



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 77 OF 2018**

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

**AND**

**IN THE MATTER OF MISC. APPLATION NO. 194 OF 2016**

**ARISING OUT OF THE BILL OF COSTS DATED 7<sup>TH</sup> APRIL 2016 BETWEEN CHIGITI & CHIGITI ADVOCATES & INVESCO ASSURANCE LIMITED**

**AND**

**IN THE MATTER OF THE RULING DELIVERED**

**BY HON. WANYAMA (DR) IN COURT ON 12<sup>TH</sup> FEBRUARY 2018**

**BETWEEN**

**INVESCO ASSURANCE CO. LIMITED .....APPLICANT**

**VERSUS**

**CHIGITI & CHIGITI ADVOCATES .....RESPONDENT**

**RULING**

1. This ruling relates to a chamber summons application dated 26<sup>th</sup> February 2018, brought under the provisions of Rule 11 of the Advocates (Remuneration) order, Sections 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. The Applicant is seeking for orders that;

*(a) pending the hearing and determination of this Application, an order do issue staying the taxation of the Respondent's amalgamated bill of costs dated 7<sup>th</sup> April 2016, as ordered by the Hon. Wanyama (DR) in her ruling delivered on 12<sup>th</sup> February 2018;*

*(b) the Honourable Court be pleased to set aside the Ruling delivered on 12<sup>th</sup> February 2018, by Hon. Wanyama (DR) dismissing the Applicant's Notice of Motion dated 8<sup>th</sup> November 2017;*

*(c) the Honourable Court be pleased to make an order striking out the Respondent's amalgamated bill of costs dated 7<sup>th</sup> April 2016; and*

*(d) the costs of this application be provided for.*

2. The Application is based on the grounds on the face of it and an affidavit dated 26<sup>th</sup> February 2018 sworn by Carolyne Shavulimo, the Legal Manager of the Applicant Company (herein "the Applicant"). She deposed that on 22<sup>nd</sup> April 2016, the Respondent served the

Applicant with a Bill of Costs (herein “the Bill”) dated 7<sup>th</sup> April 2016. That the Bill contains various matters filed in at least twenty four (24) different Court Stations in the country. It is for work that the Respondent is alleged to have conducted on behalf of the Applicant. That from the Bill, it is clear that the matters listed therein are matters which were filed at different times between the year 2002 and 2010, and the alleged work was conducted by the Respondent on or about the year 2010.

3. That the Applicant filed a Notice of Motion Application dated 8<sup>th</sup> November 2016 before the Hon. Deputy Registrar seeking to have the Bill struck out in its entirety, the ground inter alia that the Bill is defective, as it fails to demonstrate the work done in each of the files by the Respondent and in the absence of the physical files referred to in the Bill, there is no basis upon which the Taxing Master can assess costs in the Bill. That on 23<sup>rd</sup> February 2017, when the matter came for hearing of the Notice of Motion, the Court directed that the hearing proceedings be by way of written submissions and subsequently, parties filed their respective submissions.

5. On 12<sup>th</sup> February 2018, the Taxing Master Hon. Wanyama (DR) delivered her ruling and dismissed the application with costs directing that the Respondent’s Bill be taxed under Schedule V of the Advocates Remuneration Amendment (2014). The Applicant argues that the Taxing Master erred in principle in finding that the Respondent’s Bill could be taxed as drawn, notwithstanding that there were no physical files from which the taxation emanates.

7. That in addition, a Taxing Master sitting in Nairobi cannot tax a Bill of Costs for matters which were conducted in different Court Stations and which files exist in those Stations. That each Court Station has its own Taxing Master with jurisdiction to conduct the taxation.

8. It is further argued that, the Taxing Master erred in finding that the Respondent’s bill ought to have been taxed under Schedule V of the Advocates Remuneration Order 2014 in view of the fact that the alleged instructions on the part of the Respondent are alleged to have been executed in the year 2010 which was way before the amendments were done to the Advocates Remuneration Order in 2014. Therefore, in view of the foregoing, the Ruling of the Taxing Master be set aside, and the Court strike out the bill with costs to the Applicant.

10. However, the Respondent filed a Replying affidavit dated 14<sup>th</sup> May 2018, sworn by John Chigiti, an Advocate of the High Court of Kenya and a Partner in the Respondent’s Firm of Advocates. He deposed that the only issue the Applicant contested in the dismissed application dated 8<sup>th</sup> November 2016, was the issue of instruction and procedures of attaining such instructions such as lack of Board Resolutions and Minutes which was properly argued and the Respondent provided letters of instructions and various other supporting memos and letters. However it now appears that in the current application, the Applicant is raising various new issues that were never part of their application before the Registrar. That such is untenable before this Court.

12. It was argued that the Respondent drafted various documents such as application for dismissal, notices of appointment, and affidavits. It was argued that these documents even having been drafted and exhibited in the file before the Registrar, they were not filed in their respective primary files in various registries as the Applicant failed to pay filing fees as had been agreed with the Respondent and there was no filing done.

13. Similarly, though the Respondent did not enter appearance to proceed and execute full instructions, it spent lots of hours in drafting, arranging exhibits, preparing affidavits and the Respondent should be compensated on the basis of professional time spent to serve the client. Therefore the Taxing Master did not error in ruling that the block Bill should proceed for taxation after the finding that there were instructions, Advocates fees on basis of time spent which is compensable and can be determined on taxation. It is misleading to say that the matters the Respondent wishes to tax are from different stations.

15. Thus the Applicant’s application be dismissed and taxation allowed to proceed. The matter was disposed of vide filing of submissions. The Applicant submitted that where an Advocate claims for compensation for work done, that Advocate must demonstrate that he did the work in accordance with the client’s instructions. It is not enough for the Advocate to state that he had instructions with no evidence that he indeed executed the assignment according to the client’s instructions. That, Paragraph 11 of the Advocates Remuneration Order provides that any party aggrieved by the decision of a Taxing Master can approach the Court by way of a Reference. In the instant case, the Ruling given on 12<sup>th</sup> February 2018 touched on matters of taxation and was delivered by the Deputy Registrar sitting in her capacity as a Taxing officer. Reference was made to the case of; *Nyamogo & Nyamogo Advocates vs Pan Africa Insurance Company Limited & Another (2016)* where the Court held;

*“I however, do not agree with the Respondent’s submissions that since there was not taxation, the applicant could not file a reference. A party who invokes the jurisdiction of the taxing officer can only challenge that decision to the judge in chambers by way of a reference.”*

18. Further reference was laid on the case of; *Machira and Company Advocates vs Magugu (2002) 2 EA 248 at page 422*, where the Court stated:-

*“[As] I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs, is ventilated by way of reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Order.”*

19. In response to the Respondent’s allegation that, the Application dated 8<sup>th</sup> November 2016 only addressed the issue of lack of instructions and did not cover the questions of the basis for taxation, the Applicant submitted that to the contrary, the on the basis for taxation was sufficiently canvassed in paragraph 5 and 7 of the application.

20. The Applicant referred the Court to the case of; *Bernard Gichobi Njira vs Kanini Njira Kathendu & Another (2015) eKLR* where the Court held:-

*“A magistrate is allowed and/or mandated by the law to assess or tax costs payable in a given case. The words or terminology used whether “assess” or “tax” is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a magistrate has taxed or used the terminology “taxation” to assess or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of Schedule VII of the Advocates Remuneration Order. To make a different finding in my view would be unconstitutional in view of Article 159(2)(d) of the Constitution. The objection that the Applicant raised at the subordinate court was based on form rather than substance and the Learned trial magistrate’s decision on the preliminary objection cannot be faulted because it is hinged on the Constitution in so far as substantial justice is concerned.”*

21. The Applicant reiterated that it be more prudent to have each matter taxed where the physical files subsist in order for the Court to ascertain that indeed the files existed and that the Respondent did act in accordance with the instructions.

22. Further, even then, in the event that a Deputy Registrar has the mandate to tax the Bill of Costs, it has to be taxed in the High Court where the various stations are situated. That Section 12 of the High Court (Organization and Administration) Act No. 27 of 2015, provides that;

*(2) A station of the Court shall consist of-*

*(a) A presiding Judge, appointed by the Chief Justice from amongst the Judges of the Court, who shall be head of the station;*

*(b) such number of judges as the Chief Justice may, consultation with the Principal Judge, determine;*

*(c) A Deputy Registrar who shall be responsible to the Presiding Judge in the discharge of the functions of the office; and*

*(d) officers appointed under Section 24;*

*(3) The filing of appeals, bail applications, and references from the subordinate courts, tribunals and other bodies or authorities within the regions designated by the Chief Justice under the Rules, shall be made at the High Court station with the corresponding supervisory jurisdiction.”*

23. It was submitted that, by the Deputy Registrar taxing Bills from other stations with officers who have the requisite jurisdiction to do the same, amounts to usurpation of jurisdiction.

24. The Applicant submitted further that, work done by an Advocate is one which the Advocate was instructed by the client to undertake and indeed was undertaken to the best extent it should have been done which principle was recognized in the cases of; City Finance Bank vs Baranyi Brokers Ltd, Nitin Dawda & Hasamukh Dawda HCCC 910 of 2002 cited in the case of; Lubullelah & Associates Advocates vs Baranyi Brokers Limited & 2 Others (2014) eKLR where the Court held;

*“The law is very clear on how a taxing officer determines the value of subject matter. It is deducted from the pleadings, settlement or judgment of the Court. The parties settled the matter way back vide consent dated 29<sup>th</sup> September 2004. The available source on quantum is therefore pleadings as between the parties to the suit.”*

25. That where there is no proof of proceedings, a Taxing Master’s assessment of costs would be riddled with error from the beginning rendering the result defective. In that regard, Section 109 of the Evidence Act provides that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

26. That, the instructions given by the Respondent was mainly for the Applicant to come on record and apply for dismissal of the suits against the Respondent. However, the Respondent, failed to properly come on record, neither did they file any application for dismissal of the suits. It was therefore imperative for the Respondent to present before the Court evidence to support the claims for remuneration. Reliance was placed on the case of; Leonard Katunga Mbuvi t/a Katunga Mbuvi & Advocates vs Accredo Ag & 3 Others (2013) eKLR, where the Court held that an Advocate is only entitled to claim fees in respect of work done.

27. Similarly in the case of; Republic vs Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others (2006) eKLR, the Court held that;

*“The Taxing officer was not properly guided when she conducted the taxation. It is necessary to specify clearly and candidly how she had exercised her discretion since discretion as an aspect of judicial decision-making is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived...the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.....”*

28. However, in response, the Respondent submitted that they are of the view that the Applicant has totally misunderstood this matter from its root because the Applicant appears to insist that the Respondent demonstrates the work done. This was clearly done by annexing to the initial filings all the notices, applications, letters, documents to support the draftings finalized etc, the drafting and making these applications and related evidence ready for filing is itself a demonstration of work done by the Advocate. The evidence is there and the court should look at the first filing done by the Respondent. The preparation of such huge amount of work took professional hours of the Respondent which he

is claiming compensation or payment for.

29. Further, the Applicant again failed to appreciate that the work done even if it was touching on matters around the country, the work done by the Respondent was not filed in those courts. The instructing client failed to provide filing fees and as such the work done did not reach the Court doors. Unless the Applicant is saying any unfiled work done by an Advocate cannot be taxed, we fail to understand the content.

30. The Respondent directed the Court to his Replying affidavit filed on 15<sup>th</sup> May 2018 and reiterated that the issue raised by the Applicant and contested before the Deputy Registrar was only the issue of instructions. The Applicant cannot be allowed to file a reference based on issues not raised before the Deputy Registrar and claim that the Advocate has not demonstrated work done or has not filed the bills in the right Court. The Advocate will demonstrate work done at the taxation stage.

32. I have looked at the Bill which is the subject of this application and I find that, it is entitled "Advocate/Client's Bill of Costs". A deeper analysis thereof reveals that, the matters which form the basis thereof were filed in various stations as follows as per the items in the Bills :- at Migori Law Courts, listed as items Nos. 1-6, Eldoret Law Courts, item No. 7, Kitale Law Courts, items Nos. 8-10, Maseno Law Courts, Nos. 11-17, Ukwala Law Courts, item Nos 18-24, Busia Law Courts, item Nos 25-31, Kisii Law Courts, item Nos. 39-43, Webuye Law Courts, item Nos. 44-47, Butere Law Courts, item Nos. 48-49, Ogembo Law Courts, Item Nos. 50-54, Kithimani Law Courts, Item Nos. 55-56, Machakos Law Courts, Item Nos 57-62, Butali Law Courts, item Nos. 63-64, Winam Law Courts, item Nos. 65-67, Kangundo Law Courts, item Nos. 68-69, Kilungu Law Courts, item No. 70, Kitui Law Courts, item Nos. 71-73, Makueni Law Courts, item Nos. 74-83, Yatta Law Courts, item Nos. 84-91, Nairobi Matters, Item Nos 92-93, Mumias Law Courts, Item No. 94, Meru Law Courts, item No. 95, Voi Law Courts, item No. 96, Nyando Law Courts, item No. 97, Nyamira Law Courts, item No. 98, Ndhiwa Law Courts, item No. 99, Total sum sought is 4,808,000.

33. I have also considered the notice of motion application dated 8<sup>th</sup> November 2016, where the client sought for the striking out of the subject Bill, the grounds raised thereto, and submissions filed by the respective parties thereto. Finally, I have considered the ruling delivered by the Learned Hon. Deputy Registrar Claire N. Wanyama and the finding therein.

34. Basically, in my understanding, two issues were raised in the subject application for determination namely, whether the Advocate had authority and/or instructions to represent the client, and whether the amalgamation of various suits in one bill of costs is improper. The Hon. Learned Deputy Registrar made a finding to the effect that, the Advocate was properly instructed in the letter dated 1<sup>st</sup> September 2010 and in a further letter dated 16<sup>th</sup> August 2010 to represent the client. On the issue of block bill, the Learned Hon. Deputy Registrar made a finding to the effect that, there was "no proper reason given to its objection". That the said bill relates to the same parties, and would save time and give uniform decision instead of having each case filed differently. The application was then dismissed.

35. Of the two issues raised, I find that, the issue of instructions and/or authority to represent the client is an issue of fact which the Learned Hon. Deputy Registrar as a Taxing Master has the jurisdiction to deal with. The same will be dealt with during taxation of the bill. However, the issue raised in relation to the form and/or the block bill is an issue that goes to the jurisdiction of the court and/or the Taxing Master. The jurisdiction of the Courts is provided for under Section 5 of the Civil Procedure Act which states:

*"5. Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred"*

36. In furtherance of the same, Section 12-15 deals with where the suit is to be instituted. In this case, Section 15 is relevant as it deals with suits such as herein, and requires that suits be instituted in a court within the local limits of the whole jurisdiction. I therefore believe that, this is what informed the filing of these 99 suits in different courts all over the country. Once a matter is filed in a particular court, then that court is seized of that matter to finality. The other courts cannot intervene. This is informed by the reason that, the final determination can only be challenged within the same jurisdiction.

37. In this regard, the Client/Applicant herein has raised salient issues that the Learned Hon. Deputy Registrar, required to deal with. These issues were inter alia, in relation to how the Learned Hon. Deputy Registrar, will be able to ascertain that indeed all these matters have been filed in those respective courts without perusal of the physical file; and whether, as per the provisions of Section 12, the Learned Hon. Deputy Registrars in the respective court stations mandated to deal with the taxation of the Bills. The other issue raised that could cause a challenge in the Taxation of the matter is how the Taxing master will be able to ascertain that here are pleadings (if any) in these matters. It is even more complicated when one considers that, the Advocate alleges that, no pleadings were filed in these files as there was no filing done and exhibited work.

38. However, although the Advocate/Respondent argues that, the issue of block Bills was not raised before the Learned Hon. Deputy Registrar. However as stated herein, and evidenced from the ruling, the Learned Hon. Deputy Registrar made a finding on the same.

39. All in all, I find that, the Learned Hon. Deputy Registrar has no jurisdiction to tax block Bills arising from different matters all over the country. To approve and encourage that conduct by the parties will amount to anarchy. The parties will find good room for inter alia, malpractice and forum shopping. In that regard, I find that the Bill as drawn is improper and fatally defective. I allow the application herein in terms of prayer (2) and (4) as prayed. Prayer (1) will follow from the finding on prayer (2) and (4), prayer (3) can only be dealt with by the Taxing Master.

40. Those then are the orders of the Court.

Dated, delivered and signed in an open Court, this 22<sup>nd</sup> day of November 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Okelo for the Applicant

No appearance for the Respondent

Dennis -----Court Assistant