



**Kenindia Assurance Company Limited v Shilenje t/a JB Shilenje & Company
Advocates formerly C Bhakoya & Company Advocates (Miscellaneous Civil
Application 98 of 2016) [2023] KEHC 21241 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 21241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 98 OF 2016
JN KAMAU, J
MAY 30, 2023
IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA
AND
IN THE MATTER OF THE ADVOCATES (REMUNERATION)
(AMENDMENT) ORDER, IN THE MATTER OF A REFERENCE
BETWEEN
BETWEEN
KENINDIA ASSURANCE COMPANY LIMITED CLIENT
AND
JOHN BROWN SHILENJE T/A JB SHILENJE & COMPANY ADVOCATES
FORMERLY C BHAKOYA & COMPANY ADVOCATES ADVOCATE
RULING**

Introduction

1. In its Chamber Summons dated and filed on August 3, 2021, the Client herein sought for orders that the decision of the Taxing Officer dated April 26, 2018 in respect of the Bill of Costs dated June 14, 2016 be set aside and the Certificate of Costs emanating therefrom be recalled and annulled. It also sought for an order that the aforesaid Bill of Costs be remitted back to another taxing officer and the same be taxed afresh and or the court be pleased to tax afresh the items objected to and to render a decision thereon.
2. Its application was supported by an Affidavit sworn on August 3, 2021 by Josephine Onyambu, a Branch Manager at its Kisumu branch. It averred that it was dissatisfied with the aforesaid Ruling of



the Taxing Officer and thus lodged this Reference and a Notice of Objection dated April 26, 2018 to the Taxing Officer pursuant to the leave of the Court.

3. It disputed having retained the Advocate herein and contended that it retained M/s C B Bhakoya & Company Advocates to handle the primary proceedings, an issue which it asserted it raised before the Taxing Officer but she failed to determine the same thereby violating its rights to fair trial.
4. It further contended that the said Bill of Costs was allowed as drawn meaning that the Taxing Officer failed to apply her mind to the items which had been claimed in the Bill of Costs or to take into account relevant factors and circumstances in taxation of bills thereby allowing sums which were undeserved. It was its further averment that the Bill of Costs was not drawn to scale and that the items claimed therein were unreasonable and unjustified.
5. It added that pursuant to the provisions of Paragraph 11(1) of the *Advocates Remuneration Order*, the Taxing Officer was required to record and avail her reasons on the items that had been objected to but she did not provide the same and had since left the station (sic). It further stated that pursuant to the provisions of Paragraph 11(2) of the *Advocates Remuneration (Amendment) Order*, it could only file a reference challenging the Taxing Officer's decision on specific items it objected to and the absence of reasons was a valid cause for this reference.
6. It thus urged this court to order a stay of further proceedings relating to the taxed costs and any resultant certificate of costs to preserve the substratum of the intended reference.
7. The Client's Written Submissions were dated March 17, 2022 and filed on March 21, 2022. The Advocate herein did not file any response herein or file any Written Submissions. This Ruling is therefore based on the Client's said Written Submissions which it relied upon in its entirety.

Legal Analysis

8. The Client invoked Schedule VI Part B of the *Advocate Remuneration Order* which sets out parameters for a taxing officer to consider while determining costs payable as professional fees for services rendered to a client.
9. In this regard, it placed reliance on the case of *Premchand Raichand Ltd & Another vs Quarry Services of East Africa Ltd & Others* No 3 of AI972 EA at 162 where the court held that costs should not be allowed to rise to a level as to confine access to justice to the wealthy, that a successful litigant ought to be fairly reimbursed for the costs he had to incur, that the general level of remuneration of Advocates must be such as to attract recruits to the profession, that there should be consistency in the award made and that the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party. It was emphatic that the Bill of Costs herein was not taxed as required by law.
10. It further relied on Section 2 of the *Advocates Act* Cap 16 (Laws of Kenya) which defines a "client" as any person who retains or employs an advocate and any person who is or may be liable to pay to an advocate any costs and *Black's Law Dictionary 6th Edition 1990* which defined a retainer as "an act of employment when a client hires an attorney to represent him." It argued that the Advocate filed an Advocate-Client Bill of Costs against it as his alleged client for services he rendered on behalf of its insured, Pabari Enterprises Ltd, in the primary suit.
11. It pointed out that the basis of any relationship between an Advocate and his client was a retainer. It added that it paid the firm of M/s Cb Bhakoya & Company Advocates to represent their insured, West Kenya Sugar Limited in Winam SRMCC No 149 of 2008 which gave rise to a claim fees. It explained



that the said firm carried out its instructions diligently and was paid in full upon the conclusion of the case.

12. It contended that it neither withdrew its instructions from the firm of M/s Cb Bhakoya & Company Advocates nor instructed or consented to a change of advocates from the aforesaid firm to the Advocate herein. It further argued that the Advocate herein had not shown any nexus between his firm and the firm of M/s Cb Bhakoya & Company Advocates who it duly instructed.
13. It submitted that it had opposed the filing of the impugned Bill of Costs for taxation and contended before the Taxing Officer that she did not have the requisite jurisdiction to handle the matter as the existence of a retainer agreement between it and the Advocate was disputed.
14. In this respect, it relied on the case of *Mugambi & Company Advocates vs John Okal & Another* [2013] eKLR where it was held that where the issue of whether or not an advocate was duly retained and thus entitled to any costs, had to be determined by the court. It submitted that the word, “court” defined under Section 2 of the *Advocates Act* referred to the High Court. It asserted that the Taxing Officer erred when she arrogated herself the jurisdiction to determine the issue of retainer contrary to what was prescribed under Paragraphs 2, 10 and 13 of the *Advocate’s (Remuneration) Order* 2009 High Court (sic).
15. It further contended that the Advocate was also not entitled to the amounts claimed under items 1-163 for services that were rendered by the firm of M/s C Bhakoya & Company Advocates which it had retained. It added that the Advocate failed to state with clarity the relevant Schedule of the *Advocate’s Remuneration Order* pursuant to which he proposed to charge fees for services rendered. It was emphatic that it was apparent that the Bill of Costs was drawn in respect of services rendered at both the Magistrates court and the High Court.
16. It further submitted that the Bill of Costs did not conform to the provisions of Paragraphs 13(1) and 69 of the *Advocates Remuneration Order* and the Advocate ought to have appreciated the requirements set out for drafting a proper bill of costs before drafting one that failed to meet the threshold.
17. It also challenged the various items on the impugned Bill of Costs and argued that there was no assessment carried out and the Taxing Officer failed to apply taxation principles hence she erred in her decision resulting into figures which were unreasonably high. It urged the court to allow its reference and the impugned Ruling be set aside with costs.
18. Having considered the present reference, the affidavit evidence and the Client’s Written Submissions and authorities, it was the view of this court that the only issue that had been placed before it for determination was whether or not the Client had demonstrated sufficient cause to justify the setting aside of the decision of the Taxing Master that was delivered on April 26, 2018.
19. The Advocates Remuneration Order gives the taxing officer power and jurisdiction to tax the bill of costs where there is an established client-advocate relationship. Where there is no dispute as to retainer, Rule 13(1) of the *Advocates (Remuneration) Order* provides that:-

“The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.”



20. This court had due regard to the case of *Mugambi & Company Advocates vs John Okal Ogwayo & Another*(*Supra*) where the court held that:-

“The jurisdiction of a taxing officer is provided for in the Advocates Remuneration Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court...where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court.

“court” is defined in Section 2 of the *Advocates Act*, Cap 16 as the High Court. “court” is thus not the taxing officer or Deputy Registrar of the court.”

21. Under Paragraph 13A of the *Advocates Remuneration Order*, for the purposes of any proceedings before him relating to taxation of a bill of costs, the taxing officer, only has power to determine any matter in dispute before him or her only in relation to the items in the bill of costs. The taxing officer has no jurisdiction to determine any other dispute relating to the bill of costs.
22. In the instant case, the Taxing Officer was under a duty to have downed her tools first and referred the question of whether or not there was an advocate-client relationship to a judge for determination by the High Court before taxing the Advocate- Bill of Costs.
23. Going further, there was no proof that the Advocate served the Client with a Ruling Notice for the Taxation. There was also no evidence that the Client was aware when the taxation was done.
24. In the absence of proof of service of the Ruling Notice that the decision of the Taxing Officer was to be delivered on April 26, 2018, this court was persuaded by the Client’s submissions that failure to be notified of the delivery of the said decision prejudiced its right to fair hearing.
25. Notably, this court deemed it prudent not to analyse the merits or otherwise of the submissions as to whether the Client retained the Advocate herein as it was not the issue that was in contention herein. What had been placed before this court was whether or not there was merit in setting aside the decision of the Taxing Officer.
26. This court found that and held that it was in the interests of justice that parties be taken back to the position they first were before the Advocate- Client Bill of Costs was taxed so that all the disputes emanating from the same could be determined in the appropriate fora.

Disposition

27. For the foregoing reasons, the upshot of this court’s decision was that the Client’s reference application dated and filed on August 3, 2021 was merited and the same be and is hereby allowed in terms of Prayer No (a), (b), (c) therein. The costs of this reference will be in the cause.

28. It is so ordered.

DATED and SIGNED at KISUMU this 25th day of May 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY 2023.

M.S SHARIFF



JUDGE

