



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. E008 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

MUNGAI VICTOR KIMANI.....ADVOCATE/APPLICANT

VERSUS

BRIDGE INTERNATIONAL SCHOOLS.....CLIENT/RESPONDENT

RULING

BACKGROUND

By a Notice of Motion Application dated 3rd May 2019, filed together with a supporting affidavit on 6th May 2019, pursuant to **Section 3A of the Civil Procedure Act, Section 32B and 45 of the Advocates Act** and any other enabling provisions of the law, the Respondent/Applicant sought orders;

- a) That the Advocate/Applicant's Advocate/Client Bill of Costs dated 5th March 2019 be struck out with costs.
- b) That costs of this application be in the cause.

In the supporting affidavit sworn by Raymond Odhiambo Ojijo, a Human Resource Officer of the Respondent, he averred that the Advocate/Applicant was an employee of the Respondent from 1st September 2014 to 31st January 2019 when he voluntarily resigned from employment with the Respondent. A copy of the Respondent's resignation letter is marked **ROO-1**.

He stated that prior to Advocate/Applicant resignation, he had the employee designation, Manager Corporate Litigation and Prosecution Support and his employment agreement clearly spelt out his job description "**to handle litigation matters for and in defence of the Respondent amongst other related duties**" and the Respondent and James Momanyi falls squarely within the ambit of his job description for which he was remunerated for as agreed. Marked **ROO 2** is a copy of the Advocate/Applicant's previous contract addendum effective 1st September 2017 together with his previous job description.

That while in employment with the Respondent, the Advocate/Applicant was paid a monthly salary together with employee benefits, and the Respondent met the advocate/Applicant's costs including, payment for his annual practicing certificate, commuter expenses and other costs including filing fees for any pleadings, court process service fees and all other incidental costs.

He further stated that in the course of the Advocate/Applicant's employment with the Respondent, at no time did the Respondent retain and/or vary the terms of engagement with the Advocate/Applicant to accommodate the Advocate/Applicant as an independent contractor to undertake separate matters on behalf of the Respondent to be billed under a separate remuneration plan in addition to the Advocate/Applicant's salary remuneration. All court process was served on the Respondent and received at the Respondent's corporate office by the Respondent's administrative staff in the Legal Department. Marked **ROO-3** is a letter from the Law Society of Kenya confirming the Advocate/Applicants status.

That, the Advocate/Applicant is precluded by the terms of remuneration contained in his previous employment contract with the Respondent from seeking to tax Bill of Costs. The Advocate/Applicant had no basis upon which to file for taxation of his costs since the Hon. Chief Justice had/has not prescribed a distinct criterion for remuneration payable to an in-house Advocate by an Employer as required under **section 32B of the Advocates Act**.

The Applicant asserted that in the course of his employment and prior to institution of this taxation of Bill of Costs filed herein, with regard to **HCCC No. 441 of 2015** between the Respondent and James Momanyi, the Advocate/Applicant did not enter into an Agreement with the

Respondent with respect to remuneration beyond the terms of remuneration contained in his previous employment contract.

That in his last year of Employment, the Advocate/Applicant drew a gross salary of Ksh 330,000 per month, which salary he earned whether or not he was actively litigating any matter for the Respondent pursuant to his previous employment contract. It is unconscionable that the Advocate/Applicant would be seeking to tax Bill of Costs. Therefore, the Advocate/Applicant filing for taxation constitutes an act of extortion and the Advocate should be cited for unethical conduct.

The application was dismissed by the Taxing Officer by ruling delivered on 27th August 2019.

APPLICATION

By Chamber Summons Application dated 30th October 2019, pursuant to **Regulation 11(2) and (3) of the Advocates Remuneration Order Section 3A of the Civil Procedure Act**, the Applicant objected the Taxing Masters Ruling on grounds:

That the Taxing Officer misdirected himself on a matter of principle and law and thus erred in holding as follows;

- a) That the employment contract between the Applicant and the Respondent supersedes the express provisions of **Section 32A of the Advocates Act**;
- b) That the advocate had entered into an illegal arrangement with the Client/Respondent;
- c) That the advocate did not hold himself out as an independent advocate despite the contents of the verifying affidavit in the suits that were filed and the company resolution appointing him as advocate for the Client;
- d) That the **LSK** was aware that payment for the Advocate's practicing Certificate was done by a third party;
- e) That the conduct of the advocate amounted to running a law firm with an unqualified person and sharing proceeds therefrom;
- f) That **Section 32A of the Advocates Act** in particular envisioned a situation where the Chief Justice has prescribed standards of work performed by an in-house advocate and charged under the provisions of **section 44 of the Advocates Act**;
- g) That the Advocate entered into the employment contract which precluded him from charging fees. This was contrary to the express provisions of **Section 32A and 46(d) of the Advocates Act**; and
- h) That by taxing for his fees in compliance with the provisions of the Advocates Act, the Advocate was being oppressive and unsustainable.

GROUND OF OPPOSITION

The Client/Respondent by Grounds of Opposition filed on 21st November 2019 opposed the Applicant's application on grounds that;

- a) The ruling by the Taxing Master was well grounded in law and the Application herein lacks merit and should be dismissed with costs.
- b) The Chamber Summons Application dated 30th November 2019 is incompetent, hopeless and has no basis in fact and in law.
- c) The Application is frivolous and contemptuous of the court process and the same was done maliciously and is manifestly unjust.
- d) The remedies sought by the Applicant as against the Respondent are untenable.

APPLICANT/ADVOCATE SUBMISSIONS

The Applicant submitted that he filed Bill of Costs in **Misc. Application No. E008 of 2019** on 5th March 2019 for taxation of his legal fees for professional services rendered in filing **Nairobi HCCC No. 441 of 2015** which was pursuant to the Respondent's instructions as the Plaintiff therein.

It was the Applicant's submission that the Taxing Officer heard and determined the Respondent's objection whereby on the 27th August 2019 the Taxing Officer delivered his Ruling dismissing the Applicant's Bill of Costs on the ground that;

“Clearly the Applicant cannot also hold himself as an advocate and abandon the provisions of fair labour relations and hide in the provisions of the Advocates Act because, 1st he did not hold himself out as an independent advocate during the period in which the suits were filed for he had no capacity to do so for he never took out a professional indemnity cover...”

That the Applicant being aggrieved by the said Ruling filed the Reference herein seeking to have the Ruling of the Taxing Officer dated 27th August 2019 set aside in its entirety and to have the Applicant's Bills of Costs in **Misc. Application Nos E008 and E009 all of 2019**

reinstated and to proceed for taxation on the grounds that the said decision is erroneous and without basis in law and for the following reasons;

That the Applicant as a practicing Advocate of the High Court is entitled to equal protection and equal benefit of the law under **Article 27 (1) of the Constitution** as a legitimate and fundamental right. He is and was at all material times therefore entitled to similar rights and privileges accorded to all Advocates including remuneration under the provisions of the Advocates Act.

That **Section 2 of the Advocates Act** defines "Client" as "includes any person who, as a principal or on behalf of another, or as trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay an advocate any costs."

The Applicant relied on the cases of:-

a) Church Road Development Co. Ltd vs Barclays Bank Limited & 2 Others Nairobi HCCC No. 55 of 2005; Justice Warsame held;

"My position is that a contract cannot be used to override the provisions of the law. And when there is a conflict, the law is supreme. A party cannot seek an immunity from an Act of Parliament through an agreement which is in contravention of the said Act... When there is a conflict or contradiction, the point of reference would be the substantive law or procedure." ... "all agreements or contracts on payment of fees and expenses must be framed in a manner in conformity or agreement with the Advocates Act or Advocates Remuneration Order."

b) Industrial Court Cause Number 31 of 2013 Mwalimu Kalimu Gamumu & 35 Others vs Coastline Safaris Limited & 2 Others, where the Court held that;

"...the relationship of advocate and client is not a contract of service but a contract for services....the relationship between an Advocate and a client is not an employee /Employer relationship contemplated under the Industrial Court Act and the Employment Act.

c) Commissioner of Income Tax vs Kencell Communications Limited [2013] eKLR, where the Court of Appeal held that;

"...Counsel working as in-house lawyer or in private practice just like all the parties who come to Courts of law are entitled to equal treatment..."

d) Re Eastwood (Deceased) Lloyds Bank Limited vs Eastwood and Others (1974) 3 All ER where the Court of Appeal held that;

"... the proper method of taxing the Bill of Costs in a case where the successful party was represented by a salaried solicitor was to deal with it as though it were the bill of an independent solicitor, assessing the reasonable and fair amount of any discretionary item having regard to all the circumstances of the case..."

The Applicant relied on the Law Society of Kenya's **Digest of Professional Conduct and Etiquette** issued in 1982 pursuant to **Section 81 (1) (a) of the Advocates Act**, the Society expounded on the Rule as follows;

"as regards the employer's legal work, the position is regulated by rule 4, proviso (ii) of the Advocates (Practice) Rules. The employed advocate can only set off the costs of the contentious and non-contentious work done by him for his employer to the extent of his salary and reasonable office expenses. In other words, any amount by which the total fees exceed the advocate's salary and office expense must be paid to him by the employer."

The Applicant further relied on the decision in Stephen Aluoch T/A K'opot & Company Advocates vs Cornel Rasanga Amoth [2017] eKLR, where the Court held that;

"I also, find and hold that even though the Advocate acted for the Client in another capacity as a campaign manager does not detract or take away from the Advocate's duties in Court for which he was specifically instructed and for which were undertaken in his capacity qua advocate. The nature of services rendered and itemized in Bills No.s 1, 2 & 3 are distinct, identifiable and are chargeable since they involve contentious matters under Part III of the Advocates Remuneration Order. I therefore reject argument that the Advocate is not entitled to fees on the ground that he was performing other political assignment."

CLIENT/RESPONDENT'S SUBMISSIONS

The Respondent submitted that notwithstanding **Section 32 A of the Advocates Act**, the nature of the Parties' relationship was governed by an employment contract, which excluded the possibility of the Advocate Client being an independent contractor to the Client/Respondent. The case of, Nationwide Mutual Insurance Co. vs Darden 503 US 218, 112 S. CT and Mckee vs Reid's Heritage Homes Ltd [2009] ONCA 916 (CANLII), summarizes the test to be applied in determining whether a hire is an employee or independent contractor of the hirer;

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry

are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

The Respondent relied on the case of Hezekiel Oira T/A H. Oira Advocate vs Kenya Broadcasting Corporation [2015]eKLR, where the Court held;

"In as much as the client did employ the advocate to render legal services to the Corporation, in my view, the relationship that existed would not entitle the advocate to charge the 'client' employer legal fees as an independent contractor while he was drawing monthly salary which fact is not denied, and if it were not so, this court does not believe that the advocate could have worked for free from 1998 – 2010 and was only compelled to seek taxation of his bill of costs after concerted efforts to recover it failed. There is no evidence of demand for payment of the legal fees for the services rendered before filing of the said bills in court for taxation."

The Client/Respondent submitted that there was in place a retainer agreement in the form of the employment contract and the Advocate/Applicant is estopped from taxing his Bill of Costs. Section 45 (1) of the Advocates Act provides that;

"subject to section 46 and whether or not order is in force under section 44, an advocate and his client may.... Before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction in respect thereof or his fees for appearing in court or both; And such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

Section 46 (d) of the Advocates Act terms as invalid" any agreement by which an advocate agrees to accept in respect of professional business, any fee or other consideration which shall be less than the remuneration prescribed..."

In Otieno, Ragot& Company Advocates vs National Bank of Kenya Limited [2018]eKLR, T. W. Cherere J. held;

"The respective opposing positions advanced by the client and the advocate have been given judicial interpretation by several courts of concurrent jurisdiction. The client placed reliance on in Njogu& Company Advocates vs National Bank of Kenya limited [2016] eKLR, in which the court of Appeal in upholding the decision of Warsame J. (as he then was) in D. N. Njogu& Co. Advocates vs National Bank of Kenya Limited [2007]eKLR stated as follows;

In our view an advocate, who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the court to tax his advocate/Client bill of costs in accordance with the Advocate's Remuneration order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention."

In Mugambi& Company Advocates vs John OkalOgwayo& Another (2013) eKLR; Waweru J. held;

"The jurisdiction of a taxing officer is provided for in the Advocates Remuneration Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2, 10, 13 of the Remuneration Order, 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. "Court" is defined in Section 2 of the Advocates Act, Cap 16 as the High Court. 'Court' is thus not the Taxing Officer or Deputy Registrar of the court."

DETERMINATION

The Court considered parties pleadings and submissions and finds the issue(s) emerging for determination is/are;

a) Whether this Court has jurisdiction to entertain the instant application

b) Whether there is an employment dispute to be canvassed before

ELRC Court; and/or

c) Whether the Applicant was an independent Advocate with instructions in the conduct of the suit whose Bill of Costs is filed upon or an Inhouse lawyer under an employment contract whose terms excluded filing Bill of Costs for taxation.

ANALYSIS

What is the Court's jurisdiction in the instant application?

The parties invoked various provisions with regard to the instant dispute on whether to tax Bill of Costs or not at this stage before the Taxing

Officer.

The Taxing Master in the Ruling of 27th August 2020 held;

“it is important to first start by setting the record straight that the Taxing Master has powers and jurisdiction to deal with any issue incidental to the process of taxation which include jurisdiction to determine where there was an advocate-client relationship or not.

...There are several other correspondences which clearly shows that the Applicant was an employee within the meaning of the Employment Act, these include the letter of employment, acceptance of employment, letter of resignation and acceptance of resignation.”

The Taxing Master has jurisdiction to hear and determine matters incidental to taxation. The question of whether the employment contract allowed the Applicant to practice as an independent contractor with regard to the instant case(s) ***HCCC 441 of 2015*** or not and/or whether the employment contract was a retainer or not is a matter that hinges on employment law. These issues ought to have been canvassed first before the Taxing Officer, before the Bill of Costs was/is considered for taxation.

The Advocates Act Section 32A prescribes employment of an In-house Counsel. **Section 32B of Advocates Act** outlines standards of work and remuneration of Inhouse Counsel which ought to be pegged or based on standard of work and remuneration prescribed by Hon Chief Justice which are not in place as yet.

Section 44 of the Act allows the Hon, Chief Justice to grant orders prescribing remuneration of Advocates upon recommendation from the Law Society of Kenya and **Section 45 of the Act** prescribes Agreements with respect to fixing the Advocates remuneration. **Section 46 of the Advocates** enumerates Invalid Agreements.

The Applicant herein is stated to have been in the Respondent's employment under a Contract of employment as Inhouse Counsel and was paid as Inhouse Counsel as he handled Respondent's matters in Court during his employment.

The Respondent therefore contests taxation of Bill of Costs for a matter that the Applicant conducted as Inhouse Counsel under the employment contract.

The Applicant contends that this Court lacks requisite jurisdiction at this stage to canvass the matter as the present application is not a reference pursuant to an objection arising out of taxation conducted by Taxing Officer as required under **Section 11 of Advocates Remuneration Order**. It is also not an application filed before Court by virtue of Consent of the parties to refer the matter to this Court as provided for under **Section 12 of Advocates Remuneration Order**.

This Court finds from totality of the evidence/submissions presented that the contention over the Bill of Costs ought to be canvassed first, there seems to be an employment dispute over terms of engagement in employment of the Applicant as Inhouse Counsel and /or handling of the matter where Bill of Costs was filed. The issue is whether the Agreement presented to court is an employment contract or retainer for the instant matter which is the subject of the Bill of Costs. If that be the case then the issue ought to be canvassed first in ELRC Court.

There seems to be merit in the application of **Section 11, 12 & 13 & 13a of Advocates Remuneration Order** on the jurisdiction of the Taxing Officer and the High Court. This position is expounded by the case of ***Mugambi & Company Advocates*** cited above/supra. This Court is of the considered view that parties ought to appear before the Taxing Officer raise any/all objections first and if they are not subject of Taxing Officer's jurisdiction may then be referred to the High Court and not have the Bill of Costs struck off before the issue as to whether there is a competent Bill of Costs before the Taxing Master/Officer is determined.

With reference to the ***Nationwide Case Supra***, this court lacks jurisdiction to hear and determine an employment disputes.

In relation to ***Mugambi Company Advocates supra***, this court lacks jurisdiction unless issues of instructions or retainer are raised before the said Bill of Costs is taxed

DISPOSITION

This Court lacks requisite jurisdiction to canvass the instant application at this stage before it is placed before Taxing Officer or parties pursue any employment dispute first before ELRC Court.

DELIVERED SIGNED DATED IN OPEN COURT ON 28TH AUGUST 2020 (VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MUTHIGA FOR ADVOCATE/APPLICANT

LUMALLAS ACHIENG & KAVERE ADVOCATES FOR CLIENT- N/A

COURT ASSISTANT- TUPET

Muthiga: I am seeking leave to appeal.

Court: There is stay of execution for 30 days of the ruling. The leave to appeal is granted.

The parties/Counsel shall be provided with certified proceedings and Ruling upon payment of requisite fees.

Muthiga: We seek to be placed before a different Deputy Registrar.

Court: In light of the Ruling of 27th August 2019 the matter be placed before another/different Taxing Officer.

M.W. MUIGAI

JUDGE

28TH AUGUST 2020