



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC APPL. NO. 113 OF 2017**

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

**AND**

**IN THE MATTER OF THE TAXATION OF BILL OF COSTS BETWEEN ADVOCATE AND CLIENT**

**BETWEEN**

**MWANIKI GACHOKA & CO. ADVOCATES..... APPLICANT**

**VERSUS**

**ARISTIDE BRILLIANT NKUOMONDO.....RESPONDENT**

**RULING**

1) The Respondent herein took out the notice of Preliminary Objection dated 23<sup>rd</sup> March 2018 raising the following grounds:

**i) The Honourable Court lacks jurisdiction to tax a Bill of Costs where parties have entered into an agreement as to fees.**

**ii) Pursuant to section 45 (6) of the Advocates Act, where there is a fee agreement between the Advocate and a client, the court has no jurisdiction to tax a bill of Costs.**

2) The Respondent filed an affidavit he swore in support of the notice.

3) In response, the Applicant filed the replying affidavit he swore to oppose the preliminary objection. Parties filed and exchanged written submissions over the preliminary objection.

4) I have considered the grounds stated on the face of the notice of preliminary objection and the facts deponed in the affidavits filed in support and against the notice. I have further considered the rival written submissions.

5) The history behind this matter appears to be straightforward. The Respondent was represented by the Applicant in **Nairobi HCCC no 184 of 2014. East African Breweries Ltd Vs Aristide Brilliant Nkuomondo**. The applicant sought to recover his fees by filing an Advocates Bill of costs.

6) In response to the Advocates Bill of Costs, the Respondent filed the Notice of Preliminary objection arguing that they had executed a written agreement on the advocates fees therefore the court has no jurisdiction to entertain the taxation proceedings pursuant to the provisions of section 45 (6) of the Advocates' Act.

7) It is the submission of the Respondent that the Advocates Bill of Costs should in the circumstances be struck out. The Respondent attached to the affidavit he swore in support of the notice copies of email correspondences he exchanged with the Applicant to show that a written agreement on fees existed.

8) The Applicant is of the submission that the parties never executed a written agreement on fees in relation to **Nairobi H.C.C.C No 184 of 2014**. It was also pointed out that the email attached to the supporting affidavit of the Respondent was not signed and cannot therefore be construed to be a valid fee agreement between the advocate and the client. The Applicant therefore urged this court to dismiss the preliminary objection and direct the Advocate's Bill of Costs to be taxed.

9) The issue which has been posed to this court to determine is whether there was a valid agreement on fees. It is not in dispute that on 9<sup>th</sup>

April 2015, the Respondent wrote an email to the Applicant in which he indicated **inter alia** as follows:

**“As we agreed, let us proceed with a total of 7.5 all inclusive of handling the case totally to the conclusion.”**

**10)** On the same date, the applicant responded stating *inter alia* **“We confirm that this is what we agreed, we will remit the sum of 18 million.”**

**11)** According to the Respondent, the aforesaid email messages are very clear on the agreed fees in **H.CCC No 184 of 2014**. The Applicant disputed the existence of the agreement on fees and went ahead to list cases he represented the Respondent.

**12)** A careful perusal of the provisions of Section 45 (1) of the Advocates Act will reveal that an agreement on fees must be in writing and signed by the client or his agent duly authorized in that behalf.

**13)** With respect, I am persuaded by the Applicant’s argument that the unsigned email availed by the Respondent cannot be construed to be a valid fee agreement between the parties. A Critical look at these emails will reveal that they do not show that there was an agreement on fees between the parties in relation to **H.CCC No 184 of 2014**. It would appear that the parties were negotiating on fees deposits and remission of funds to the Respondent.

**14)** In the end, I am satisfied that there was no valid written agreement on fees between the Applicant and the Respondent in relation to **H.CCC No 184 of 2013 , East African Breweries Ltd Vs Aristide Brilliant Nkuomondo**. Consequently, the notice of preliminary objection is found to be without merit. The same is ordered dismissed with costs abiding the outcome of the Advocates Bill of costs. The taxation of the Bill of Costs should proceed for hearing.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> of December, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent