



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 36 & 35 OF 2011

HEZEKIEL OIRA

T/A H. OIRA ADVOCATEADVOCATE/APPLICANT

VERSUS

KENYA BROADCASTING CORPORATIONRESPONDENT

RULING

Before this court for determination is a Notice of Motion dated 11th July 2012 filed on 13th July 2012 by Hezekiel Oira T/A H.Oira/ advocate against the Kenya Broadcasting Corporation/ client.

The application is brought under the provisions of Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010, Sections 1A,1B,3A and 80 of the Civil Procedure Act and all the enabling Provisions of the law.

The advocate/applicant seeks from this court orders that:

1. Spent
2. That the court be pleased to review, vary and or set aside the order made on the 27th day of June, 2012 striking out the Bill of Costs in this matter and HC Misc Application No. 35 of 2011 and that the Bills of Costs be taxed on merit.
3. That costs of this application be provided for.

The application is predicated on the grounds that:-

- a. The Bill of Costs herein and in the HC Miscellaneous Application 35/2011 were struck out on account that the advocate/applicant had no valid instructions to act for the client/respondent.
- b. That the client/respondent had abandoned that line of argument, and had conceded to the taxation of the Bill of Costs on their merit; and hence the submissions made by the parties were limited to the merits of the said Bill of Costs.
- c. That there is an error apparent on the face of the record in that the taxing master based his ruling on an issue already abandoned by the client respondent, and in particular in relation to retainer ship of the advocate/applicant.
- d. That issues of retainer ship of an advocate's services by a client when in dispute can only be

dealt with and determined by the judge of the High Court and hence the error on the ruling herein.

- e. That it is in the interest of justice and fairness that parties be heard on an issue before determination of the same by the court, and hence the need to review, vary and or set aside the ruling herein as parties were never heard on the issues relied upon in striking out the same.

The application is further supported by the supporting affidavit of Hezekiel Oira Advocate applicant sworn on 11th July 2012. Mr Oira deposes that when the matter came before Honourable Ougo (as she then was) taxing officer on 9th July 2011, an order was made that him and Mr Waithaka Waihenya do personally appear in court on 21st August 2011 for cross examination on the content of their respective affidavits. However, the matter was not listed on that day and another fresh date was to be obtained from the registry. That the law firm of Kale Maina & Bundotich Advocate took over the conduct of the matter on behalf of the client on 25th November 2011 replacing Mr Paul Jilani advocate of Kenya Broadcasting Corporation. That Mr Oira was informed by his counsel on record that Mr Bundotich informed his counsel that he had advised his client (Kenya Broadcasting Corporation) to abandon the contest of retainership and focus on the taxation of the Bill of Costs on merit and based on that understanding, the parties appeared before the Deputy Registrar on 16th December 2011 and took directions to file their respective submissions on the Bill of Costs and the matter was fixed for taxation on 27th January 2012. That the parties exchanged submissions omitting reference to that ground of retainership and that therefore it was erroneous for the taxing officer to strike out the Bill of Costs on account of retainership which matter she had no jurisdiction as it can only be determined by a judge of the High Court.

In their written submission, the advocate/applicant submitted, reiterating what was contained in the application and supporting affidavit that when the parties filed their submissions to dispose of the Bill of Costs, they did not address the court on the issue of retainership since they had in principle 'agreed' not to pursue that issue. That that was evidenced by the respondent's counsel proposing that the advocate/client Bill of Costs be taxed at shs 18,145 for the services rendered.

The advocate laments that Honourable Ndungu Deputy Registrar erroneously struck out the bill of costs on 27th June 2012.

Further, that the application herein is in order as Rule 11 of the Advocates Remuneration Order on filing references is only applicable where a bill is taxed and a party is seeking to challenge that taxation, not like in the instant case where there was no taxation. Further that in any case the Deputy Registrar failed to invoke Rule 13 by way of calling evidence to clear the issue of retainership in light of the directions by Honourable Ougo that parties be cross examined on the contents of their respective affidavits before the bill of costs could be taxed.

Counsel for the advocate submitted that this court's duty is to do substantive justice to the parties without undue delay as espoused in Article 159(2)(b) and (d) of the Constitution and Sections 1A, 1B and 3 of the Civil Procedure Act. He further submitted that there shall be no prejudice to the respondent if the bill of costs is taxed afresh since there is no question about retainership.

The respondent/client filed their written submissions dated 10th December 2012 on the same day reiterating their grounds of opposition. They contended that the application for review as sought was incompetent. They also supported the taxing officer's order of 27th June 2011 striking out the advocates bill of costs. The client/respondent contended that the application is fatally defective as the order for review cannot be granted in the absence of an annexure in the order which is sought to be reviewed.

Further, that an order or ruling arising from taxation cannot be reviewed and that a party who is aggrieved can only file a reference to the High Court. Finally, that a reading of Order 45 Rule (1) (a) and (b) of the Civil Procedure Rules that "appeal" does not include reference. They urged this court to dismiss the application by the advocate with costs.

I have carefully considered the application by the advocate, which invokes Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

In my view, the main issues for determination are:-

1. Whether the application for review as filed seeking for review instead of a reference is competent before this court.
2. Whether the taxing officer had the jurisdiction to consider the issue of retainer.
3. What orders should this court make.

On the issue of whether the application herein as filed is competent before the court, the respondent contends that as the order by the taxing master concerned taxation of an advocate/client/bill of costs then the said order could only be challenged before a judge by way of a reference initiated by way of a chamber Summons as required by the provisions of paragraph 11(2) of the Advocates Remuneration Order and not by way of a review under the provisions of Section 80 and Order 45 Rules 1 of the Civil Procedure Act and Rules respectively.

The advocate on the other hand maintains that the Advocates Remuneration order could only apply where the bill of costs was taxed by the taxing officer and the order of taxation being objected to. In his view, that is when a reference pursuant to paragraph 11 (2) of Advocates Remuneration Order could be lodged to review the decision on taxation, and not when what is being challenged is an order striking out the entire bill of costs. None of the parties' advocates in their respective submissions referred this court to any case law.

Paragraph 11 of the Advocates Remuneration Order provides that:

Where a party is aggrieved by the decision of a taxing officer, he is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to this court.

In the present case, it is apparent that the respondents were objecting to the validity of the entire bill of costs as filed, by their grounds of opposition and replying affidavit sworn by Waitihaka Waihenya the respondent's Managing Director, contending that the advocate was an employee of the corporation at the time as an in house lawyer and that the purported memo by William Ikapel giving him authority to act as an independent contractor was a fraud as it was not authorized by the corporation.

In my view, the applicant was required to file a reference to this court to challenge the *decision* of the taxing officer and not an application for review under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.

Further, the advocate would only be so entitled to apply to this court for review or appeal, under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules if he was able to satisfy the court that the decision rendered by the taxing officer was the kind of decision that can be appealed to this court, under Section 79G of the Civil Procedure Act or reviewed as provided by Section 80 and Order 45 of the Civil Procedure Act and Rules respectively.

Under the said Paragraph 11, of the Advocates Remuneration Order, an "appeal" against the decision of a taxing officer in a taxation matter is not provided for. The only procedure provided for an "appeal" or "review" against the decision of a taxing officer is by way of a reference.

In my view, the applicant cannot invoke the Civil Procedure Act and Rules made there under to circumvent the procedure provided under the Advocates Act and the Advocates Remuneration Order in regard to review of a decision of the taxing officer in an advocate/client bill of costs where the taxing officer exercises the special jurisdiction conferred upon him or her under the Advocates Remuneration Order and NOT in his capacity as the Deputy Registrar of this court.

The Deputy Registrar exercises his jurisdiction in accordance with the powers given to him under the Civil Procedure Act and the Rules made there under. The two roles of the said officer of the court are separate and distinct. The two jurisdictions and their separate procedures are mutually exclusive. One procedure cannot be substituted for the other. The procedure adopted by the advocate applicant in this matter was therefore in my view, an abuse of the court process and procedures.

The advocate's Notice of Motion creates a presumption that he had a right of appeal pursuant to Section 79G of the Civil Procedure Act and therefore Sections 65 and 75 of the Civil Procedure Act on orders and Decrees that are appealable as a matter of right or with leave of the court making the order comes into play. Perhaps that is the reason why upon the ruling being delivered on 27th July 2012, he sought leave to appeal against the decision of the taxing officer.

In cases where there is a right of appeal, whether by way of obtaining leave or automatic right, then Order 43 of the Civil Procedure Rules apply. Equally, under Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules, the latter being the hand maiden to Section 80 comes into play, as an alternative to an appeal under Section 79G of the Civil Procedure Act.

In the instant case, where the Deputy Registrar is exercising the special jurisdiction as taxing officer, a decision whether made on the actual items of the itemized bills or striking out of the bills or striking out of the bill of costs altogether, is a decision of the taxing officer in that capacity and therefore it is my humble view that there is no provision for an 'appeal' or "review" per se under the Advocates Act, which is the legal regime governing taxation of costs whether party and party or Advocate/client.

The Advocates Act, in my most considered view, is a complete statute in itself on matters of taxation of costs and as such, a party cannot invoke the provisions of the Civil Procedure Act or Rules made there under for purposes of challenging any decision of the taxing officer.

I am fortified by the Court of Appeal decision in the case **Machira & Company Advocate vs Arthur K. Magugu (2012) e KLR** where the Court of Appeal stated:

“ Appeals require the tying of proceedings compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions a kin to those of Section 80 of the Civil Procedure Act, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”

The Learned Judges of the Appellate court further held:

“ 10. the appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in Machira Vs Magugu (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”

The above holding which I agree with wholly was also upheld by Havelock J (as he then was) in **HC Misc. 655/2012** that there is no appeal from a taxing officer's decision except under the provisions of Rule 11 of the Advocates Remuneration Order. In that case, the learned Judge was faced with the respondent arguing that the question of retainer (just as was argued in this case before me) having been decided upon by the taxing officer, it was their opinion that the applicant could not raise the same as a reference, except by way of an appeal or an application for review, if applicable. The respondents had further argued that the applicant's bill of costs not having been taxed by the taxing officer, but instead,

the taxing officer having declined to tax it on the grounds that there was no retainer or instruction, the Advocate's Remuneration Order could not apply as the same only dealt with an objection to a decision on taxation and therefore, appealable to the Court of Appeal.

Further, it was also argued that it was only after taxation that the Judge could be asked by way of reference to review the decision of the taxing officer.

From the above enunciations, I am inclined to find that the application herein as filed under Section 80 of the Civil Procedure Act and its hand maiden Order 45 of the Civil procedure Rules is incurably incompetent, not for want of form but statutorily, the applicant has deliberately overlooked the established procedure under the relevant statute for challenging decisions of the taxing officer and instead imported the Civil Procedure Act and Rules which is a totally different legal regime. A merger thereof would in my view bred confusion. It is an abuse court process. That, in my view, cannot be said to be a mere procedural technicality which Article 159 of the Constitution was meant to cure.

In the Court of Appeal decision of **Kimani Wanyoike vs Electoral Commission of Kenya CA 213/95** (un reported) the Court of Appeal held:

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

In another Court of Appeal decision of **Speaker of the National Assembly vs Karume (2008) 1 KLR 425** the Court reiterated its earlier decision in Kimani Wanyoike case(supra) that:

“ In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

On the strength of all the above decisions, it is my humble view that paragraph 11 of the Advocates Remuneration Order cannot be short circuited by filing for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

The above decision was made prior to enactment of Article 159(2) (d) of the Constitution which espouses that justice shall be done without undue regard to procedure technicalities. Does it hold today? To answer the above question In **Abok James Odera T/A A.J. Odera & Associates vs John Patrick Machira T/A Machira & Company Advocates (2013) e KLR**, the Court of Appeal, very recently, per Githinji, Nambuye & Koome JJA in deliberating on whether to import the oxygen principle and or Article 159(2) (d) of the Constitution to achieve a fair, just, speedy, proportionate time and cost saving disposal of cases before it when faced with a situation where they had to decide whether to breathe life into an otherwise incurably defective appeal, the Court, citing with approval the case and decision of **Karuturu Networks Ltd & another vs Dally Figgis Advocates, Nairobi Court of Appeal CA NO. 293/2009** where it was held that:

“ The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals.”(EMPHASIS MINE)

Applying the decision above to this review application. I am satisfied that Article 159(2) (d) does not oust the jurisdiction of this court to determine that the application was filed under the Civil Procedure Rules when there are clear procedures under the Advocates Act, and is therefore incompetent in limine suitable for striking out.

In the **Karuturu Networks** case, (supra), the court was further categorical that:

...” it is a basic principle of procedural law that appeals to the High Court only lie where a right of appeal has been conferred by statute. Secondly, I as understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer whether it relates to appoint a law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Order”.....

The appeal that they have purported to file from the decision of taxing officer by way of an appeal by chamber summons as provided under Order XLV111 Rule 5(5) of the Civil procedure Rules is not contemplated by the Advocates Remuneration Order. It is therefore, on the face of it, incompetent and a nullity in law.”

There is no reference as contemplated under paragraph 11 of the Advocates Remuneration Order filed before this court challenging the decision of the taxing officer that would grant this court jurisdiction to hear and determine the application seeking to stay the taxation of the Advocates Bill of Costs pending the hearing of such reference. In the circumstances, this court cannot exercise its discretion in favour of the respondents who have not lodged a competent reference to this court from the decision of the taxing officer”.

The Court of Appeal in the above case then went ahead and dismissed with costs an application seeking to stay the taxation, and the application for review, as lacking in merit.

On the basis of the above decisions, by which I am enjoined, by the doctrine of precedence, and which I find to be good law, I have no option but to dismiss the advocate/applicant’s application seeking for review of the taxing officer’s decision made on 27th June 2011.

In the event that I was wrong in arriving at the above drastic decision, after espousing the established principles of law of competence of the application before me and which I highly doubt that I am wrong, I would then proceed to determine whether, assuming the application for review is the ‘reference’ contemplated under paragraph 11 (2) of the Advocate Remuneration Order, whether the taxing officer had jurisdiction to determine the issue of retainer as he did since, as was submitted by the advocate, the parties did not submit on it.

In my view, the Advocates Remuneration Order gives the taxing officer jurisdiction to tax the bill of costs where there is an established client/ advocate relationship, and where there is no dispute as to retainer(See paragraphs 2,10,13 of the Advocates Remuneration Order.

In **Mugambi & Company Advocates Vs John Okal Ogwayo & Another (2013) e KLR** where the issue was that there was no advocate/client relationship between the advocate and the clients, and so the advocate was not entitled to costs from the clients that could be taxed, Waweru J held that the taxing officer did not have jurisdiction to hear and determine the client’s chamber summons dated 28th February 2011 to strike out the advocates bill of costs because the issue being canvassed in the application was whether or not the advocate was entitled to costs in the first place from the clients. The Learned Judge further state, and I concur thus:

“ The jurisdiction of a taxing officer is provided for in the Advocates Remuneration Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2,10,13 of the Remuneration Order, where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court.

“ court” is defined in Section 2 of the Advocates Act, Cap 16 as the High Court. “court” is thus not the taxing officer or Deputy Registrar of the court.”

In the instant case, it is clear that although the parties did not submit on the issue of retainer which

the taxing master based his decision, the parties had nonetheless elaborately canvassed the issue in their affidavits which the taxing master was under a duty to consider as there was no order recorded that the parties had agreed to abandon that line of argument. Nonetheless, the taxing officer did consider that issue of retainer so without the necessary jurisdiction. Under paragraph 13A of the Advocates Remuneration Order, the taxing officer, for the purposes of any proceedings before him, relating to taxation, has power to determine any matter in dispute before him," only in relation to the powers of the taxing officer on the items in the bill of costs and which cannot be interpreted to mean any issue that challenges the taxing officer's jurisdiction to tax the bill of costs.

I am in total agreement that the issue of retainer challenges the taxing officer's jurisdiction to tax the bill as he could only tax the bill after a determination of whether client/advocate being in existence and which issue could only be determined by the 'court.'

The relevant Rule 13A provides:

"For the purposes of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the productions of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him."

In the case of **Abincha & company Advocates vs Trident Insurance Company Ltd (2013) e KLR Waweru J** where the issue was whether the taxing officer had jurisdiction to determine the question whether the advocate's bill of costs was statute barred, the court held that that was an issue that could only be determined by a Judge and that it was the kind of issue that the taxing officer, with the consent of both parties, should have referred to the opinion of the High Court. The Learned Judge further held:

"Only after determination of that fundamental issue by the High court, that is whether or not there were any costs due to the advocate that could be taxed, would the bill of costs be referred back to the taxing officer for taxation. It is found that there were costs that were due to the advocate. I therefore hold that even the taxing officer of the court did not have jurisdiction to hear and determine the main prayers of the Notice of Motion dated 20th February 2012."

In the instant case, I reiterate that the issue of retainer was raised by the defendant in their grounds of opposition and replying affidavit of Waithaka Waihenya contending that the advocate was an employee of the client and earned a salary as per his terms of employment contract hence he could not have acted as an independent advocate in matters where the corporation was sued or suing.

Further, Mr Waihenya challenged the memo that the corporation secretary is alleged to have issued to the advocate employee giving him the authority to represent the corporation and charge legal fees under the Advocates Remuneration Order. That authority and authenticity thereof was seriously challenged by affidavit evidence. Therefore, if the parties later on agreed to abandon that issue, the most prudent way would have been to record a consent for the court's adoption to the effect that the issue of retainer had been abandoned, and not to merely adopt a silent mode by not submitting on it, and expecting that the taxing officer would not allude to it in his decision. In my view, that assumption was misplaced and misconceived. A court of law must consider all the issues raised unless the said issues have been abandoned or compromised by consent of both parties, or by way of a withdrawal of the issue and an order of the court acknowledging the abandonment or withdrawal must be recorded and endorsed by the court, or taxing officer in this case.

In the absence of such endorsement or consent endorsed by the court, the taxing master could not have been expected to know the intentions of the parties, as submissions are only intended to clarify issues of law and fact, not to serve as evidence by the parties.

I therefore find that in as much as the taxing master did rely on the issue of retainer which was not canvassed in the submissions, the said issue was never abandoned by the parties.

Having found that the taxing master had no jurisdiction to determine the issue of retainer, the next question is what orders can this court make?

In my view, this court is entitled to determine the issue of retainer as it is only by so determining that it can establish whether there was client/advocate relationship between H. Oira advocate and Kenya Broadcasting Corporation and therefore whether the bill of costs as filed by the advocate should or should not be taxed. This assessment of the issue of retainer is however, secondary to the main issue which I have already determined that the application herein for review of the taxing officer's decision is in any event, incompetent and is therefore struck out.

Section 2 of the Advocates Act defines a "client" to include:

" Any person who, as a principal or on behalf of another, or as trustee or personal representative, or on any other capacity has power express or implied to retain or employ and retains or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs."

In **Blacks Law Dictionary 6th Edition 1990** the word retainer has been explained as follows:-

" In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. The act of employment is called the retainer. The retainer agreement between the client and attorney sets forth the nature of services to be performed. Costs, expenses and related matters."

Further, in **Strounds Judicial Dictionary of Words and Phrases 1986, VOL 4 at page 2283**, it posited that the retainer is:

" to keep in pay," " to hire"

In **Words and Phrases Legally Defined, 2ND edition, VOL 4 by JB Saunders**, it is explained that:

"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment."

In the instant, case the applicant advocate averred that he was instructed to represent the respondent client in the two matters subject of the dispute in HC Misc. 35& 36/2011. The respondent on the other hand concedes that the instructions were indeed given to the advocate, but that such advocate was under an employment contract with the respondent and that he earned his dues for providing the legal services. The employment contract was annexed as WW1 to the replying affidavit of Waihenya Waithaka sworn on 4th May 2011. It is dated 16th September 1993. The said services of the advocate Mr Hezekiel Oira were terminated on 6th September 2010.

It is worth noting that for the period the advocate served as the legal officer for the respondent Corporation until his services were terminated formally, he never demanded for the legal fees for the services rendered, as none was annexed of his bills of costs.

It was only after his services were terminated that he filed his 2 bills of costs dated 14th February 2011 and filed on the same day, claiming for kshs 2,348,550.00 in HCC Misc. 35/2011 and 387,385.00 in HCC Misc. 36/2011 respectively.

The two bills of costs, carefully examined claim that the respective services were rendered between 15th April 2004 to 12th July 2005 in HC Misc 35/2011 and 15th April 2004 to 28th November 2005 in HC Misc 36/2011 respectively. The curious question that this court asks itself is, did the advocate have to wait for nearly 11 years from the time instructions were given to him, to seek the intervention of

the court to have his bill of costs settled? Another ancillary question is was the advocate ever paid any part of his legal fees for the services rendered to the client from 2004 since there is no acknowledgement of part payment?

This court appreciates that the advocate was in permanent employment of the respondent/client's corporation which is a public statutory body. The court also appreciates that the record shows that in the two matters subject of this dispute, the advocate in the two cases subject of the two bills of costs Nairobi HCC 290/2004 and HCC 305/2004 entered appearances on behalf of the client, filed defences and at all material times used both the physical and postal address of Hezekiel Oira Advocate for the 1st defendant/respondent client herein. Thus broadcasting House, Harry Thuku Road, P.O. BOX 30456-00100 Nairobi, the same address on his letter of appointment and termination except when he filed the bills of costs herein for taxation wherein he used his advocate's contacts.

in the absence of an admission by the client that instructions were given to the advocate as an independent contractor while in the permanent employment of the client corporation /statutory body, In my an advocate in full time employment of a public body which draws its expenditure partly from the exchequer, even if it is a self executing body, cannot be permitted to engage in private practice and draw a separate salary from his employer as that would be inconsistent with his terms and conditions of employment.

Furthermore, when the client objected to the taxation and filed grounds of objection and the replying affidavit of Waithaka Waihenya alluded to herein, there were serious issues raised concerning the internal memo from the then Corporation secretary Mr William Ikapel to the 'legal officer' (name not provided) dated 3rd April, 1998 whose subject was in-house handling of court cases.

The said memo reads:-

“As part of costing, it was resolved by management that you henceforth personally handle court cases for and against the Corporation in your capacity as an advocate. This will include filing of civil cases initiated by the corporation and defend those filed against the Corporation. whereas the Corporation will facilitate all such activities, you will be entitled to professional fees in accordance with the Advocates Act and he Remuneration order there under

William Ikapel

Corporation Secretary

C.C. MD.”

That memo under Ref. KBC/MC/15/7/A/C dated 3rd April 1998 was annexed to the advocate's affidavit in reply to the client/Managing Director's replying affidavit sworn on 4th May 2011. In paragraph 5 of his affidavit, the advocate contended that the memo was a resolution by the management of the Corporation appointing him to represent the Corporation, in his capacity as an advocate and that he was entitled to full fees under the scale as that was an added responsibility.

In my most considered view, while I accept the rationale that added responsibilities should go with more money, in this case, the said memo, which was hotly contested by the Managing Director, commences with the words: “ As part of costing.....”

If the purpose of the added responsibility was to cut down on costs, then it defeats logic that the advocate who was in full time permanent and pensionable employment of a public statutory body and earning his monthly salary, was nonetheless allowed to charge the client employer according to the Advocates Act and Remuneration Order!

Advocates are prohibited from charging fees less than what is provided for under the Advocates

Remuneration Order. If they did so, it would amount to undercutting, which is a professional misconduct. How then would the Corporation cut on costs by restricting the employment of advocates from ‘outside’ who would be expected to charge full fees in accordance with the Advocates Act and Remuneration Order, yet instructing its own in house salaried permanent employees advocate to represent it in his capacity as an ‘advocate’ (as if he was a qua advocate’) and still ask him to charge full fees under the advocates Act and Remuneration Order there under?

If the client intended to cut down on costs, then in the circumstances, it would enhance the employees’ salary and allowances to cater for the extra responsibilities, but not to ask him to charge the Corporation under the Advocates Act and Remuneration Order, while still retaining him on the payroll under his contract of employment.

In my humble view, if the advocate felt that he was inadequately being compensated as the work was overwhelmingly more, he should have asked for a salary increment. In addition, it is my humble view that after his services were terminated in 2010, if there was any unpaid salaries or allowances he was entitled to claim for the same before the Industrial Court (now the Employment and Labour Relations Court) and not file a bill of costs as between advocate and client for taxation.

For the advocate employee to wait until his services with the State Corporation as a full time employee are terminated in 2010 before he could file his bill of costs for taxation of work done on instructions given in 1998, and in the absence of any evidence that from 1998 when the alleged internal memo was issued, he had ever rendered any bill to his client for settlement or that the client had ever made any part payment for the extra services rendered by the advocate employee as an independent contractor, is to attempt not just to steal a match on the respondent/Corporation, but to attempt to defraud the Corporation by some conspiracy.

This court cannot and is not, in view of the above discoveries inclined to believe that the internal memo dated 3rd April 1998 was genuine or that it was sanctioned by the Kenya Broadcasting Corporation Management and if it was, then it was a fraud.

This court frowns on any attempt to defraud public institutions and to my mind, this was such one attempt of conspiracy to defraud the Kenya Broadcasting Corporation, a public statutory body. This court, regrettably, would not make orders that are contrary to public policy.

In as much as the client did employ the advocate to render legal services to the Corporation, in my view, the relationship that existed would not entitle the advocate to charge the ‘client’ employer legal fees as an independent contractor while he was drawing monthly salary which fact is not denied, and if it were not so, this court does not believe that the advocate could have worked for free from 1998-2010 and was only compelled to seek taxation of his bill of costs after concerted efforts to recover it failed. There is no evidence of demand for payment of the legal fees for the services rendered before filing of the said bills in court for taxation.

Further, the Corporation’s Managing Director Mr Waithaka Waihenya did on 4th July 2011 swear an affidavit in response to the advocates affidavit in reply wherein he vehemently denied that there was any such memo in existence at the Corporation or that it was ever created in their records since it had no folio number as was a practice in filing of documents at the Corporation and that it was nothing but a forgery to mislead the court in assisting the advocate enrich himself unjustifiably at the expense of the Corporation. Mr Waihenya was categorical that there was no management resolution authorizing the writing of that controversial memo by Mr Ikapel and that if the court allows it then the alleged author thereof Mr William Ikapel was to be summoned to attend court and be cross examined on the same. Following that further affidavit by Mr Waithaka Waihenya filed on 6th July 2011, the matter dragged on for some time until the ruling of 27th June 2012.

In my humble view, with that kind of serious opposition to the issue of retainer, it would have been expected that if there was any concession by the respondent corporation, then a consent between the parties advocates, with the authority of the client, would have been filed and adopted by the court

before the bills could be taxed by the taxing officer. Instead, what I decipher from the files herein is a conspiracy of silence to simply not to submit on the issue of retainer by either party's advocate and let the court also be silent about it.

Unfortunately for both parties, Mr Ndungu (taxing officer) as he then was had meticulously perused the files and the pleadings and as he was not part of the conspiracy, notwithstanding the absence of jurisdiction to determine that issue as raised, nonetheless addressed it, thereby prompting this application subject of this ruling.

Without sanctioning or clothing the taxing master with jurisdiction to determine that issue of retainer, I must however commend Mr A Ndungu(as he then was) for raising the issue which he should nonetheless have referred to the Judge to determine, instead of striking out the bills of costs on account that there was no retainer.

Another aspect of the advocate's conduct that invites this court to find that the issue of retainer is farfetched and a conspiracy to defraud the Kenya Broadcasting Corporation is that even after filing this application for review, he did not attempt to counter the affidavit of Mr Waihenya and instead capitalized on the fact that he had agreed with the respondents not to raise the issue of retainer that is why in the respondent's advocates submissions they never raised it and that, that is the reason why he did not respond to it.

In addition and with utmost respect to Learned counsel, Mr Oira, it has never been the case that a party would seek a review of the court's own orders under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rule (assuming they are applicable) on account that the court that made the order had no jurisdiction to entertain or determine the matter. That ground for review would be completely outside the jurisdiction of the court as the court that has no jurisdiction cannot be asked to review its own order made without jurisdiction . The taxing officer exercises special jurisdiction of taxing bills of costs filed in the High Court and where there is no jurisdiction, then that is a fundamental point of law that cannot be cured by way of review under Section 80 or Order 45 of the Civil Procedure Act and Civil Procedure Rule respectively. That is the very reason why, as stated elsewhere in this ruling, the Advocates Act and Remuneration Order establishes a special procedure by way of reference to the Judge to make a determination.

In this case, indeed, the burden of proving that there was retainer between the advocate and client lay on the advocate, who regrettably did not discharge that burden to the standard required on a balance of probabilities.

By approaching this court with an application for review , it would have been upon the advocate to demonstrate that notwithstanding the decision of the taxing officer which was made without jurisdiction, there was retainer by procuring affidavits of Mr William Ikapel the then Corporation Secretary who is alleged to have communicated the resolution by management to an unnamed legal officer vide memo of 3rd April 1998 authorizing the conduct of all cases by the in house advocate and authorizing him to charge the legal fees in accordance with Advocates Act and Remuneration Order thereof. The only inference this court can make of such is that had Mr Ikapel been availed to court to clarify what he had allegedly done vide the annexed memo, his response would have been adverse to the advocate's case.

It is trite law that the who alleges must prove (see Section 107 of Evidence Act Cap 80 Laws of Kenya and in this case, it was upon the advocate to prove the existence of that relationship and entitlement to his full legal fees under the Advocates Remuneration Order.

Therefore, the provisions of Section 3(4) of the Evidence Act Cap 80 Laws of Kenya are applicable, that ***"A fact is not proved when it is neither proved nor disproved"*** comes into play.

For the above reasons, I find that the two bills of costs in HCC Miscellaneous Application 53 & 36/2011 are misconceived and an abuse of the process of court and filed with the sole intention of and

conspiracy to defraud a public body .

I would conclude that the main issue in this dispute is not whether or not there was a retainer but whether the respondent/client was liable to pay to the advocate any other fees under the Advocates Remuneration Order besides what he received under his terms and conditions of permanent employment. Public officers are paid a non practicing allowance to cover what they would have earned had they been in active practice, which allowance, if the advocate was not paid, nothing prevented him from claiming.

However, in this case, not even a pay slip was exhibited to show the amount the advocate earned as an in house lawyer and at the time of his departure through his termination on 6th September 2010 as Corporation Secretary. It would be deceitful for a Corporation Secretary or legal officer of a public body to receive a salary and to simultaneously bill his employer as an independent contractor.

The dispute herein brings to the fore a practice in some State Corporations that must be checked, now and not later, and which is likely to be contributing to the demise of most State Corporations funded by tax payers.

I reiterate that the situation would probably be different if the respondent client was a private entity, entering into a contract with an advocate who was engaged in private practice to handle both in house and external legal services to the client at not only an agreed monthly remuneration, but also for providing independent legal services, as was in the case of **Cannon Assurance Ltd vs Anthony Kanai & Another (2014) e KLR Petition No.433/2013**.

In the instant case, there was no disclosure or proof that the advocate took out his annual practicing certificate using his own earnings or whether it is the employer that paid for him. Secondly, there was no disclosure or proof whether the advocate took out a mandatory professional indemnity cover or whether the advocate recovered any costs and the respondent sought from him reimbursement of all other expenses from the advocates salary as provided for in Rule 4(1) of the Advocates Practice Rules where, a non advocate who has employed an advocate is permitted to receive costs from a third party provided that the same are set off against the salary payable to the advocate or reasonable office expenses incurred by the employer in connection with the advocate.

In my humble view, the relationship between the advocate and the respondent herein could only be governed by the employment laws which this court cannot delve into for want of jurisdiction, as ousted by Article 165(5) (b) of the Constitution. However, as the bills filed related to matters that were filed or defended in the High Court and which the High court had unlimited jurisdiction over, this court is well placed to delve into whether the advocate had any cause of action against his employer in his capacity as an “advocate independent contractor.” The advocate in this case having served as a public officer in a public state corporation, his letter of appointment was clear as to the terms and conditions of service including salary scales and yearly increments. He joined as a legal officer and rose to the position of corporation secretary upon which his services were terminated.

In my view, the advocate herein is estopped from attempting to recover legal fees for services rendered to his employer (as if he was an independent contractor) after termination of his employment with the respondent. To allow such bills of costs to be taxed on merit would be assisting a public officer to brazenly breach the law and more specifically, the provisions of Section 11 of the Public Officer Ethics Act, 2003 which was applicable at the time the advocate was engaged in employment of the respondent, which provisions outlaw unfair enrichment by public officers.

The upshot of all the above exposition is that I find no merit in the advocate/applicant’s application for review and proceed to dismiss the same as filed.

I also find that the taxing officer had no jurisdiction to determine the issue of retainer. Nonetheless, I further find that the advocates bills of costs as filed in HC Miscellaneous Application No 36/2013 and 35/2013 do not disclose any cause of action and I dismiss them.

Costs are in the discretion of the court. In this case, the court hesitates to award the respondent any costs for reasons that the court discerns some conspiracy of silence on the issue of retainer between the respective parties' advocate, which issue was strongly advanced by the respondent in its affidavits opposing the taxation of bills of costs, and without any abandonment of that hard stance explicit in the sworn affidavits, the respondent's advocate did not raise it in his submission before the taxing officer, knowing very well that there was no consent filed abandoning the issue, that would go to the jurisdiction of the matter divesting the taxing officer of any power to tax the bills where the issue of retainer was raised.

Further, in the submissions before this court, the respondent did not, whether by design or otherwise, respond to that same issue of retainer which is the subject of the application for review and therefore, this ruling.

In the premise, I order that each party shall bear their own costs of this application and of the bills of costs filed by the advocate for taxation.

I further direct that this ruling be typed and served on the Inspectorate of State Corporations and the Attorney General.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th May 2015

R.E. ABURILI

JUDGE

26/5/2015

26.5.2015

Coram R.E. Aburili J

C.A. Kavata

Mr Mwangi for the advocate/applicant

No appearance for respondent.

Court- Ruling delivered as scheduled in open court.

R.E. ABURILI

JUDGE

26.5.2015

Mr Mwangi- I seek leave to appeal and a copy of the typed ruling.

R.E. ABURILI

JUDGE

COURT- The applicant for make a formal application for leave to appeal and give reasons as leave cannot be granted without reasons advanced. The applicant/advocate to be provided with a typed copy of the Ruling upon payment of the requisite fees.

R.E. ABURILI

JUDGE

26.5.2015