



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISC. APPLICATION NO. 50 OF 2020**

**VIRGINIA SHAW & CO. ADVOCATES.....ADVOCATE**

**VERSUS**

**MINAR KATHERINE HOLROYD**

**SUNEINA LEONORA PULLING**

**LAURA SUSHILA PULLING (Sued as the**

**administratrixes of the estate .**

**of the late Dipa Pulling).....CLIENTS**

**RULING**

**Introduction:**

On 17<sup>th</sup> June 2020, the advocate filed advocate/client bill of costs for taxation against the clients. The bill was drawn in the sum of Kshs. 18,839,947.80. The bill was contested by the clients on various grounds among them that there was no retainer between the advocate and Dipa Pulling, deceased and that the bill was not drawn to scale. In a ruling delivered on 29<sup>th</sup> September 2020, the taxing officer taxed the advocate’s bill of costs (hereinafter referred to only as “the bill”) at Kshs. 4,757,963.45 inclusive of 16% VAT.

What is now before the court are two applications brought by the clients (hereinafter referred to only as “the Applicants”). The main application is a reference against the said taxation by the taxing officer. The same was brought by Chamber Summons dated 12<sup>th</sup> October 2020. Following a response by the advocate (hereinafter referred to only as “the Respondent”) to the said application, the Applicants brought another application by way of Notice of Motion dated 26<sup>th</sup> April 2021 in which they sought to strike out some of the annexures to the Respondent’s affidavit in opposition to the reference.

**The Chamber Summons application:**

In their Chamber Summons application, the Applicants sought the following orders;

1. There be a stay of execution of the taxing officer’s ruling delivered on 29<sup>th</sup> September 2020 taxing the Respondent’s Bill of Costs dated 18<sup>th</sup> May 2020 at Kshs. 4,757,963.45 pending the hearing and determination of the application.
2. The taxing officer’s ruling delivered on 29<sup>th</sup> September 2020 taxing the Respondent’s Bill of Costs dated 18<sup>th</sup> May 2020 at Kshs. 4, 757, 963.45 be set aside in its entirety.
3. In the alternative to paragraph 2 above, the Respondent’s bill of costs dated 18<sup>th</sup> May 2020 be taxed by a different Deputy Registrar in the division.
4. There be no order as to costs.

The application was supported by the affidavit of Neisha Eleanor Krastanoff. The Applicants averred that the taxing officer had no jurisdiction to tax the Bill of Costs dated 18<sup>th</sup> May 2020 (the bill) as there was no retainer between the firm of Virginia Shaw & Co. Advocates (the Respondent) and Dipa Pulling, deceased (hereinafter referred to only as “the deceased”) in respect of the services that the Respondent allegedly rendered to the deceased in ELC Suit No. 200 of 2008, Dipa Pulling v Suchan Investment Limited & 3 others

(hereinafter referred to only as “the suit”). The Applicants averred that the deceased had instructed the firm of Ransley, McVicker and Shaw Advocates in 2008 before the Respondent came into existence. The Applicants averred that no notice of change of advocates was filed by the Respondent in the suit. The Applicants emphasized that the deceased had instructed the firm of Ransley, McVicker and Shaw Advocates and not Ms. Virginia Shaw in her personal capacity.

The Applicants averred that the issue of whether there was a retainer was weighty and could not be cured by invoking Article 159 of the Constitution.

Apart from the retainer, the Applicants also disputed the value of the subject matter of the suit in which the Respondent alleged to have represented the deceased. The Applicants averred that the value of the property that was in dispute in the suit could not be ascertained from the pleadings. It was asserted by the Applicants that the deceased only had 25% share in the property that was in dispute in the suit that was valued at Kshs. 125,000,000/- and not Kshs. 150,000,000/- in a valuation that was carried out in 2020.

The Applicants averred further that getting up fees was supposed to be 1/3 and not 1/2 of the instruction fees that was applied by the taxing officer. On VAT, the Applicants averred that as at the date of the ruling by the taxing officer VAT on legal fees was 14% and not 16%. The Applicants averred that in view of the foregoing, the instruction fees assessed at Kshs. 2,728,122.67, getting up fees assessed at Kshs. 1,364,061.34 and VAT assessed at Kshs. 654,749.44 were erroneous and excessive.

The Respondent opposed the application through a replying affidavit sworn by Ms. Virginia Shaw on 29<sup>th</sup> March 2021. Ms. Virginia Shaw stated that she was a partner in the Respondent firm, Virginia Shaw & Co. Advocates and the surviving partner in the firm of Ransley, McVicker and Shaw Advocates. She stated that in 2008 when she was a partner in Ransley, McVicker and Shaw advocates, the deceased instructed her to institute ELC Suit No. 200 of 2008, Dipa Pulling v Suchan Investment Limited & 3 others (the suit). She stated that she had the conduct of the suit from 2008 until 2019 when judgement was delivered in the matter.

She stated that in 2017, she registered the Respondent firm, Virginia Shaw & Co. Advocates as she was the sole surviving partner in Ransley, McVicker and Shaw Advocates. She stated that she informed the deceased of this development and continued to act on her behalf in the suit. She stated that sometimes she communicated with the deceased’s daughters when the deceased was ailing and brought up the issue of fees. She attached to her affidavit, copies of e-mail correspondence in support of this assertion. She stated that when the deceased died, her daughters contacted her to commence succession proceedings but later changed their minds and instructed another law firm.

Ms. Shaw stated that due to the refusal of the estate of the deceased to settle her outstanding fees, she filed an advocate/client bill of costs (the bill) that was fairly taxed by the taxing officer. She stated that the retainer dispute is an afterthought. She contended further that the value of the property that was the subject of the suit in which her firm acted for the deceased was ascertainable from the pleadings and/or valuation reports filed in evidence. She urged the court to direct the Applicants to deposit a sum of Kshs. 4,757,963.45 and an additional sum of Kshs. 150,000/- as security since none of the Applicants is resident within the jurisdiction of the court.

#### The Notice of Motion application:

In their Notice of Motion application, the Applicants sought the following orders:

1. That the court strikes out exhibits VWS-1, VWS-2, VWS-3 and VWS-4 that were annexed to the Respondent’s replying affidavit dated 29<sup>th</sup> March 2021.
2. That the costs of the application be provided for.

The application was supported by the affidavit of the Applicant’s advocate, Ms. Pearlyne Omamo. The Applicants averred that a reference from the decision of a taxing officer is an appeal to a single judge of the court. The Applicants averred that like in any other appeal, any document in support of the bill of costs that was not produced before the taxing officer cannot be legally produced before the judge as it would undermine the Applicants’ right to a fair trial. The Applicants contended that for the foregoing reasons, the exhibits in the Respondent’s affidavit dated 29<sup>th</sup> March 2021 that were not produced before the taxing officer are inadmissible in these proceedings. The Applicants contended further that the impugned exhibits were also inadmissible on the grounds that they constituted privileged communication under sections 134 and 137 of the Evidence Act, Chapter 80 Laws of Kenya.

One of the Applicants, Suneina Leonora Pulling swore a supplementary affidavit on 21<sup>st</sup> June 2021 in support of the application in which she reiterated the contents of the affidavit by Ms. Omamo. She averred that the Respondent had an opportunity before the taxing officer to produce the said documents which she never utilised as she insisted on her bill being taxed instead of having the issue of retainer determined as a preliminary objection. She averred that the said exhibits that the Respondent sought to rely on to prove her retainer by the deceased were inadmissible on account of the foregoing and the fact that the same were privileged. She contended that in any event, the said exhibits supported the Applicants’ contention that the deceased had a retainer with the firm of Ransley, McVicker and Shaw Advocates and not with the Respondent since the communication was between the deceased, her daughters and Virginia Shaw as a partner in Ransley, McVicker and Shaw Advocates.

The Respondent filed a further affidavit sworn by Virginia Shaw on 10<sup>th</sup> May 2021 in opposition to the application. In the affidavit, she contended that Ms. Omamo who had sworn the affidavit in support of the application was not competent to depose to facts relating to the issue of retainer. She stated that the impugned exhibits attached to the Respondent’s replying affidavit were necessary for settling the main dispute before the court namely; whether or not there was a retainer between the deceased and the Respondent. She averred that before the taxing officer, the issue of retainer was raised as a preliminary objection and as such the Respondent did not have an opportunity to properly respond to the same. She stated that the Respondent should be allowed to respond to the issue. She stated that an attempt to stop the admission of the exhibits was against Article 159 of the Constitution.

### The Submissions:

#### The Applicants' Submissions:

The Applicants filed submissions on 21<sup>st</sup> June 2021. The Applicants submitted that the deceased had retainer with the firm of Ransley, McVicker and Shaw Advocates and not with the Respondent. The Applicants submitted that if the court finds that there was a retainer between the deceased and the Respondent then, the Respondent would only be entitled to fees for the services rendered from the time it came on record and not from 2008 when the deceased retained the firm of Ransley, McVicker and Shaw Advocates to act for her in the suit.

The Applicants submitted further that the taxing officer had no jurisdiction to tax the Respondent's bill. The Applicants submitted that under the Advocates Remuneration Order, the jurisdiction of a taxing officer is limited to taxing a bill of costs where there is no dispute as to retainer or where costs have been duly awarded by an order of a court. The Applicants submitted that where there is a dispute as to retainer, the taxing officer should refer the same to the High Court for determination before proceeding with the taxation. The Applicants cited Mwadumbo & Company Advocates v Joseph Maina Kimani [2018] eKLR in support of this submission.

The Applicants argued that the issue of retainer was raised before the taxing officer as a preliminary objection and the first paragraph of the ruling by the taxing officer acknowledged that retainer was disputed. The Applicants submitted that the taxing officer had no jurisdiction in the circumstances to tax the Respondent's bill. The Applicant submitted that on this ground alone, the decision of the taxing officer should be set aside.

Without prejudice to the foregoing, the Applicants submitted that the amount that was awarded to the Respondent in the impugned taxation was erroneous and/or excessive.

The Applicants submitted that the instruction fees as taxed was excessive. The Applicants argued that instruction fees was only payable for actual work done. The Applicants argued that the Respondent would only be entitled to fees for services rendered between 22<sup>nd</sup> June 2016 (when it was registered) and 19<sup>th</sup> January 2019 when judgment was rendered in the suit. The case of Kenyariri & Associates Advocates v Salama Beach Hotel Ltd. & 4 others [2014] eKLR was cited in support of this submission. The Applicants submitted further that the Respondent was not entitled to instruction fees as it came on record long after the close of pleadings. The Applicants asserted that holding otherwise would mean that the firms of Ransley, McVicker and Shaw and the Respondent are one and the same while they are differently constituted.

The Applicants also challenged the instruction fees awarded on account of the value of the subject matter of the suit in which the Respondent acted for the deceased. The Applicants argued that the value of the subject matter of the suit could not be ascertained from the pleadings. The Applicants submitted that a valuation report that was submitted by the 1<sup>st</sup> defendant in evidence during the trial of the suit in 2017 on which the taxing officer based her assessment of instruction fees was not a pleading. The Applicants argued that the assessment of instruction fees that was based on the said report was therefore erroneous. The Applicants submitted that there was a recent valuation report on record that put the value of the deceased's share in the property that was in dispute in the suit at Kshs. 125,000,000/-. The Applicants submitted that the value of Kshs. 150,000,000/- that was adopted by the taxing officer in assessing instruction fees was erroneous.

The Applicants submitted further that as at the time the taxing officer's ruling was delivered, VAT rate on legal fees had been reduced to 14% in order to mitigate the effects of COVID-19 on the economy. The Applicants submitted that the VAT rate of 16% that was imposed by the taxing officer was erroneous.

On whether exhibits VWS1-VWS 4 annexed to the Respondent's replying affidavit dated 29<sup>th</sup> March 2021 should be expunged from the record, the Applicants argued that the Respondent had an opportunity to produce these documents in evidence or seek extra time to do so during the taxation proceedings but it failed to do so. The Applicants cited Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR and submitted that the Respondent had not met the criteria for adducing additional evidence at this appellate stage. The Applicants also relied on sections 134 and 137 of the Evidence Act and the case of Jackline Chepkemoi Kimeto v Shafi Grewal Kaka & 3 others [2019] eKLR to argue that the said exhibits constituted privileged communication between an advocate and a client and as such the same were inadmissible in evidence without the consent of the deceased or her daughters.

On whether the affidavit of Pearlyne Omamo sworn in support of the Applicant's Notice of Motion application was proper, the Applicants cited Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR and submitted that since Pearlyne Omamo had the conduct of the matter and the application was restricted to points of law and facts that she was personally aware of, there was nothing wrong with her swearing the affidavit in support of the application.

#### The Respondent's Submissions:

The Respondent filed its submissions on 15<sup>th</sup> September 2021. The Respondent submitted that the order for stay of execution was untenable as the Respondent's application for judgment on taxed costs was yet to be determined by the Court.

The Respondent submitted that this court can only interfere with the decision of the taxing officer if the Applicants established that the taxing officer misdirected herself or committed an error of principle. The case of Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd [2019] eKLR was relied upon in support of this submission. The Respondent submitted that the Applicant had not discharged that burden.

On the issue of retainer, the Respondent argued that where there is no written retainer it can be deduced from the client's conduct. In support of that submission, the Respondents relied on Otieno, Ragot Advocates v Deniel Oduor Okumu [2014]eKLR and Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited [2007]eKLR. The Respondent submitted that the Respondent had the conduct of the suit from 2008 to 2019 during which period the Respondent was in communication with the deceased and her daughters about the same. The

Respondent submitted that during their communication, the issue of retainer was not brought up. The Respondent submitted that it was unconscionable for a client to enjoy the services of an advocate and then refuse to pay.

On the Applicants' contention that the taxing officer had no jurisdiction to tax the Respondent's bill, the Respondent submitted that the taxing officer had jurisdiction to determine the issue of retainer and that she rightfully made a determination that there was a retainer between the deceased and the Respondent. The Respondent cited the cases of Triple O Law LLP v Marianne Jebet Kitany [2020] eKLR and Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR in support of that submission.

On the value of the subject matter of the suit, the Respondent submitted that the same was discernible from the valuation reports that were produced in evidence by the 1<sup>st</sup> defendant in that suit. The Respondent submitted that it was a stranger to the valuation report dated 31<sup>st</sup> March 2020 that was referred to by the Applicants. The Respondent submitted that the same may have been filed in the suit after the Respondent had ceased to act for the deceased in the matter.

On the issue of the exhibits annexed to its replying affidavit which the Applicants sought to have expunged, the Respondent argued that there was no opportunity to produce the same before the taxing officer during the taxation proceedings as the Applicants had raised the issue of retainer by way of a preliminary objection rather than through a substantive application. On the issue of confidentiality of the said exhibits, the Respondent argued that the production of the exhibits was necessitated by the Applicants' argument that there was no retainer. The Respondent submitted that the exhibits were not confidential in the circumstances of the case. The Respondent urged the court to invoke its inherent jurisdiction, the overriding objectives of the Civil Procedure Act and Article 159 of the Constitution to admit the additional evidence.

#### Determination:

I have considered the two applications by the Applicants together with the affidavits filed in support thereof. I have also considered the affidavits filed by the Respondent in opposition thereto. I have finally considered the submissions by the advocates for the parties and the authorities cited in support thereof. The issues arising for determination in the two applications are the following:

1. Whether the taxing officer had jurisdiction to tax the Respondent's bill of costs.
2. Whether there was a retainer between the deceased and the Respondent and whether exhibits VWS-1, VWS-2, VWS-3 and VWS-4 that were annexed to the Respondent's replying affidavit dated 29<sup>th</sup> March 2021 should be expunged from the court record.
3. Whether the ruling of the taxing officer delivered on 29<sup>th</sup> September 2020 should be set aside.

#### Whether the taxing officer had jurisdiction to tax the Respondent's bill of costs.

Jurisdiction to tax bills of cost is conferred upon the Deputy Registrar under paragraph 11 of the Advocates Remuneration Order. In my view, this court only intervenes in taxation of costs in limited circumstances provided for in the said Remuneration Order. Paragraph 13A of the Advocates Remuneration Order gives the Deputy Registrar (hereinafter referred to only as "the taxing officer") full power to deal with all issues that may arise during taxation. The instances when this court can intervene in a taxation of a bill of cost are first, when an objection is raised to a decision of the taxing officer under paragraph 11 of the Advocates Remuneration Order (hereinafter "the Remuneration Order") and secondly, where with the consent of the parties, the taxing officer refers any matter in dispute arising out of a taxation of a bill of cost for the opinion of the court under paragraph 12 of the Remuneration Order.

The Applicants had raised a preliminary objection before the taxing officer that the taxing officer had no jurisdiction to tax the Respondents bill of costs because there was no retainer between the Respondent and the deceased. According to the Applicants, once they raised the said preliminary objection, the taxing officer was supposed to lay down her tools and refer the matter to this court for determination of the issue of retainer. I am not in agreement with this reasoning. This is not the first time I have been confronted with a dispute of this nature. In Mwema Kitulu & Co. Advocates v Kenya Deposit Insurance Corporation, ELC Misc. Application No. 29 of 2016 where the dispute before the taxing officer was whether there was an agreement on fees between the advocate and the client, this court stated as follows:

**"The taxing officer has wide powers under paragraphs 10 and 13A of the Remuneration order which he can employ to determine whether or not there was an agreement between the parties on fees. Since the determination of the issue would require calling of evidence, the taxing officer is better placed to take such evidence and he has power to do so. The party who is aggrieved with the decision of the taxing officer on any issue raised before him can file an objection under paragraph 11(1) of the Remuneration Order. This I believe would bring to an end the practice which is gaining root in which parties for various reasons are raising all sorts of objections to bills of costs and seek reference of such objections to the High Court for determination. Some of these objections are raised for the purposes of delaying taxation of bills of cost. I believe that judicial time and costs to the parties would be saved if all the issues in dispute in a bill of costs are determined by the taxing officer and a single reference is brought to the High Court under paragraph 11(1) of the Remuneration order for all objections which a party may have against the decision of the taxing officer. The only exception should be where the parties agree under paragraph 13A of the Remuneration Order to refer a matter to the High Court for its opinion.**

I have considered the decisions of my brothers, Waweru J. and Gikonyo J. in the cases of Abincha & Co. Advocates vs. Trident Insurance Co. Ltd. [2013]eKLR and Kenya Orient Insurance Limited vs. Oraro & Company Advocates[2014]eKLR which were cited by the Respondent in support of its submission that the issue as to whether or not the taxing officer had jurisdiction to tax the Applicant's bill could only be determined by this court. I beg to differ from the restrictive interpretation which my colleagues gave to the provisions of paragraphs 10 and 13A of the Remuneration Order. As I have stated above, my view is that the taxing officer has power to determine all issues factual and legal, arising out of or connected with a bill of costs before him and that this court's intervention is limited only to giving an opinion pursuant to a

**reference by agreement of the parties under paragraph 12 of the Remuneration Order or determining an objection under paragraph 11 of the said Remuneration Order. The taxing officer has no power to refer an issue to the superior court for its opinion in the absence of agreement by the parties. If the position taken in the two cases above was to hold, the question which arises is, what happens if the parties do not agree to refer an issue to the superior court for its opinion? Does the taxation come to a halt?"**

I still hold the same view. Since the parties had not agreed that the issue of retainer be referred to this court for determination under paragraph 12 of the Remuneration Order, the only option that was open to the taxing officer was to proceed with the taxation and whichever party was aggrieved with the outcome could file a reference under paragraph 11 of the Remuneration Order. It is my finding therefore that the taxing officer had jurisdiction to tax the Respondent's bill.

Whether there was a retainer between the deceased and the Respondent and whether exhibits VWS-1, VWS-2, VWS-3 and VWS-4 that were annexed to the Respondent's replying affidavit dated 29<sup>th</sup> March 2021 should be expunged from the court record.

In Black's Law Dictionary, Ninth Edition a retainer is defined as:

**"A client's authorization for a lawyer to act in a case."**

In Ochieng, Onyango, Kibet & Another v Adopt A Light Limited [2007] eKLR the court stated as follows on retainer:

**"It is clear that the respondent's defence is based on the fact that no evidence of retainer is exhibited to the present application. I reckon that an Advocate/client relationship is grounded on retainer and in the absence of retainer, one can say the relationship is on shaky grounds. The burden of establishing the existence of a retainer is always and primarily on the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service."**

I am of the view that a retainer need not be in writing. The same can be oral or inferred from the conduct of the parties. There are few cases in this country where advocates are instructed in writing. My view on the issue finds support in J Mbugua Mburu & Associates Advocates v City Star Shuttle Ltd [2021] eKLR and Omulele & Tollo Advocates v Mount Holdings Limited [2016] eKLR.

It is not disputed that Ms. Virginia Shaw advocate was a partner in the firm of Ransley, McVicker and Shaw Advocates. It is also not disputed that the deceased instructed Ms. Virginia Shaw as a partner in the said firm to act for her in the suit in 2008. It is also not in dispute that it was Ms. Virginia Shaw who appeared in court and represented the deceased from 2008 until 2019 when judgment was delivered in the suit. It is not in dispute as it was not contested by the Applicants that by 2016, Ms. Virginia Shaw remained as the only partner in the firm of Ransley, McVicker and Shaw Advocates. It is also not contested that Ms. Virginia Shaw registered the Respondent, Virginia Shaw & Company Advocates in 2016. Although Ms. Virginia Shaw had registered a new firm, she did not file a notice of Change of Advocates in the suit and she continued to appear for the deceased in the suit in the name of Ransley, McVicker and Shaw Advocates.

The Applicant's contention is that the deceased instructed Ransley, McVicker and Shaw Advocates and not Virginia Shaw & Company Advocates and as such it was the former firm that was entitled to file a bill of costs for taxation and not the latter. I have no doubt in my mind that the issues raised by the Applicants are mere technicalities without any substance. I cannot fault but would agree with the taxing officer's observation that **"the Respondent herein is trying to clutch at straws with this objection."** The advocate who was instructed by the deceased was Ms. Virginia Shaw. The advocate who represented the deceased in the suit was Ms. Virginia Shaw. The surviving partner in Ransley, McVicker and Shaw Advocates which has ceased to exist is Ms. Virginia Shaw. The sole partner in Virginia Shaw & Company Advocates is Ms. Virginia Shaw.

The bill of costs was filed by Ms. Virginia Shaw who is trading in the firm of Virginia Shaw & Company Advocates. Even if the bill of costs had been filed by Ransley, McVicker and Shaw Advocates, that would not have made any difference in my view. The only partner in the firm is Ms. Virginia Shaw and as such the costs would be due to her. It is my finding that there was a retainer between Ms. Virginia Shaw advocate and the deceased and that the administrators of the deceased cannot avoid paying fees for the services rendered merely because instead of taxing her bill of costs in the name of the firm of Ransley, McVicker and Shaw Advocates that has ceased to exist, Ms. Virginia Shaw chose to file the bill in the name of Virginia Shaw & Company Advocates. The Applicants did not deny that Ms. Virginia Shaw acted for the deceased in the suit. They have not mentioned any other advocate in the firm of Ransley, McVicker and Shaw Advocates who appeared in the suit on behalf of the deceased apart from Ms. Virginia Shaw. I am of the view that with the knowledge that the firm of Ransley, McVicker and Shaw Advocates has ceased to exist, the Applicants are trying to avoid paying fees. A court of law cannot aid the Applicants in such mischievous endeavour.

Before concluding on this issue, I wish to add that the issue of retainer was improperly raised by the Applicants' before the taxing officer by way of a preliminary objection. Whether or not there was a retainer between the Respondent and the deceased was not a pure point of law. The determination of the issue required evidence oral or by way of an affidavit.

The taxing officer was right in the circumstances to overrule the objection although she did so on other grounds.

A rising from the foregoing, I am in agreement with the Respondent that she did not have an opportunity to adduce evidence before the taxing officer on the issue of retainer. What was before the taxing officer was a Preliminary Objection that by its very nature evidence is not required. I wonder therefore how the Applicants expected the Respondent to produce before the taxing officer the correspondence that the Respondent has placed before this court in proof of the fact that there was a retainer between the Respondent and the deceased. The said correspondence are therefore properly before the court. I see no reason why the same should be expunged as they deal directly with the issue before the court for determination. The issue that the same are privileged does not arise. I would have taken the point seriously if the

correspondence were being used by third parties. A client cannot use advocate/client privilege to bar an advocate from adducing correspondence exchanged between the client and the advocate to prove a retainer. The advocate/ client privilege was intended to protect the advocate/client confidentiality. It could not have been intended to be used by the advocate or the client as a shield against their obligations to each other.

For the foregoing reasons, I find no merit in the Applicants Notice of Motion application dated 26<sup>th</sup> April 2021.

Whether the ruling of the taxing officer delivered on 29<sup>th</sup> September 2020 should be set aside.

Having held that the taxing officer had jurisdiction to tax the Respondent's bill of costs and that there was a retainer between the Respondent and the deceased, what I now need to determine is whether valid grounds remain that warrant interference with the decision of the taxing officer made on 29<sup>th</sup> September 2020. In Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd. [2014] eKLR the court stated that:

**“The circumstances under which a judge of the High Court interferences with the taxing officer’s exercise of discretion are now well known. These principles are:**

- 1. that the court cannot interfere with the taxing officer’s discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;**
- 2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;**
- 3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;**
- 4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”**

In the South African case, Visser v Gubb 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in the case of KTK Advocates v Baringo County Government [2017] eKLR, the court stated as follows:

**“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”**

In addition to the issues that I have disposed of above, the Applicants have challenged the decision of the taxing officer on several other grounds which they have argued amount to errors of principle which warrant the setting aside of the said decision. The Applicants argued that the value of the subject matter of the suit could not be ascertained from the pleadings and as such, the taxing officer erred in assessing instruction fees at Kshs. 2,000,000/- based on a valuation report that was adduced in evidence by one of the parties in the suit. The Applicants argued further that getting up fees is 1/3 of the instruction fees and as such the taxing officer erred in assessing it at ½ of the instruction fees. The other issue that was raised by the Applicants related to VAT. The Applicant’s claimed that VAT was 14% as at the time of the taxing officer’s ruling and as such the taxing officer erred awarding VAT on fees at 16%.

On the issue of instruction fees, I am in agreement with the Applicants that the value of the subject matter of the suit could not be ascertained from the pleadings or judgment of the court and that the taxing officer should have proceeded to assess instruction fees on that basis. I am in agreement with the Applicants that the taxing officer erred in basing instruction fees on a valuation report that was produced by one of the parties in evidence in the suit as that was neither a pleading nor a judgment of the court. The taxing officer was entitled to take the valuation into consideration while assessing an appropriate instruction fees to award but should not have used it as a basis for her assessment. On getting up fees, I have noted that the taxing officer assessed the same at Kshs. 666,666.67/- which is 1/3 of the instruction fees that she had assessed at Kshs. 2,000,000/-. It is not correct therefore that the taxing officer assessed getting up fees as ½ of the instruction fees. The item that was assessed at ½ of instruction fees was the advocate/client fees provided for in Part B (a) of Schedule VI of the Remuneration Order. On the issue of VAT, I am of the view that VAT is payable when the fees is settled. When the Respondent draw its bill, the VAT rate on legal fees was 16%. I am in agreement with the Applicant that as at 29<sup>th</sup> September 2020 when the ruling by the taxing officer was delivered, the VAT rate had been reduced to 14% to cushion the public against the effects of COVID-19 pandemic. The VAT rate of 14% was however temporary. VAT has since reverted to the old rate of 16%. Since the Applicants are yet to pay the costs due to the Respondent, they will have to pay the same together with VAT at the prevailing rate of 16%. In the circumstances, I find no reason why I should disturb the taxing officer’s award of VAT on taxed costs at the rate of 16%.

Due to the foregoing, the Applicants have only established that the taxing officer committed an error of principle while assessing instruction

fees. The Applicants have in the circumstances established valid grounds warranting interference with the taxing officer's exercise of discretion with respect to instruction fees.

In the case of Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board (2005) 1 KLR 528 the court stated as follows:

**“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D'Souza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243.”**

In the circumstances of this case, I am of the view that the taxing officer is best suited to assess the instruction fees. Since the other items in the bill were not contested, I will remit the bill of costs back to the same taxing officer who had taxed the Respondent's bill of costs with appropriate directions.

In conclusion, I hereby make the following orders;

1. The ruling of the taxing officer delivered on 29<sup>th</sup> September 2019 is reviewed and varied to the extent that the taxation of the item on instruction fees is set aside.
2. The Respondent's Advocate/Client Bill of costs dated 18<sup>th</sup> May 2020 is remitted back to the taxing officer Hon. Diana Orago with direction that she assesses the instruction fees a fresh on the basis that the value of the subject matter in ELC Suit No. 200 of 2008. Dipa Pulling v Suchan Investments Limited & 3 others cannot be ascertained from the pleadings or judgment of the court. The parties shall be at liberty to address the taxing officer during the reassessment of the instruction fees.
3. The taxing officer shall thereafter tabulate a fresh the costs payable to the Respondent upon reassessment of the instruction fees that will have effect on the ½ advocate/client costs which is added to party/party costs under Part B of the Remuneration Order and VAT payable.
4. Each party shall bear its own costs.

**DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022**

**S. OKONG'O**

**JUDGE**

Ruling read virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Omamo for the Applicants

Ms. Minyiri h/b for Ms. Shaw for the Respondent

C. Nyokabi-Court Assistant