



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

MISC. APPLICATION NO. 128 OF 2015

JIMMY AGGREY SIMIYU T/A B.W. MATHENGE & CO. ADV.....RESPONDENT

-VERSUS-

ELIZABETH WANJIRU EVANS.....APPLICANT

RULING

Background to Chamber Summons date+d 6th June 2018

1. Jimmy Aggrey Simiyu t/a B.W. Mathenge & Company Advocates is the Respondent in this application, on the matter of advocate-client Bill of Costs arising from the primary suit, **Nakuru Civil Appeal No. 233 of 2007 (UR 144/07)**. The said firm of advocates was representing the Applicant Elizabeth Wanjiru in the appeal while M/S Konosi & Co. Advocates represented the Appellants.

2. The Bill of costs was drawn by M/S B.W. Mathenge & Co. Advocates and was dated 12th May 2015. Upon service the Respondent objected to the taxation and further sought stay of proceedings in the application pending determination of the same. It is premised on Paragraph 11(4) of the Advocates (Remuneration) Order.

Further a preliminary objection was filled challenging the competence of the Advocates to maintain court proceedings including taxation of costs.

3. Upon hearing of the preliminary objection the court's taxing officer rendered in favour of the Advocates and proceeded to tax the bill of costs in the sum of Kshs.122,120/= on the 29th May 2018.

4. The Applicant by her application dated 6th June 2018 seeks orders that

(1) Spent

(2) Spent

(3) That the decision of the taxing master delivered on the 29th May 2018 on the Bill of costs dated 12th May 2015 be set aside.

(4) That this court be please to declare the firm of B.W. Mathenge and Company advocates an illegal entity established in contravention of **Section 37 and 39 of the Advocates Act** and as such cannot recover any costs or fees for matters instituted in any court on behalf of the applicant in its name.

5. The application is opposed by a replying Affidavit sworn on the 18th June 2010 by Jimmy Aggrey Simiyu Advocate.

6. Legal provisions underpinning the practice of Advocates and the application.

- Sections 31, 34, 37, 39, 40 of the Advocates Act.
- Paragraph 11 (4) of the Advocates (Remuneration) order.

7. Section 31 unqualified person not to act as an advocate – states

(i)

Is the firm an illegal entity?

17. In the cases **Lumumba & Kaluma Advocates -vs- Kenya Railways Corporation (2011) e KLR, Mohammed Ashraf Sadique & Another, Mathew Oseko t/a Oseko & Company Advocates (2009) e KLR, Ngomeni and Swimmers Ltd -vs- Katana Charo Suleiman (2014) e KLR** among others, the general thread running through is that a law firm registered as a partnership where one or more of the partners do not hold a practicing certificate is an illegal entity and is unqualified to practice or engage in legal practice in terms of **Section 31, 37 and 39** of the **Advocates Act**. Such firm of advocates is liable to punishment under **Section 39 thereof**.

18. To that end, any legal briefs taken up by the Applicant under the name M/S B.W. Mathenge & Company Advocates from the year 2009, despite the fact that the said legal firm remains undissolved or unregistered, cannot be sustained in a court of law.

In **Lumumba** case the court held that a suit or legal proceedings initiated or continued by an illegal entity cannot be sustained.

19. The Court of Appeal in **Ngomeni Swimmers Ltd** (Supra) faced with similar issues and citing the **Wesley John** case above held

“that as one of the partners was an unqualified person in terms of Section 9 (c) of the Advocates Act the plaint filed by the firm despite being signed by an advocate who was qualified on behalf of the firm.”

20. The impugned Advocate-client Bill of Costs was filed by the firm B.W. Mathenge & Co. Advocates on the 12th May 2015. At the time, the Applicant was a partner in the said law firm. However his senior Partner B. M. Mathenge Advocate was an unqualified person (advocate) having not taken out practicing certificates for the period 2009 – upto 2017. It therefore follows that any legal documents, pleadings, instruments drawn and filed under the said legal firm of B.W. Mathenge and Company Advocates, including the Bill of Costs subject of this application must be declared illegal having been drawn by an illegal entity. Had Aggrey Jimmy Simiyu Advocate t/a A.J. Simiyu and Company Advocates drawn and filed the bill of costs he would not have found himself in this predicament.

21. Consequently, I come to the finding that the legal firm, B.W. Mathenge & Co. Advocates is an illegal entity, its existence being in contravention of **Sections 37 and 39 of the Advocates Act**.

It therefore follows that the Bill of costs dated 12th May 2015 and the ruling dated 29th May 2018 are all a nullity as being illegal *ab initio*. The ruling is set aside.

22. **Part 1 Paragraph II (4) Advocates Remuneration Order** reproduced at page 3 above grants power to the High Court in any matter arising from a taxation by the taxing master of the court and particularly power to extend time to file a reference or objection from a taxation. Upon receipt of the bill of costs and prior to the taxation the respondent raised the Preliminary objection on the 12th April 2016. It raised the same issues in the application before me. The Taxing Officer heard the objection and on the 20th March 2018 dismissed the same and proceeded to tax the Bill of costs.

23. By the present application the applicant being dissatisfied with the taxing officers decision had every legal right to challenge the same before the High Court. A close look at the challenge reveals that it is not on the *quantum* of costs but on the preliminary objection that the bill had been drawn and prosecuted by an illegal entity.

24. **Paragraph 11(4) of the Advocates Remuneration Order** authorises a party objecting to the decision of a taxing officer to move to the High Court for redress. This is what is before me in the present application.

In **Cannon Assurance Co. Ltd –vs- Antony Thuo Kanai & Another NBI Civil Appeal No. 177 of 2014**, the Court of Appeal rendered that a party dissatisfied with the decision of a taxing master may thereafter lodge reference in the High Court. The applicant brought himself under the court’s jurisdiction under **Paragraph 11(4)** and indeed filed his submissions without raising any issue on the court’s jurisdiction.

25. For the above reasons, I find that the application dated 6th June 2018 and filed on the 11th June 2018 to be meritorious. The taxing master’s decision dated the 29th May 2018 on the Bill of Costs dated 12th May 2015 is set aside. It is further declared that the firm of B.W. Mathenge & Co. Advocates is an illegal entity pursuant to **Sections 37 and 39 of the Advocates Act** and as such cannot recover any costs or fees from matters instituted in court in its name.

26. Costs of the application are awarded to the applicant, Elizabeth Wanjiru Evans.

Dated, signed and delivered this 21st Day of February 2019.

J.N. MULWA

JUDGE