



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL MISC. APP. CASE NO. 111 OF 2017

MORRIS GUCHURA NJAGE T/A

MORRIS NJAGE & COMPANY.....ADVOCATE/APPLICANT

VERSUS

LIZA CATHERINE WANGARI MWANGI.....CLIENT/RESPONDENT

RULING

A. Introduction

1. The applicant herein filed this reference vide a Chamber Summons dated 3/09/2018 seeking the following orders;

- a) The Ruling delivered on 30th August, 2018 be set aside in its entirety.*
- b) Bill of Costs dated 19th December, 2017 be taxed by the Honourable Court.*
- c) Costs of this application be borne by the client.*

2. The respondent filed a replying affidavit to the application on the 10/09/2018 opposing the reference by the Applicant in its entirety to which the Applicant filed a further affidavit on the 11/09/2018. Parties agreed to dispose of the matter through written submissions.

B. Applicant's Submission

3. The Applicant submitted that the taxing officer unlawfully and unjustly refused to award instruction fees in respect of HC Misc. Application No. 28 of 2007 and further that taxing officer dealt with the three suits as though they were various stages of a single suit. It was the Applicant's further submission that **HC Misc. Application No. 28 of 2007** was the foundation on which the Respondent's claim rested and as such, the taxing officer ought to have factored this in his taxation. On this he relied on **JEREMIAH MUKU VS METHODIST CHURCH IN KENYA TRUSTEES REGISTERED & ANOTHER [2015] eKLR**.

4. The Applicant further submitted that the taxing officer failed to regard HC Misc. Application No. 28 of 2007 as a separate suit within the meaning of Schedule 6A (1) (a) of the Advocates Remuneration Order and thus unlawfully and unjustly denied the Applicant instruction fees. He relied on the case of **GEORGE ARUNGA SINO T/A JONE BROOKS CONSULTANTS LIMITED VS PATRICK J. & GEOFFREY D.O. YOGO T/A ATIENO, YOGO & CO. ADVOCATES [2012] eKLR**.

5. The Applicant further submitted that the taxing officer ought to have taxed the suit taking into consideration the pleadings, judgement on settlement or in his discretion in a just manner taking into account the nature of the matter. On this, he relied on the case of **JORETH LIMITED Vs KIGANO & ASSOCIATES [2002] eKLR**. It was the Applicant further submission that the taxing officer failed to award him other costs as provided under **Schedule 6A (2), (4), (5), (6), (7), (8), (9) and 6B (a) of the Advocates Remuneration Order**.

6. The Applicant further submitted that the taxing officer acted unlawfully and arbitrarily by purporting to tax the instruction fees for HCCC No. 31 of 2007 below the prescribed scale of fees. He relied on the **D. NJOGU & COMPANY V KENYA NATIONAL CAPITAL CORPORATION [2005] eKLR**. He further submitted that the taxing officer failed to tax the bill of cost relating to HCCA No. 74 of 2008.

C. Respondent's Submission

7. The Respondent's counsel submitted that this Honourable Court should not interfere with the decision of the taxing officer especially since sound reasoning and proper application of the law informed the decision.

8. It was further submitted that there was no advocate-client relationship between the Applicant and the Respondent and that this Bill of costs had been filed in disregard to the orders issued by the High Court in Misc. Application No. 117 of 2014.

9. The Respondent further submitted that the relevant ARO to be used in taxation was the Advocates Remuneration Order of 2006 since the suit was filed in 2006 and specifically Part B of Schedule VI.

10. The Respondent further submitted that there was no error of principle, as there was no novelty identified by the Applicant. He relied on the cases of **REPUBLIC V MINISTER FOR AGRICULTURE & 2 OTHERS EX PARTE SAMUEL MUCHIRI W'NJUGUNA & 6 OTHERS [2006] eKLR**. Concerning the amount awarded in taxation being too little, the respondents relied on the case of **B MBAI & ASSOCIATES ADVOCATES V CLERK KIAMBU COUNTY ASSEMBLY**.

11. It was the respondent's submission that this Court cannot interfere with the discretionary decision of the taxation officers solely because the Applicant was not happy with the amount awarded. Concerning the issue of instruction fees, the respondent relied on the cases OF **NATIONAL OIL CORPORATION LIMITED V REAL ENERGY LIMITED & ANOTHER [2016] eKLR** and that of **GOVERNORS BALLON SAFARIS LIMITED V SKYSHIP COMPANY LIMITED & ANOTHER [2015] eKLR**.

12. The respondent concluded by submitting that the applicant's reference be dismissed with costs.

D. Analysis of the Law

13. It was submitted on behalf of the respondent that there exists no advocate-client relationship between the applicant herein and the respondent and as such, the applicant's bill of costs should be dismissed.

14. The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the **Advocates Act** and the **Advocates Remuneration Order**. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. Moreover, inherent jurisdiction cannot be invoked where adequate statutory provision exists.

15. It was held in **TAPARN VS ROITEI [1968] EA 618** that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The **Advocates Act** and the **Advocates Remuneration Order** confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered.

16. The legal position is as submitted by the respondent 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. In the absent of such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.

17. 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. As Nyarangi, JA. stated in the memorable words in the "**MV Lilian S**" [1989] 1 KLR case-

"Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. The issue is whether there was an advocate client relationship between the applicant and the respondent. I have looked at some court files referred to in this application and I make the following observations: -

a) That **Embu HCCC No. 31 of 2007 Liz Catherine Wangari Mwangi Vs Attorney General** was filed by the plaintiff's counsel M/s Morris Njage & Co. Advocates Embu. This case was heard to conclusion and judgment was delivered on 29/09/2010 in the presence of the applicant as the respondent's advocate.

b) **HCA No. 74 of 2008** was filed by M/s Morris Njage & Co. Advocates for the appellant Liz Catherine Wangari Mwangi on 21/07/2008.

c) **Misc. HC. Civil Application No. 28 of 2007 Liz Catherine Wangari Mwangi Vs Attorney General** was an application to file a suit out of time. It was filed by the applicant and orders sought were granted.

19. It was therefore not correct for the respondent to say that there was no advocate/client relationship between the applicant and the respondent.

20. At some point the respondent was represented in her further legal pursuits by Legal Fund Against Torture which was succeeded by Independent Medical Legal Unit as Ong'udi J. observed in her ruling delivered on 1/08/2014. In HC Misc. Application No. 117 of 2017 which the applicant filed against the respondent to recover his legal fees.

21. I have looked at the relevant files and noted that bills were not filed or taxed. The counsel is still entitled to his fees if he was not paid.
22. It is my considered opinion that the applicant was entitled to instruction fees, drawing of documents and any other fee payable under the Advocates Remuneration Order (ARO) in the two suits and one miscellaneous application. This seems to have been overlooked by the taxing master,
23. It is also contended that the taxing officer failed to increase the taxed amount by half as provided for in the ARO.
24. However, if the taxation did not include the other suits included in the bill save for HCCC No. 32 of 200, this was an omission on part of the taxing master.
25. The respondent submits that the scale applicable is Schedule IV of the ARO of 2006. In my considered view, the taxing master is supposed to apply the ARO that was applicable at the time of filing the suits or the application whichever is applicable.
26. As I have pointed out, the taxing officer committed some error of principle in the exclusion of two of the suits factored in the bill of taxation.
27. It is my finding that this application has merit and it is hereby allowed in the following terms: -
- i. That the ruling delivered on 30/08/2018 on the bill of costs dated 19/12/2017 be and is hereby set aside.*
 - ii. That the bill is hereby referred to the Chief Magistrate Hon. M. N. Gicheru for taxation.*
 - iii. That the taxation be done within 30 days from the date of this ruling.*
28. That each party meets its own costs of this application.
29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mr. Gachuba for Applicant

Respondent in person