REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 37 OF 2016

IN THE MATTER OF AN ADVOCATE/CLIENT BILL OF COSTS

MUKONO ONDIEKI & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

VS

UNCLAIMED FINANCIAL ASSETS AUTHORITY.....CLIENT/APPLICANT

RULING

Background

1. The background necessary to this ruling is that on 22nd June 2016, the firm of Mokono Ondieki & Co Advocates (herein after referred to as the Advocates) filed an advocate/client Bill of Costs seeking to recover professional fees amounting to Kshs. 191,970/= from Unclaimed Financial Assets Authority (herein after referred to as the client).

2. Both parties filed written submissions for consideration by the taxing master. However, in their submissions filed on 19th October 2016, the advocates took a rather legally frail procedure of annexing documents to their submissions. The practice of introducing documents by way of submissions is not only un procedural and improper, but it is alien to the law.

3. However, of great interest is the reaction the said documents elicited from the client. One of the documents is a letter dated 29th April 2015 from the client addressed to the advocates. This letter informs the advocates that from the client's records, it had no documentary evidence or otherwise that the advocates were instructed to act for them in the case that gave rise to the Bill of Costs. Put simply, the client state that it was not aware of the case that gave rise to the advocate/client Bill of costs.

4. Among the said documents is a letter dated 9th April 2014 allegedly written by the client purporting to appoint the advocate to act in the case, and instructing the advocate settle the matter amicably. Also attached to the submissions is a letter dated the same date purported to be addressed to a one Eric Barare Orina authorizing him to sign affidavits on behalf of the client.

5. Reacting to the said documents, the client filed a Replying Affidavit dated 17th January 2017 sworn by a one George Omino, a former acting CEO of Unclaimed Financial Assets, that is, the client, the applicant in the application under consideration. He denied that the advocate was ever instructed to act for the client in Pet No. 162 of 2014, which gave rise to the Bill of Costs. He deposed that the said letters are a forgery, falsified and an attempt to unjustly enrich the advocates, and, that, the said letters were written on fake letterheads.

6. This development prompted the Taxing Master to refer the matter to a judge for determination arguing that the advocate's retainer was being contested. Subsequently, the matter was placed before a judge who noted that even though the parties had filed submissions on the Bill of Costs, there was no application for the court to determine the disputed question of the advocate's retainer. On 14th March 2018, the client filed the application through his advocates on record.

7. In find it proper to address the question whether it was proper for the Taxing Master to refer the matter to a judge to adjudicate the question of retainer. None of the parties raised the issue either before the Taxing Master or before this court. It is a correct to statement of the law to state that for the taxing officer to embark on taxing a Bill of Costs, it must be established that there exists an Advocate/Client relationship and that the advocate was instructed in accordance with the law.

8. Differently stated, the dispute raises a jurisdictional question as opposed to an issue outside the jurisdiction of the Taxing Master. This being a jurisdictional question on whether or not the Bill of Costs was properly before her for taxation, the Taxing Master had jurisdiction to determine the question whether there existed an advocate/client Bill of Costs. It was not necessary to refer the matter to a judge. This is because the issue raised raises a jurisdictional question. I am fortified in this proposition, by the Court of Appeal decision in *Wilfred N.*

*Konosi t/a Konosi & Co. Advocates v Flamco Limited**[1]*** which held that:-

> *"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."*

9. I have nothing useful to add to the above proposition of the law, save to emphasize that the issue in question was perfectly within the jurisdiction of the Taxing Master because it was a jurisdictional issue. Accordingly, she erred by failing to appreciate the nature of the dispute before her, and abdicated her jurisdictional mandate by failing to properly appreciate the breadth and width of her jurisdiction. Simply put, it was of the nature of a preliminary objection as to the validity of the Bill since the advocate/client relationship was disputed.

10. However, after referring the matter to the High Court, the learned judge directed the client to file a formal application, which it did, hence, this ruling.

The prayers sought

11. The client seeks the following orders:-

> ***a. Spent.***
>
> ***b. That the honourable court be pleased to strike out the applicant's bill of costs dated 21st June 2016 in Miscellaneous Application No. 37 of 2016.***
>
> ***c. That*** *the costs of this application and the proceedings herein be provided for.*

12. The core ground upon which the application stands is that there was never a client/advocate relationship between the parties to underpin the jurisdiction of a taxation of an advocate-client bill of costs. It also states that it never instructed the said Advocates and that the purported instruction is a fraud and therefore a nullity *ab initio.*

13. The application is supported by the affidavit of James Nduna, the applicant's Corporation Secretary. He averred that from their records and from the information of the officers who served the applicant at the material time, the applicant did not give instructions to the firm of Mokono Ondieki Advocates.

14. He deposed that the applicant became aware of the Bill of Costs after receiving letters dated 26th January 2015 and 9th February 2015 seeking payment of professional fees for legal services rendered. He averred that the letters purporting to have emanated from the applicant instructing the said advocates are not genuine, and, that, the letterhead used in the disputed letter is different from the applicants' genuine letterheads.

15. He also averred that the client lodged a complaint with the Law Society of Kenya, but no response, but the society never replied. He also averred that the former acting CEO of the applicant swore an affidavit denying the signature appearing in the letter dated 9th April 2014 relied upon by the said advocates, hence, the Bill of Costs is filed in bad faith and is an abuse of court process.

Respondent's Replying Affidavit

16. Albert Mukono Ondieki, advocate in his replying affidavit dated 14th September 2018 averred that the client instructed him on 11th April 2016. He deposed that pursuant to the instructions, he filed a notice of appointment on 11th April 2016 and responded to the Petition by way of a Replying Affidavit sworn by a one Vincent Kimutai Kimosop the then Chairman, Board of Directors filed in court on 14th April 2014. He further deposed that he wrote to the client requesting his fees, and the client wrote stating that it had no evidence that it instructed him. He stated that he raised his Bill of Costs for taxation and filed it in court. He maintained that he was properly instructed.

Client's Advocate's submissions

17. Counsel for the client submitted that the client has no record of ever instructing the advocate, and that its former Chief Officer, a Mr. George Owino swore an affidavit stating that the purported signature is a forgery, and pointed out a disparity in the client's letter heads and the letterheads used in the letters relied upon by the advocate.

18. Counsel argued that the fees is not payable and cited a passage from *Halsbury''s Laws of England.*[2] He also cited *Bugere Coffee Growers Ltd v Sebaduka and another*.[3] He invited the court to strike off documents annexed to the advocates' submissions on grounds that they were improperly introduced in court because evidence cannot be introduced by way of submissions.

The Advocate's submissions

19. The crux of Mr. Ondieki's submissions was that a one Eric Barare Orina instructed him at his office and gave him the letter dated 9th April 2014, hence, he was properly instructed.

Determination

20. Annexed to the advocate's submissions are the same documents he annexed to his submissions before the Taxing Master. These are the letter dated 9th April 2014 purporting to instruct him to represent the client. Also annexed is an incomplete copy of the judgment in Petition 162 of 2014. (To me this is of no value. It is incomplete and does not make sense. He did not annex pleadings and documents filed in the said case to demonstrate that indeed he acted for the client. Also, he annexed the letter dated 9th April 2014 purporting to authorize a one Eric Barare Orina to swear affidavits in respect of the said Petition, and, a letter dated 18th May 2015 from the advocate demanding the fees. Lastly, he annexed a Notice of Taxation and a copy of Bill of costs.

21. The law of evidence encompasses the rules and legal principles that govern the proof of facts in a legal proceeding. It also provides for the manner in which documents can be produced in court. These rules determine what evidence must or must not be considered by the trier of fact in reaching its decision, and how the evidence may be introduced in court.

22. Submissions, whether written or oral are legal arguments. A party cannot properly annex documents to his or her submissions nor can the facts be proved by way of documents annexed to submissions. It follows that the said documents are improperly before the court and cannot be considered. They are of no utilitarian value.

23. If the purpose of the annextures was to demonstrate that the client properly retained the advocates, then, I am afraid, the advocate has failed to achieve this goal. I am persuaded that the word retainer as used in section 51(2) of the Advocates Act [4] is synonymous with "employment," "engagement" or "instruction." An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute. This position was stated in *Owino Okeyo & Company Advocates v Pelican Engineering and Construction Ltd.**[5]***

24. Consistent with the above decision, the retainer in the instant case is disputed. Serious allegations of forgery have been cited. Whilst it is generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to take all disputes of fact at face value, which would enable a party to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence. [6] Guidance can be obtained from *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**[7]* where the South African Court observed as follows:-

> "*A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court would generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them.*"

25. As Megarry J observed in a well-known dictum in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John**[8]***

> "*As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."*

26. I have cited the above passage to demonstrate that this is not an open and shut case. The instructions to the advocates are seriously disputed. There are serious allegations of fraud. While appreciating that such allegations cannot easily be resolved by way of affidavits, the court takes the view that for the purposes of the application under consideration, the client has cast serious doubts as to whether the advocates were instructed as alleged. As to the veracity of the respective parties positions, in my view, those are issues which can properly be resolved in a civil suit where the parties can adduce oral evidence and be subjected to cross-examination.

27. Regarding the question whether the advocate has proved his retainer to the trequired standard, guidance can be obtained from *Danish Mercantile Co. Ltd v. Beamont & Anor**[9]*** where Jenkins L .J at page 687 stated the position as follows:-

> " *I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority so to do, or under an erroneous assumption of authority does so at his own peril , and that so long as the matter rests there, the action is not properly constituted.*
>
> *In that sense it is a nullity and can be stayed at any time, provided that the aggrieved party does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the Solicitor who started the action to adopt the proceedings to approve all that has been done…"*

28. The import of the law above is that instructions run with the action itself. Instructions to an advocate to represent a client cannot inferred. They must be express. The purported instructions to the advocate have suffered a serious assault. Since instructions cannot be assumed,

unless and until the issues raises by the parties are determined in judicial proceedings and the veracity or otherwise of the allegations and counter allegations established, there would be no basis at all for the advocate to claim his fees. Differently stated, the question whether or not the advocate was retained as he claims is a serious dispute that cannot be determined in this application by way of affidavits. It is a contest that requires oral evidence and an opportunity for the opposing parties to be subjected to cross-examination.

29. In *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited**[10]*** (supra) the Court of Appeal while dismissing an appeal that had risen from the finding of the High Court that there was no advocate- client relationship, observed:-

> *"Not a single letter by the appellant was exhibited to demonstrate that the relationship of advocate- client obtained. The onus reposed on the appellant it was not discharged. In the absence of proof that there existed advocate –client relationship the taxing officer was justified in striking out the Bill of costs and the learned Judge of the High Court was right to uphold the decision of the taxing officer."*

30. In the instant case, the letters relied upon by the advocate have been described as a forgery, thus, casting doubts on the existence of a client/advocate relationship. In *Mugoye & Associates Advocates v Kiambu County Assembly Speaker*[11]the Advocates, filed their advocate/client Bill of costs against Kiambu County Assembly Speaker. When the Bill of costs came up for taxation before the Deputy Registrar, the issue of instructions was raised and the taxing officer referred the matter to the High Court for resolution of the question of instructions before taxation could proceed. After reviewing the material presented before it, the court held that there was no advocate/client Bill of Costs and struck of the Bill of Costs.

31. Similarly, in *Charles M Karweru t/a Karweru and Co Advocates v Maisha Flour Mills Ltd*[12]the High Court up held a Taxing Masters decision dismissing a Bill of Costs on grounds that the advocate Client relationship was not established. Without an Advocate/Client relationship, the taxing officer has no jurisdiction to tax the bill and without jurisdiction, the taxing master has to down his/her tools. In *Wilfred N.Konosi t/a Konosi & Co Advocate v Flamco Limited* (supra), the court stated that:-

> *"The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.''*

32. As stated earlier, the advocate/client relationship is fiercely contested. The advocate has not established he existence of an advocate/client relationship. The issue of fraud must be resolved either way. That cannot be done in this application since it requires oral evidence. That being the case, I find the Advocate/ Client Bill of costs lacks the crucial basis upon which it can stand.

33. Consequently, I find and hold that the application dated 14th March 2018 is merited. Accordingly, I allow the said application and order that the Bill of costs dated 21st June 2016 filed by the firm of Mokono Ondieki & Company Advocates is hereby struck off with costs to the client.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 24th day of July 2019

John M. Mativo

Judge

---

[1] {2017}e KLR

[2] Vol 44 Page 84.

[3] {1970} EA 147.

[4] Cap 16, Laws of Kenya.

[5] {2006} e KLR.

[6] See *Rhodes University v Student Representative Council of Rhodes University and Others* {2017} 1All SA 617 (ECG).

[7] {2008} ZASCA 6; 2008 (3) SA 371 (SCA) [13].

[8] {1970} 1 Ch 345 ([1969] 2 All ER 274 (Ch)) at 402 (Ch) and 309F (All ER).

[9] {1951} Ch. CA 680.

[10] {2017}e KLR

[11] [2018]eKLR

[12] [2019] eKLR.