



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISC. CIVIL APPLICATION NO. 176 OF 2014**  
**FRANCIS MWANZA MULWA .....RESPONDENT**  
**VERSUS**  
**GEORGE MUTUKU MASAI .....APPLICANT/CLIENT**

**RULING OF THE COURT**

**Introduction**

1. The substantive Notice of Motion before the court is dated and filed herein on **30<sup>th</sup> May, 2016** by the applicant/client. The application prays for the following orders;

a. That there be stay of taxation of the Advocate's –Client Bill of Costs dated 5<sup>th</sup> November, 2014 filed in Court and is scheduled for Hearing before Deputy Registrar and coming for mention on 30<sup>th</sup> May, 2016.

b. That the court do order that there was no advocate – Client relationship between F.M. Mulwa Advocate and George Mutuku Masai, upon which the Bill of Costs for Advocates and Client was filed in Court.

2. The respondent opposed the application and also filed a Preliminary Objection which the parties agreed should be heard first. The Preliminary Objection is dated **22<sup>nd</sup> September, 2016** and filed herein on **23<sup>rd</sup> September, 2016**. The Preliminary Objection raises the following objections on point of law. That is, that in so far as it is brought under **Section 51(2)** of the **Advocates Act**, the application is incompetent as the said section only applies in relation to a certificate of a Taxing Officer by whom any Bill has been taxed which is not the case here. The application is incompetent in that it inferably seeks declaratory orders through a Notice of Motion. The issue raised in the application was raised in the applicant/client's Preliminary Objection herein dated 4<sup>th</sup> December, 2014 which Preliminary Objection was dismissed on 12<sup>th</sup> May, 2016. The Objector's case is that the present application is therefore *res judicata*. The application does not purport to be a reference to a Judge against a decision of a Deputy Registrar and it is thus not properly before the judge. In any event the decision of the Deputy Registrar was made on 12<sup>th</sup> May, 2016 and could only be challenged within the period prescribed under **paragraph 11** of the **Advocates (remuneration) (Amendment) Order**. The applicant/client is not entitled to the orders sought.

3. Parties made oral submissions on the Preliminary Objection. **Mr. Mulwa**, the Objector, objects to the application dated 30<sup>th</sup> May, 2016. Counsel submitted that the Miscellaneous Cause where this application emanates was filed before the Deputy Registrar under **paragraph 13** of the **Advocates**

**Remuneration Order.** The application which the applicant opposed was brought under a Notice of Motion under **Section 52 (2) of Advocates Act.** The respondent had filed a Preliminary Objection before the Deputy Registrar raising the same issues which are being raised in the Notice of Motion i.e that there is no advocate/client relationship between the parties to the Bill of Cost. The Preliminary Objection was canvassed and dismissed with costs on 12<sup>th</sup> May, 2016. This application was brought on 30<sup>th</sup> May, 2016 strangely seeking for a declaration that there was no advocate /client relationship. Such a prayer is a declaration which is being sought through a Notice of Motion rather than through a suit. There are only two ways by which a matter before a Deputy Registrar can find its way to a judge through;

*i. Paragraph 11 of Advocate Remuneration Order – reference.*

*ii. Consent (reference by consent)*

4. **Mr. Mulwa** submitted that if the Deputy Registrar gave such directions, which he was not aware of, the Deputy Registrar must have been saying that the applicant uses the correct law and procedure to seek High Court intervention.

5. Counsel submitted that **Section 52** is irrelevant to the current application. The Notice of Motion does not purport to be a reference. So the matter is not properly before this court and the issues are *res judicata*. Counsel urged the court to uphold the Preliminary Objection and dismiss the Notice of Motion

6. In response, **M/S Mutuku** for the applicant/client submitted that they filed a Preliminary Objection dated 4<sup>th</sup> December, 2014 before the Deputy Registrar in which they raised similar issues as those before this court. It was dismissed because the court said the issue raised required evidence which she did not have since it was a Preliminary Objection. That is why they filed the current Notice of Motion in the High Court to determine whether there was an advocate/client relationship. This issue was not determined by the Deputy Registrar. They have put facts before the court to deal with. These facts were not with the Deputy Registrar and so the issue of *res judicata* does not apply. Counsel submitted that the suggestion that the rules under which the Notice of Motion is brought are not proper is curable under **Article 152(2) (2) of the Constitution.** The matter is not a reference, and does not question the issue of costs before the Deputy Registrar. It merely seeks to clarify if there is an advocate /client relationship.

7. I have carefully considered the Preliminary Objection and submissions of the parties. The issue I raise for determination is whether or not the Deputy Registrar has the jurisdiction to determine whether or not an advocate/client relationship existed to enable the Deputy Registrar tax the matter.

8. To address the issue, it is clear that in almost all taxation matters the Taxing Master is normally called to determine the existence of an advocate/client relationship before she can then tax a particular item. In other words, this is an ordinary duty of the Taxing Master. If the High Court was required to determine in every Bill of Costs the existence of advocate/client relationship, no proceedings would take place in the Taxing Master's office. The Taxing Officer has the first jurisdiction to determine the existence of an advocate/client relationship. Such a finding can only be appealed by an aggrieved party to the High Court through a reference on the grounds that the Taxing Master erred in finding that such a relationship existed while there was none. It is therefore premature for the applicant to come to this court for a prayer for an order that there was no advocate/client relationship between the advocate and the client herein.

9. It is the finding of this court that the Bill of Costs dated **5<sup>th</sup> November, 2014** now pending before the Deputy Registrar should be heard for taxation. Any aggrieved party will then be at liberty to come to the High Court under the appropriate rules for further orders as may be necessary.

10. The upshot is that the Preliminary Objection under reference is upheld with costs in the cause.

Orders accordingly.

**DATED AND DELIVERED AT MACHAKOS THIS 22<sup>ND</sup> DAY OF NOVEMBER,**

2016.

**E. OGOLA**

**JUDGE**

**In the presence of:**

Mr. Kyalo holding brief for Mulwa for respondent

M/S Ombega holding brief or Masika for applicant

Court Assistant – Mr. Munyap