



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 191 OF 2014**

**LETANGULE & COMPANY ADVOCATES.....APPLICANT**

**-VERSUS-**

**TELKOM KENYA LIMITED.....RESPONDENT**

**RULING**

1. **Letangule & Co. Advocates** (the Applicant) filed a Bill of Costs dated 12<sup>th</sup> February 2014 against **Telkom Kenya Limited** (the Respondent). When the bill came up for taxation, the Respondent raised a preliminary objection on the ground that the firm of Letangule & Co. Advocates had never been instructed by the Respondent to represent it in **Thika CMCC No. 5 of 2003 Joseph Waweru v Telkom (K) Limited**, and hence the bill of costs was misconceived.

2. The preliminary objection was orally argued on 5<sup>th</sup> May 2021. The Respondent reiterated that no advocate-client relationship existed between the parties and that the Bill of Costs ought to be struck out. The Applicant argued that the preliminary objection raised was not a pure point of law but based on factual issues and in the circumstance, the Respondent ought to move the Court in the manner appropriate. The Court directed the parties to file authorities in support of their respective submissions. Only the Respondent complied by filing the decision of the Court of Appeal in **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited (2017) eKLR**.

3. The court has considered the material canvassed in respect of the preliminary objection. In **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A.** stated that:

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to 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 on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”**

4. In the case of **Oraro v Mbaja (2005) KLR 141, Ojwang J** (as he then was) reiterated the foregoing by stating that:

**“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.**

**Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”**

5. Applying the above tests to the preliminary objection raised by the Respondent, it is evident that the objection is primarily grounded on a contested fact, namely whether the Respondent instructed the Advocate Applicant to act or represent the Respondent in **Thika CMCC No. 5 of 2003**. As espoused in **Mukisa Biscuits**, a proper preliminary objection raises a pure point of law which is argued on the assumption that

all the facts pleaded by the other side are correct and cannot be raised if any fact must be ascertained. In the circumstances, the Court finds that the instant preliminary objection is not properly taken and strikes it out. Costs will abide the outcome of the taxation of the Bill of Costs or final orders thereon. The Respondent is at liberty to file an appropriate application before the Taxing Master.

6. Pursuant to the decision in **Wilfred N. Konosi t/a Konosi & Co Advocates v Flamco Limited** the taxing master has the necessary jurisdiction to deal with the question whether a client-advocate relationship had been created between the parties. The Court of Appeal stated therein that:

**“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 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.**

**As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, 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.”** (Emphasis added).

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Mrs. Mbaabu for the Respondent**

**Applicant: N/A**

**C/A: Carol**