



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CIVIL APPLICATION NO. 33 OF 2016

GEORGE M. MAENGWE T/A

G. M. MAENGWE & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

JOSEA KIPKIRUI MUTAI.....RESPONDENT/APPLICANT

RULING

1. This ruling relates to the client/respondent's reference dated 17th January 2017 in which he sought to set aside the decision of the taxing officer dated 11th January 2017 on the Advocate/Client's bill of costs dated 20th July 2016. The applicant asks the court to set aside the decision of the taxing officer as far as it relates to the taxation of the respondent's (advocate's) bill of costs dated 20th July 2016, the quantum awarded and the reasoning on which the amount awarded was based. He further prays that the bill of costs be dismissed or, in the alternative, that it be remitted for taxation before another taxing officer with appropriate direction in respect of the taxation.

2. The application is based, first, on the ground that the taxing officer erred in law by failing to consider pertinent issues regarding the remuneration of Advocates. Further, that he failed to take into account that the respondent was not qualified to receive remuneration under the Advocates Remuneration Order as he did not hold a practising certificate in the period in contention. The taxing officer was also faulted for failing to consider the applicant's preliminary objection, and for awarding an amount that was excessively and inordinately high as to amount to an error of principle.

3. The application is supported by an affidavit sworn by the applicant's Counsel, Julius K. Mutai, and the annexures thereto.

4. Prior to the taxation of the bill of costs, the applicant had filed a notice of preliminary objection in which he argued that the advocate did not have a valid practising certificate and was therefore not entitled to remuneration as an advocate. This objection, however, was overruled by the taxing officer and in his ruling dated 11th January 2017, he taxed the advocate/client bill at Kshs 512,774. It is this ruling of the taxing officer that is the subject of this reference.

5. The applicant filed submissions dated 31st October 2018 which he requested the court to rely on in rendering its decision. The respondent did not file any submissions on the reference.

6. The facts giving rise to the taxation and the present reference are that on or about 18th April, 2016, the applicant had instructed the respondent to act for him in Kericho ELC No. 93 of 2011. The advocate had entered appearance and filed a defence on behalf of the applicant. However, the applicant later discovered that the respondent did not have a practising certificate. He therefore withdrew instructions from the respondent and instructed another advocate to take over the conduct of the matter. The respondent then filed his advocate-client bill of costs on 20th July 2016, and it was taxed on 11th January 2017 in the sum of Kshs. 512,774.50.

7. The applicant asks this court to consider and determine four issues, but the crux of this application is whether the respondent was qualified to practice law between 1st January 2016 and 29th September, 2016 and as a corollary thereto, whether he was entitled to receive remuneration under the Advocates Remuneration Order between 1st January, 2016 and 29th September, 2016. Should the answers to these two issues be in the negative, then the response to the secondary issues would be in the affirmative. These are first, whether the decision of the taxing officer dated 11th January, 2017 should be set aside and secondly, whether the respondent's bill of costs dated 20th July 2016 should be dismissed. Finally, the applicant asks the court to determine who should bear the costs of the application.

The Practising status of the Advocate/respondent

8. The applicant submits that as at 14th June 2016, the Advocate respondent was yet to take out his practising certificate for the year 2016. The applicant relies on a letter from the Law Society of Kenya dated 14th June, 2016 annexed to the present application which showed that

the respondent did not have a practising certificate for the year 2016 as at that time. He had obtained his practising certificate for the year 2016 on 30th September, 2016.

9. I have considered the applicant's submissions on this point. He refers the court to the provisions of section 24 of the Advocates Act, Cap 16 of the Laws of Kenya which states that:

“(1) Every practising certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day:

Provided that a practising certificate which is issued during the first month of any practising year shall have effect for all purposes from the beginning of that month.

(2) The practising year shall be from the 1st January to 31st December:

Provided that the Council of the Society, with the approval of the Chief Justice, may by order alter the practising year, and the order may make such transitional provision in regard to incidental matters as may be expedient.

(3) Every practising certificate shall expire at the end of the practising year in which it was issued:

Provided that, where the name of an advocate is removed from or struck off the Roll, the practising certificate (if any) of that advocate shall expire forthwith.

(4) The Registrar shall enter upon the Roll a note of the date of the issue of every practising certificate. (Emphasis added).

10. The applicant submits, rightly in my view, that under the above section, a practising certificate issued on any date in January takes effect from the 1st day of January of that year. A certificate issued after the 31st of January, however, takes effect from the date indicated on the practising certificate.

11. The Advocate respondent in this case took out his practising certificate on 30th September 2016. He did not therefore have a valid practising certificate for the period January 2016 to 30th September 2016 when he took out a practising certificate. He therefore did not have a valid certificate for the period upto June 2016 when he received instructions from the applicant, his practising certificate for the previous year, 2015, having expired at the end of that year.

12. That being the case, the question is whether he was qualified to practice law at any point in 2016 prior to the date he obtained his practising certificate on 30th September, 2016.

13. Under section 9 of the Advocates Act, a person is not qualified to practice law in Kenya unless he has, among other things, a valid practising certificate. The section provides as follows:

“Subject to this Act, no person shall be qualified to act as an advocate unless—

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practising certificate and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4).

(Emphasis added).

14. I believe that there is no dispute about the requirements of section 9 set out above. A person who does not meet the requirements of the section cannot validly practice law or engage in the business ordinarily carried out by those qualified under the section.

15. Which brings me to the next core issue: whether the Advocate/respondent was entitled to receive remuneration as an Advocate between 1st January, 2016 and 29th September, 2016.

16. The provisions of the Advocates Remuneration Order under the Advocates Act set out the manner in which Advocates can charge fees for services rendered as Advocates. It cannot be the basis of remuneration for a person who is not qualified as provided under section 9 of the Act.

17. Since the Advocate in this case did not have a practising certificate, he could not lawfully charge fees under the Advocates Remuneration Order, or at all, for services purportedly rendered as an Advocate. He obtained his practising certificate on 30th September 2016. He was purporting to charge for services rendered between January and June 2016. However, ***“a practising certificate cannot have a retrospective effect.”*** See in this regard **Standard Chartered Bank vs Mechanical Engineering Plant Ltd & Others [2009] EA 404** and **Abdul Aziz Juma vs Nikisui Investment & 2 Others, Nairobi E.L.C. No. 291 of 2013.**

18. The provisions of section 34 (1) of the Advocates Act govern the charging of fees for legal services. It provides that:

“No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument...”

(Emphasis added).

19. Section 34 (2) provides that any sums paid to such an unqualified person is recoverable summarily:

“Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.”

20. The response to the question whether the Advocate/respondent in this case was entitled to receive any remuneration under the Advocates Remuneration Order between 1st January 2016 and 29th September 2016 must therefore be in the negative.

21. The applicant has cited the decision of the Supreme Court in **National Bank of Kenya Limited vs Anaj Warehousing Limited, S. C. Petition No. 36 of 2014** in which the Court was dealing with the question of legal documents drawn by unqualified persons. The Supreme Court in that case emphasised that under the Advocates Act, a client may recover fees paid to unqualified persons.

22. I believe that where the above findings lead me to is the conclusion that the decision of the taxing officer dated 11th January, 2017 was erroneous. He erred in dismissing the applicant’s preliminary objection with respect to the fact that the Advocate did not have a practising certificate and was therefore not entitled to receive remuneration as an Advocate. He further erred in taxing the advocate/client bill of costs presented by an unqualified person, by virtue of not having a valid practising certificate.

23. That being the case, it is my finding that the taxing officer should not have taxed the Advocate/client bill of costs dated 20th July 2016 and the ruling dated 11th January 2017 was erroneous and is hereby set aside. It follows also that the advocate/client bill of costs dated 20th July 2016, having been presented by an unqualified person, is invalid and is hereby struck out.

24. In view of my findings above, I need not enter into an inquiry as to whether the taxed costs were so ordinally high as to demonstrate an application of the wrong taxation principles.

25. The upshot of my findings above is that the reference dated 17th January 2017 succeeds. It is hereby allowed with costs to the applicant.

Dated Delivered and Signed at Kericho this 27th day of February 2019

MUMBI NGUGI

JUDGE