



John Brown Shilenje t/a JB Shilenje & Company Advocates v Kenindia Assurance Company Limited (Miscellaneous Civil Application 97 of 2016) [2022] KEHC 14489 (KLR) (25 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 97 OF 2016
JN KAMAU, J
OCTOBER 25, 2022
IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA
IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER
IN THE MATTER OF A REFERENCE**

BETWEEN

**JOHN BROWN SHILENJE T/A JB SHILENJE & COMPANY
ADVOCATES ADVOCATE**

AND

KENINDIA ASSURANCE COMPANY LIMITED CLIENT

RULING

Introduction

1. In its chamber summons application dated August 3, 2021, the client sought for orders that the decision of the taxing officer dated April 26, 2018 in respect of the bill of costs dated June 13, 2016 be set aside, the resultant certificate of costs emanating from the aforesaid decision be recalled and annulled and that the bill of costs dated June 13, 2016 be remitted back to another taxing officer for fresh taxing and/or the court be pleased to tax the items objected to afresh and 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 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. In response thereto, on March 15, 2022, the advocate filed grounds of opposition dated March 8, 2022. He termed the present application bad in law, misconceived, misguided, an afterthought, frivolous, vexatious and an abuse of the court's process. He urged this court to strike out the same as the client had not raised any triable issues, it had been overtaken by events and that it had not demonstrated sufficient cause to warrant grant of orders sought. It asserted that it was in the interests of justice that the application be dismissed and pointed out that litigation had to come to an end.
8. The client's written submissions were dated March 17, 2022 and filed on March 18, 2022 while those of the advocate were dated March 8, 2022 and filed on March 15, 2022.
9. This ruling is therefore based on the said written submissions which parties relied upon in their entirety.

Legal Analysis

10. In addition to relying to the provisions of paragraph 11 (1) and (2) of the [Advocates Remuneration Order 2009](#), 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.
11. In this regard, it placed reliance on the case of *Premchand Raichand Ltd & another v 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.
12. 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 [Blacks 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.
13. 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 C.B 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.
 14. It contended that it neither withdrew its instructions from the firm of M/S C.B 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 C.B Bhakoya & Company Advocates who it duly instructed.
 15. 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.
 16. In this respect, it relied on the case of *Mugambi & Company Advocates v 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).
 17. It further contended that the advocate was also not entitled to the amounts claimed under items 1-42 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.
 18. It further submitted that the bill of costs did not conform to the provisions of paragraph 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.
 19. 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.
 20. On his part, the advocate submitted that the client had retained them and that there existed a valid advocate-client relationship which culminated after the client duly instructed him to defend its claim in Tamu SRMCC No 97 of 2009 *David Otieno Kisiiza v Chemilil Sugar Co Ltd* and in which judgment was entered for the sum of Kshs 70,000/=. He added that it was trite law that existence of an advocate-client relationship had to be established prior to drawing up a bill of costs as was the position in the instant case and as such the client could not be heard to dispute the existence of such retainer.
 21. In this regard, he placed reliance on the case of *Ochieng Onyango Kibet & Ohaga Advocates v Akiba Bank Ltd* [2008] 1 EA 300 where Warsame J (as he then was) stated that the act of authorising an advocate to act was what constituted the advocates retainer by the client and that it was not necessary for the advocate to obtain written authority before commencing to act for a client. He also referred this



court to the cases of *Kinluc Holdings Ltd v Mint Holdings Ltd & another* [1998] eKLR and *Zakbeem Construction (Kenya) Ltd v Mereka & Co Advocates* [2017] eKLR where the question of retainer of an advocate was addressed.

22. The advocate was emphatic that the client's attempt at denying existence of a retainer could not hold for reasons that the firm of M/S C.B Bhakoya and Company Advocates and M/S J.B Shilenje and Co Advocates were one and the same firm of advocates with the firm having been previously known as M/S C.B Bhakoya and Company Advocates. He was emphatic that the contested retainer could be ascertained from the memorandum of appearance that was filed on September 3, 2009 when he came on record on the client's behalf.
23. He pointed out that the reference was *res judicata* in terms of its substance and grounds in support of the application thereto as it was similar to the already determined application dated July 25, 2020. He added that the prayer for stay of execution of the taxed costs and the resultant certificate of costs emanating from the impugned ruling had also been prayed for in the aforesaid two (2) applications.
24. In that respect, he relied on the case of *George Miyare t/a Miyare & Co Advocates v Evans Gor Semelang'o* [2019] eKLR where the court held that multiplicity of actions on the same matter between the same parties even where there existed a right to bring the action was regarded as abuse. He argued that a stay order could not issue with respect to costs as was held in the case of *Francis Kabaa v Nancy Wambui & another* [1996] eKLR.
25. He further contended that the taxing officer exercised her discretion judiciously and the onus was on the client to demonstrate that there was an apparent error of principle on the part of the taxing officer which he failed to prove through sufficient evidence. He added that the notion that when a bill of costs is allowed as drawn there had to be an apparent error on principle was misconceived.
26. He also submitted the client was duly served with a ruling notice for the taxation dated August 9, 2016.
27. Having considered the present reference, the affidavit evidence, grounds of opposition and the parties' respective 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.
28. 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.”

29. This court had due regard to the case of *Mugambi & Company Advocates v 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.”

30. 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.
31. 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.
32. 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. The notice of taxation the advocate claimed was served upon the client was immaterial as the ruling of the taxation was delivered almost one and a half (1¹/₂) years later. It could not reasonably be said to have been the notice of the ruling that was delivered on April 26, 2018.
33. In the absence of proof of service of the ruling notice that the decision of the taxing master 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.
34. Notably, this court deemed it prudent 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 master.
35. 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

36. 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.
37. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH OF OCTOBER, 2022.

J. KAMAU

JUDGE

