



**REPUBLIC OF KENYA**

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

**(FAMILY DIVISION)**

**MISC. APPLICATION NO. 93 OF 2016**

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

**BETWEEN**

**THOMAS K'BAHATI T/A**

**K'BAHATI & COMPANY ADVOCATES....ADVOCATE/APPLICANT**

**AND**

**LIZZIE MUTHONI WANYOIKE.....CLIENT/RESPONDENT**

**ARISING FROM SUCCESSION CAUSE NO. 64 OF 2010**

**IN THE MATTER OF THE ESTATE OF JOSPHAT MBURU WANYOIKE (DECESAED)**

**RULING**

1. The advocate/applicant filed a bill an advocate/client bill of costs for taxation against Lizzie Muthoni Wanyoike, the respondent/client herein. The respondent reacted to the bill by filing an application, by way of a Motion, dated 6<sup>th</sup> October 2016, seeking striking out of the bill. She argued that there was no advocate/client relationship between her and the applicant. The advocate responded to the application through an affidavit sworn on 27<sup>th</sup> November 2016. He asserts that there was such a relationship. He gives a background as to how he came to place himself on record for the respondent and how he related with her over the relevant period.
2. The only issue for me to determine is whether there was an advocate/client relationship between the applicant and the respondent to warrant taxation of the bill on record.
3. An advocate/client relationship is said to arise when a client instructs an advocate to act for him, and pays to the advocate fees for the service provided or to be provided. The relationship is contractual, and is often referred to as a retainer. It may be in writing. Often it is not reduced to writing in which case it is to be inferred from the conduct of the parties.
4. In this case, the applicant initially handled the matter in question at the time he practised in the firm of Lumumba Mumma and Kaluma Advocates, who had ostensibly been instructed in the matter by the respondent. The partnership which was the firm of Lumumba Mumma and Kaluma Advocates fell apart and the applicant set up his own practice known as K'Bahati & Company Advocates. It would appear that he moved with the file of the respondent to the new outfit, and apparently placed himself on record and appeared in court for the respondent. The respondent's case is that she never instructed him to do so, and on all the occasions that she dealt with him during that period she thought that he was still practising under Lumumba Mumma and Kaluma Advocates, the firm that she had instructed in the matter.
5. It was stated by Warsame J in *Ochieng Onyango Kibet and Ohaga Advocates vs. Akiba Bank Limited* (2007) eKLR, that the burden of establishing existence of that relationship, where the same is denied, lies with the advocate, and the standard of proof is on a balance of probability. It is the advocate who moves the court to have a client bill taxed, and therefore it is he who asserts existence of that relationship. It falls upon him to prove its existence.
6. The question that I should be striving to answer at this stage is whether the applicant has established that there was indeed an advocate/client relationship between him and the respondent.
7. I have perused through the annexures to the applicant's affidavit and I have not come across any document written by the respondent to the applicant that would suggest that she ever instructed him to act for her, or suggesting that she acquiesced to his acting for her in the

matter in question. Indeed, the only document that the applicant addressed to the respondent is the letter dated 9<sup>th</sup> December 2014 forwarding a fee note. There is not response to this letter. The bulk of the annexed correspondence is not with respondent, but an Anthony Wanyoike. It has not been explained in the affidavit who Anthony Wanyoike was to the respondent, specifically whether he was her agent.

8. I am not satisfied that from the material before me that the applicant had instructed the respondent to act for her in the succession cause as alleged. I shall accordingly allow the Motion dated 6<sup>th</sup> October 2016, with the result that the bill of costs dated 4<sup>th</sup> August 2016 stands dismissed with costs to the applicant/client.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> DAY OF APRIL, 2018.**

**W. MUSYOKA**

**JUDGE**