



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kwengu & Company Advocates v Raja (Environment & Land Miscellaneous Case E267 of 2022) [2023] KEELC 20861 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E267 OF 2022**

**MD MWANGI, J
OCTOBER 17, 2023**

BETWEEN

KWENGU & COMPANY ADVOCATES ADVOCATE

AND

HITENKUMAR A RAJA CLIENT

RULING

1. This is a ruling on the reference brought by way of a chamber summons application dated 27th March, 2023 by the Advocate seeking for the following Orders:
 - a. That this Honourable Court be pleased to set aside the ruling dated 14/3/2023 by the Taxing Officer in its entirety striking out the Applicant's Advocates/Client Bill of Costs dated 18/11/2022.
 - b. That pursuant to order 1 above, this Honourable Court be pleased to reinstate the Applicant's Advocates/ Client Bill of Costs dated 18/11/2022 and place and/or refer it to another Taxing Master for Taxation with appropriate directions.
 - c. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and further supported by the Affidavit of Apell Alloys Kwengu, Advocate deponed on the 27th March, 2023. The Advocate depones that the Applicant's Advocate- Client Bill of Costs dated 18th November, 2022 was struck out by the Taxing Officer on 14th March, 2023. He deposes that the Taxing Master misdirected herself and erred in law in the said Ruling.
3. The Advocate/Applicant argues that the Taxing Master erred in finding that there was a Deed of Settlement dated 22nd June, 2017 entered into between the Applicant and Respondent when he



(Advocate) had denied its very existence and ever executing the same. He states that there was no valid and binding agreement pursuant to Section 45 of the Advocate's Act.

4. Counsel avers that the purported Agreement was invalid, void ab initio and unenforceable in law pursuant to Section 46 (d) of the *Advocates Act* for lack of consideration. The Taxing Master therefore erred in relying on the alleged Deed of Settlement dated 22nd June, 2017 to dismiss the Advocate's bill of costs.

Replying Affidavit

5. In response to the application, the Client filed a Replying Affidavit dated 11th April, 2023 sworn by Hitenkumar A. Raja. The Deponent avers that a series of suspicious Advocate-Client Bills of costs, including the Bill of Costs engendering these proceedings were filed against him seeking to revive long settled claims for costs by the Advocate against him. That the basis of the prayer to strike out the Bill of Costs was the Deed of Settlement dated 22nd June, 2017. This Deed served as an agreement between the parties on remuneration of the Advocate for various court matters, including Nairobi ELCC/E 261/2010.
6. He further avers that it was part of the agreement in the said Deed that the Advocate's remuneration for various court matters including Nairobi ELCC/ E261/2010 would be pegged at a lump sum amount of Kshs. 10 Million upon which the Advocate would have no further claim against him. All matters in dispute between the parties would be marked as fully and finally settled.
7. He further states that the plain reading of the Deed of Settlement shows that the Deed was not champertous as alleged since the Deed is solely executed between the parties herein. He argues that Section 45 (1) of the *Advocates act* allows an Advocate and his Client to enter into an agreement fixing the Advocate's remuneration. Such an agreement is considered to be valid and binding provided it is in writing and duly executed between the parties.
8. The deponent restates the provisions of Section 45 (6) of the *Advocates Act*. He asserts that the Deed was, indeed, the parties' agreement on remuneration of the Advocate. The Taxing Master did not therefore err in finding that the Deed of Settlement entered into mutually between him and the Advocate was binding as regards the remuneration of the Advocate.
9. In any event, that the Advocate had not pleaded that the Deed was invalid or fraudulent as claimed. The Deed of Settlement was mutually executed by both parties and subsequently stamped and flanked. Further, that the Deed was attested by an Advocate who certified that the parties had executed the Deed "freely and voluntarily" and that the parties had "understood its contents and the financial, legal and economic implications thereof".
10. The Advocate accepted the sum of Kshs. 10,000,000/= as recorded in the Deed of Settlement, in full and final settlement of costs due for, and including Nairobi ELCC/ E261/2010. It is therefore unfair for the Advocate to bring taxation proceedings against him, 5 years later seeking to circumvent a valid and legally binding agreement on fees and obtain a double payment of costs that have long been settled.
11. In any event, the Advocate's Bill of Costs ought to have been struck out in limine as it was filed over 9 years since the lawful termination of his retainer with the Client.
12. The Client deposes that the Advocate/Applicant ceased acting for him on 2nd October, 2013. Therefore, any retainer that may have existed stood terminated. He avers that an Advocate's claim for costs is an action founded on contract and governed by the statute of limitation of time. The Advocate's claim is therefore statute barred having been filed 9 years after the termination of the Contract.



Court's Directions

13. The court directed that the application be canvassed by way of written submissions. Both parties complied. The Advocate's submissions are dated 26th July, 2023 whereas the Client's submissions are dated 31st August, 2023, which submissions the court has read and considered.

Issues for Determination

14. The Court has considered the instant application, the pleadings herein, the written submissions, the impugned Ruling, the cited authorities and the relevant provisions of law and finds the issues for determination are as follows: -
- a. Whether the taxing officer erred in principle in her ruling of 14th March, 2023 by considering the validity of the Deed of Settlement.
 - b. Whether the Court should issue the orders sought by the Applicant.
 - c. What orders should issue in regard to costs.

Analysis and determination

a. Whether the taxing officer erred in principle in her ruling of 14th March, 2023 by considering the validity of the Deed of Settlement.

15. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court of Kenya *in the Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:

- (29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.”
16. What is before the court is a challenge of the ruling on the taxation of the Bill of Costs dated 18th November, 2022. From the proceedings, the Respondent objected to the taxation of the bill of costs on the basis that he had executed a Deed of Settlement dated 22nd June, 2017 with the Advocate. That the said Deed of Settlement according to the Respondent constituted a binding settlement agreement relating to the Costs in Nairobi ELCC 261 of 2010. The Respondent argument was that the Applicant could not therefore use the court to circumvent the mutually agreed deed of settlement, rendering the Applicant's bill of costs invalid.



17. The Applicant on the other hand argued that he had never received a sum of Kshs. 10,000,000/= as alleged in the Deed of Settlement. He argued that he had not compromised any of the cases handled on behalf of the Respondent. The Advocate stated that he had lodged a complaint with the Directorate of Criminal Investigations regarding the forgery of the Deed of Settlement. In any event the Deed of Settlement was invalid as it contravened Sections 45 and 46 of the *Advocates Act* since it provided for payment of fees less than that provided for in the Advocates Remuneration Order (ARO). The Advocate asserted that he could not have definitely signed an illegal agreement.
18. Relying on Section 45 of the *Advocates Act*, the Taxing Master held that no evidence had been placed before her to show that the Deed of Settlement had been invalidated. She then proceeded to strike out the Bill of Costs with costs to the Respondent. The issue then is whether the taxing officer had the requisite jurisdiction to do as she did.
19. It is not in doubt that matters purely taxation fall within the jurisdiction of a taxing officer and not a Judge. This position has been settled by the Courts in numerous decisions. The Court of Appeal in *Sharma v Uburu Highway Development Limited* [2001] 2 EA 530, (Akiwumi JA) dealt with the issue and held that a Judge:
- “... not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and 12 of the *Advocates (Remuneration) Order* from a decision of the taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent’s application to strike out. This by itself makes his hearing of and his ruling of 19th May, 2000, of the Respondent’s application a nullity from the word go.”
20. Waweru J on his part in *Donholm Rabisi Stores v East African Portland Cement Limited* [2005] eKLR, expressed himself as hereunder: -
- “Taxation of costs, whether those costs be between party and party or between Advocate and Client, is a special jurisdiction reserved to the taxing officer by the *Advocate (Remuneration) Order*. The court will not be drawn into the arena of taxation except by way of reference (from a decision of taxation) made under Rule 11 of the *Advocates (Remuneration) Order*. The present application is not such a reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer.
21. The jurisdiction of a taxing officer is to tax the bill of costs before him/her. His/her powers are set out in Paragraph 13A of the *Advocates (Remuneration) Order* are in connection with taxation of the bill of costs before him. That paragraph states –
- “13A. For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.” (emphasis added)
22. In *Abincha & Co Advocates -vs- Trident Insurance Co Ltd* [2013] eKLR, the Learned Judge in reference to the above provision and the phrase “any matter in dispute before him” stated that the phrase,
- “Any matter in dispute before him’..... must mean any matter connected with or concerning the taxation of any item in the bill of costs. It cannot mean any issue that challenges the taxing officer’s jurisdiction to tax the bill of costs.”



23. The Learned Judge further stated that:

“The main issues raised in the notice of motion dated 20th February 2012 were challenging the Taxing Officer’s jurisdiction to tax the bill of costs before him. Those issues were whether the Advocate’s bill of costs was statute-barred under the *Limitation of Actions Act* and whether the Advocate was estopped from claiming any further costs? Did the Taxing Officer have jurisdiction to deal with those issues?

Those issues were raising one fundamental issue, to wit, whether there were any costs due to the Advocate that the Taxing Officer could tax? I hold that it was an issue that could only be determined by a Judge. It is the kind of issue that the Taxing Officer, with the consent of both parties, should have referred to the opinion of the High Court.

Only after determination of that fundamental issue by the High Court, that is, whether or not there were any costs due to the Advocate that could be taxed, would the bill of costs be referred back to the Taxing Officer for taxation, if it is found that there were costs that were due to the Advocate”

24. The process of taxation must be distinguished from the process of determining whether or not the Bill of Costs filed is the correct mode of determining fees between the parties. Where for example parties are agreed on their fees, taxation would not arise and where a party in those circumstances purports to tax his costs, it is proper for the party against whom the Bill is filed to object. Such an objection does not constitute taxation and therefore is outside the jurisdiction of the taxing officer.

25. I agree with the finding of Odunga J. (as he then was) in the case of [*Corporate Insurance Company Ltd vs Advocates*](#) (Miscellaneous Application 033 of 2020) [2022] eKLR where he stated that:

“where an issue arises that does not concern the taxation, the Taxing Officer lacks the competence to deal with the same and the procedure is to refer the matter to the Judge for determination after which, depending on that determination, the Taxing Officer may continue with the matter.”

26. Considering the above analysis, the Court finds that the Taxing Master lacked the jurisdiction to determine the validity of the Deed of Settlement. The Taxing Master ought to have referred the matter to a Judge for determination on the validity of the alleged agreement for fees. Only after determination of that fundamental issue by the Judge, that is, whether or not there were any costs due to the Advocate that could be taxed, would the bill of costs be referred back to the Taxing Officer for taxation, if it is found that there were costs that were due to the Advocate.

27. Having held that the Deputy Registrar/Taxing Officer lacked jurisdiction, the Ruling dated 14th March, 2023 is hereby set aside.

Conclusion

28. Consequently, the Applicant’s application is allowed in the following terms:

- a. The Taxing Officer’s Ruling delivered on the 14th March, 2023 is set-aside.
- b. The Applicant’s Advocates/ Client Bill of Costs dated 18th November, 2022 is reinstated.
- c. The Bill of Costs shall be placed before another Taxing Officer for Taxation.
- d. The Costs of this application are granted to the Advocate/ Applicant.



It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY
OF OCTOBER, 2023**

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kimani for the Client/Respondent

Ms Wanjiru holding brief for Oduk for the Advocate/Applicant

Yvette: Court Assistant.

M.D. MWANGI

JUDGE

