



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 460 OF 2016

JB SHILENJE & COMPANY, ADVOCATES.....APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being a Reference from ruling and order herein, by Hon. JN Maragia, of 8th April 2020)

RULING

1. What is for determination is a reference by the respondent herein brought by way of a Chamber Summons, dated 23rd July 2020. It principally seeks the setting aside of Items 1, 2, 3, 4, 5, 7, 8, 9, 10, 12, 18, 19, 20, 21, 22, 23 and 24 on taxation of the applicant's advocates bill of costs, dated 16th June 2016. The court is asked to reconsider the items, disallow them and thereafter discount them from the sum total due to the advocate. The prayer for stay of execution was granted on 27th July 2020.

2. The grounds are on the face of the application, which are aligned to the affidavit in support, sworn by Josephine Onyambu, on 23rd July 2020, and state the case for the respondent. Regarding Items 1, 2 and 3, the applicant cites paragraph 13(3) of the Advocates Remuneration Order, to state that instruction fees are prohibited, so that no advocate is entitled to instructions fees for presenting or opposing a miscellaneous application incorporating a bill of costs filed between an Advocate and client. It further averred that the taxing officer had equated the Advocate client bill of costs to a party and party bill of costs, governed by Schedule VI of the Advocates Remuneration Order. It is also averred that the taxing officer failed to determine whether the bill of costs is a suit under Schedule of the Advocates Remuneration Order. It is argued that the taxing officer does not sit as a court, and that an application for taxation of an Advocate client bill of costs is not a suit, hence there should be no entitlement to instruction fees.

3. Regarding Items 4, 5, 7, 8, 9, 10, 12 and 14 of the Advocates Remuneration Order, it is averred that there was no proof, supported by the record of the proceedings in the primary suit that services were indeed rendered, as claimed and allowed. It is averred that, with regard to Items 17, 18, 19, 20, 21, 22, 23 and 24, it is averred that these relate to services that were not rendered by the applicant, but by the firm of Messrs. Abok & Company Advocates, the firm instructed to act for the applicant in the instant proceedings, and, therefore, these are services rendered to the applicant as opposed to the respondent. It is submitted that the said Items ought to have been disallowed for the same reasons that the court applied to disallow Items 25, 26, 27, 28, 29 and 30 of the bill, for being far-fetched.

4. Regarding the importance of dates in drawing and presentation of bills for taxation, and in claiming fees for legal services, it is submitted that it is a legal requirement that the dates when legal services were allegedly offered or rendered must be shown in the body of the bill. The other issue related to paragraph 77 of the Advocates Remuneration Order, in relation to taking into account the act that costs of and occasioned by taxation could only be allowed or be disallowed under that paragraph. The respondent also raises issue with the taxing officer allowing costs which had not been supported by the record of proceedings of the primary suit, and when no receipts, vouchers or affidavits of service were not produced before her, contrary to paragraph 12 of the Advocates Remuneration Order. The respondent also claims that its right to a fair hearing was denied when the taxing officer failed to consider and give regard to its notice of preliminary objection dated 16th March 2017, for dismissing the same without notice to the respondent.

5. The record does not reflect that the applicant filed any response to the application, by way of affidavit or grounds of opposition. What he did was to file a notice, dated 28th September 2020, to cross-examine the Josephine Onyambu, the deponent of the affidavit sworn in support of the reference. Mr. Abok was given fourteen days, on 21st January 2021, to file a reply to the reference. I have carefully perused through the bundle of papers in the file before me, and I have not seen any response by the applicant to the reference.

6. Ms. Onyambu appeared on 21st January 2021. She testified that she was an employee of the respondent. She confirmed that the applicant had been instructed by the respondent, but he did not render services to conclusion,

7. On 21st January 2021, directions were given for filing of written submissions. Both sides did file written submissions. The submissions by the respondents were filed on 25th February 2021. They largely regurgitate the grounds on the face of the chamber summons, as well as the

affidavit sworn in support, and cite no judicial opinions. The submissions by the applicant were filed on 22nd March. They identify four issues for determination, being: whether the applicant is entitled to instruction fees, whether absence of dates on the bill of costs was fatal, whether the respondent was entitled to the orders sought, and whether the applicant was unqualified at the time he acted for the respondent. The applicant has cited judicial opinions and attached copies of the said decisions.

8. Let me start with whether the applicant was qualified to act as an Advocate at the date when he was instructed to act for the respondent. That issue was raised by the respondent by way of preliminary objection, dated 16th March 2017, essentially saying that the applicant took out his practicing certificate for the year 2014 on 22nd April 2014, and the same took effect as from that date, and that he was unqualified to act as an Advocate between 1st January 2014 and 21st April 2014 was not valid, and whatever he did as an Advocate between those dates could not be charged on the respondent. A copy of a letter from the Law Society of Kenya, dated 6th October 2016, is attached, which confirms that position.

9. The applicant's position, as articulated in his written submissions, is that he was an Advocate as at the material time, within the meaning of the Advocates Act, Cap 16, Laws of Kenya. He submits that the failure to take out a practicing certificate did not have the meaning that one ceased to be an Advocate. He asserts that despite lack of a practicing certificate, an Advocate, any documents prepared and signed by him would be still be valid. He relies on *Barbra Georgina Khaemba vs. Central Bank of Kenya & 2 others* [2019] eKLR (W. Korir J).

10. The jury is still out on the question of the effect of not taking out a practicing certificate. The courts have never come out clearly on the matter. Not holding a practicing certificate does not mean that an Advocate ceases to be one, yet to practice law an Advocate would require a practicing certificate, and that would mean that there should be some consequence to not taking out the certificate. What is that consequence? Does it mean that any documents drawn and signed by such an Advocate would be invalid, so that they are liable to striking out? Does it mean that the Advocate would not be entitled to earn fees for anything done by him on behalf of his client during the period that he does not have the certificate? What is for sure is that such an Advocate would be denied audience in court.

11. I have read through *Barbra Georgina Khaemba vs. Central Bank of Kenya & 2 others* [2019] eKLR (W. Korir J). The court was fairly clear, that without a practicing certificate any documents drawn would be invalid, for the definition of an Advocate fuses or combines admission to the Roll of Advocates and the holding of a current practicing certificate, so that without the two in place at the same time, the person would not be a qualified to practice as an Advocate, going by sections 2 and 9 of the Advocates Act. The effect of that then would be that the applicant was not qualified to practice as an Advocate for the period that he had not taken out a practicing certificate, that is to say between 1st January 2014 and 21st April 2014. Any documents drawn by him during that period were not valid, for they would have been drawn by an unqualified person, and such a person was not entitled to earn any fees for any services that he might have purported to render to a client during that period.

12. I feel I should consider next the question, as to whether absence of dates on the bill of costs was fatal, because the same is intimately linked to the issue above, that of taking out practicing certificates. It is a preliminary issue, whose determination may finally resolve the reference. Without a practicing certificate, an Advocate is not qualified to act as an Advocate. Where such a person takes out a certificate late into the year, as in this case, and an issue arises as to whether he would be entitled to fees for the period that he operated without a certificate, it would be critical that dates be indicated in the bill for taxation, to make it easier to identify services that were rendered when he was unqualified, to separate them from the services rendered when he was qualified. It is that critical. However, dates are critical whether or not doubts arise on the qualification of the Advocate. It is about accountability and credibility. The client is entitled to know when the services, he is being charged for, were allegedly rendered, so that he can cross-check with his own records. Even if he has no records for cross-referencing, he would be entitled to know when the services that are alleged to have been rendered on his behalf by the Advocate, and when they were allegedly rendered is at the centre of it. A bill for taxation which does not have an indication of the dates when the services were allegedly rendered is completely at odds with accountability, is the basis for taxation, for there can be no accountability where there is no disclosure of the dates when the alleged events happened. A taxing officer ought not tax any bill where there is no such disclosure. Clearly, there was no proper bill of costs before the taxing officer, that was capable of being taxed.

13. The issue came up, though not directly, in *Ouma vs. Warega* [1982] eKLR (Law JA), where one of the issues that arose was whether wrong dates in the bill were fatal. It was held that it was not, for work, in that case of preparation of an appeal, dates given for such items as perusing the record, taking instructions, making research into the law and so forth, must necessarily represent an approximation. However, the above decision turned on wrong dates, as opposed to no dates at all, which is the case which obtains here. Whereas the taxing officer can treat wrong dates as reflecting approximations, where there are no dates she would have nothing to work with.

14. On whether lack of dates on the bill can be treated as a mere technicality or an irregularity of form and not substance, I take the view that it goes to substance. It operates to place the events in the delivery of services by the advocate in a historical or chronological context. More importantly, as stated above, it is an accountability and integrity issue. It goes to the heart of the matter, as the advocate is telling client, these are the services that I rendered on these dates. Where no dates are indicated throughout the entire document, that creates a sense of fiction and opacity. In my view, Article 159(2)(d) of the Constitution, and the overriding objective principles, cannot be called in aid to breathe life to this obviously hopeless case.

15. It would be academic to address any of the other issues that have arisen from this matter, which go to the substance and merit of the matter, in view of what I have stated above. The applicant's bill of costs, dated 16th June 2016, should not have been entertained. I hereby set aside the orders, that were made in the ruling delivered on 8th April 2020, with respect to the said bill, and I direct that the matter be remitted to the taxing officer, for fresh taxation, of course after a properly drawn advocates bill of costs is placed on record, should the applicant be minded to file one.

16. I have perused through the references in Kakamega HC Miscellaneous Applications Nos. 454, 455, 456, 457, 458, 459 and 464 of 2016, all dated 23rd July 2020, and established that they are of the same background, where the applicant did not have a practicing certificate for part of the period when he allegedly rendered services, and where the advocates bill of costs does not indicate the dates when the alleged services were rendered. The said references are between the same parties as the matter herein. Consequently, the orders made herein shall apply with equal measure to the applications in Kakamega HC Miscellaneous Applications Nos. 454, 455, 456, 457, 458, 459 and 464 of

2016. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2021

W MUSYOKA

JUDGE