



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS APPLICATION NO 436 OF 2010**  
**IN THE MATTER OF THE ADVOCATES ACT**  
**AND IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER**  
**BETWEEN**  
**KWENGU & COMPANY ADVOCATES.....ADVOCATE**  
**VERSUS**  
**INVESCO ASSURANCE COMPANY LIMITED.....CLIENT**  
**RULING**

**INTRODUCTION**

1. On 17<sup>th</sup> September 2010, the Advocate filed a Bill of Costs of even date. It was for a sum of Kshs 13,470,395/=. On 16<sup>th</sup> June 2016, the Client filed a Notice of Preliminary Objection dated 14<sup>th</sup> June 2016 challenging the said Bill of Costs.
2. On 19<sup>th</sup> June 2018, the Client's advocates informed this court that there was a Ruling by Khaminwa J (as she then was) stopping any taxation by the Advocate herein and that order had not been appealed from and/or reviewed. On the other hand, the Advocates' counsel pointed out that **Petition No 1178 of 2007** was spent and each party was to bear its own costs. However, the Client's advocate were categorical that the Petition had been scheduled for hearing before Odunga J on 31<sup>st</sup> July 2018 and that it was therefore not correct for the Advocate's counsel to contend that the said Petition had been determined.
3. In view of the diametrically opposed positions that had been taken by the Advocate and the Client herein, this court granted the Client leave to file an Affidavit showing that the aforesaid Petition had not been determined so that it could proceed with an informed mind. Whereas this court indulged the Client's advocates time to do so by the time it was reserving this Ruling on 11<sup>th</sup> October 2018, they had still not done so.
4. The Client's Written Submissions were dated 23<sup>rd</sup> March 2017 and filed on 24<sup>th</sup> March 2017 while those of the Advocate's were dated and filed on 2<sup>nd</sup> August 2016.
5. When the matter came up on 11<sup>th</sup> October 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

6. The Client's case was that it instructed M/S Neptune Credit Management Company Ltd (hereinafter referred to as "Company") to recover monies owed to it from several parties that had emanated from fictitious claim. The said Company was also to conduct investigations on myriads of claims that had been lodged against it (the Client).
7. The Client signed an agreement with the Company on 25<sup>th</sup> May 2007. It contracted the Company on a "no cure no pay" basis and the

amount payable on performance of the task was to be at an agreed percentage.

8. The Company subsequently instructed the Advocate herein to file the aforementioned Petition seeking protection of its fundamental rights as enshrined in the Constitution of Kenya, 2010 and conservatory orders pending the hearing and determination of the said Petition. The Client was adamant that the agreement was entered purely between the Company and the Advocate and that it was only involved in the verification of the Petition as required under the law. It was emphatic that there was no privity of contract between it and the Advocate herein.

9. It was its contention that it fell out with the Company which commenced winding up proceedings against it for a claim of Kshs 14,760,000/=. It was categorical that the Company and the Advocate were at liberty to proceed with the said Petition in the best way they deemed fit as it had not privity of contract with the Advocate.

10. It averred that it was therefore the Company that was under an obligation to pay the Advocate's fees. It added that the Ruling by Khaminwa J (as she then was) that was delivered on 23<sup>rd</sup> May 2012 directed that the Advocate should not tax its Bill of Costs until the Petition in which the Company was enjoined was heard and determined. It was therefore emphatic that since the Petition was on-going, then the Advocates' Bill of Costs could not proceed for taxation.

11. On his part, the Advocate argued that an advocate is entitled to fees from his client for whatever services he has rendered and that the fees payable are not dependant on the success or failure of the case as was held in the case of **HC Misc Application No 8 of 2005 T O Kopere & Co Advocates vs John N Mututho** (unreported).

12. He also pointed out that in the aforesaid case, Ochieng J observed that an outgoing advocate can file a bill of costs once the advocate-client relationship ends. This was the same holding in **Machira & Co Advocates vs Arthur K Magugu [2012] eKLR**.

13. It was his contention that the Client had raised several factual aspects that would require evidential investigation and consequently, the preliminary points that it had raised were not strictly a preliminary objection as defined in the case of **Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors [1969] EA** where it was held that **"a preliminary objection cannot be raised if any fact has to be ascertained..."**

14. He was also emphatic that the issues raised in the Preliminary Objection had been decided by Ougo J and Onyancha J (as he then was) on 25<sup>th</sup> July 2013 and 8<sup>th</sup> April 2014 respectively and that this matter being *res judicata*, this court had no jurisdiction to entertain the same.

15. This court carefully considered the parties' submissions and the case law they each relied upon and noted that they both set out the correct position of the law regarding the taxation of advocates' bills of costs. It noted that their point of departure was whether or not the Advocate could proceed to tax his Bill of Costs following the aforesaid Ruling for Khaminwa J (as she then was).

16. They also took divergent positions as to whether or not the aforesaid Petition had been concluded. As can be seen hereinabove, the Client was adamant that the said Petition had never been concluded while the Advocate was emphatic that the same had been concluded.

17. Although the Client did not file an affidavit attaching the said Ruling, it had attached the same in its aforementioned Written Submissions. Although this was highly irregular and unprocedural, this court took judicial notice of the same as the same was posted in the Kenya Law Report (KLR) as **Kwengu & Co Advocates vs Invesco Assurance Co Ltd [2012] eKLR**. This court opted to proceed in that manner as Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to procedural technicalities.

18. In her disposition, Khaminwa J (as she then was) rendered herself as follows:-

**"I therefore grant the order to enjoin M/S Neptune Credit Management Ltd as defendant in this suit. On the bill of costs filed by M/S Kwengu & Co Advocates against the applicant for the same reason is stayed pending the hearing and determination of the petition(emphasis court). The Petitioner shall proceed to prosecute the petition within the next 30 days. I am of the view that prayer 5 in the application is best heard and determined at the hearing of the petition"**.

19. The effect of the said Ruling was that:-

**1. The Company was enjoined as a party in Petition No 1178 of 2007.**

**2. The Advocates' Bill of Costs was to be stayed pending the hearing and determination of the said Petition;**

**3. The Advocate was to prosecute the Petition within thirty (30) days of the date of the said Ruling;**

**4. The question as to whether or not there had been an advocate-client relationship was to be heard and determined during the hearing of the Petition.**

20. A perusal of the said Ruling showed that the same was in respect of the Advocates' Bill of Costs filed on 17<sup>th</sup> September 2010. This was the same Bill of Costs the Advocate was purporting to tax.

21. There was no evidence from the Advocate that he had prosecuted the Petition within the thirty (30) days as had been ordered by Khaminwa J (as she then was). There was also no indication that her Ruling had been set aside and/or vacated. The issues that the Advocate

had raised regarding when an advocate whose relationship with a client has been terminated was best determined by the Court of Appeal.

22. This is because this court could not overturn, set aside and/or vacate the Ruling of Khaminwa J (as she then was) as both courts are of equal and competent jurisdiction. In the absence of any order from the Court of Appeal overturning the aforesaid order, her orders of 23<sup>rd</sup> May 2012 remained in place and could not be circumvented by any applications that were purporting to set the same aside, even impliedly.

23. This court also took the view that ground No (1) was an issue that Khaminwa J (as she then was) had directed should be determined during the hearing of the Petition herein. In this respect, this court agreed with the Advocate that the said issue was *res judicata*. The other grounds also related to that advocate-client relationship. These were factual issues. As was held in the case of **Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors** (Supra), a preliminary issue cannot be sustained if the issues raised therein were factual and had to be ascertained.

24. Accordingly, having considered the Written Submissions and the case law that both parties had relied upon, this court came to the firm conclusion that it could not decide on the issues that had been raised in the Client's Notice of Preliminary Objection as Khaminwa J (as she then was) was crystal clear that the issues therein had to be determined during the hearing of **Petition No 1178 of 2007.**

25. Asking this court to determine the said issues as preliminary points of law was erroneous as it not only meant that this court would be sitting of appeal of the order of Khaminwa J (as she then was) despite it having the same and concurrent jurisdiction with the said judge but it would also be proceeding on the erroneous assumption that the weighty issues raised therein could be determined without evidence being placed before it for analysis. The issues therein required proper evidentiary documentation for their determination.

#### **DISPOSITION**

26. For the foregoing reasons, the upshot of this court's decision was that the Client Preliminary Objection application dated and filed on 17<sup>th</sup> May 2017 was not merited and the same is hereby dismissed. Costs shall be in the cause.

27. For the avoidance of doubt, the parties herein are hereby directed to comply with the orders of Khaminwa J (as she then was) delivered on 23<sup>rd</sup> May 2012 and/or seek appropriate remedies from the right forum.

28. It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of December 2018**

**J. KAMAU**

**JUDGE**