



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE NO. 245 OF 2015**

***MWANGI KENG'ARA & CO. ADVOCATES)...ADVOCATE/RESPONDENT***

**-VERSUS -**

***INVESCO ASSURANCE COMPANY LIMITED.....CLIENT/APPLICANT***

**RULING**

1. The application dated 12<sup>th</sup> April 2016 was brought by the Law Firm of **MWANGI KENG'ARA & Co. ADVOCATES** (*hereinafter "the Advocate?"*).
2. It asserts that there are a total of 25 other cases which were pending at the Commercial Division of the High Court of Kenya, Milimani, Nairobi.
3. The Advocates, position was that in those matters, the issues raised were similar to the issues raised in this case. Therefore, the Advocates wishes to have this case treated as a Test Case, which would then determine the following issues;

***"a) Whether the Advocate/Client Bill of costs filed herein should be struck out for contravening the fees agreement dated 19/10/2006.***

***b) Whether the Advocate/Client Bill of costs has been filed by an unqualified person and, whether the Advocate/Client is entitled to the fees charged.***

***c) Whether the period running from 1/3/2008 to 15/11/2012, ought to be excluded in the computation of the limitation period for presenting the Advocate/Client bill of costs.***

***d) Whether the Client/Respondent's quest for accounts of the alleged payment of over Kshs. 20,000,000/- paid in honor of the agreement of 19/10/2006 or the alleged global fees agreement ought to be taken before the taxing master.***

***e) Whether the Client/Respondent's Notice of Motion is res judicata, sub judice and an abuse of court process in the light of the rulings in:-***

***i) Hcc No. 504 of 2013 (originating summons) INVESCO ASSURANCE COMPANY LIMITED VERSUS MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & Co. ADVOCATES.***

**ii) HIGH COURT CIVIL APPEAL No. 65 of 2015 INVESCO ASSURANCE COMPANY LIMITED Vs MWANGI KENG'ARA & Co. ADVOCATES.**

**f) Whether there was an agreement on the total fees payable to the Advocate/Applicant for services rendered.**

**g) Whether the further affidavit sworn on 9/9/2015 by Paul Gichuhi is fatally defective and therefore for striking out?.**

4. When canvassing the application, the Advocate cited **MOTOR Vs AUTO GARAGE LTD & OTHERS [1970] E.A. 249.**

5. In that case the plaintiff had applied for stay of the counter-claim, on the grounds that the issues raised in the counter-claim ought to be referred to arbitration.

6. The court rejected the application, as the proceedings, in their entirety were before the same court. However, the court noted as follows;

***“The possibility of conflicting decisions of fact being reached by different tribunals is a legitimate factor to be taken into consideration in deciding whether a stay should be granted or not?.***

7. The advocate also placed reliance on **NIXON KAMAU GICHUHI Vs PATRICK WAWERU KARUKWA & ANOTHER, Hccc No. 7 of 2013 (at Embu).**

8. In that case, the High Court declined the application that the case before it should be a test case. The situation in that regard was that there were many cases which had been filed before the Magistrate's Court. The said cases, as well as the case before the High Court arose from the same motor vehicle accident.

9. Muchemi J. observed thus;

***“The principle...was that where there are common questions of law or fact having sufficient importance, in proportion to the rest of each action to render it desirable that the whole matters should be disposed of at the same time, consolidation should be ordered?.***

10. Although the learned Judge did not order that the case before her should be the test case, she transferred the case to the Chief Magistrate's Court, *“for purposes of consolidation with the other suits...?”*

11. In the case before me, the parties have not raised any issue concerning the possible consolidation of the many pending cases. Therefore, I find that that authority has no application to this case.

12. As regards the jurisdiction bestowed upon a Taxing Officer, there is no doubt that it is limited to the determination of the quantum of costs payable to the person who was awarded costs.

13. It is not the function of the Taxing Officer to determine which party was entitled to costs.

14. As between an advocate and his client, the Taxing Officer is supposed to determine the quantum of fees payable to the advocate. However, if the client should question the existence of an Advocate/Client, that issue ought to be first determined by the court.

15. If the court should hold that there was no relationship of Advocate/Client between the parties, there cannot be any taxation of an Advocate/Client Bill of Costs.

16. On the other hand, if the client only disputes the quantum of the fees charged by the advocate, the Taxing Officer will have the requisite authority to determine the issue, through taxation. That is provided

for by Section 49 of the Advocates Act.

17. Meanwhile, Section 45 of the Advocates Act expressly recognizes that an advocate and his client may enter into an agreement with respect to remuneration.

18. With respect to any contentious business an advocate and his client may either make an agreement fixing the amount of the advocate's remuneration; or they may have an agreement fixing the amount of the instruction fee or his fees for appearing in court or both.

19. As between the parties herein there was an agreement on the issue of remuneration.

20. The client sought a nullification of the agreement, which was dated 19<sup>th</sup> October 2006. But in **INVESCO ASSURANCE Co. LTD Vs. MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & Co. ADVOCATES Hccc No. 504 of 2013**, the Court held as follows;

***"I do not agree with the plaintiff's argument that the said Agreement should be nullified, noting that the Defendant relied on the same to continue rendering services to the plaintiff whilst relying on the safeguard as stated in the Agreement?."***

21. Unless that decision was set aside or reversed, it remains firmly in place. Therefore, the position is that the Court recognizes the existence of an Agreement between the Advocate and the Client. This court cannot be called upon to adjudicate on that issue as it was already determined by a Judge of concurrent jurisdiction.

22. The question that is yet to be determined is the scope of the Agreement. I say so because the advocate suggests that the Agreement was only in relation to the Instruction Fee, whilst the Client suggests that the Agreement was in respect of the whole range of services which the advocate rendered.

23. That issue does not fall within the jurisdiction of the Taxing Officer.

24. As I understand it, the Client had filed Hccc No. 633 of 2015 against the Advocate, and that matter was still pending before the Hon. Lady Justice Amin. Therefore, it would be wrong for me or any other Judge to take on an issue which was already being handled by another Judge of concurrent jurisdiction.

25. I note that although the issues before the various courts all relate to fees which the Advocate is claiming from her former client, the cases are at different stages.

26. In some instances, Bills of Costs have already been taxed. Indeed, in HCCA No. 65 of 2015, Mabeya J. dismissed the Client's application for stay of execution.

27. In cases where Bills of Costs have been taxed, and where judgement had been entered in favour of the Advocate, this court would be wrong to tell the parties to hold their horses, to await decisions on issues which had never arisen in those cases.

28. If the parties or either of them had moved the court at an early stage in all these cases, it may have been possible to either stay the others, whilst allowing one case to proceed; or it may have been possible to direct that the matters should all be placed before one court, for determination.

29. Given the varying stages in which different cases have reached, I hold the considered view that it would be imprudent to order that this, or any other case, be handled as the Test case, in respect to the many cases between the parties herein.

30. As to whether or not there was a contravention of the orders made on 19<sup>th</sup> October 2006, the issue needs to be placed before the court which made that order.

31. The question as to whether or not the Advocate was an unqualified person, cannot be determined as

an interlocutory application. Furthermore, the decision would have serious repercussions, if a court were to hold that the Advocate was unqualified, because a number of Advocate/Client Bills of Costs had already been taxed. By participating in the process of taxation, it is probable that the Client may be deemed to have accepted that the Advocate was duly qualified as an Advocate.

32. The question on accounts is already pending before Amin J. Therefore, I decline to make any comments about the alleged payment of Kshs. 20 Million.

33. For the same reason, I decline to make any comment as to whether or not there was an Agreement on the total or the global fees payable to the Advocates.

34. Finally, in relation to the affidavit sworn by **PAUL GICHUHI**, I find that it does not offend any provision of the law. Gichuhi swore the affidavit as a witness. He made it clear that he was talking about issues which he had first-hand experience with.

35. He was working with the Client at the material time. Therefore, his evidence, through the affidavit, is direct evidence. It is admissible.

36. This case is distinguishable from that obtaining in **MICROSOFT CORPORATION Vs MITSUMI COMPUTER GARAGE LTD [2001] 2 E.A. 460**.

37. That case dealt with the issue of a Verifying Affidavit, which is one of the documents that should accompany a Plaintiff. Pursuant to Order III rule 2, (*which is now Order 4 rule 4*) of the Civil Procedure Rules;

***“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so?”.***

38. The deponent, Marilyn Pearman was an employee whose responsibilities included the overseeing of software anti-piracy enforcement. The court held that even though she was not the company secretary, a director or a manager, she was an officer of the plaintiff. The only down-side to her affidavit was the fact that she did not expressly depone that the company had duly authorized her to swear the verifying affidavit.

39. In the case before me, Paul Gichuhi did not swear a verifying affidavit. Therefore, the requirements of Order 4 rule 4 do not apply to him.

40. Accordingly, there is no basis in law, for striking out his affidavit.

41. Nonetheless, the application dated 12<sup>th</sup> April 2016 is without merit. It is therefore dismissed, with costs to the respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> day of October 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Awele for Ms. Mwangi for the Advocate/Respondent

No appearance for the Client/Applicant

Collins Odhiambo – Court clerk.