



Peter O. Ngoge t/a O.P Ngoge & Associates v Kenya Koch Light Industries Ltd & another (Miscellaneous Civil Suit E969 of 2020) [2022] KEHC 13676 (KLR) (Civ) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL SUIT E969 OF 2020
DO CHEPKWONY, J
SEPTEMBER 23, 2022**

BETWEEN

PETER O. NGOGE T/A O.P NGOGE & ASSOCIATES APPLICANT

AND

KENYA KOCH LIGHT INDUSTRIES LTD 1ST RESPONDENT

REKHAVANTI PANKAJ SHAH 2ND RESPONDENT

RULING

1. Vide a chamber summons dated March 28, 2022, the applicant is seeking for orders that;
 - a. Spent;
 - b. The ruling delivered herein by the taxing officer on the March 23, 2022 which alluded falsely and unlawfully that the 1st respondent herein was not a client of the applicant as defined under section 2 of the *Advocates Act* be reviewed and set aside;
 - c. A declaration be issued herein to the effect that the 1st respondent herein was indeed a client of the applicant herein as defined under section 2 of the *Advocates Act* and therefore has got the legal obligation to pay scale fees and Value Added Tax arising from the legal services rendered by the Applicant;
 - d. The taxing officer Hon Stephany Githongori be disqualified forthwith from taxing the applicant's bill of costs herein;
 - e. Costs of this application be provided for by the respondent's herein.



2. The application is premised on the grounds on the face of it and in the annexed supporting affidavit sworn on March 28, 2022 by Peter O Ngoge the applicant. The applicant's case is that the 1st respondent deposited a total of Kshs 120,000/= vide Cheque No 000831 and Cheque No 000865 with the applicant as a consideration and fees for instructions to act for it in Nairobi Milimani HCCC No 146 of 2003 and pursuant to section 2 of the Advocates Act, client-advocate relationship was established between the parties. The applicant has alleged that a client does not necessarily have to be a party in the proceedings where the advocate has been instructed to act or render services in reliance on section 2 of the Advocates Act, hence the 1st respondent as a client is bound to pay fees per the scale and the Value Added Tax in the bill of costs arising from the legal services rendered to it by the applicant.
3. It is the applicant's case that the decision of the taxing officer dated March 23, 2022 shielding the 1st respondent from paying the scale fees and the VAT is biased, incompetent, highly irrational, arbitrary and malicious with the intention to expose the applicant to the risk of disbarment in view of the disciplinary proceedings instituted by the 1st respondent. The applicant alludes that bias can be inferred from the fact that the taxing master did not consider his submissions, but allowed the respondents to serve him submissions late after she had retired to prepare the impugned ruling and even after the delivery of the impugned ruling she refused to release the file to the registry thus denying him the right to fair trial and access to copies of the ruling on time.
4. Further, the applicant avers that the taxing master ignored a ruling delivered in Milimani HC Misc Applications No E671/2021 and No E670/2021 wherein Hon Elizabeth Tanui dismissed the respondent's preliminary objection on March 22, 2022 on similar matters as before her and which decision has never been challenged. It is for the foregoing reasons, that the applicant describes the taxing officer as highly irrational, incompetent, malicious and biased and with the intention of exposing him to the risk of disbarment and urges this court to allow his application.
5. The application is opposed vide the replying affidavit of Faith Wambui, the 1st respondent's general manager sworn on the May 5, 2022. She avers therein that the application is unmerited and is disguised as an appeal/review yet it is a scathing attack on the character and person of the judicial officer. According to the 1st respondent's general manager, the instant application is not only marred with falsehoods but the applicant has resorted to maliciously attack and malign the deputy registrar for allowing the preliminary objection dated September 20, 2021. She goes on to state that while it is not true that Honorable Elizabeth Tanui agreed with the applicant in in MISC Nos E670/2021 and E671/2021, the court merely directed the applicant to file an application in place of the preliminary objection for reasons that it had raised issues of facts. She adds that the applicant has not proved anything worth interfering with the taxing officer's ruling and urges the court to dismiss the application with costs.
6. In rejoinder to the replying affidavit above, the applicant filed a further affidavit sworn by Peter O Ngoge sworn on May 6, 2022 and reiterated the dispositions in his supporting affidavit with an addition that in allowing the preliminary objection, the taxing master denied him the right to be heard by determining the issue of retainer arbitrarily on the respondents' preliminary objection and unlawfully predisposed him to the risk of disbarment. He averred that it is the respondents who ought to have brought a suitable application or suit to challenge the question of retainer so that he produces the 1st respondent's books of account to show and prove that indeed the 1st respondent recognized the cheques in his replying affidavit were legal fees for him to render legal services in the said matter..
7. On May 12, 2022, upon listening to counsel for the respondents, parties were directed to canvass the application dated March 28, 2022 by way of written submissions. The applicant filed his submissions dated June 7, 2022 while the respondents' submissions are dated June 7, 2022.



Analysis and determination

8. I have carefully read through and considered the application at hand, the affidavits sworn in support and rebuttal thereof as well as the applicable statute and case law. It is my finding that in as much as the parties extensively submitted on whether there existed client-advocate relationship and a retainer agreement between them, it is my most respectful view that the proper issue for determination herein is;
 - a. Whether the learned deputy registrar properly addressed herself to the law in deciding to allow the respondent's preliminary objection; and,
 - b. Whether the dismissal of the suit amounted to denial of the applicant's right to access justice.
9. It is a trite principle in law that this court should will not unnecessarily interfere with decision of the taxing master unless it is shown that the taxing master is clearly wrong due to some misdirections, or that the taxing master considered irrelevant matters and as a result reached into a wrong conclusion among other factors as was laid down in the case of *First American Bank of Kenya v Shab & another*, Nairobi HCCC No 2255 of 2000[2002]1EA 64, which list, I wish not exhaust at this juncture.
10. It is undisputed that the impugned ruling by the taxing master was in relation to the notice of preliminary objection dated September 20, 2021. Needless to say, the law on what constitutes a preliminary objection was laid out in the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd*[1969] EA 696, wherein it was held that a preliminary objection must raise a pure point of law. The court stated as follows:-

“ a preliminary objection consist of a point lf law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are on objector to the jurisdiction of the court, or a plead of limitation, or a submission that the parties are bound by the contract giving raise to the suit to refer the arbitration.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued in the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any of the facts has to be ascertained as if what is sought is the exercise of judicial discretion” (emphasis added)
11. Thus, for the application to succeed in the instant case, and for the court to grant the prayer of setting aside the taxing master's decision, the applicant has to show that the respondent's preliminary objection did not meet the threshold as was laid out in the Mukisa Biscuits case. Better still, the applicant has to show that the preliminary objection did not raise a pure point of law.
12. In that respect, the applicant contends that the deputy registrar in allowing the preliminary objection, the deputy registrar denied him the right to be heard on contested facts on whether the respondent were proper clients and bound to pay client fees. He added that the taxing master kept a blind eye on decisions made on similar issues that had been raised by the respondent in a preliminary objection in twin cases but the court declined the preliminary objection for raising factual issues as opposed to issues of law. The respondents in contra-submissions expressed the view that the earlier decisions by twin courts were not binding and did not make a proper determination on the question of whether the respondents were proper clients or wrongly joined as parties.
13. I have perused the preliminary objection under question which is dated September 20, 2021 and established that it is premised on two major grounds, to wit, that the 1st respondent is improperly joined to this Miscellaneous Civil Application as it was not a party in Milimani HCCC No 146 of 2003, in which this Bill arises thereby violating order 1 rule 10(2) of the *Civil Procedure Rules* and secondly,



that the miscellaneous application is an abuse of the process of this court and ought to be dismissed with costs. Can the two grounds be said to be pure grounds of law in compliance with the threshold set in the Mukisa Biscuits case?

14. In my view, anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence. The court cannot be called upon through a preliminary objection to make a decision by ascertaining facts from elsewhere. In the present case, the respondents relied on order 1 rule 10 of the [Civil Procedure Rules](#) which forms the basis of the preliminary objection to argue that they were improperly enjoined as parties to this suit.
15. I have read through the said order 1 rule 10 of the [Civil Procedure Rules](#) and it relates to instances where a plaintiff has to be substituted or where a party has to be joined as a co-plaintiff which is not the case here. Instead, the respondents argued that they never gave instructions for the plaintiff to act on their behalf or a retainer issued in that respect, to warrant the applicant to sue for legal costs under the present suit.
16. In my view, these are issues to be addressed on additional evidence to establish whether there was a retainer agreement or whether the same can otherwise be implied. The preliminary objection was therefore unmerited and hence, the learned Magistrate erred in allowing it. In addition to that, the Deputy Registrar determined the issue on the existence of a retainer agreement without according the applicant a hearing on the same.
17. From the foregoing, the present application be and is hereby upheld on grounds that the preliminary objection raised factual issues which need the calling of further evidence.
18. As per further orders in the decision and ruling of the taxing master, the suit be mentioned together with High Court Miscellaneous Applications, 968, E651 and E931 of 2020 which have similar issues pending between the parties with a view of consolidating the same before another Deputy Registrar. Mention on October 15, 2022.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23rd DAY OF SEPTEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Maina counsel for Respondent

Court Assistant - Sakina

