixed but reflects ad valorem the amount demanded, and rises steeply when the sums claimed are substantial.

## OTHER CONSIDERATIONS

It must also be kept in mind that the demand letter or notice may later become highly relevant in subsequent applications and hearings within the suit, as well as to an assessment of the conduct of parties. In *Mbogo v. Shah* (1968) E.A.94 a party applied to set aside an ex parte judgment entered against it. The judge in the High Court refused to set aside the ex parte judgment. In appeal, the party sought to play down the events prior to the suit. This is how the Court of Appeal dealt with such an approach:

"Counsel for the appellants has submitted that nothing that happened before the filing of the suit has any relevance to the application to set aside the ex parte judgment. I respectfully disagree. It was in my view clearly relevant that the insurance company refused to accept service of the summons on behalf of the defendants, and that only a month before the plaint was filed a notice was served on the company informing them that a suit was being instituted. These are all matters which the judge was entitled to take into consideration, as he did, in deciding whether the interests of justice required him to allow the company to re-open the case by setting aside the ex parte judgment obtained by the respondent." (per Law J.A. at 96-97).

## COURT CAN ORDER PARTICULARS OF NOTICE

The mandatory nature of the requirements for demand notices may also be gauged from the fact that express provision is made in the Civil Procedure Rules for a court to order that particulars of any notice pleaded be supplied to the opposite party. O.VI, r.8 (3) (K) provides:

"Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of sub-rule (2), the court, may, on such terms as it thinks just, order that party to serve on the other party :-

(b) where he alleges notice, particulars of the notice."

When a plaint is at variance with the demand letter, particulars in explanation must be given by the plaintiff: *Abdulla v. Esmail* (1969) E.A.111. In this case the claim was for money lent, and the correspondence exchanged following on the demand letter gave dates for the loans different from the dates given in the plaint. Spry J.A. (as he then was) held :

"Moreover, the plaint expressly refers to the letter of April 14, 1967, written by the plaintiff's advocates [prior to the suit] and yet, as Duffus Ag.V-P., has pointed out, the claim in the plaint is materially different from that in the letter. In this respect, I think that the plaintiff is clearly under a duty to particularize his claim."

The lack of importance attached by the plaintiff to his own demand letter, and to the correspondence that followed prior to the suit, led to the discrepancy and led to a costly loss in the appeal. It created a poor impression of the plaintiff's case and of his own conduct, with the judge ordering the plaintiff to furnish the best particulars he could, and closing his judgment with these remarks:

"In the event, they [the particulars] may not be very satisfactory but they may help the defendant to prepare his case, and may in some measure, tie down the plaintiff, whose case at present is ambiguous." (at 116 B)

'Notice' in this context of course has meanings, (such as 'condition of the mind' or sometimes 'knowledge'), other than written communication of intention to sue, but the rule is wide enough to empower the Court to order particulars where the contents of a statutory notice, or the circumstances of its giving, are

material and or in issue. Some of these considerations were dealt with in *Cresta Holdings v. Karlin* (1959) 1 W.L.R. 1055; (1959) 3 All E.R.656.

The effect of a plaint that differed from the initial demand letter was also the subject of decision in *Jared Benson Kangwana v. Attorney-General* (Unreported) H.C.Misc. Civil Application No.446 of 1995, a judicial review application for prohibition. The applicant alleged that criminal proceedings against him in the magistrate's court were an abuse of process to pressurize him to pay a disputed civil debt. A civil action had also been filed against him. In determining the issue the Court examined the charge sheet in the criminal case, the paragraphs of the plaint, the correspondence between the parties and the demand letter. The court began its consideration of the key issue of abuse of process with these words:

"The letter of demand dated 21.10.1993 from the advocate for the plaintiff/complainant asking for recovery of a debt of Shs.328,865,123.20 is important as a starting point." (Page 113)

By reference to the initial letter of demand the court held that the plaintiff/complainant kept changing its claim. "That was done," the court continued, "without explaining how the change[s] had come about, at the time the same advocates were insisting that the applicant must pay Shs.328,865,123.20." (Page 114). That, and other variances, in the plaintiff/complainant's claim was one basis for the holding that the criminal case constituted an abuse of process. (Page 119) A second basis also related to the importance of the demand letter. The criminal case alleged that the applicant took the moneys by fraud; the civil case plaint and the demand letter alleged that he was given the moneys as a loan. (Page 120). This discrepancy also led the court to the conclusion that the criminal case constituted an abuse of process for an extraneous purpose. This case emphasizes the need to take care that the demand letter alleges the correct cause of action, if cause of action is stated at all. The demand letter should be recalled and examined when the plaint is being drawn, so that no irreconcilable differences between the demand letter and the subsequent plaint emerge later. These differences in the sums claimed, in which the demand letter played a big part, were also referred to by the Court in the *Kangwana case* as "elements of mala fides." (Page 128).

## CONSEQUENCES OF FAILURE TO GIVE (NON-STATUTORY) NOTICE

### (a) ADVOCATES (REMUNERATION) ORDER

Rule 53, The Advocates (Remuneration) Order, (made under the Advocates Act, Cap.16) provides as follows :

"53. If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate's costs shall be allowed except on a special order of the judge or magistrate."

The Marginal Note of this Rule puts it succinctly:

"No advocate's costs where suit brought without notice except on special order."

In *Amradha Construction Co. v. Sultani Street Agip Service Station* (1968) E.A.85 the High Court of Tanzania (Saidi J.) considered the identical provision, Rule 61 of the Rules of Court (Advocates' Remuneration & Taxation of Costs Rules). Saidi J. held:

"It is clear that where the suit is brought without notice to the defendant and the defendant pays the amount claimed before the first hearing, or even on the date of the first hearing, no advocate's costs will be allowed except on a special order of the court . . ."Even in a case like this, that is to say where a suit is brought without notice to the defendant, advocate's costs could still be allowed, but this must be on a special order of the court . . . "The court must give special reasons for awarding the counsel's costs of a plaintiff who brings a suit without notice to the defendant. In my view there would be very few cases where such a course should be taken." (at 88)

The judge considered that the appellant had exaggerated the situation and to some extent misled his counsel, and that the facts given to the lower court to obtain the advocate's costs despite the absence of any notice, were not correct. In the event he held that the plaintiff "had not made out a special case which would entitle him to the award of counsel's costs of the action." (at 89).

When the case goes to taxation of costs, proof of the dispatch of the original demand letter and a copy thereof must be available for production at the taxation of the bill of costs, should the giving of the notice be in issue. Similarly, the rule is a reminder that

where notice has been given, the same must be proved as evidence in court and the copy be admitted as an exhibit, to forestall Rule 53 being invoked to tax off counsel's costs.

It must be noted that the only costs that the Remuneration Order bars are the plaintiff's advocate's costs. The successful plaintiff is entitled to a reimbursement of the court fees paid, other disbursements made, and permissible expenses that he has incurred. It will be noted that the above-quoted Rule 53, Remuneration Order deprives costs if payment is made prior to, or at the "first hearing". But this is *not* a reference to the first day of the first time the suit comes up for hearing. 'First hearing' was a technical term, and referred to a pre-trial procedure in civil proceedings in British India. Our first civil procedure laws were received laws, being the Applied Laws under the Order-in Council, 1897, which applied the Civil Procedure Code, 1882 of India. Sections 152-155 of the 1882 Code (Sections 144-145 in the earlier 1859 Civil Procedure Code), then applied to Kenya (then the East Africa Protectorate), and by their provisions 'first hearing' procedure first became applicable to our jurisdiction. The Indian Code was amended at different times after (1882 and) 1897, and the next consolidating re-enactment of the Code came in 1908. This continued the provisions for a 'first hearing' in Order XV, rr.1-4, Civil Procedure Code, 1908: *Disposal of the Suit at First Hearing*. For the provisions of that O.XV and a commentary on the 'first hearing' procedure see 823-824, Woodroffe & Ameer Ali *Civil Procedure in British India* (2nd Edn.) (Thacker Spink, Calcutta, 1916). For the 1882 Code provisions (SS.152-154), see O'Kinealy *Code of Civil Procedure* (6th Edn.) 1905. See also M.P. Jain *Outlines of Indian Legal History* 5th Edn., (Nagpur, Wadhwa, 1990) at 534-537 on the civil procedure codes. Thus 'first hearing' continued to be a process in Kenya even after 1908.

Our first statute law civil procedure code was the Civil Procedure Ordinance, No.3 of 1924. Though enacted in 1924 it did not come into force until 1st August 1927 (by Government Notice No.230/1927 dated 28.1.1927). The Orders and Rules were then published as Government Notice No. 231/1927, and by Rule 1 thereof, also 'came into operation' on 1st August 1927. It is from this Ordinance and these subsidiary rules that our present Civil Procedure Act, Cap.21 and the Civil Procedure Rules made thereunder, derive, via the Civil Procedure Ordinance, Cap. 5 (1948 Laws of Kenya) and the famous Civil Procedure (Revised) Rules 1948, (which rules were referred to as such even long after 1962). The 1962 Laws of Kenya consolidated the ordinance into Cap.21 (1962 Laws of Kenya), and this has remained the format for the past forty years as the Civil Procedure Act, Cap21, and the Civil Procedure Rules.

In the 1927 Civil Procedure Rules, which were then replacing the Indian applied law, the Indian provisions regarding First Hearing (Order 15, 1908) were dropped. Richard Kuloba in his pioneering research 'Historical Origin and Growth of the Modern Civil Procedure', the first part of *Judicial Hints on Civil Procedure* Vol.1 (Nairobi, Professional Publications, 1984), makes express reference to the omission of the provisions of the Indian Order 15 on 'first hearing', and to the disadvantage of having done so, (at 6-7). Thus, since 1st August 1927, when the 1927 Rules came into force, 'First Hearing' has not been a procedure in our jurisdiction. This reference to it in the Remuneration Order however has remained unnoticed in the corners of a statute, like evolutionary remnants such as the appendix.

Sadru Thanawalla in his article *Determining The Subject For Decision* (1974) 10 East African Law Journal, Vol.X, No.1, 41 sets out the historical position, at 44, thus:

"The 'first hearing' to which reference is made above must be distinguished from the trial itself. This was a separate sitting of the court, the purpose of which was described by the Commissioners appointed in England, under 16 & 17 Vic. c.95, S.28, to comment on a corresponding provision in the [Indian] Draft Code of 1859, as follows:

"The object of the first hearing is merely to enable the judge to ascertain what is the matter in dispute between the parties. . . . It is also manifest that statements made at this examination stand on a different footing from evidence given in a trial on fact."

For the implementation of this object, the 1882 Code provided (SS.117-120) that at the first hearing the court should ascertain from the defendant whether he admitted or denied the allegations in the plaint, and ascertain from each party whether he admitted or denied allegations of fact made in the written statements (if any) of the opposite party. Power was given to the court to examine orally any party or person able to answer material questions which might define

the issues in controversy. The issues were then recorded, and it was this record of issues which generally controlled the [subsequent] trial and fulfilled the notice-giving function between the parties as regards the area of the controversy on which evidence at the trial would be required." Thus, it can be seen that the words in Rule 53 of the Remuneration Order are illusory. There is no 'first hearing' procedure in our jurisdiction. And has not been for over seventy-five years. Consideration needs to be given to the formal repeal of Rule 53, Advocates (Remuneration) Order. In the circumstances, no defendant can utilize the escape route it afforded long ago. A plaintiff, who has not served a prior demand letter, may thus yet claim his advocate's costs since the Rule is no longer enforceable and ought to be disregarded. On the other hand, the principle that due warning, and therefore opportunity, ought to be given to a defendant to avoid litigation, is one that is independent of statute and of the Remuneration Order. That principle was emphatically endorsed in *Wambugu v. Public Service Commission* (1972) E.A.296.

(b) RELEVANT GENERAL PRINCIPLES ON COSTS

Costs of a suit are in the discretion of the court, provided that normally costs follow the event. S.27, Civil Procedure Act, Cap.21 embodies this, and Rule 54, Advocates (Remuneration) Order echoes it in respect of applications. But other general principles also apply when no prior demand has been made or notice of intention to sue been given to a defendant. *Wambugu v. Public Service Commission* (1972) E.A.296 is a leading case on the issue of costs and notice before action. The applicant had sought orders of certiorari and mandamus against the Commission. When the proceedings were filed, the Attorney-General (for the Commission) did not contest the suit and the appropriate order was granted as prayed. The only issue that came for argument then was that of costs. In the argument on costs, the issue of notice before action was dealt with at length.

> *"Another argument advanced by Mr. Potter [for the Commission] is that the applicant did not give a notice before action and that, therefore, the respondent had no opportunity to seek legal advice and to make amends without the necessity of a court case. Mr. Potter assures me that there would have been no need for these proceedings if the matter had been brought to the attention of the Attorney-General by the usual notice before action.*

"Two cases are usually quoted in support of such a request. These are bankruptcy cases: *ex p. Brooks* (1883-4) 13 Q.B.D.42 and *ex p. Blease* (1884-5) 14 Q.B.D.123. A preliminary objection was raised in those proceedings without prior notice to the other side. The objection was upheld but no costs were awarded to the successful objector." (at 298 G-H)

The Court then considered the case of *Upmann v. Forester* (1883) 24 Ch.D. 231. There the plaintiff, without giving any notice, sued the defendant for trademark infringements. When served with the writ, the defendant at once agreed to the orders sought. The only issue left was costs. The defendant argued that there should be no order for costs as no notice prior to the suit had been given. The argument was not accepted and the defendant was ordered to pay the costs. The reason for the order of costs was given by the judge in the following terms:

"I do not think that this is a case where it would be just for me to deprive the plaintiffs of their costs. A plaintiff in these cases is placed in circumstances of difficulty, because if it were to give notice, there is a great probability of the defendant at once getting rid of the spurious articles before the plaintiff could interfere, and the plaintiff, therefore by giving notice would in many instances be affording the defendant an opportunity of doing that which an injunction would have prevented."

Accordingly, the Courts do not expect that a demand letter should be served on a defendant where it is intended that an application will be made for an Anton Piller order (1976) 1 AllE.R.779, CA), or a Mareva injunction ((1975) 2 Lloyd's Rep. 509, CA). Stephen Gee *Mareva Injunctions and Anton Piller Relief* 3rd Edition, (London, FT Law & Tax, 1995) confirms this in observing that:

"The initial application for a Mareva injunction is usually made ex parte without notice to the defendant, as knowledge by the defendant that the application is pending may well defeat the very object which the plaintiff is trying to achieve. An application for Anton Piller relief is invariably made ex parte." (at 87)

A demand letter would obviously adversely affect the element of surprise and thus the efficacy of the court's order; for example, "to obtain information to safeguard the plaintiff's rights, or to locate assets upon which a judgment may be enforced, or to preserve property which might otherwise be dissipated or destroyed", (Gee, *ibid*, 2-3) and would give the defendant the opportunity to take avoiding action which would leave the plaintiff without any benefit from the order. Thus the court would not deprive a successful plaintiff in such applications of his costs on the ground that no notice of intention to sue had been given prior to the suit and ex parte application. The same principle allows the court also to grant the orders ex parte, and it is embodied in Order L, Rule 2, Civil Procedure Rules ("that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief."). For the plaintiff to obtain his costs despite the absence of a notice in these circumstances, reliance may also be placed upon the provisions of S.25(8), Judicature Acts 1873-75 of England, through S.3, Judicature Act, Cap.8 and *Njoroge Kironyo v. Kironyo Njoroge* (1976) KLR 109 at 110-111; and also upon S.3A., Civil Procedure Act, Cap.21 which preserves the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court.

Another consideration to the opposite effect needs also to be kept in mind:

"Where however the Plaintiff has allowed the defendant to do the same thing without objection for years, he may be deprived of costs if he issues his writ without notice." - 9 Halsbury's *Laws of England* 4th Edn., Paragraph 958.

In *Wambugu*, the Court after its exhaustive consideration of the authorities came to the conclusion that the applicant had not given the notice, and that there were no good reasons why he should not have done so. He was deprived of his costs. No order of costs was made in favour of the applicant, and none against the respondent Commission. The court ordered each party to bear its own costs. Another leading case on the aspect of demand letters and costs is *Fidelity International Imports v. Central Bank of Kenya* (2003) 1 E.A.56. This decision considered the issue of costs alone as the principal claim had been paid up. This had been done after the defence had been filed, but before the hearing had commenced. The defendants then relied upon the aforesaid Rule 53, Advocates (Remuneration) Order and *Amradha Construction Co. v. Sultani Street Agip Service Station* (1968) E.A.85 (T) (Saidi J.) also referred to above. They urged the Court not to order costs. Reliance was placed on the Rule, on the fact that payment had been agreed to prior to first hearing, and on Saidi J.'s Judgment. The Court accepted that the Rule could be relied on, and considering *Amradha* extensively, followed the decision. The Headnote of the *Fidelity* report states "No notice of intention to sue had been served on the First Defendant before the suit was laid and accordingly, pursuant to Rule 53 Advocates Remuneration Order the Plaintiff was not entitled to costs. *Amradha Construction Company v. Sultani St. Agip Service Station* (1968) E.A. 85 approved."

> *The issues of 'first hearing' being a different and inapplicable procedure, and its effect on Rule 53, were not submitted on by counsel nor considered in the ruling. (In argument, counsel "invited the court to consider it to mean starting on a trial to finally determine a cause." (at 58c)).*

Notwithstanding that the decision was made per incuriam on this point, (and therefore also on that aspect of the *Amradha* case), the Ruling also dealt extensively with other aspects of the principles on which costs are dealt with when no notice of intention to sue has been given, and it remains an important authority on the subject.

The Court dealt at length with the giving of a notice, the receipt of the notice, and the pleading of its service. There must be a giving of the notice of intention to sue. If posted, there must be evidence of that posting. Service must be made on the defendant at its principal place of business and not at departments or subsidiary offices. Suit must not be filed before the expiry of the notice period. If suit is filed before the expiry of the notice, the notice does "not actually amount to a notice of intention to sue."(at 59h). The receipt of the notice must be proved. In proof of non-service, the Court commented on the fact that notice of intention to sue had not been pleaded in the Plaint, an observation that underlines the importance of the issue.

In sum, the Court held that "In that case then the Plaintiff is not entitled to costs

here except with the Court's special order. This Court nonetheless sees no circumstances to warrant making such an order in favour of the Plaintiff." Although the Court used the words of the inapplicable Rule 53, the decision embodies all the other principles of costs where no notice of intention to sue has been given, and repays the attention of practitioners.

## DEMAND LETTERS ARE CLAIMABLE IN TAXATION

There are alternative authorizations in the Advocates (Remuneration) Order for the taxation of demand letters.

1. *"Debt Collection"* authorized by Schedule V, Paragraph 8. This is the charge for non-contentious debt collection. A scale of charges is laid down for the demand letter based upon the amount of the debt being demanded. The advocate can charge for individual letters or can charge a total fee by a general agreement based on the total of the sums demanded. Where not more than one letter of demand is written, the scale fee is reduced by one-half, subject to a minimum fee of Shs.225.

Where the letter of demand is followed by the institution of proceedings by the same advocate, this scale under Schedule V, Paragraph 8. is not applied, and the letter is charged under either the same schedule, Schedule V, but Paragraph 5, "or under Schedule VI or Schedule VIII as may be appropriate." (See below)

2. Schedule V Paragraph 5. *"Correspondence"* provides that presently 'Letters' are charged either at Shs.150 or at Shs.90 per folio. These would be the fees for demand letters where the remuneration "is not otherwise prescribed or which has been the subject of an election under Paragraph 22" (of the Order). (See Schedule V title). Paragraph 22 of the Remuneration Order gives liberty to an advocate to elect to tax his bill under Schedule V instead of the normally applicable Schedule. The advocate must communicate this to the client in writing either before or contemporaneously with rendering the bill of costs. If no such election is made by the advocate, the remuneration shall be according to the scale normally applicable, such as that of the High Court (Schedule VI).

3. Schedule VI Paragraph 6. *Correspondence* makes "Letters before action and other necessary letters" permitted items for remuneration under the Advocates (Remuneration) Order in respect of Proceedings in the High Court in *A - Party and Party Costs*. It is not all letters prior to action that are allowed as costs. 'Letters before action' must constitute notice of intention to sue or a demand properly required by law. Where allowed, the amount provided is Shs.105, or Shs.60 per folio.

"The plaintiff is entitled to send a separate letter of demand to each defendant where there are more than one defendants, and even if the demand to one or more of the other defendants were carbon copies of the letter to the other defendant, it is a 'letter before action' within the meaning of Schedule VI, Scale 6, Item (a): *Lachmandas Deviditta v. Girdharilal Vidyarthi* Supreme Court of Kenya at Nairobi, Civil Case No.1228 of 1953 (3rd November 1953)." Richard Kuloba *Judicial Hints on Civil Procedure* Vol.1 (Nairobi, Professional Publications, 1984), 155.

4. "Schedule VIII" is the third alternative mentioned in Paragraph 8., Schedule V above. This appears to be an error, which should read "Schedule VII". The intent appears to be to provide for taxation either under the elected general provisions of Schedule V, or under the prescribed amounts for High Court Proceedings or Subordinate Court Proceedings. High Court Proceedings are covered in Schedule VI. And Subordinate Court Proceedings are covered by Schedule VII. That is also the provision in the previous Schedule V (which was repealed by L.N. No.550/1997 which enacted the present Schedules and this apparent error).

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*Parts II and III will appear in succeeding issues*