



**Njuguna & another v Tamirat Court Company Limited (Environment and Land Miscellaneous Application 182 of 2022) [2023] KEELC 16995 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16995 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 182 OF 2022**  
**EK WABWOTO, J**  
**APRIL 27, 2023**

**BETWEEN**

**SAMUEL GITONGA NJUGUNA ..... 1<sup>ST</sup> ADVOCATE**

**SAMUEL GITONGA NJUGUNA T/A SAMUEL GITONGA &  
ASSOCIATES ..... 2<sup>ND</sup> ADVOCATE**

**AND**

**TAMIRAT COURT COMPANY LIMITED ..... CLIENT**

**RULING**

1. The Applicants filed a Reference *vide* a Chamber Summons application dated 14th September 2022 which was accompanied by a supporting affidavit sworn by Samuel Gitonga Njuguna where the Applicants sought the following orders:
  - a. ...Spent.
  - b. That this Honourable Court be pleased to vacate, review and set aside the Ruling of the Learned Taxing officer Honourable Diana Orago dated and delivered on 25<sup>th</sup> August 2022 striking out the Advocate-Client bill of costs dated 28<sup>th</sup> July 2021 consequently reinstate the same.
  - c. That this Honourable Court be pleased to tax the Applicant's Bill of costs dated 28<sup>th</sup> July 2021 on merit.
  - d. That in the alternative of prayer (3) above, this Honourable Court be pleased to remit the Applicant's Bill of Costs dated 28<sup>th</sup> July 2021 to the Taxing Officer with directions for fresh taxation.
  - e. That this Honourable Court grants any other relief that may be just to meet the ends of justice in this case.



- f. That the costs of this application be provided for
2. The Application was premised on the grounds that:
- i. The Learned Taxing Officer Hon. Diana Orago in her ruling acted contrary to well settled principles of law and also misdirected herself on the applicable principles.
  - ii. The Learned Taxing Officer erred in law and in fact in finding that there was no advocate-client relationship between the Applicants and the Respondent.
  - iii. The Learned Taxing Officer lacked jurisdiction to determine the issue of existence of an advocate-client relationship.
  - iv. The Learned Taxing Officer erred in law and in fact in determining the issue of an advocate-client relationship which issue is not within her jurisdiction.
  - v. The Learned Taxing Officer misdirected herself and arrived at a decision that was not only erroneous and unreasonable in the circumstances but legally untenable.
  - vi. The Learned Taxing Officer misapprehended the law in finding that the absence of correspondence from a client to an advocate leads to an inference of inexistence of an advocate-client relationship.
  - vii. The Learned Taxing Officer wrongly construed the evidence before her and erred in failing to consider the submissions filed by the Applicants to enable her to exercise her direction and arrive at a fair and just conclusion.
  - viii. The Learned Taxing Officer erred in failing to appreciate that the Applicant acted on behalf of the Respondent as evidenced by the numerous Agreements for sale wherein the Respondent was the vendor which Agreements were drawn and registered by the Applicant. Further, the Learned Taxing Officer failed to consider the correspondences from the Applicant addressed to the Respondent/Client.
  - ix. No prejudice will be occasioned on the Respondent if the orders sought are granted.
  - x. If orders sought by the Applicant are not granted, the Applicant will suffer irreparable and substantial loss.
3. On 21<sup>st</sup> February 2023, the Court directed that the application be canvassed by way of written submissions.
4. In a supplementary affidavit sworn by Samuel Gitonga Njuguna dated 3<sup>rd</sup> March 2023, it was averred that the Court should take judicial notice that due to the 2022 presidential election petition, access to the Courts was restricted and would have hampered with the Applicant's ability to file the reference in a timely manner. In submissions dated 28<sup>th</sup> March 2023, the Applicant outlined the following issues for consideration by the court.
- i. Whether the delay in filing the reference was inordinate and inexcusable.
  - ii. Whether granting the Defendant enlargement of time is in the interest of justice.
  - iii. Whether the taxing officer had the jurisdiction to determine the issue of the existence of an advocate client relationship.
  - iv. Whether there existed an advocate client relationship.



- v. Whether the taxing officer misapprehended the law in finding that the Advocate sued the wrong party.
  - vi. Whether the Applicant is entitled to the reliefs sought in the Application.
  - vii. Who bears the cost of the Application.
5. It was submitted that the Respondent had instructed the Applicant to act for it while he was in the conduct of Wangoko & Gitonga Advocates. Relying on the case of *Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited* [2007] eKLR, it was argued that instructions to advocates need not be in writing and can be inferred from the conduct of parties.
  6. In the Replying affidavit dated 27<sup>th</sup> February 2023, sworn by Ephraim Munene Karwigi, it was averred that the instant Application ought to have been filed in Milimani ELC Miscellaneous Application No E143 of 2021 where the taxation was conducted and not in a separate file. It was also averred that the Applicant lacked locus to institute the suit since the firm is different from M/s Wangoko & Gitonga Advocates which was instructed by Realux Holdings Limited. The application was opposed in the Respondent's submissions dated 31<sup>st</sup> March 2023 in which it was reiterated that Realux Holdings and the firm of Wangoko & Gitonga Advocates had agreed that the firm would charge legal fees of Ksh 100,000/- for reviewing the draft joint venture agreement (JVA) and Ksh 60,000/- for incorporation of the special purposes vehicle. The total fees of Ksh 160,000 was invoiced and paid via cheque number 000043.
  7. Relying on the Supreme Court involving *Nicholas Kiptoo Arap Kiptoo Salat v Independent Electoral and Boundaries Commissions and 7others* [2014] eKLR, it was submitted that the Advocate ought to have first filed an Application seeking leave to enlarge or extend time for filing of reference and annex the draft reference for the perusal of the Court. Nonetheless, it was argued that the Applicant had not made out a case for granting of extended time.
  8. Having considered the all the parties' submissions, evidence and supporting documents, it is clear that the issues for determination before this court are as follows whether the Application dated 14th September 2022 is merited.
  9. Section 2 of the *Advocates Act* which defines a "client" to include:-
 

"Any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity has power express or implied, to retain or employ, and retains or employs or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs."
  10. I echo the sentiments of Ojwang J (as he was then) in *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna* [2006] eKLR, where he expressed that:
 

"The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors...If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment..."



The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity ...” [Emphasis Mine]

11. In *Oriental Commercial Bank Limited v Central Bank of Kenya* [2012] eKLR, the Court reiterated the scope under which an advocate-client relationship can be defined.

“...A client-advocate relationship arises when a client retains an Advocate to offer legal services specifically or generally. In Blacks Law Dictionary, 6th Edition, 1990, the word retainer has been explained as follows:-

“In the practice of Law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This act of employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses and related matters...” [Emphasis Mine]

12. It is common ground that a reference is an appeal against the decision of the taxing officer, therefore the issue of Taxing Officer’s jurisdiction is of paramount importance. This Court is guided by the decision of the Court of Appeal in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* NRB CA Civil Appeal No. 154 of 2014 [2017] eKLR where the Court in holding that the Deputy Registrar had jurisdiction to determine, as a preliminary issue of whether an advocate/client relationship existed as a prelude to taxation held as follows:-

“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...a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction...” [Emphasis Mine]

13. In this instance, a Preliminary Objection dated 27<sup>th</sup> August 2021 had been raised in ELC Misc. Application no E143 of 2021 which raised the issue of advocate/client relationship and retainer which necessitated the Taxing Officer to determine the determine before the actual taxation. In my opinion, since the advocate/client relationship is the anchor upon which taxation proceedings are brought, I find that the Taxing Officer acted appropriately in pronouncing herself on whether there existed an advocate/client relationship.



14. Secondly, the Applicant alluded to relying on correspondences dated 21<sup>st</sup> April 2017, 30<sup>th</sup> January 2019, 26<sup>th</sup> June 2020, 25<sup>th</sup> March 2021 and 9<sup>th</sup> April 2021 which would prove that the Respondent was their client and not Realux Holdings Limited. However, this Court takes note that the same were not submitted as evidence in this instant suit
15. The letter dated 15<sup>th</sup> May 2017 was submitted as evidence and addressed to Realux Holdings Limited. The letter reads as follows:

“Dear Sirs

Re: Incorporation of Tamirat Court Company Limited

We wish to inform you that we have successfully finalized registration of the subject company as per your instructions...

.... Yours Faithfully

For-Wangoko &Gitonga Advocates

Samuel Gitonga”

16. In my view, this confirms that Advocate Samuel Gitonga unequivocally acknowledged Realux Holdings Limited as their Client with regard to the given incorporation of the Respondent. It is undisputed that the Applicant carried out various legal services over the years as evidenced by Agreement for Sale dated 28<sup>th</sup> June 2018 and Further Addendum dated 9<sup>th</sup> November 2018. In line with this, I am in agreement with the Taxing Officer that the Applicant is entitled to fees for the work done and in this instance such satisfaction can only be relished when instituted against the right party which was not the case herein.

In the foregoing, this Court hereby finds that the Chamber Summons application dated 14th September 2022 is unmerited and the same is hereby dismissed with an order that each party to bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Olunga for the Advocate/Applicants.

Mr. Oguye for the Client/Respondent.

Court Assistant; Caroline Nafuna.

