



**Kairu & Mc Court Advocates v Directline Assurance
Company Limited (Miscellaneous Application 922 of 2020)
[2023] KEHC 3954 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 922 OF 2020**

**A MSHILA, J
APRIL 28, 2023**

BETWEEN

KAIRU & MC COURT ADVOCATES APPLICANT

AND

DIRECTLINE ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The Chamber Summons dated 10th December 2020 was brought under for the following orders;
 - a. This Reference against the decision of Honourable Stephany Wambui Githogori made on 27th November 2020 be and is hereby allowed;
 - b. The entire Ruling delivered by the Taxing Officer Honourable Stephany Wambui Githogori on 27th November 2020 dismissing the Applicant's Bill of Costs dated 10th March 2020 be and is hereby set aside.
 - c. The Court to make a determination that the Applicant was at all material times fully retained by the Respondent to render legal services to and for the benefit of the Respondent;
 - d. The items 1 to 60 of the Applicant's Bill of Costs dated 10th March 2020 be allowed as drawn in the said Bill of Costs or assessed by the Court in such other sums as may appear to be reasonable;
 - e. The Court to enter judgment for the Applicant against the Respondent together with interest at 14% per annum and issue a Decree;



- f. In the alternative, the Court do remit the Applicant's Bill of costs dated 10th March 2020 to another Taxing Officer for taxation;
 - g. The costs of and occasioned by this Reference be provided for.
2. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Christine Kirimi.

Applicant's Case

3. The Applicant submitted that when the Bill came up for taxation, the Respondent's Advocate only raised the issue of instructions for the first time in his submissions before the Deputy Registrar. Therefore, the Advocate cannot testify for the Client in his submissions. Consequently, the Deputy Registrar erred in making a finding that there existed an issue on instructions when in fact no such issue was properly raised before her.
4. It is therefore contended for the Applicant that the Bill was in fact unopposed and should have been allowed. The only proper channel for the Respondent to challenge the Advocate Client relationship was for the Respondent to file a preliminary objection before the Deputy Registrar and file a Reference to that effect before the Judge.
5. The Deputy Registrar indicated that she had no jurisdiction until the issue of whether the advocate was issued instructions was determined by a judge but misdirected herself when she proceeded to dismiss the Bill of Costs instead of referring the issue to the Court.
6. On whether there existed an Advocate Client relationship between the Applicant and the Respondent at all material times; the Applicant contended that it represented the Respondent (as Purchaser) for purchase of 44 apartments erected on land known as Land Reference Number 29271 Nairobi. The Applicant was the Advocate for the Purchaser and 2 directors of the Respondent at the time namely, Ms Terry Wijenje and John Macharia who have executed the transaction documents, including the unregistered Leases for the 44 apartments on behalf of the Respondent.
7. It has been severally decided that a retainer need not be in writing but maybe implied by conduct of the Parties as was held in *George Ndungu Kimani T/A George N. Kimani and Companv Advocates v Ronald Schaich* (2013) eKLR.
8. There cannot be any doubt that at all material times that an Advocate client/relationship existed between the Applicant and the Respondent. The correspondence exchanged with the Respondent; the respondent executed Leases to the 44 apartments, made payment of the full purchase price to the Vendor and shared the remittance confirmation with the Applicant for onward transmission to the Vendor, a confirmation that the Applicant was its Advocate in this transaction.
9. The work done by the Applicant is captured in the correspondence between the parties and the Applicant's contribution to the transaction documents and the engagements between the various parties as captured between pages 007 and 093. The Respondent had already acknowledged the outstanding fees in respect of this matter through the emails exchanged between the parties.

Respondent's Case

10. The Respondent argued that the Taxing Officer did not tax the bill of costs. The bill of costs was dismissed on account of want of Jurisdiction. Provisions of Order 11 (1) and (2) which form the basis/foundation of this reference cannot come to the aid of the Applicant. The Chamber Summons application is in the circumstances incompetent and ought to be dismissed in limine. Objection



(reference) provided for/contemplated under Order Rule 11(1) and (2) is in respect to the bill of costs with emphasis on items of the bill being objected to. The Applicant's Application as relates to Section 51 (2) of the *Advocates Act* must fail at this stage as there does not exist any certificate of taxation for the bill as it was not taxed.

11. The Respondent submitted that the taxing officer has no power to make a decision on instructions or whether Advocate/Client relationship existed where the same is disputed. This is a preserve of the Judge and in the circumstances, the taxing officer was right in dismissing the Bill of costs for want of Jurisdiction.
12. The Respondent pointed out that the issue of instructions (with emphasis) was hotly contested in cross-examination hence the Taxing Officer was right in making a finding that, the issue of instructions was in dispute. In the circumstances the Deputy Registrar did not err. Further, it was admitted during cross examination by the applicant that if the applicant acted for the respondent, it was on instructions of harbour capital. this was their client, in which an advocate/client relationship exists. the applicant did not render any services to the respondent. further, the applicant has not exhibited (44) leases executed by terry wijenje and John Macharia as alleged at in their submissions.
13. The Respondent has not admitted or acknowledged any outstanding fees. Any emails exchanged and appearing at page 0085 and 0094 of exhibit (MK1) the Applicant's bundle do not in any way acknowledge outstanding fees as is being portrayed by the Applicant.

Issues For Determination

14. The Court has considered the Application, response as well as the written submissions and frames only one issue for determination;
 - a. Whether the Taxing Officer erred in law and fact in dismissing the Bill of Costs?

Analysis

15. The Applicant's case is based on the ground that there existed a dispute on retainer yet the Respondent never denied issuing of instructions to the Applicant. Further, the Applicant contended that it had adduced enough evidence to prove that an advocate client relationship existed at all material times.
16. The Respondent on the other hand argued that everything was handled directly between the Vendor's Advocates M/s Anjarwalla & Khanna Advocates and the Respondent and that the only work done by the Applicant was to write 5 letters. Thus, the Applicant was not involved in the preparation and execution of leases.
17. This then brings us to the question – did the Taxing Officer err in law and fact by dismissing the Bill of Costs on the ground that she did not have jurisdiction to tax the Bill of costs until the issue of retainer was determined by a judge?
18. The Court of Appeal when faced with similar issues in the case of *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* [2017] eKLR held;

“The Appellant placed before the DR his advocate/client Bill of Costs with a view to having it taxed. The DR struck it out on the ground that the appellant/advocate had failed to establish existence of an advocate-client relationship between him and Flamco Limited against which the bill was intended to be taxed. On reference to the High Court against the order striking out the Bill, the learned Judge made a finding that as the fees sought to be taxed related to legal services for preparation of a Discharge of Charge and as Rule 24 of the Advocates



Remuneration Order provides that unless otherwise agreed, the Release of Discharge of Charge is to be prepared by the advocate of the party in whose favour such release or discharge is given, it was the firm of Jones & Jones Advocates which was entitled to prepare the Bill and if necessary file the Bill of Costs. The learned Judge held-

“For the Taxing Officer to embark on taxing a Bill of Costs, it must be established that there exists an advocate-client relationship and that the advocate was instructed as the law provided. Even if the Bill went to another taxing officer, it would suffer the same fate. For these reasons, I dismiss the application dated 14th July 2011 with costs to the respondent.”

The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn vs Roitei* [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The Advocates Act and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered.

The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.....

In the absence of proof that there existed advocate-client relationship, the Taxing Officer was justified in striking out the Bill of Costs as she did and the learned Judge of the High Court was right to uphold the decision of the Taxing Officer. We find no merit in any of the grounds of appeal. We dismiss the appeal with costs to the respondent.”

19. This court reiterates the holding that;

“For the Taxing Officer to embark on taxing a Bill of Costs, it must be established that there exists an advocate-client relationship and that the advocate was instructed as the law provided.’

20. The upshot of the above decision is that for the Taxing Officer to have jurisdiction to tax the Bill of Costs it must first be established that there exists an advocate-client relationship and that the advocate was instructed as the law provided. Based on this, the Taxing Officer had the jurisdiction to first make a determination on the issue of retainer as between the Applicant and the Respondent.

21. Based on the above, the Court is satisfied that the Application dated 10th December 2020 is partially meritorious to the extent of setting aside the decision of the taxing officer of 27th November 2020 and directs that the issue of retainer be first determined by a Taxing Officer other than Honourable Stephany Wambui Githogori (DR).

Findings and Determination

22. In light of the forgoing this court makes the following findings and determinations;

i. This Court finds the Application dated 10th December 2020 to be partially meritorious;



- ii. The decision of the taxing officer of 27th November 2020 is hereby set aside;
- iii. This court directs a Taxing Officer other than Honourable Stephany Wambui Githogori (DR) to make a determination on whether the Applicant was at all material times fully retained by the Respondent to render legal services to and for the benefit of the Respondent;
- iv. Each party to bear its own costs.
- v. Mention on 9/05/2023 before the Deputy Registrar to fix a hearing date.

Orders Accordingly

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Mr. Maunda holding brief for Miss Kirimi for the Applicant

Achieng holding brief for Orege for the Respondent

Sarah-----Court Assistant

