



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 174 OF 2015**

**OKONG'O WANDAGO & COMPANY ADVOCATES....APPLICANT**

**VERSUS**

**BISHOP REV. JOSEPH MEMBA SYUMA &**

**6 OTHERS.....RESPONDENTS**

**RULING**

1. **The Applicants** took out the motion dated 8<sup>th</sup> December 2015 in which they sought for the following orders:
  - i. ***THAT the O.S dated 15<sup>th</sup> May 2015 and filed on 18<sup>th</sup> May 2015 be struck out with costs to the respondent.***
2. The application is premised on the grounds that the issue of accounts was raised or ought to have been raised before the deputy Registrar since the matters arising therein fall within the jurisdiction of the Deputy Registrar as such the issue of accounts is res judicata.
3. When the motion came up for interpartes hearing, I directed that the matter be disposed of by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support of the application, replying affidavit and grounds of opposition. The applicant avers that the issue of accounts was raised before the Deputy Registrar, Hon. Makori, on 28<sup>th</sup> January 2015 by Mr Kanjama, the Respondents advocate in HCCC Misc Taxation Cause no. 65 of 2013. They argued that the Deputy Registrar directed the applicant to serve the respondent with a detailed fee note which they did. The applicant asserted that, the taxing master **Hon S. Mwiuli** delivered his ruling on 28<sup>th</sup> October 2015 where he awarded the advocates costs of kshs 4,846,625/= and noted that the only issue in dispute was the instruction fees. They argued that the issue of accounts was dealt with and the respondents have not filed a reference in the High Court consequently, the matter is resjudicata in line with section 7 of the Civil Procedure Act. They further argued that this court lacks jurisdiction to review the ruling of the taxing officer since it can only review the same if there is a clear error of principle or the sums awarded are manifestly high or low as to amount to an injustice.
4. The respondents on the other hand claimed that they had instructed the applicant to represent them and paid him with Kshs 10,000,000/= but in his greed, the applicant filed a bill of costs seeking a further kshs 20,212,859/=. They claimed that this amount was further reduced when it was taxed by the taxing master at Kshs 4,846,625/=. They asserted that the master failed to take into consideration the kshs 10,000,000/= already paid to the applicants prompting the respondents to

file a reference on 19<sup>th</sup> November 2015 and served on the applicant on 11<sup>th</sup> December 2015. They urged the court to hear and determine the originating summons.

5. Looking at the application the subject of this ruling, there are two issues for determination. Firstly, there is the question as to whether this court has jurisdiction to review the taxing master's decision and whether, the dispute over accounts is res judicata.
6. It is trite law that Jurisdiction is everything and where there is

doubt, then the same ought to be dealt in the first instance before proceeding any further. If a court finds its devoid of Jurisdiction, then it is required to down its tools. This was accentuated in the Court of Appeal case of *Peter Gichuki King'ara v Independent Electoral And Boundaries Commission & 2 others while emphasising of the matter of jurisdiction held thus:*

*"...The starting point is the decision in Lillian 'S' Case as restated by the Supreme Court In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of 2011:-*

*"The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."*

7. In this particular case, the applicant claims that this court lacks jurisdiction to interfere with the decision of the Taxing Master unless there is a clear error of principle or where the sums awarded are distinctly high.
8. The High Court derives its Jurisdiction in subject of taxation from paragraph 11 of the Advocates (Remuneration) Order. The aggrieved party is required to file a reference. Without such reference, then this court is devoid of Jurisdiction and should not proceed any further with the matter. From the Court record, it is clear that the bill of cost filed by the applicant was taxed and a Ruling was delivered by **Hon. S. Mwayuli**, who taxed the bill at kshs 4,846,625/=. The respondents claims to have filed a reference being Miscellaneous application number 293 of 2015 which application, they claim is coming up for mention before **Okongo, J.** on 4<sup>th</sup> April 2016.
9. It is therefore evident that, there is no reference before me that the dispute herein arises from the decision of a taxing master. The claim that the dispute over accounts is resjudicta cannot be conclusively determined without the proceedings of the taxing master and the submissions by the parties as submitted before the taxing master. In my view, and after perusal of the Taxing Master's ruling dated 28<sup>th</sup> October 2015, it is difficult to deduce what was taxed and what was not taxed, whether or not the issue of kshs 10,000,000/= was raised and considered or not. Generally, the most ideal court to tackle the Originating Summons dated 15<sup>th</sup> May 2015, is the court which a reference has been filed for determination, through which forum, the respondent can raise this issue.
10. I therefore find that the Originating summons Application filed herein is premature, given that there is a reference already filed i.e Misc Application 293 of 2015 that was due to come up for hearing before **Okongo. J.** Consequently, this court lacks jurisdiction to entertain this matter. The originating summons dated 15.5.2015 is hereby ordered struck out with costs to the respondents.

Dated, Signed and Delivered in open court this 22<sup>nd</sup> day of April, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

.....for the Respondents