



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E494 OF 2019.

AGN KAMAU ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

CHABRIN AGENCIES LIMITED.....RESPONDENT/CLIENT

RULING

Background

1. The client herein, **Chalbrin Agencies Ltd**, was sued together with other parties in HCCC No. 119 of 2016 in his capacity as a rent collecting agent cum property manager for the 1st, 2nd and 6th defendants and the interested parties in respect to properties which were the subject matter of the suit.
2. It is alleged that the Advocate came on record for the client's Principals (the 1st, 2nd and 6th defendants) in the suit and also wrongfully entered appearance for the client. The advocate did not file any defence on behalf of the client.
3. The advocate thereafter demanded for legal fees from the client which the client declined to pay on the basis that it did not instruct the advocate to act for it. The advocate filed an application dated 2nd August, 2019 in which he sought to cease acting for the client on the grounds inter alia, that the client had failed to pay the legal fees after which he filed his Bill of Costs for taxation. The advocate argued that he received oral instructions to act for the client.
4. The client objected to the taxation of the advocate's Bill of Costs through a Notice of Preliminary Objection in which it listed the following grounds:
 - a. ***There was no advocate-client relationship and or instructions between the advocate applicant and the Respondent.***
 - b. ***The bill of costs should be struck out and or dismissed with costs.***
 - c. ***The bill of costs is exaggerated not factual and the Respondent objects to all items on the bill.***
 - d. ***The bill of costs herein is pre-mature hence defective.***
5. The Taxing Officer upheld the Preliminary Objection through a ruling delivered on 30th April 2020 in which he struck out the Bill of Costs and held, inter alia, that since the Respondent is a limited liability company, it required a resolution from the Board or written instruction from the Managing Director giving instructions to the Applicant. This is to say that the Taxing Officer upheld the Client's preliminary objection and found that there was no client/advocate relationship between the parties and that there were no instructions issued to the Advocate to act in the matter. The ruling by the Taxing Officer precipitated the institution of the application that is the subject of this ruling.

Application

6. Aggrieved by the ruling of the Taxing Officer striking out his Bill of Costs, the Advocate moved this court under Rule 11 of the Advocates Remuneration Order seeking orders: -

1. ***THAT the decision of the taxing officer on the Applicant's bill of costs dated 25th October 2019 delivered on 30th April 2020 be set aside.***

2. **THAT** the Bill of Costs dated 25th October 2019 be referred back for taxation under a different taxing officer with appropriate directions.

3. **THAT** this Honourable Court grants any other relief that may be just to meet the ends of justice in this case.

4. **THAT** the costs of this application be provided for.

7. The application is supported by an affidavit sworn by **Mr. Allan George Njogu Kamau**.

8. The Client opposed the application through the Replying Affidavit sworn by its property manager **Mr. Dishon Ndonga**.

9. Parties canvassed the application by way of written submissions.

10. A summary of the Applicant's case is that the taxing officer erred in finding that there was no Advocate/Client relationship between the Applicant and the Respondent. According to the applicant, it was not within the taxing officer's jurisdiction to determine the issue of existence of an advocate-client relationship at that preliminary stage. The applicant cited the decision in **Mugambi & Company Advocates v John Okal Ogwayo & Another** (2013) eKLR where Waweru J. held that the taxing officer did not have jurisdiction to hear and determine the client's chamber summons dated 28th February 2011 to strike out the advocates bill of costs because the issue being canvassed in the application was whether or not the advocate was entitled to costs from the clients in the first place. The Learned Judge stated: -

"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 court. See paragraphs 2,10,13 of the Remuneration Order, 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. "

11. The Applicant further argued that under paragraph 13A of the Advocates Remuneration Order (ARO), the taxing officer, for the purposes of any proceedings before him, relating to taxation, has power to determine any matter in dispute before him, "only in relation to the powers of the taxing officer on the items in the bill of costs which cannot be interpreted to mean any issue that challenges the taxing officer's jurisdiction to tax the bill of costs.

12. The Applicant's case was that since the issue of retainer challenges the taxing officer's jurisdiction to tax the bill, the said issue could only be determined by the 'court.' Reliance was also placed on **Abincha & company Advocates vs Trident Insurance Company Ltd** (2013) e KLR where Waweru J. held that the issue of the jurisdiction of the taxing officer can only be determined by a Judge and that it was the kind of issue that the taxing officer should have referred to the opinion of the High Court in the first place. The Learned Judge further held: -

"Only after determination of that fundamental issue by the High court, that is whether or not there were any costs due to the advocate that could be taxed, would the bill of costs be referred back to the taxing officer for taxation. It is found that there were costs that were due to the advocate. I therefore hold that even the taxing officer of the court did not have jurisdiction to hear and determine the main prayers of the Notice of Motion dated 20th February 2012."

13. The Applicant relied on the case of **Namachania & Mbugua Advocates vs Igainya Limited** [2015] eKLR wherein it was held that: -

"...where an issue is raised as regards to retainer, that issue ought to be determined by a court as defined in Section 2 of the Advocates Act. In that definition, a taxing officer/master or a deputy registrar is not a court. Therefore, it was submitted for the Applicant that, when the Applicant herein raised the issues regarding retainer and whether the Respondent could claim rights under PSA, these are substantial matters that the learned Deputy Registrar ought to have referred to court with competent jurisdiction to determine the same before she could exercise her jurisdiction. "

14. The Applicant argued that the Taxing Officer failed to appreciate that a preliminary objection must raise pure points of law and not of facts. It was submitted that the issue as to whether there existed a

retainer could only have been determined based on facts. Parties had to adduce evidence to support their claims on whether there were instructions given by the Respondent to the Applicant. This could not have been made possible through submissions.

15. According to the applicant, in the absence of evidence, the taxing master could not have been expected to know the intentions of the parties as submissions are only intended to clarify issues of law and fact, not to serve as evidence by the parties. Reference was made to the decision in ***Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007***: where it was held that: -

"Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided. "

16. Reliance was further placed on the case of ***Nancy Wambui Gatheru vs. Peter W. Wanjere Ngugi Nairobi HCCC No. 36 of 1993*** where it was held:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case. "

17. The applicant further submitted that the taxing officer erred when he solely relied on the respondent's submission that there was no retainer thus failing to appreciate that that retainer was a factual issue that required proof which could only be adduced by the parties at the hearing before a judge.

18. The Client, on the other hand, submitted that the instant application is incompetent and ought to be dismissed or struck out as it has been brought under Rule 11 of the ARO which is only applicable when the Bill of Costs has been taxed. The client observed that the Bill of Costs was struck out on the basis that the client did not issue any instructions to the Advocate. Reference was made to the decision in ***Wilfred N. Konosi T/A Konosi & Co Advocates v Flamco Ltd*** [2017) eKLR wherein the jurisdiction of the taxing officer was discussed and the court noted that the existence of a client/advocate relationship is core in the taxation of a Bill of Costs. In the said case, the court further held that: -

"The relationship between the Advocate and his client springs from instructions by the client to the Advocate. Absence of such relationship the taxing officer would be bereft of jurisdiction to tax a bill".

19. The parties identified several issues for determination, I however find that the main issues for determination is whether the taxing officer had jurisdiction to hear the and determine the issue of the existence of advocate-client retainer.

20. The applicant is aggrieved by the decision of the Taxing Master to strike out his Bill of Costs on the basis that there was no advocate/client relationship between him and the respondent/Client. According to the applicant, the issue of whether or not an advocate was duly retained and is therefore entitled to costs can only be determined by the court.

21. Under Paragraph 11 of the Advocates Remuneration Order, it is mandatory that a reference can only be filed within 14 days of filing the notice to the High Court under the same rule. In the present case, the Client argued that the application is incompetent as Paragraph 11 of the Advocates Remuneration Order is only applicable where a Bill of Costs has been taxed yet the bill was struck out for want of retainer and not taxed. The said Paragraph provides, inter alia, as follows: -

(1) Should any party object to the decision of the taxing Officer, he may within fourteen days

after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned setting out the grounds of his objection.

(3)

(4)

22. A simple reading of the above provision shows that it is applicable where a party objects to the taxing officer's taxation of the items on the bill of costs. In the instant case, it is not in dispute that the Bill of Costs was not taxed. The question which then arises is whether the applicant can approach this court under Paragraph 11 when the bill was not taxed. In **Vishisht Talwar v Antony Thuo Kanai T/a Thuo Kanai Advocates [2014] eKLR** the Court adopted a passage in the case of **Machira & Co. Advocates v Arthur K. Magugu (CA 199/2012) eKLR** and discussed the filing of a reference under Rule 11 as follows: -

“Rule 11 therefore provides for ventilation of grievances from such decision through references to a Judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open Court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the fact of the record and so on. In our view of the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through reference under Rule 11 to a Judge in chambers.”

23. Guided by the above decision, I find that even though the taxing officer did not tax the bill in question so as to necessitate the filing of a reference in line with Rule 11, the instant application challenges the decision of the taxing officer regarding the issue of taxation. I therefore find that the applicant is within the law in seeking a review of the taxing officer's decision.

24. Turning to the issue of whether the taxing officer had the jurisdiction to determine the issue of retainer between the client and the advocate, I find that this is a well-trodden path going by the existing authorities over the subject for which I do not intend to reinvent the wheel.

25. Paragraph 13A of the Advocates Remuneration Order provides as follows: -

“The taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

26. The Applicant argued that since the issue of retainer challenges the taxing officer's jurisdiction, the taxing officer ought to have referred the same to the court for determination instead of striking out the Bill of Costs. This is to say that the applicant faults the Taxing Master for acting without jurisdiction in determining the issue of retainer which is the preserve of the court. When faced with a similar scenario, Waweru J. held as follows in **Mugambi & Company Advocates v John Okal Ogwayo & Another (2013) eKLR** on whether or not the advocate was entitled to costs from the clients: -

“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 court. See paragraphs 2,10,13 of the Remuneration Order, 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. "

27. Guided by the above decision, I find that the taxing officer erred in determining the issue of retainer which he ought to have referred to the court as defined under Section 2 of the Advocates Act. Consequently, I allow the application dated 4th August 2020, *albeit* partly, and set aside the decision of the taxing officer of 25th October 2019 and direct that the issue of retainer be determined by this court first before the applicant's Bill of Costs can be considered.

Dated, signed and delivered via Microsoft Teams at Nairobi this 22nd day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Mbirwe for the Applicant.

No appearance for Respondent.

Court Assistant: Sylvia