



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APP. NO. 252 OF 2017

MASORE NYANG'AU & CO. ADVOCATES.....APPLICANT

= VERSUS =

SOLAI GROUP OF COMPANIES.....1ST RESPONDENT

ENKASITI FLOWER GROWERS LIMITED.....2ND RESPONDENT

RULING

On 11th May, 2021, the Deputy Registrar delivered a ruling on an Advocate-Client Bill of Costs dated 27th June, 2017. The Deputy Registrar after considering the pleadings before her, held that she did not have jurisdiction to determine the issue of retainer and made the following orders;

- 1. The Applicant to take a date at the Virtual Registry before a Judge in the Division within twenty one (21) days from today to have the issue of retainer determined.**
- 2. The Directions herein to apply in Misc. 205, 248, 253, 254, 255, 256 and 266 of 2017.**
- 3. Failure to have the matters placed before a Judge within the aforesated period, the Bills of Costs filed in the aforesated matters stand struck out with no Costs and the files to be marked as closed.**

Following the above ruling, the applicant filed a Notice of Motion dated 12th May 2021 seeking the following orders;

- 1. Spent**
- 2. Spent**
- 3. THAT the Honourable Court be pleased to set aside the order of the Taxing Officer given on the 11th May, 2021 and, upon setting aside the said order, direct that the issue of retainer and the taxation of the various bills of costs, the subject of this application, be heard and determined by a Taxing Officer of this court other than Hon. L.A. Mumassaba (DR).**
- 4. THAT in the alternative to prayer 3 hereof, the Honourable Court be pleased to hear and determine the issue of retainer as between the parties hereof as a preliminary point before the various bills of costs are taxed.**
- 5. THAT the costs of this application be provided for.**

The application is premised on the grounds on the face of the application and supported by the affidavit of **LEO MASORE NYANG'AU** sworn on the 12th May, 2021. The grounds of the application is that the parties herein had agreed that the Taxing Officer had jurisdiction to consider and determine the issue of retainer however in her ruling of 11th May, 2021 the Taxing Officer held that she lacked the jurisdiction. That the Taxing Officer stated that the issue of retainer is a preserve of the High Court and directed that the matter be placed before a Judge within 21 days. That having no case stated under Rule 12(1) of the Advocates Remuneration Order, the applicant filed the present application to enable this court consider and determine the issue of retainer.

When the parties appeared before this Court on 13th July, 2021 they were in agreement that the only issue for determination is on retainer and sought to rely on the pleadings and the submissions filed before the Taxing Officer. In his submission dated 28th January, 2021 the applicant asserts that the Taxing Officer has Jurisdiction to determine the issue of retainer whenever it is raised. He sought to rely on the case

of *Masore Nyang'au & Co. Advocates v Kensalt Limited* [2019] eKLR where Muigai J. stated:-

“Secondly, a reading of the Advocates Remuneration Order more particularly 10 13 13a & 16 place the first port of call as the Taxing Master/Officer in any Bill of Costs filed. It is during the hearing of the Bill of Costs that preliminary issues may be raised including the issue of Retainer.”

The applicant further submitted that the issue of retainer should have been raised at the earliest time possible when the Bills were filed and relied on the case of *Mugambi & Co Advocates v John Okal Ogwayo & another* [2013] eKLR where Waweru J. held that;

“ 12. 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.”

The applicant also raised issue with the definition of ‘Court’ under the Advocates Act, Cap 16 as interpreted by the Court in the *Mugambi & Co. Advocates Case* and submitted that the said definition is too narrow as opposed to the definition under Section 2 of the Civil Procedure Act which the court ought to have taken into consideration. The applicant further submitted that the Taxing Officer has jurisdiction to determine the issue of retainer as envisioned under Rule 13A as read with paragraph 16 of the Advocates (Remuneration) Order, which states;

13A. For the purpose of any proceeding before him, 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.

In its submission filed on 6th March, 2019, the respondents opined that the Taxing Officer lacked Jurisdiction to tax the applicant’s bill of costs because the retainer was disputed. In support of this assertion, the respondents relied on the case **Owner of the Motor Vessel “Lillians” vs Caltex Oil (Kenya) Limited** [1989]KLR at page 14 where the Court held that;

“I think that 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 take one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

Reliance was also placed on the case **Mugambi & Co. Advocates vs John Okal Ogwayo & Another** [2013]eKLR and the case of **Evans Thiga Gaturu, Advocate vs Kenya Commercial Bank Limited** [2012]eKLR. In a further submissions dated 1st March, 2021, the respondents made about-turn and submitted that the Taxing Officer had jurisdiction to hear and determine the issue of retainer. Reliance was placed on the case of **Wilfred N. Konosi & Co. Advocates vs Flamco Limited** [2017]eKLR where the court of appeal stated that;

“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. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.”

Analysis And Determination:

Paragraph 12 (1) of the Advocates (Remuneration) Order provides that; the Taxing Officer may refer any matter in dispute arising out of the taxation of a bill of costs for the opinion of the High Court and Paragraph 12(2) thereof provides the procedure for such reference shall follow that of a case stated but shall be to a Judge in Chambers. It therefore follows that the Taxing Officer has the discretion to refer any matter in dispute arising out of the taxation of a bill of costs to the Court for its opinion and according to the Taxing Officer, the issue of retainer arose and in her ruling dated 11th May, 2021 she held that she could not proceed to tax the bill when the issue of retainer is disputed.

The powers of the Taxing Officer is provided under Paragraph 13A of the Advocates Remuneration Order which provides that;

“For the purpose of any proceeding before him, 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.”

I am in agreement with the parties herein that indeed the Taxing Officer has the jurisdiction to hear and determine the issue of retainer as it is a core issue on whether a matter can be sustained or not. I am guided by the decision of the Court of Appeal in **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited** NRB CA Civil Appeal No. 154 of 2014 [2017] eKLR where the Court in holding that the Deputy Registrar had jurisdiction to determine, as a preliminary issue of whether an advocate/client relationship existed as a prelude to taxation held as follows:-

“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.

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. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.”

The Black’s Law Dictionary (10th edition) defines “retainer” as follows:-

- i. A client’s authorization for a Lawyer to act in a case.
- ii. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.
- iii. A lump sum fee paid by the client to engage a lawyer at the outset of a matter – Also termed engagement fee.
- iv. An advance payment of fees for work that the lawyer will perform in future.

It is my considered view that the Deputy Registrar can consider what form of retainer, if any, was paid to the advocate and take such payment into account when taxing the bill. It is not a forgone conclusion that the payment of a retainer excludes an advocate from taxing his bill. If a retainer has been paid, the same has to be supported by evidence. This is an issue which the taxing master can deal with.

It is evident that although the Taxing Officer addressed herself to the holding in the Wilfred N. Konosi Case, she failed to acknowledge the import of that case. Guided by the above decision, I find that the taxing officer has jurisdiction to determine the issue of retainer. Consequently, I allow the application dated 12th May, 2021, and set aside the decision of the taxing officer of 11th May, 2021 and direct that the issue of retainer be determined by a Taxing Officer other than Hon. L.A Mummassabba (DR). Parties shall meet their own respective costs of this application.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021

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S. CHITEMBWE

JUDGE