



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 40 OF 2019

BETWEEN

NYAKUNDI & CO ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

COUNCIL OF GOVERNORS.....CLIENT/RESPONDENT

RULING

The Application

1. Nyakundi & Company Advocates, the Advocate/Applicant herein, filed an application by way of a Notice of Motion dated 9th March 2020, seeking judgment against the Council of Governors (the Client/Respondent herein) for the sum of Kshs 6,690,902.48 together with interest at Court rates from 6th September 2013 until payment in full. The said application was supported by an affidavit sworn on the same date by Kibagendi Assa M. Nyakundi, who stated that he practices in the Advocate/Applicant's firm of advocates. Further, that their bill of costs was taxed on 5th March 2020 for Kshs 6,690,902.48, and has not been set aside or altered by the Court, and is therefore final as to the amount of costs covered thereby.

2. The Client/Respondent subsequently filed a Notice of Preliminary Objection dated 20th January 2021, contesting this Court's jurisdiction on account of the taxing master taxing an advocate/client Bill of Costs that was subject to a fee agreement contrary to the provisions of the Advocates Act.

3. This Court directed that the Client/Respondent's Notice of Preliminary Objection dated 20th January 2021 be heard and determined together with the Advocate/Applicant's Notice of Motion dated 9th March 2020, and parties were directed to file pleadings and submissions thereon. The Advocate/Applicant filed submissions dated 8th October 2020, 22nd January 2021 and 22nd March 2021 on the said Preliminary Objection and its application. The Client/Respondent has not file any response to the Advocate/Applicant's Notice of Motion or submissions as directed.

4. The Advocate/Applicant while citing the decision in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, submitted that the preliminary objection is frivolous and incompetent for reasons that the Client/Respondent's Advocate fully participated in the taxation proceedings and did not raise any of the matters he now raises, and there was nothing before the taxing master to show that the advocate/client bill of costs was subject to a fee agreement in line with the provisions of section 45 of the Advocates Act. Further that the said agreement ought to have been furnished for a finding by the taxing officer, and for any party aggrieved with the finding to have recourse to a reference in accordance with the law and procedure thereto.

5. The Advocate/Applicant further cited the provisions of section 51(2) of the Advocates Act, and the decisions in **Alfred Ochieng Opiyo t/a Ochieng Opiyo Co Advocates vs Export Hydro Pump and Services (Africa) Ltd, HCCC Misc. Appl. No 416 of 2017**, and **Ndungu Githuka Co. Advocates vs Geoffrey Moriasi Ole Maloiy, Kajiado HCCC No. 19 of 2018**, to submit that the certificate by the taxing officer has neither been set aside nor altered, and the Court thereby ought to enter judgment for the taxed costs.

The Determination

6. The Notice of Preliminary Objection filed by the Client/Respondent needs to be determined first, as it has the potential of disposing of the Advocate/Applicant's Notice of Motion if upheld. The circumstances in which a preliminary objection may be raised, and its nature and purpose was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

“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.”

7. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and 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. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

8. The Client/Respondent's objection is that there was a fee agreement which ousted the jurisdiction of the taxing master in taxing the Advocate/Applicant's advocate/client Bill of Costs. The provisions of section 45(6) of the Advocates Act in this regard provide that the costs of an advocate shall not be subjected to taxation, where an agreement has been made by the advocate and client fixing the advocate's remuneration. Sections 45 and 46 of the Act detail the circumstances in which such agreements are considered valid and invalid.

9. The fact of a valid agreement must therefore be established before the jurisdiction of the taxing master is ousted by section 45(6) of the Advocates Act, and this ground cannot therefore be raised as a pure question of law in a preliminary objection. In any event, the proper forum to raise such an objection is before the taxing master and not this Court, whose jurisdiction is limited to hearing and determining references challenging decisions of taxing masters under the procedure provided by Rule 11 of the Advocates Remuneration Order.

10. The Client/Respondent did not bring any evidence of having urged the issue of existence of a fee agreement with the Advocate/Applicant before the taxing master, to now purport to raise it before this Court as a preliminary objection. The Client/Respondent's Notice of Preliminary Objection dated 20th January 2021 is therefore found not to have merit for these reasons.

11. The outstanding issue for determination in the Advocate/Applicant's application is whether judgment should be entered against the Client/Respondent for the taxed costs due to the Applicant. Under section 51(2) of the Advocates Act, this Court has power to enter judgment in an Advocates' favour on taxed costs as follows:

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”.

12. It is an established position of law that the only reason that a court of law cannot enter judgment on a Certificate of Costs is if the same has been set aside or altered, or where there is an issue with retainer. This position has been upheld in various cases including **Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited (supra)**, **Dally and Figgis Advocates vs Homelex Limited (2013) eKLR** and **Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd (2012) eKLR**. In addition, Rule 7 of the Advocates Remuneration Order provides for interest on the said costs at 14 % until payment in full.

13. In the present application, it is not in dispute that the Advocate/Applicant's Bill of Costs dated 9th December 2019 was taxed as between the Advocate/Applicant and Client/Respondent in the sum of Kshs 6,690,912.48, and there is a Certificate of Taxation dated 13th March 2020 on record certifying the said taxation. It is also noteworthy that the Client/Respondent's advocate participated in the said taxation proceeding and filed submissions dated 18th February 2020 which are also on record. In addition, based on the record before the Court and the conduct of the parties in this matter, it is evident that there existed an advocate/client relationship between the parties herein at all material times.

14. Lastly, the Client/Respondent has not brought any evidence of any pending dispute as regards the amount of taxed costs. As the taxed costs and Certificate of Costs issued to the Advocate/Applicant dated 13th March 2020 has not been challenged, and there is no demonstrated dispute on the Advocate/Applicant's retainer, the taxed costs and Certificate of Costs issued to the Advocate/Applicant are therefore deemed to be final, and the said Applicant is thus entitled to judgment.

15. In the premises I find merit in the Advocate/Applicant's Notice of Motion dated 9th March 2020 and grant the following orders:

I. Judgment is entered for the Advocate/Applicant against the Client/Respondent for taxed costs of Kshs. 6,690,912.48, as certified in the Certificate of Taxation dated 13th March 2020, with interest at 14% per annum from the date of taxation until payment in full.

II. The Applicant shall have costs of the Notice of Motion dated 9th March 2020 of Kshs 20,000/=.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE