



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL MISC. APPL. NO. 447 OF 2010**

**MUGAMBI & CO. ADVOCATE.....ADVOCATE/APPLICANT**

**VERSUS**

**JOHN OKAL OGWAYO.....CLIENT/1<sup>ST</sup> RESPONDENT**

**RUTH REBECCA AUMA.....CLIENT/2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 17<sup>th</sup> May, 2016 seeks orders that:

**“1.THAT judgment be entered for the Advocate/Applicant as against the client/Respondent for the sum of Kshs.714,502.00 being certified costs due to the Applicant.**

**2. THAT the Respondent do pay to the applicant interest on the Certified Costs at the Rate of 14% per annum from 3<sup>rd</sup> September 2015 until payment in full.**

**3. THAT the Respondent do pay to the Applicant the costs of this application.”**

2. The application is based on the grounds stated therein and is supported by the affidavit of the Applicant, John Mugambi. The Applicant’s case is that he was instructed by the client (Respondents) as their Advocate in HCCC Nbi No.381 of 2009 John Okal Ogwayo & another v Dr. Peter Madinde & 2 others. That on 9<sup>th</sup> December, 2010, the Respondents withdrew instructions from his firm without having paid the legal fees. The Applicant then proceeded to tax the Advocate client Bill of Costs. The bill of costs was taxed on 4<sup>th</sup> August, 2015 and a ruling delivered on 3<sup>rd</sup> September, 2015. Subsequently, the certificate of taxation was issued on 1<sup>st</sup> October, 2015 for the sum of kshs.714,502/=. It is averred that the client has not settled the said costs. That the certificate of Costs has not been set aside, varied or reviewed.

3. The application was opposed. The grounds of opposition dated 16<sup>th</sup> August, 2016 state that:

**“1.That the Advocate/Client agreement was that “instruction fees agreed as between the advocate and the client shall be thirty percentum (30%) of such General damages as may be awarded to us by the court (This being an agreement for remuneration of the Advocate by the**

**client under section 45(1) of the Advocates Act (Chapter 16 of the Laws of Kenya) or any amendment to that as may be done from time to time or under any provisions of law replacing the same for the representation herein but excluding all court attendance outside the office.” No general damages have been awarded by court in Nairobi HCCC No. 391 of 2009 John Okal Ogwayo and Ruth Rebecca Auma v Dr. Peter Masinde, Dr. Andrew C Kibet and the Karen Hospital as such taxation was not necessary.**

**2. That the certificate of costs has never been served on the clients.**

**3. That Taxation was done notwithstanding that the same should have been filed in Nairobi HCCC No. 391 of 2009 John Okal Ogwayo and Ruth Rebecca Auma vs Dr. Peter Masinde, Dr. Andrew C. Kibet and The Karen Hospital as such the learned Deputy Registrar did not appreciate what work if any had been done by the advocate.”**

4. The replying affidavit sworn by the Respondents/client on 5<sup>th</sup> October, 2016 expounds on the said grounds. It is stated that no general damages have been awarded by the court in Nairobi HCCC No.391 of 2009 John Okal Ogwayo and Ruth Rebecca Auma v Dr. Peter Masinde, Dr. Andrew C Kibet and the Karen Hospital and therefore taxation was not necessary. It is further contended that the client has never been served with the certificate of costs. That the taxation ought to have been carried out in the parent file HCCC Nbi No. 381of 2009 John Okal Ogwayo & another v Dr. Peter Madindi & 2 others for the Deputy Registrar to appreciate what work, if any had been done by the Advocate. It is further deposed that the ruling herein (Hon Waweru, J) did not delve into the nature and extent of the instructions that are at the centre of this dispute.

5. The client filed the Application dated 16<sup>th</sup> August, 2016 seeking orders that the order by the Deputy Registrar made on 3<sup>rd</sup> September, 2015 be set aside. The application is supported by the Affidavit sworn on 16<sup>th</sup> August, 2016. It is averred that the Advocate/client agreement stated that the taxation was done notwithstanding that the same should have been filed in Nairobi HCCC No. 391 of 2009 John Okal Ogwayo and Ruth Rebecca Auma v Dr. Peter Masinde, Dr. Andrew C. Kibet and the Karen Hospital as such the learned Deputy Registrar did not appreciate what work if any had been done by the advocate.

6. It is further stated that the client was not aware of the ruling on taxation or whether a certificate of taxation was issued. That the taxation was carried out herein instead of in HCCC No. 391 of 2009 John Okal Ogwayo and Ruth Rebecca Auma v Dr. Peter Masinde, Dr. Andrew C. Kibet and the Karen Hospital.

7. The application was opposed as per the replying affidavit sworn on 6<sup>th</sup> September, 2016. It was stated in the said replying affidavit that the Advocate Client Bill of costs was taxed and a certificate of taxation issued. That the taxing followed a ruling by Hon Waweru, J delivered on 3<sup>rd</sup> December, 2013 which determined the issue of the Advocate/client relationship. That no appeal has been preferred against the said ruling. That the taxation process was completed and a ruling delivered and there has been no appeal and/or reference filed. That the client’s application is therefore a non-starter. The court was referred to Section 51 of the Advocate Act Cap 16 Laws of Kenya and paragraph No. 13 of the Advocates (Remuneration Order) in regard to the making of an application for the taxation of an advocate’s bill.

8. The two applications were argued simultaneously before me on 6<sup>th</sup> October, 2016. I have considered the applications, the response to the same and the submissions made by the learned counsels for the parties.

9. It is not in dispute that the Bill of Costs was taxed and a certificate of taxation issued. Prior to the said taxation, a ruling had been delivered by Hon Waweru, J in respect of the application dated 8<sup>th</sup> August, 2011. The said application had sought orders to have the decision of the Deputy Registrar that had struck out the bill of costs set aside. The Hon Judge reinstated the Bill of costs and stated *inter alia*, as follows:

**“The Clients have not disowned this suit. What they did subsequently was to withdraw**

**instructions from the Advocate. Thereupon the Advocate was entitled to tax his bill of costs against the Clients. And to do this he did not have to wait for the suit to be heard and determined first. Paragraph 62A of the Advocates (Remuneration) Order is not a bar to such an advocate/client bill of costs during pendency of a suit. That paragraph prohibits multiple party and party bills of costs where costs have been awarded in contentious matters. It does not bar an advocate whose instructions have been withdrawn in a contentious matter from taxing his advocate/client bill of costs before the matter is heard and finally decided.”**

10. The ruling by Hon Waweru, J has not been varied, reviewed or appealed from. The issues raised concerning the retainer agreement were dealt with by Hon Waweru, J. Although the primary suit is yet to be finalized, the instructions were withdrawn from the advocate. Indeed the issue of the instructions was dealt with by Hon. Waweru, J in the aforesaid ruling. The Advocate/client agreement in clause No. 5 provided for the payment of the fees until completion of the work or the withdrawal of the instructions. The said clause provided as follows:

**“We do understand that this agreement binds me to pay to the Advocates all amounts due from us to them for all work done until completion and/or until withdrawal of instructions by us from them but excludes any appeals.”**

11. On whether the client was notified of the ruling by the Deputy Registrar and served with the certificate of taxation, it is noted that the client was served with the application herein dated 17<sup>th</sup> May, 2016 that seeks orders for the entry of judgment. The certificate of taxation dated 1<sup>st</sup> October, 2015 is one of the documents annexed to the said application. The client therefore became aware of the said certificate of taxation and proceeded to file the Notice of motion herein seeking the setting aside of the orders of the Deputy Registrar dated 3<sup>rd</sup> September 2015 on the grounds already stated above.

12. Turning to the issue raised by the client on whether the Advocates application ought to have been filed in the primary suit, the answer is found in paragraph No. 13(3) of the Advocates (Remuneration Order) which provides as follows:

**“The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.”**

The bill of costs was therefore filed in the right manner.

13. Having arrived at the foregoing conclusions, the clients application cannot succeed. Consequently, the provisions of Section 51(2) of the Advocates Act apply herein. The said provision states:

**“(2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”**

14. The upshot is that the application dated 17<sup>th</sup> may, 2016 is allowed as prayed. The application dated 16<sup>th</sup> August is dismissed with costs.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of Nov., 2016

**B.THURANIRA JADEN**

**JUDGE**