



**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. CIVIL APPLICATION NO. E092 OF 2019**

**CONSOLIDATED WITH MISC. APPLICATIONS**

**NOS. E095, E097, E273 AND E275 OF 2019**

**IN THE MATTER OF THE ADVOCATES ACT**

**(CHAPTER 16 OF THE LAWS OF KENYA)**

**BETWEEN**

**TRIPLE A LAW LLP .....ADVOCATES/APPLICANT**

**AND**

**BARONS ESTATE LIMITED ..... 1<sup>ST</sup> CLIENT/RESPONDENT**

**MARIANNE JEBET KITANY .....2<sup>ND</sup> CLIENT/RESPONDENT**

**RULING**

1. This matter arises from a ruling dated 27<sup>th</sup> November 2019 in which the Deputy Registrar dismissed a Preliminary Objection by the Respondents (“the Clients”) and proceeded to tax several bills of costs dated 10<sup>th</sup> April 2019 filed by the Applicant (“the Advocates”) in the following matters:

(a) In **Misc. E092 of 2019, Triple A Law LLP v Barons Estate Limited**, the Advocates claimed Kshs. 2,016,536.50 for fees in relation to HCCC No. 412 of 2018 on account of instructions relating to rendering an opinion and taking instructions to file suit to recover general and special damages and other reliefs including conservatory orders for KCF 392 Y Range Rover 4.4 SDVE Vogue SE valued at Kshs. 22,307,573.00. The bill was taxed at Kshs. 2,016,536.50.

(b) In **Misc. E095 of 2019, Triple A Law LLP v Barons Estate Limited**, the Advocates claimed Kshs. 1,895,200.86 in relation to CMCC No. 9391 of 2018 with instructions to strategize, render an opinion, watch brief and, if necessary, come on record for prosecution of the plaintiff’s prayers for preservatory orders for motor vehicle registration number KCF 392 Y Range Rover 4.4 SDVE Vogue SE valued at Kshs. 22,307,573.00. The bill was taxed at Kshs. 1,313,915.00.

(c) In **Misc. E097 of 2019, Triple A Law LLP v Barons Estate Limited**, the Advocates claimed Kshs. 25,289,794.14 in respect of HCCC No. E138 of 2018 for taking instructions to file suit to recover special and general damages amounting to Kshs. 550,000,000.00. The bill of costs claimed Kshs. 25,289,784.14. The bill was taxed at Kshs. 17,342,084.88.

(d) In **Misc. E273 of 2019, Triple A Law LLP v Barons Estate Limited**, the Advocates claimed fees for instructions to render opinion and to draft a letter of demand to Family Bank for released of logbooks over motor vehicles KCD 883Y, KCD 884Y, KCG 463Z, KCE 735Z and CHSD22AWCE1017087 (Crawler Bulldozer) charged at Kshs. 19,880,000.00. The bill of costs claimed Kshs. 563,829.60 and the same was taxed as drawn.

(e) In **Misc E275 of 2019, Triple A Law LLP v Marianne Jebet Kitany**, the Advocates claimed fees for instructions to draft a demand letter to Family Bank for release of titles to properties known as LR KAJIADO/KAPUTEI NORTH 1044-10447 charged for

7,200,000.00, KAJIADO/KAPUTEI NORTH/10724-19725 charged for Kshs. 4,200,000.00, KAJIADO/KITENGELA/25310 in Kajiado County, RUNDA MAE RIDGE ESTATE LR NO. 7785/1324 (IR NO. 123703) charged for legal charge for Kshs. 56,250,000 and a further charge of Kshs. 26,250,000.00. The bill of costs claimed Kshs. 1,863,041.20 but was taxed at Kshs. 1,243,491.00.

2. At the hearing, the Clients filed Notices of Preliminary Objection dated 4<sup>th</sup> October 2019 supported by the affidavits sworn on 4<sup>th</sup> October 2019 by Collins Kipchumba Ngetich, a Director of Barons Estate Limited, and Marianne Jebet Kitany. The grounds of objection were as follows:

(1) *The Applicant (Advocates) is not a registered Law firm hence it is not recognized by Law.*

(2) *The Applicant is non-entity that does not have the capacity to institute proceeding in the manner.*

3. The thrust of the deposition was that the Clients wrote letter of complaint to the Law Society of Kenya (“LSK”) regarding the conduct of the Advocates and in particular complaining that the Advocates were not authorised to practice law. The LSK addressed a letter dated 17<sup>th</sup> May 2019 to Mr Ngetich in response to the complaint against the Advocates which stated, in part, as follows;

*We have not received any response to the complaint from the advocate and despite out numerous requests to her to cease practicing in the name Triple A Law LLP, she continues to do so and to handle client matters in the same name.*

4. In another letter dated 22<sup>nd</sup> August 2019, the LSK in response to letters from the Clients’ advocates, it stated as follows:

*We wish to respond as follows: by a letter dated 8<sup>th</sup> September, 2016 from the Registrar of Companies. The firm had been registered as **Triple A Law LLP**, was advised that the name had been inadvertently registered and was no longer tenable as it was deceptively similar to another firm’s name in the register. The members of the firm were advised to change the said name within six months.*

*We recently received communication that deregistration was effected and we have requested for evidence in support of the same.*

5. Based on this evidence, the Clients submitted that the bills of costs filed be dismissed as the firm of advocates had no capacity to prosecute them.

6. In response to the preliminary objection, the Advocates submitted that the Preliminary Objection was not preliminary objection as defined in **Mukisa Biscuits Manufacturing Co., Ltd v West End Distributors [1969] EA 696** as the Clients purported to rely on evidence in the form of affidavits. In response to the evidence, they submitted that it was insufficient to show that the firm was deregistered. They contended that in any case, the issue of instructions was not contested.

7. The Deputy Registrar found that the preliminary objection did not meet the threshold of a preliminary objection within the meaning of the **Mukisa Biscuits Case (Supra)** as the issues raised were not only argumentative but also required evidence. On the substance, the Deputy Registrar found that there was no evidence that the Advocates were not registered at the time they were instructed and that they carried themselves as Advocates knowing that they were not registered.

8. Dissatisfied with the ruling, the Client’s advocates wrote to the Deputy Registrar on 4<sup>th</sup> December 2019 requesting for reasons for the decision in line with **Rule 11(1)** of the **Advocates Remuneration Order**. Thereafter, they filed Chamber Summons dated 3<sup>rd</sup> March 2020 and similar applications in the respective matters seeking an order that, *“That the finding and Ruling of Hon. Opande in Misc. E092 of 2019, taxation with regard to the Applicant’s Bill of costs be dismissed on the basis of non-registration of the Applicant.”*

9. The application is opposed by the Advocates through the replying affidavit sworn by Neddie Eve Akello, the Managing Partner in the firm of Advocates, sworn on 12<sup>th</sup> March 2020. She pointed out that the firm of Advocates was registered under the **Limited Liability Partnerships Act, Act No. 42 of 2011** as **Triple A Law LLP** by a Certificate of Incorporation dated 2<sup>nd</sup> March 2017. The firm thereafter changed its name to **Mamra Sitacus and Associates Law LLP** by a Certificate of Change of Name dated 21<sup>st</sup> February 2017 which was approved by the Council of the LSK informed by its letter dated 18<sup>th</sup> October 2019. It therefore urged that on the evidence, the firm was duly registered when the instructions were issued.

10. The Advocates objected to the Reference on the ground that the Clients had not complied with **Rule 11** of the **Advocates Remuneration Order** (“the **Order**”). The Advocates contended that the Client’s advocates failed to write to the Deputy Registrar seeking reasons for the decision within the time prescribed and that they also failed to file the references within the prescribed time and that they did so without leave.

11. In response to the replying affidavit, Mr Ngetich filed a supplementary affidavit sworn on 8<sup>th</sup> June 2020. He stated that following the ruling, the Client’s Advocates on record wrote a letter dated 4<sup>th</sup> December 2019 seeking reasons for the decision. He also reiterated that the Client withdrew instructions once it was discovered that the Advocates were not registered. It argued that the evidence presented was never submitted before the Deputy Registrar and could not be relied upon to oppose the applicant’s application.

12. Being a reference, the parties recapped the grounds which they had agitated before the Deputy Registrar. Both parties agreed to canvass the application by written submissions. The success or otherwise of the reference is dependent on the procedural issue which I shall first deal with.

## Whether the application is competent

13. The Advocates procedural objection is grounded on **rule 11(1)** and **(2)** of the **Order** which provides as follows:

*11. (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

*(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.*

*(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*

*(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.*

14. There is on record a letter dated 4<sup>th</sup> December 2019 from the Client's Advocates requesting reasons for the ruling in terms of **Rule 11** of the **Order**. There is no evidence that the Deputy Registrar responded to the letter either by giving of reasons or by referring to the ruling as the reasons for taxation. The reference filed by way of the Chamber Summons dated 3<sup>rd</sup> March 2020 was filed on 4<sup>th</sup> March 2020, over 3 months, after the ruling was delivered.

15. The implication of this in the absence of reasons, the reference is premature as the reasons for the taxation have not been given to the Client in terms of **Rule 11(2)** of the **Order**. On the other hand, there is ample authority for the proposition that reasons for the taxation decision are contained in the ruling hence there was no need to seek reasons for the decision when the ruling has been delivered (see **Mumias Sugar Company Limited v Professor Tom Ojienda and Associates KSM HC Misc. No. 279 of 2017 [2018] eKLR**). In this case though, the Client elected to seek reasons in line with the legal provisions. It was therefore the duty of the Deputy Registrar to furnish the applicant with reasons either by setting out the reasons separately or signify the reasons by reference to the ruling.

16. I cannot also fault the Clients for filing the references prematurely. It complied with the procedure. I also do not find any prejudice to the Advocates who have been able to respond to the matters raised by the Client. I will now deal with the substantive matter raised.

## The Reference

17. As I understand, the Clients' case is straightforward. It is that the Advocates were not registered as firm at the time they were instructed. The contention was based on two letters, which I have quoted, issued by the LSK. I agree with the Deputy Registrar that the Preliminary Objection lodged by the Clients was not in the nature of a preliminary objection and it ought to have been dismissed on that count.

18. At the risk of repetition, a preliminary objection as defined in the well-known case of **Mukisa Biscuits Manufacturing Co., Ltd (Supra)**. It is based on a pure point of law or uncontested facts. In that case Law JA., observed 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 pleading and which if argued as Preliminary Objection may dispose of the suit.*

19. Whether the Advocates were registered or not is a question of fact and not law. The issues of fact were presented by the Clients in the form of affidavits showing evidence that the Advocates were not registered. Once the Deputy Registrar concluded that the objection was not in the nature of a preliminary objection and that it did not meet the threshold, the proper course was to dismiss it.

20. On the other hand, if the Deputy Registrar considered that the matter required evidence to be taken, the proper course was to hear the matter based on the evidence and in this case, direct the Advocates to file its responses on the issue. As I understand, the objection implicated the issue whether in fact there was a retainer as the Clients state that they could not instruct a firm that was not licenced to practice as such. As was held by the Court of Appeal in **Wilfred N. Konosi t/a Konosi and Company Advocates v Flamco Limited NKU CA Civil Appeal No. 154 of 2014 [2017] eKLR**, the taxing officer has jurisdiction to determine whether there was a retainer agreement as a preliminary issue:

*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.*

21. Of course, the Deputy Registrar was entitled to consider the issue based on the assumption that the facts as presented were true and correct but from the submissions on record, the facts and documents were not admitted as true and correct by the Advocates. As the issue was contested, the Deputy Registrar ought to have directed the Advocates to file their replying affidavit to set out its position on the matter. Under **Rule 13A** of the **Advocates Remuneration Order**, the Deputy Registrar has the power to call evidence and documents to determine any issue in the taxation fully.

22. In this respect, I find that having dismissed the preliminary objection on the ground that it did not meet the threshold of a preliminary

objection, the proper procedure was to proceed to determine the substance of the objection by calling evidence. It is before the Deputy Registrar that the issues raised in the replying affidavit filed herein must be raised and determined.

23. The Deputy Registrar further fell into error by proceeding to tax the bills after dismissing the Preliminary Objection. Prior to hearing the preliminary objection, the Deputy Registrar had reserved the matter for ruling after an ex-parte hearing. The matter was re-opened for purposes of taking the preliminary objection and once the objection was dismissed, it was incumbent upon the Deputy Registrar to give directions on hearing any objection on the itemized bills before concluding the taxation. I say so because, admission of the bill of costs for hearing of the Preliminary Objection amounted to setting aside ex-parte proceedings that had already taken place when the ruling reserved.

24. It is now clear that the impugned ruling was the result of procedural missteps. I allow the reference and direct that the bills of costs in **HC Misc. Nos. E092, E095, E097, E273 and E275 of 2019** shall be taxed afresh by any other Deputy Registrar other than Hon. S. Aswani. The applicant shall bear costs of the application.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of AUGUST 2020.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Kayugira instructed by Ongoya and Wambola Advocates for the Advocates/Applicant.

Ms Masaki instructed by Musyoki and Mogaka and Company Advocates for the Clients/Respondents.