



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 15 OF 2016

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

NGATIA & ASSOCIATES ADVOCATES.....APPLICANT

-VERSUS-

INTERACTIVE GAMING & LOTERIES LIMITED.....RESPONDENT

RULING

1. *Ngatia & Associates Advocates*, hereinafter referred to as the Advocate, files a Bill of Costs on 29th January 2016 against *Interactive Gaming and Lotteries Ltd*, hereinafter referred to as the client.

2. The part of the narration as of item number 1, the instruction fees, is as follows:-

“To receive instructions, to act for the client’s Premium Rate Service Provider (PRSP) Flint East African Limited following an impending raid on their premises by the police in connection with the client’s public lottery “Mzalendo Bora”

To receiving instruction from Interactive Gaming & Lotteries Limited regarding the relationship between the client and Flint East Africa ltd who were the service provider.”

3. A preliminary objection has been raised by the client to that Bill of Costs on the following grounds:-

“That there exists no advocate – client relationship between the applicant (the Client) and the Respondent (the Advocate)

That in the absence of retainer, the Court lacks requisite jurisdiction to tax the Bill of costs.”

4. The client in support of the preliminary objection argued there was absent an Advocate –client relationship between the Advocate and the Client. That accordingly the taxing master lacked jurisdiction to tax the advocate’s Bill of costs. The client cited the case of *Hezekiel Oira T/A H. Oira Advocate –vs- Kenya Broadcasting Corporation [2015] eKLR*, viz:-

“In my view, the Advocates (Remuneration) order gives the taxing officer jurisdiction to tax the bill of costs where there is an established client/Advocates relationship, and where there is no dispute as to retainer.”

5. The client made reference to item No. 1 of the bill of costs and emphasized that that item related to instructions to act for Flint East Africa Limited yet the bill of costs was against the client.

6. The Advocate by his submission responded to the client’s submission by stating that it was the client who retained the Advocate to institute judicial review proceedings on its Premium Rate Service Provider, that is, Flint East Africa Limited, against the communication Commission of Kenya. The advocate contended that services rendered to Flint East Africa ltd were carried out upon instructions by the client.

7. The advocate submitted further that the client’s preliminary objection was based on contested facts and should therefore fail. The advocate relied on the case *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E.A* viz:-

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”

8. According to the advocate the ration of that case made it clear that a preliminary objection cannot be raised if any facts require to be ascertained.

ANALYSIS AND FINDINGS

9. From the reproduced narration of the item 1 of the advocates bill of costs it becomes clear that the advocate’s contention, thereof, is that he acted for Flint East Africa Ltd on the instructions of the client. Section 2 of the Advocates Act Cap 16 defines a client as:-

“Includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs or is about to retain or employ an advocate and any persons who is or may be liable to pay to an advocate any costs.”

10. That definition shows that a person can retain or employ an advocate on his behalf or on behalf of another. That definition fits in with the narration of item 1 of the bill of costs where the advocate states that the client instructed him to act for Flint East African Ltd. The Court of Appeal in the case **Samson Owino Ger –vs- Marmanet Forest Co-operative & Credit Society [1988]eKLR** discussed who a client is and held:-

“When a person says that he has instructed an advocate to act for him all he means, and is understood by the officious bystander to mean, is that he has retained the professional services of an advocate in relation to a particular transaction or business and he has in consequence become that particular advocate’s client.”

11. I wholly agree with the advocate’s submissions that the client erred to have raised contested matter by way of preliminary objection. This practice was frowned upon in the case of **Mukisa Biscuit** (supra) where the Court stated:-

“The matter was raised in the guise of a preliminary objection, which it was not. It should have been raised in the form of an application by way of motion...”

12. Similarly here, the client should have filed an application which application would have been supported by affidavit evidence and the advocate would have responded by affidavit evidence.

13. For the client to have filed a preliminary objection it could only do so by raising a pure point of law which is argued on assumption that all the facts pleaded by the advocate, and in this case the facts are the narration in the bill of costs, were correct: if the assumption of the advocate are correct then the preliminary objection must and does fail because the advocate has a basis of taxing the bill of costs since he stated in the bill of costs that he acted on the instructions of the client.

14. The findings of Court therefore are:

- a) *The preliminary objection is overruled, rejected and dismissed with costs to Ngatia & Associates Advocates.*
- b) *At the reading of the Ruling mention date before the taxing master will be fixed for purpose of obtaining a dated for taxation of the bill of costs filed in Court on 29th January 2016.*

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE