



**CM Advocates LLP v Cole (Suing as the Administrator of the Estate of Josephine Eleanor Moikobu) (Environment and Land Miscellaneous Application E170 of 2021) [2023] KEELC 19149 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19149 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E170 OF 2021  
JO MBOYA, J  
JULY 31, 2023**

**BETWEEN**

**CM ADVOCATES LLP ..... ADVOCATE**

**AND**

**ANDREW OMANDI COLE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE ELEANOR MOIKOBU) ..... CLIENT**

**RULING**

**Introduction and Background**

1. Vide notice of motion application dated the March 17, 2023; the client, (now Applicant) herein has approached the Honorable court seeking for the following reliefs;
  - i. ....(Spent).
  - ii. Pending the Inter-Partes hearing and determination of the Notice of Motion filed herewith, an Order be and is hereby issued that the hearing of the Advocate’s Notice of Motion Application dated February 1, 2023; scheduled for June 14, 2023; be vacated and/or held in abeyance.
  - iii. The Client be heard and is hereby granted Leave to file a response to the Advocate-Client Bill of costs dated June 21, 2021; in terms of the draft Replying affidavit annexed to this Application.
  - iv. The Advocate’s Bill of Costs filed on June 21, 2021 and the Advocate’s Notice of Motion dated February 1, 2023 be and are hereby struck out.
  - v. The Ruling delivered on November 22, 2022 and Certificate of Taxation dated January, 2023 are hereby set aside Ex-Debito Justitiae.
  - vi. The cost of this application be provided.



2. The instant application is premised and anchored on various albeit numerous grounds totaling 13 in number. Furthermore, the instant Application is supported by an affidavit sworn by Andrew Omandi Cole; and which is sworn on the March 17, 2023 and in respect of which the deponent has annexed 6 documents.
3. Upon being served with the instant Application, the Advocate (now Respondent) filed a Replying affidavit sworn on the April 5, 2023; and in respect of which the Deponent thereto has attached a total of 3 documents, inter-alia, a copy of the submissions which were filed by and on behalf of the Client herein before the taxing officer.
4. For good measure, upon being served with the Replying affidavit, (details in terms of the preceding paragraph), the Client (now Applicant) sought for and obtained Leave and thereafter filed a Further affidavit sworn on the May 30, 2023; and wherein the Deponent avers inter-alia that the taxation of the Advocate-Client costs, which was undertaken at the instance of the advocate herein was irregular, illegal and unlawful; insofar as there was in place a retainer agreement, which precluded the filing and taxation of Advocate-Client Bill of Costs.
5. First forward, the instant Application came up for hearing on the June 27, 2023; and whereupon the advocates for the respective Parties agreed to canvass and ventilate the subject Application by way of written submissions. Consequently and in this regard, the Honourable court thereafter circumscribed the timeline for the filing and exchange of the written submission.
6. Notably, the Advocates for the Parties duly complied and filed the written submissions, which submissions form part of the record of the Honourable court.

### **Submissions By The Parties**

#### a.client's/applicant's Written Submissions:

7. The Client herein filed written submissions dated the July 3, 2023; and in respect of which same has raised, canvassed and highlighted three (3) salient issues for consideration by the Honourable court.
8. Firstly, Learned counsel for the Client has submitted that on or about the year 2016, the Advocates herein agreed and or covenanted to represent the Client over and in respect of various matters, whose details were supplied and availed to the advocate.
9. Further and in addition, Learned counsel for the Client has submitted that arising from the acceptance by the advocate herein to take up the instructions and to represent the Client, the advocate proceeded to and generated a Retainer Agreement and Engagement wherein the advocate detailed the quantum of costs/ Remuneration that were to be paid to and in favor of the advocate.
10. Additionally, Learned counsel for the Client has submitted that upon the generation/preparation of the Retainer agreement, same was dispatched to the Client for his consumption and further action. In this regard, Learned counsel for the Client has submitted that there was therefore a Retainer Agreement, whose terms were binding on the advocate and the Client, respectively.
11. In any event, Learned counsel for the Client has proceeded to and contended that arising from the Retainer Agreement, the advocate herein billed the Client and the Client responded to and settled the various invoices which were issued by the Advocate.
12. On the other hand, Learned counsel for the Client has submitted that even though the Client has availed and exhibited a copy of the retainer agreement as well as assorted invoices which were issued



- by the advocate; the Advocate herein has failed to controvert and/ or impeach the existence of the Retainer Agreement.
13. In view of the forgoing, Learned counsel for the Client has therefore submitted that insofar as there was a retainer agreement, the Advocate herein is precluded from generating a bill of costs and purporting to have same taxed, in the manner in which the Advocate did.
  14. Furthermore, Learned counsel for the Client has submitted that once there exists an agreement, that agreement binds both the Client and the Advocate and in this respect, Learned counsel for the Client has cited and relied on inter-alia the case of Omulele & Tolo Advocates versus Mount Holdings Ltd (2016)eKLR, Mamta Peeush Mahajan (Suing on behalf of the Estate of the Late Peeush Premlal Mahajan) v Yashwant Kumari Mahajan (Sued personally and as the Executrix of the Estate and beneficiary of the Estate of the Late Krishan Lal Mahajan (2017)eKLR and RTS Flexible Systems Ltd versus Molkerei Alois Muller GmbH & Co KG (UK Production) (2010) UKSC 14, respectively.
  15. Secondly, Learned counsel for the Client has contended that the import and tenor of a Retainer agreement entered into and executed in accordance with the provisions of Section 45 of the Advocates Act, Chapter 16, Laws of Kenya; is to fix or put a cap on the professional charges/costs due and payable to an Advocate. In this regard, Learned counsel for the Client contend that the Advocate herein could therefore not be allowed to seek professional fees beyond the amount stated in the retainer agreement.
  16. Thirdly, Learned counsel for the Client has submitted that the Bill of Costs dated the June 21, 2021 and which was filed by the Advocate herein, despite the existence of a retainer agreement, was therefore erroneous and legally untenable.
  17. Furthermore, Learned counsel for the Client has submitted that in the course of the taxation of the illegal bill, which was filed by the Advocate herein, the advocate failed to bring to the attention of the Taxing officer that same had been paid and indeed received various amounts of money from the Client herein.
  18. In view of the foregoing, Learned counsel for the Client has contended that the lodgment and subsequent prosecution of the Advocate-Client Bill of Costs; by and on behalf of the Advocate herein, was therefore an abuse of the Due process of the Honourable court.
  19. Arising from the foregoing, Learned counsel for the Client has therefore contended that the instant Application is meritorious and thus same ought to be granted.

b. Advocate's Submissions:

20. The Advocate (now Respondent) filed written submissions dated the July 11, 2023; and in respect of which same has raised and highlighted four (4) pertinent issues for consideration and ultimate determination by the Honourable court.
21. First and foremost, Learned counsel for the Advocate has submitted that this Honorable court is devoid and divested of the requisite Jurisdiction to entertain and adjudicate upon the subject Application; which in itself is not a reference as envisaged vide the provisions of Rule 11 of the Advocates Remuneration Order.
22. Furthermore, Learned counsel for the Advocate has submitted that the Client herein was duly represented by an Advocate during the course of the taxation before the Deputy Registrar. Nevertheless, Learned counsel for the Advocate has contended that despite having been duly represented by an Advocate during the taxation, the issues now being raised at the foot of the current Application, were neither canvassed nor ventilated by the previous Advocate or at all.



23. Additionally, Learned counsel for the Advocate has also submitted that insofar as the issues pertaining to (sic) the existence of a Retainer Agreement, were neither raised nor canvassed before the taxing officer; same cannot now be raised and/or canvassed before this Honorable court.
24. In the premises, Learned counsel for the Advocate has submitted that the gravamen/ substratum of the Application before the Honourable court relates to the existence or otherwise of a Retainer agreement, which does not fall within the Jurisdiction of this Honourable Court.
25. In support of the foregoing position, namely, that issues which were never canvassed before the Deputy Registrar/Taxing Officer, cannot form the basis of arguments before the court; Learned counsel for the Advocate has cited and relied on inter-alia the case of Wilfred N Konosi T/a Konosi & Company Advocate versus Flamco Ltd (2017)eKLR, Cecil G Miller T/a Miller & Co Advocates versus Parin Sharif & 3 Others (2012)eKLR and Showcase Properties Ltd versus Mugambi & Co Advocates (2020)eKLR, respectively.
26. Secondly, Learned counsel for the Advocate has submitted that whenever a Party is aggrieved and/or dissatisfied with the decision of a taxing officer, arrived at in the course of taxation; such a Party can only approach the Honourable court through the designated process and not otherwise.
27. In this respect, Learned counsel for the Advocate has submitted that the only prescribed manner for approaching the Honourable court, whilst challenging the Certificate of taxation is vide a Reference and not by way of an Application, seeking to review or to set aside the certificate of taxation and to strike out the Bill of Costs, leading to the certificate of taxation.
28. Further and in addition, Learned counsel has submitted that insofar as the Client herein has neither complied with nor abided by the express provisions of the law, the instant Application is therefore incompetent, illegal and a nullity in law.
29. Thirdly, Learned counsel for the Advocate has submitted that there was no retainer and/or engagement agreement, which was executed by the Client herein or such other person authorized by the Client to warrant the claim that the Advocate was bound by (sic) the Retainer agreement.
30. In any event, Learned counsel for the Advocate has submitted that the primary suit, which gave rise to the Advocate/ Client Bill of costs herein and by extension the certificate of taxation, was filed in the year 2018; and hence it is inconceivable that the purported retainer agreement, which was issued in 2016 can be said to relate to same.
31. On the other hand, Learned counsel for the Advocate has also submitted that the purported Retainer agreement which is neither signed nor executed by the Client, does not refer to the Primary suit, namely, ELC 190 of 2018; which is the basis of the taxation of the Advocate-Client Bill of Costs.
32. Additionally, Learned counsel for the Advocate has also submitted that the impugned document which the client seeks to rely on does not comply with the mandatory requirements of Section 45 of the Advocates Act, whose terms are explicitly and devoid of ambiguity.
33. In support of the submissions pertaining to non-existence of a Retainer Agreement, Learned counsel for the Advocate has cited and relied on, inter-alia, the case of Omulele & Tollo Advocates versus Mount Holdings Ltd (2016)eKLR, Otieno Ragot & Co Advocate versus National Bank of Kenya Ltd (2016)eKLR and Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 3 Others (2015)eKLR, respectively.



34. Fourthly, Learned counsel for the Advocate has submitted that the Client herein was represented by an advocate duly appointed by same and it is therefore instructive that the Client had given to the previous Advocate all the necessary instructions, to enable the Advocate to protect the interests of the Client.
35. Furthermore, Learned counsel has contended that having previously engaged and retained an Advocate, the Client herein is bound by the actions and/or omissions of the erstwhile Advocate; and if same was/is dissatisfied with the actions of the previous Advocate, then the Client can only pursue the erstwhile advocate for negligence and not otherwise.
36. In any event, Learned counsel for the Advocate has submitted that it cannot be fashionable for the Client herein to now come to court and start blaming his previous advocate for not having properly and/or duly represented him (Client) during the taxation proceedings.
37. In support of the submissions that it is not sufficient to lay the blame on the previous Advocate and expect the court to grant and/or exercise equitable discretion, Learned counsel for the Advocate has invited the Honourable court to take cognizance of the holding in the case of Estate of Karori Kihagi (deceased) (2018)eKLR and Rachael Njango Mwangi (Suing as personal representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & Another (2021)eKLR, respectively.
38. Premised on the foregoing submissions, Learned counsel for the Advocate has therefore implored the Honourable court to find and hold that the current Application is not only premature and misconceived; but same is also an abuse of the Due process of the court.
39. Consequently and in the premises, Learned counsel for the Advocate has impressed upon the Honourable court to dismiss the Application beforehand, albeit, with costs.

#### **Issues For Determination**

40. Having reviewed the Application dated the March 17, 2023; and the Response filed thereto and having taken into account the written submissions filed by the respective Parties; the following issues are pertinent and are thus worthy of determination.
  - i. Whether the Honorable court is seized and possessed of the requisite Jurisdiction to adjudicate upon the subject Application.
  - ii. Whether there existed any Retainer Agreement or otherwise, between the Advocate and the Client relating to ELC (OS) No. 190 of 2018 or otherwise.

#### **Analysis And Determination**

Issue Number 1

Whether the Honorable court is seized and possessed of the requisite Jurisdiction to adjudicate upon the subject Application.

41. Before venturing to address and deliberate upon whether or not this Honorable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the instant matter, it is important to understand the background leading to the filing of the current Application.
42. In this respect, I beg to point out that on or about the June 21, 2021, the Advocate herein crafted and filed a Bill of Costs wherein same sought to tax and thereafter recover the Advocate-Client charges arising from ELC No. 190 of 2018 (OS), wherein the Advocate had hitherto been engaged and/or instructed by the Client.



43. Furthermore, upon the filing of the Advocate-Client Bill of Costs, the Client herein proceeded to and retained a firm of Advocates to file the requisite responses to and in opposition of the Advocate-Client Bill of Costs. For good measure, the Advocate who was instructed and retained by the Client crafted and filed suitable responses to the Bill of Costs.
44. Subsequently, the Advocate, who was engaged by the Client herein, (details which have been alluded to herein before) thereafter participated in the proceedings before the taxing officer; including filing of written submissions, articulating the items which were being challenged on behalf of the Client.
45. Suffice it to point out that upon examining and considering the various submissions which were filed by the Advocates for the respective Parties, the Learned taxing officer proceeded to and rendered a ruling on the November 22, 2022; wherein the Advocate -Client Bill of Costs was taxed and certified in the sum of Kes.4, 643, 295.50/= only.
46. Instructively, it is important to underscore that upon the delivery of the Ruling on taxation, the Learned taxing officer proceeded to and issued the requisite certificate of taxation.
47. Nevertheless, it is also important to state and underscore that despite having been privy to and knowledgeable of the taxation proceedings and the ultimate ruling on taxation; the Client herein neither lodged the requisite objection to taxation nor filed any Reference against the impugned certificate of taxation.
48. Be that as it may, the client has now approached this Honourable court vide the Notice of motion Application dated the March 17, 2023; and in respect of which the Client has now raised the question of a Retainer agreement, which is contended to have been entered into and executed by the Parties.
49. Furthermore, Learned counsel for the Client has further contended that insofar as there was a Retainer agreement, then the Advocate herein was precluded and or prohibited from filing an Advocate-Client Bill of Costs for taxation as against the Client.
50. Two things do arise and which are critical in determining whether or not this Honourable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject Application. In this regard, I proposes to examine the two issues seriatim;
51. Firstly, it is important to note and understand that what is being challenged before the Honourable Court is the taxation proceedings and in particular; the resultant certificate of taxation, which was issued by the taxing officer following the rendition of the ruling delivered on the November 22, 2022.
52. The question that does arise is whether a person/litigant, the client herein not excepted, who is aggrieved and dissatisfied with a certificate of taxation can approach the Honourable court by way of an Application, like the one beforehand seeking to set aside the ruling on taxation and the consequential certificate of taxation, without following the provision of Rule 11 of the Advocates Remuneration Order.
53. To my mind, the Advocate Remuneration Order constitutes and or comprises of a self-contained code, which regulates the process of taxation of costs; whether Advocate-Client Bill of Costs; or Party and Party Bill of Costs.
54. Insofar as the Advocate Remuneration Order constitute a self-contained code; it therefore behooves all and sundry, the Client herein not excepted, to abide by and or comply with the prescribed mechanism for impugning a certificate of taxation.



55. In any event, it is now trite and established position of the law that where the law prescribes the manner of challenging and/or impugning a particular decision or process, it is incumbent upon every litigant to comply with the designated process/procedure and not otherwise.
56. Further and in addition, it has been held times without number that where one fails to comply with the established and prescribed mechanism, the defaulting party shall be non-suited; and the offensive pleadings shall be amenable to be struck out, for being incompetent and constituting an abuse of the Due Process of the Court.
57. In this respect, it is important to take cognizance of the dictum of the Court of Appeal in the case of Kipkalya Kiprono Kones versus Republic & another Ex-parte Kimani Wa Nyoike & 4 others [2006] eKLR , where the court stated and held as hereunder;

“There is, first the case of The Speaker Of The National Assembly Vs. The Hon. James Njenga Karume, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported). This was, of course an application for a stay of some orders of the High Court under Rule 5 (2) (b) of the Court of Appeal Rules, and that being the position, no concluded views could be expressed. But the Court of Appeal, consisting of KWACH, COCKAR & MULI, JJ.A did state as follows in their Ruling dated 29th May, 1992;

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

58. Further and in addition, it is instructive to observe that the mechanism that is adopted and deployed while approaching the Jurisdiction of the court, also impacts on the competence or otherwise of the proceedings taken and/or placed before the court. In this respect, it behooves the Parties, the Client herein not excepted to comply with the prescribed mechanism.
59. Whilst underscoring the importance of the mechanism deployed in approaching the Jurisdiction of the court, the Court of Appeal stated and observed in the case of Scope Telematics Sales International versus Stoic International & Another (2017)eKLR, where the court and held thus;

“It must be borne in mind that the substantive provision that the 1<sup>st</sup> respondent invoked was Section 7 of the Act. The 1<sup>st</sup> respondent was seeing an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425). The 1<sup>st</sup> respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities.

That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner



of indiscretions relating to procedure (See Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors [2010] eKLR;

60. On the other hand, where the procedure adopted and deployed is interwoven and or intertwined with the substance of the case, it cannot be argued that the mechanism adopted and/or deployed will not affect the substance of the case. In this respect, what is before the court is a kind of Application that is unknown to and unfathomed by the Advocates Remuneration Order.
61. Clearly, the procedure adopted and applied by the Client herein militates and vitiates the entire proceedings before the Honourable court. Consequently and in this regard, the wrong procedure deployed divests this court of the requisite Jurisdiction to interrogate the merits or otherwise of the dispute beforehand.
62. To fortify and anchor the foregoing exposition, I take succor in the dictum of the Supreme Court in the case of Moses Mwicigi versus IEBC & Others (2016)eKLR, where the court stated and held thus;
  - (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
63. Invariably, the filing of the Notice of Motion Application herein instead of lodgment of the requisite Notice of Objection to Taxation and the necessary reference, divests the court of the requisite Jurisdiction to entertain the subject matter.
64. The 2<sup>nd</sup> aspect which also impacts on the Jurisdiction of this Honourable court, relates to the question as to whether this Honorable court can entertain and adjudicate upon the issue of the existence of a Retainer agreement or otherwise; which issues was neither canvassed nor ventilated before taxing officer prior to and or during the taxation proceedings.
65. Instructively, there is no gainsaying that the Client herein was duly represented before the taxing officer, wherein same filed various responses, inter-alia, written submission to ventilate the Clients position as pertains to the Advocate-Client bill of Costs which was pending before the Taxing officer.
66. Notably, the Advocate who represented the Client before the Taxing officer and who certainly had instructions from the Client, neither raised nor canvassed the question of the existence of retainer agreement or at all.
67. Having not canvassed nor ventilated the question of the existence of a retainer agreement before the taxing officer; can the Client now comes before this Honourable court and seek to implore this court to engage with a question that was neither canvassed nor raised before the taxing officer or otherwise.
68. In my humble view, this Honorable court, when its jurisdiction is appropriately invoked; can only entertained a reference, albeit arising out of and pertaining to the issues which had been ventilated and canvassed before the Deputy Registrar and not otherwise.
69. Put differently, this honorable court does not have jurisdiction to engage with and/or adjudicate upon with questions and issues which were neither canvassed nor discussed before the taxing master, let alone, the question of the existence of Retainer, which is now being raised by the Client herein.



70. To this end, it is imperative to take cognizance of the decision in the case of Showcase Property Ltd versus Mugambi & Company Advocates (2020)eKLR, where the court held thus;

“ 6. I have read the documents filed before the Deputy Registrar and in none of them did the parties raise the issue of lack of a retainer. The Client chose to respond to the Bill of Costs through its affidavit and the issue of a retainer, which is an issue of fact, was not raised. The issue was also not broached in the detailed written submissions on the matter. It is only when the Client denies the retainer that the Advocate is called upon to prove it (see Omulele Tollo and Company Advocates v Mount Holdings Ltd MSA CA Civil Appeal No. 75 of 2015 [2016] eKLR). In this case the issue of the retainer was not in contention before the Deputy Registrar, it cannot be raised in the reference. The reference is in the nature of an appeal and the High Court determining a reference cannot entertain a matter that was not raised before the Deputy Registrar. This position is confirmed by the fact that letter seeking reasons for the taxation dated 17<sup>th</sup> January 2020 was only in relation to the instruction fee and not whether or not there was a retainer. Prayer 1 of the application is accordingly dismissed.

71. Additionally, the scope and extent of the Jurisdiction of the taxing officer, which includes the interrogation and determination of the question of existence of retainership and by extension, whether there was a retainer agreement, was considered and elaborated upon by the Honorable Court of Appeal in the case of Wilfred N. Konosi T/A Konosi & Co Advocate versus Flamco Company Ltd (2017)eKLR.

72. For good measure, the Honorable Court of Appeal stated and observed as hereunder;

“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.

73. From the ratio decidendi obtaining in the decision (supra), there is no gainsaying that the question as pertains to the existence or otherwise of the retainer agreement, which now forms the crux of the current Application, was a matter which ought to have been canvassed and ventilated before the Deputy Registrar/Taxing Officer, but, which was not the case.



74. Consequently and in the premises, having not raised the issue of retainer agreement before the taxing officer, the Client herein is precluded and prohibited from now sneaking the purported issue before this Honourable court, albeit through the backdoor.
75. Most importantly, Jurisdiction is so central and critical and hence where a court is divested of Jurisdiction, then it behooves the court to down her tools, at the earliest. For good measure, once the court finds that same is divested of Jurisdiction, the court is not obliged to venture forward and interrogate the merits or otherwise of the dispute beforehand.
76. Notably and without belaboring the significance of Jurisdiction, it suffices to reiterate and adopt the dictum of the court of appeal in the case of Owners of Motor Vessel Lilian S versus Caltex Oil (K) Ltd (1989)eKLR, where the court stated and held thus;
 

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without Jurisdiction.”
77. With the foregoing analysis, I surmise that the current Application, which is contrary to and in contravention of Rule 11 of the Advocate Remuneration Order, is certainly invalidated by want of Jurisdiction.
78. Consequently and on this score alone, I would be inclined to strike out the entire Application without venturing forward to address the second issue. However, to avert a back and forth on the question of whether there was a Retainer agreement, I propose to interrogate the said issue, albeit briefly as hereunder;

#### Issue Number 2

Whether there existed any Retainer agreement or otherwise, between the Advocate and the Client relating to ELC (OS) No. 190 of 2018.

79. The Client/ Applicant herein has indeed contended that there existed a retainer agreement on the basis of (sic) the Letter of Engagement dated the July 12, 2016, which was generated and issued by the Advocate herein.
80. Furthermore, the Client has ventured forward and annexed a copy of the Letter of Engagement, which same espouses to denote retainer agreement.
81. On the other hand, the advocate has contended that as pertains to and in respect of ELC No. 190 of 2018 (OS), which is the primary suit that gave rise to the taxation of the Advocate-Client Bill of Costs; there was no retainer agreement or at all.
82. As a result of the contradictory positions taken by the Client and the Advocate respectively, it is therefore appropriate to interrogate the Letter of engagement which founds the claim by the Client that there was a retainer agreement.
83. To this end, it would therefore be appropriate to take cognizance of the scope of work and duration which was alluded to at the foot of the Document which is touted as a retainer agreement.



84. For coherence, it states as hereunder;

“Scope of work and duration

1. the initial legal work required will include but will not be limited to, the following;
    - a. Petitioning the High Court at Nairobi for a Limited Grant of Letters of Administration Ad Litem on behalf of the beneficiaries of the Estate of the Late Josephine Moikobu for the purpose of defending Nairobi City Counsel Civil Suit No. 35 of 2015 – Nairobi City Counsel v Josephine Moikobu.
    - b. Following up the court registry attendance on the expedient typing, signing, sealing and issuance of the limited grant ad litem.
    - c. Petitioning the High Court at Nairobi for a limited grant of administration and coligenda on behalf of the beneficiary of the estate of the late Josephine Moikobu for the purpose of collecting, preserving the estate and in particular breaking open the Eco Bank Account to facilitate payments of rates and legal fees in the two suits.
    - d. Following up with court registry attendance on expedient typing, signing, sealing and issuance of the limited grant ad coligenda.
    - e. Attending to the management of Eco Bank Ltd to advise on issuance of the limited grant and effecting service of the grant to the bank including pursuing the release of title document for property L.R No. Block 1159/92 (if any) held by the bank and to further general attendance required on the Bank.
    - f. Applying for letters of administration of the Estate of the Late Josephine Moikobu in the names of Andrew Cole and Omaiyo Moikobu.
    - g. Following up on the gazettelement of the Petition for letters of administration intestate, obtaining the letter of administration intestate and thereafter applying for the certificate of confirmation of grant; and overseeing the distribution of estate and registration of the properties in the name of the sole beneficiaries.
85. From the foregoing, it is evident that the purported document which is being alluded to by the Client does not relate to and or concern the instructions which were given for purposes of the filing and prosecution of Milimani ELC No. 190 of 2018 (OS); which is the primary suit that gave rise to the taxation of the Advocate-Client Bill of Costs.
86. Clearly, the impugned document cannot be relied upon by the Client herein to invalidate and or vitiate the lawful taxation proceedings which were taken and/or conducted before the taxing officer.
87. Other than the foregoing, there is yet the second critical issue that the impugned document was never signed by the Client and/or the Client’s authorized representative in accordance with the prescription of Section 45(1) of the [Advocates Act](#).



88. In any event, what constitutes a valid retainer agreement was underscored by the Court of Appeal in the case of Omulele & Tollo Advocates versus Mount Holdings Limited [2016] eKLR, where the court stated and underscored thus;

“An agreement entered into pursuant to the above section is what can be termed as a ‘retainer agreement.’ As the section indicates, under such agreement, the parties ‘fix’ or put a cap on the advocate’s instruction fee, meaning that both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent.

89. Even assuming that the impugned document was generated in respect of the primary suit, which gave rise to the taxation proceedings herein (which is not the case), the submissions that there existed a retainer agreement would still collapse insofar as the impugned document was never signed by and on behalf of the Client.

90. To surmise, I come to the conclusion that there was no retainer agreement, duly executed by the Client and or on his behalf, in accordance with the provision of Section 45(1) of the *Advocates Act*, Chapter 16 Laws of Kenya.

### **Final Disposition**

91. Having calibrated upon and evaluated the two thematic issues enumerated in the body of the Ruling, it must have become crystal clear that the subject Application is not only premature and misconceived; but is also legally untenable.

92. Consequently and in view of the foregoing, the Notice of Motion Application dated the March 17, 2023; be and is hereby Dismissed with costs to the Advocate, to be agreed upon and/ or taxed by the Taxing Officer of the Honourable Court.

93. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS \_\_31<sup>ST</sup>\_\_ DAY OF JULY 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of:**

*Benson - Court Assistant.*

*Mr. Arnold Oriwa for the Client/Applicant.*

*Ms. Kendi for the Advocate/Respondent.*

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