



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NUMBER 510 OF 2012**

**GICHUKI KING'ARA & CO. ADVOCATES..... APPLICANT**

**VERSUS**

**KINGORANI INVESTMENTS LTD**

**TRANSFLEET LIMITED**

**TRANSFLEET EPZ LIMITED. .... CLIENTS/RESPONDENTS**

**RULING**

This honourable court has been called upon to make a ruling on the Preliminary Objection dated 24<sup>th</sup> day of February, 2016 together with the application dated 17<sup>th</sup> December, 2015.

The application aforesaid has been brought under Section 51(2) of the Advocates Act Cap 16 Laws of Kenya, Order 51 Rules 1 and 4 of the Civil Procedure Rules, 2010, Rule 7 of the Advocates Remuneration Order, 2009 and all other enabling provisions of the law.

The Applicant who is the Advocate has sought the following orders: -

1. That judgment be entered for the sum of Ksh.11,675,079/- taxed and certified by the Deputy Registrar Honourable F. R. Wangila as due to the Applicant/Advocate with interest thereon at 14% until payment in full.
2. That the costs of the application and the suit be awarded to the applicant.

The application is premised on the grounds set out in the body of the same and it's supported by the affidavit of Peter Gichuki King'ara sworn on the 17<sup>th</sup> December, 2015. The summary of facts as captured in the replying affidavit are that the Respondent instructed the applicant to file a criminal Revision application Number 468 of 2007.

That on the 14<sup>th</sup> September, 2012, the Applicant prepared and filed an Advocate's/Client Bill of Costs in respect of its fees in Misc. Application No. 510 of 2012 and the same was heard. The Taxing Officer issued a Certificate of Taxation which costs the Respondent failed and/or refused to settle.

It is further averred that the retainer is not disputed and that by the Respondent's failure to settle the fees, the Applicant has been unjustly denied its rightfully earned Fees and that in granting the application herein the Respondent shall not be prejudiced in any way.

Before the application dated 17<sup>th</sup> December, 2015 could be heard, the Client/Respondent filed the Preliminary Objection and when the matter came up before me on the 25<sup>th</sup> February, 2016, both counsels agreed to have the Preliminary Objection and the said application heard together.

The Preliminary objection is on a point of law and it's based on the ground that: -

***“This Honourable court lacks jurisdiction to hear and determine the application herein following the failure by the taxing officer to determine whether there was an agreement as to fees between the parties precluding the Taxing Officer or otherwise of the jurisdiction to tax the Bill of Costs as per the express provision of Section 45 (6) of the Advocates Act, Chapter 16 of the Laws of Kenya.”***

In his submissions, counsel for the Respondent submitted that after the Applicant filed the Bill of Costs, the subject matter of this application, the Respondent filed an application dated 13<sup>th</sup> February, 2015 seeking stay of taxation on the basis that there was a fees agreement between the parties.

That in a related application filed by the Advocate against the Respondent in Misc. 548 of 2012, the Honourable Lady Justice Kamau in a ruling delivered on the 30<sup>th</sup> December, 2013 rendered a decision that the issue as to whether there was an agreement on fees is to be determined by the Taxing Officer.

Counsel for the Respondent further submitted that following the said ruling, the parties appeared before the Taxing Officer who heard them on the issue by way of written submissions and in her ruling rendered on the 17<sup>th</sup> November, 2015, proceeded to tax the Bill without determining that issue.

He relied on Section 45(1) of the Advocates Act which he submitted makes it clear that the Taxing Officer will not tax a Bill of Costs if there is an agreement on fees by the Advocate/Client. According to him, failure to determine that issue goes to the core of the jurisdiction of the Taxing Officer and to drive this point home, he relied on the case of **Owners of Motor Vehicle “Lillian S” Vs Caltex Oil (Kenya) Limited** in which the court held that without jurisdiction the court ought not to make any other step. He submitted that the orders by the taxing master were made without jurisdiction and is therefore null and void and therefore the Certificate of Taxation is null and void as well.

On his part, Counsel for the Applicant opposed the Preliminary Objection and in arguing his application submitted that the issue of jurisdiction was raised before Hon. Lady Justice Kamau in Misc. 548 of 2012 and when the matter was referred back to the Taxing Officer, the Respondent abandoned the issue. He submitted that the letters relied on related to the work that the Applicant had done for the Respondent against Kenya Commercial Bank but the Bill of Costs herein was for an application made against the Director of Kenya Anti-Corruption Commission at the Chief Magistrate's Court at Makadara.

He argued that the Respondent cannot raise the issue of fees agreement; at this point because taxation has already been done and that it is only the Deputy Registrar who could issue a Certificate of Taxation.

As to whether the Deputy Registrar considered the issue of fees agreement, it was his submission that, she did. According to him, the Deputy Registrar said she had considered the submissions by the parties which they had made on the issue. That what is before the court is a valid Certificate of Taxation and that instructions are not disputed. He further submitted that under Section 51(2) once there is a valid Certificate of Taxation and there is no dispute on retainer, the court enters judgment.

In reply, counsel for the Respondent submitted that though the issue of fees agreement was supposed to be determined by the Taxing Officer, she did not do so and that the submissions they made before the Deputy Registrar on the Bill of Costs were done on a **“without prejudice”**. According to him, Section 51(2) cannot override the provision of Section 46 and if the Certificate of Taxation is precluded by the law, the taxation is *void ab initio*. He averred that the figure of Ksh.7 Million awarded as instruction Fees is excessive yet the matter in which the Applicant was instructed, the value of the subject matter was not disclosed and for that reason the figure was granted by error on the part of the Taxing Officer.

The Respondent has raised the issue of jurisdiction and this Honourable Court has a duty to determine the issue before proceeding further with the matter. This is in line with the principle that was espoused in the case of **Kimani Wanyoike Vs Electoral Commission , Civil Appeal No. 213 of 1995 (UR)** where the Court of Appeal ruled that: -

***“Where, there is a law prescribed by either a constitution or an Act of Parliament governing a procedure for redress of any particular grievance, that procedure should be strictly followed.”***

Similarly, in the celebrated case of **The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR Nyarangi JA**(as he then was)had this to say: -

***“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the areas over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular set of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court... the moment a court determines that it has no jurisdiction it has to down its tools and proceed no further.”***

That issue of jurisdiction has been raised by way of a Preliminary Objection. The essence of a Preliminary Objection was given by Law JA Old Sir Charles Newbold P in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) E.A. 696** where at page 700 JA stated: -

***“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newsbold added as follows page 701: -

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

I have considered the Preliminary Objection, the application together with the submissions made by the learned counsels herein. The application seeks that judgment be entered for the applicant for the said sum as taxed by the Deputy Registrar together with interest until payment in full. The same is brought under Section 51(2) of the Advocates Act gives the court the discretion to make such order in relation to a Certificate of Taxation that has not been set aside or altered by the court as it deems fit. Such an order would be judgment in the sum certified to be due in the Certificate of Taxation with costs, where the retainer is not disputed. In the case before me, the retainer is not disputed. What the Respondent seems to have a problem with is the fact that the Deputy Registrar failed to consider whether there was an agreement on fees between the Applicant and the Respondent.

In their submissions, both counsels are in agreement that the issue was raise before the Deputy Registrar

pursuant to the orders issued by Hon. Lady Justice Kamau and they submitted on it. However, according to the Respondent she failed to consider the issue as a consequence of which, in his view, the Certificate of Taxation was rendered null and void. The Certificate of Taxation was issued on 25<sup>th</sup> November, 2015.

Since the same was issued, the Respondent though dissatisfied with it did not move to challenge it in court as required by the law. Once the Taxing Officer has issued the Certificate of Taxation, the same is final unless it is set aside or altered by the court. It is final as to the amount of the costs and pursuant to the same, the court may make such orders in relation thereto as it thinks fit and the only way to challenge the certificate of taxation is to file a reference in the High Court.

In this case, it is noted that the Respondent has not filed any such reference to challenge the Certificate in absence of which the same stands as final. The submissions by the counsel for the Respondent would have formed the materials in support of a reference if one had been filed. There is no other channel open to him other than by way of reference. The fact that the Respondent alleges that the Taxing Officer failed to determine the issue of whether there was an agreement on fees between the parties did not in any way oust the jurisdiction of either the Taxing Officer to tax the Bill or of this court to entertain the Applicant's application dated the 17<sup>th</sup> December, 2015.

From the foregoing it is apparent that the Preliminary Objection has no merits, the same is dismissed while the application dated the 17<sup>th</sup> December, 2015 is hereby allowed as prayed.

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of June, 2016.

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**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Applicant***

..... ***for the Respondent***