



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS APPLICATION NO. 655 OF 2012**

**IN THE MATTER OF: THE ADVOCATES ACT, CAP 16**

**AND**

**IN THE MATTER OF: TAXATION OF COSTS BETWEEN**

**ADVOCATE AND CLIENT**

**BETWEEN**

**WAMBUGU, MOTENDE & ADVOCATES ..... ADVOCATE**

**VERSUS**

**KAJULU HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**LALJI KARSAN RABADIA ..... 2<sup>ND</sup> RESPONDENT**

**ARVIN JADUA RABADIA ..... 3<sup>RD</sup> RESPONDENT**

**CHANDARAKANT LALJI RABADIA ..... 4<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. Before this Court is the Applicant/Advocates' Chamber Summons dated 12th July 2013 brought under the provisions of **Rule 11 (2)** of the *Advocates (Remuneration) Order, 2009*. The Application seeks to set aside, vary and/or review the decision of the Taxing Officer made on 20th of June 2013. The Applicant requests of this Court to make a finding as regards the issue of retainer as between the Applicant and the Respondents. The Court was also asked to order that the taxation of the Bill of Costs filed herein and dated 25th of October 2012 in respect of items Nos. 1 to 26, be carried out by a different Taxing Officer. The Application was supported on the following Grounds:

**“1. That the Honourable Deputy Registrar erred in law and in fact assuming jurisdiction to make a finding on the issue of retainer whereas the issue of the retainer can only be determined by the high court in an application under section 51 (2) of the Advocates Act.**

2. **The taxing master erred in law and in fact by ailing to find that the respondents were liable to pay legal fees despite overwhelming evidence placed before him notably the letter of offer dated 2<sup>nd</sup> March, 2007 that clearly shows that the respondents agreed to take loan facility from development bank of Kenya limited and further agreed to pay any charges that may fall due.**
  3. **The taxing master erred in law and in fact by failing to find that the respondents were liable to pay legal fees as borrowers in line with the express provisions of paragraph 31 of the Advocates' Remuneration Order.**
  4. **The taxing master erred in law by failing to tax the Bill of Costs according to paragraph 69 of the Advocates Remuneration Order.**
  5. **The taxing master erred in law by failing to apply the applicable principles of taxation and tax the Bill of Costs according to the applicable schedule provided for in the Advocates Remuneration Order.**
  6. **That the taxing master erred in law and in fact by falling to indicate the amount taxed off in the Bills of Cost for each and every item, the taxing master did not tax the Bill of Costs in accordance with the law or at all.**
  7. **The taxing master erred in law by failing to apply the applicable principles and tax the Bill of Costs according to the applicable schedule provided for in the Advocates Remuneration Order.**
  8. **The Taxing Master failed to exercise her discretion judiciously when he held that the Applicant legal fees were payable by M/s. Development Bank of Kenya Limited who were mere financiers in the transaction and despite the express provisions of the law particularly paragraph 31 of the Advocates Remuneration Order.**
  9. **The taxing master erred both in fact and law by failing to take into account the work done and the complexity of the subject matter in arriving at his decision”.**
2. The Application was supported by the Affidavit of **John Wacira Wambugu** sworn on 12th July 2013. The deponent recorded that his firm had been instructed by Messrs. Development Bank of Kenya Ltd (hereinafter “the Bank”) to prepare the necessary security documents to secure a loan facility of Shs. 250 million offered to the first Respondent. Such security involved in the preparation of Charge over Kisumu Municipality Block 6/515 for Shs. 45 million, the Charge Kisumu Municipality Block 7/312 of Shs. 55 million and a Charge over Kisumu Municipality Block 3/312 of Shs. 30 million as well as an all asset Debenture over the assets of the first Respondent to secure the total borrowing. It seemed that the transaction as between the Bank and the first Respondent went off resulting in the filing of the Applicant’s Bill of Costs on 30th October 2012. In the view of the deponent, the Taxing Officer erred in law by failing to tax the said Bill of Costs in terms of paragraph 31 of the Advocates (Remuneration) Order. There was no dispute, according to the Applicant, that the Respondents were borrowers within the meaning of the said paragraph 31. The deponent went on to maintain that that the duty for determination of the issue of retainer is upon the trial Judge after the said Bill of Costs had been taxed under **section 51 (2)** of the *Advocates Act*. The deponent attached to his said Supporting Affidavit relevant documentation relating to the professional work carried out by the Applicant as regards the aborted transaction.
  3. The Respondents filed Grounds of Opposition to the Application dated 19<sup>th</sup> July 2013 and filed herein on 24th July 2013. The same detailed as follows:
    - “1. The application is incompetent since Rule 11 (2) of the Advocates (Remuneration) Order, 2009 does not apply to the ruling delivered by the Taxing Master on 20<sup>th</sup> June, 2013.**

**2. The Applicant's remedy, if any, only lies in an appeal against the ruling dated 20<sup>th</sup> June, 2013 and not a reference under Rule 11 (2) of the Advocates (Remuneration) Order.**

**3. The Taxing Master had jurisdiction to deal with the issue of retainer and the parties having raised and canvassed the issue at length before the Taxing Master without any objection by the Applicant as to jurisdiction, the Applicant is stopped from raising the issue of jurisdiction at this stage.**

**4. The Taxing Master correctly applied the applicable principles and law and reached the correct decision when he held that there was lack of retainer as between the Applicant and the Respondent”.**

4. The Applicant filed its written submissions in Court on 12th November 2013. It recorded the instructions that it had received from the Bank as to the preparation of security documentation for the advancement of Shs. 250 million to the first Respondent. The Applicant maintained that the transaction had stalled at the behest of the Respondents. As a consequence, the Applicant had filed its Bill of Costs on 30th October 2012 for determination of the amount payable by way of taxation. The Taxing gab officer had failed to tax the Bill of Costs on 20th June 2013 citing a lack of retainer being the advocate/client relationship. This was despite the fact that the matter was a conveyancing transaction falling under the category of non-contentious matters relating to Part II of the Advocates (Remuneration) Order. The applicant went on to say that it had filed this Application before Court well in time as provided for under **Rule 11 (2)** of the Order. The Applicant noted that a borrower has an obligation to pay legal fees and referred in this regard to paragraph 31 of the Advocates Remuneration Order. The same reads as follows:

**“31. The costs of a mortgagee for the investigation of title and the preparation, completion and registration of his security or of any discharge or assignment thereof made at the request of the borrower, whether one not the transaction is completed shall be payable by the borrower, but any commission due to the mortgagee's advocate for negotiating the loan shall be payable by the mortgagee.”**

The Applicant maintained that there was no dispute that the Respondents were borrowers within the meaning of the above paragraph. It also pointed to the executed letter of offer dated 2nd March 2007 as exhibited to the Supporting Affidavit as annexure “JMW 3”. It was the view of the Applicant that the Respondents are liable to pay legal fees in line with paragraph 31 as well as per the said letter of offer.

5. The Applicant continued its submissions by turning to the issue of the retainer. It is noted that the Taxing gab officer had refused/failed to tax the said Bill of Costs citing lack of retainer. It maintained that the Taxing Officer lacked the jurisdiction to make a determination on the issue of a retainer. To this end, the Applicant referred to the cases of **Evans Thiga Gaturu v Kenya Commercial Bank Ltd HC Misc Appl No. 343 of 2011**, **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd HCCC No. 532 of 2004** as well as the Ruling of **Warsame J.** (as he then was) in the case of **Ochieng Onyango, Kibet & Ohaga, Advocates v Adopt-A-Light (2007) eKLR**. The Applicant thereafter noted that it was the Respondents' submission that it should have filed an appeal instead of a reference under paragraph 11 (2) of the Advocates (Remuneration) Order. The Applicant maintained that there was no provision for an appeal under the Advocates Act as regards matters touching on advocate/client bills of costs as the Act was a complete statute in itself and thus a party could not invoke the provisions of the Civil Procedure Rules. To this end, the Applicant referred to the Court of Appeal authority being the case of **Machira & Co, Advocates v Arthur K. Magugu (2012) eKLR**. The Applicant quoted in the 3 Judges of the Court further by detailing:

**“Appeals require the typing of proceedings, compiling records of Appeal and hearing of the same in open Court. Reviews, however would require provisions akin 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 bills of costs through references under Rule 11 to a Judge in Chambers.”**

6. The Respondents filed their submissions herein on 19th November 2013. They outlined their Grounds of Opposition to the said Application before Court. The Respondents maintained that by letter dated 15th October 2012, they had requested the Applicant to provide them with evidence of retainer, response to which had been the filing of the said Bill of Costs. The Respondent then listed the documents that were before the Taxing Officer at the time of the taxation and noted that submissions were made on either side. The Applicant had annexed fresh documents to its written submissions without any leave of the Court, which the Taxing Officer ignored. The Respondents went on to say that the issues/question of the retainer had been raised and canvassed at length before the Taxing Officer and that he was perfectly right in making a decision as regards the same. In the Respondents’ view, the assertion by the Applicant that the Deputy Registrar had no jurisdiction to deal with the question of the retainer was wrong. As the Respondents maintained that the question/issue of the retainer had been decided upon by the Taxing Officer, it was their opinion that the Applicant could not raise the same as before this Court except by way of appeal or an application for review, if applicable. The Respondents went on to say that as the Applicant’s Bill of Costs was not taxed by the Taxing Officer, the provisions of paragraph 11 (2) of the Advocates (Remuneration) Order could not apply as the same only dealt with an objection to a decision on taxation and appeal to the Court of Appeal. It is only after taxation that this Court can be asked by way of reference to review the decision of the Taxing Officer. Thereafter, the Respondents referred to the definitions in relation to taxation as per **Stroud’s Judicial Dictionary of Words and Phrases (6th Edition)** and **Black’s Law Dictionary (8th edition)**. The Respondents asked the Court to note that in its Application before this Court there were fresh documents attached to the Supporting Affidavit which were not before the Taxing Officer at the time of the taxation. As regards the law, the Respondents referred this Court to the case of **Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project (2004) 2 KLR 548**. Finally, the Respondents pointed out that even if this Court looked at the merits of the Application before it, there was no evidence whatsoever before the Taxing Officer the linking the Respondents with the instructions which the Applicant alleged to have acted upon. The Taxing Officer had observed in his Ruling that the instructions for the Applicant to act had emanated from the Bank which was not a party to the Bill of Costs before him. There was no evidence, even in the bundle of documents which the Applicant filed after having been ordered to do so, to show that the Applicant had rendered the alleged services.
7. The principles upon which a Court acts as regards references from Deputy Registrars in their capacity as Taxing Officers are well known. The finding of **Ogwang Ag J.** (as he then was) in the **Housing Finance Company** case (supra) is quite clear to this end:

**“It is recognised that the taxation of costs is the responsibility of the taxing master and not of the judge. There will, however, be those instances in which the taxing master is seen to have departed from governing principles of law, in the course of taxation. In such a case an appeal lies to a judge who will consider the relevant issues of law and make appropriate orders.”** (Emphasis mine).

The question here is whether the Applicant has adopted the correct procedure by coming by way of the provisions of **Rule 11 (1) and (2)** of the *Advocates (Remuneration) Order*. Those sub-rules read as follows:

**“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.**

**(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the**

**receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”**

There is no doubt that the learned Taxing Officer Hon. Nyakundi D.R. in his Ruling delivered on 20th June 2013, made a decision. Such was as follows:

**“In the premises of the Bill of costs dated 25. 10. 2012 seeking Ksh. 10,230,461 against the respondents cannot lay for reason of lack of retainer. I would hold and agree with the respondent’s counsel that the remedy is elsewhere and not with the respondents to compensate the applicant for professional legal services rendered.**

**I sustain the objection by the respondents and decline to make any orders as to costs for lack of retainer between the applicant and respondents. Orders accordingly.”**

8. From the Court’s record, it does not seem as if the Applicant gave notice in writing to the Taxing Officer to give his reasons as regards this particular item of taxation to which it objected. It may be that the applicant felt that the said Ruling contained reasons enough. To this end, I am cognizant of the position taken by my learned brother **Ochieng J.** in the case of **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5** in which he held as follows:

**“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”**

In my opinion there are reasons on the face of the Taxing Officer’s Ruling which would make it futile to expect him to furnish further reasons. My learned brother **Odunga J.** put it this way in his finding in the case of **Evans Thiga Gaturu, Advocate** (supra):

**“The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons as happened in the case of *Kerandi Manduku & Company vs Gathecha Holdings Ltd Nairobi (Milimani) HMCA No. 202 of 2005*, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.”**

9. The Application before Court was filed on 15th July 2013 some 25 days after the learned Taxing Officer’s Ruling had been delivered. If the Applicant considered the Taxing Officer’s Ruling contained the reasons, it could file its reference within 14 days from the date of the delivery thereof. If, on the other hand, it was of the view that the Taxing Officer’s Ruling contained no reasons for his decision, then it could have requested the same in writing in which case it would be bound to wait for the same to be issued by the Taxing Officer. I would concur with my learned brother **Odunga J’s** viewpoint again as expressed on page 16 of the **Evans Thiga Gaturu** case as above:

**“If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11 (4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure of the Taxing**

**Master to furnish him with the reasons which, according to the decision in *Kipkorir, Titoo & Kiara Advocates (ibid)*, is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if, even by the time of making the same reference, the said reasons have not been furnished.”**

With the above in mind, it seems to me that this Court would necessarily have to disallow the Applicant’s Chamber Summons dated 12th July 2013 for that reason alone.

10. The Respondents’ Grounds of Opposition held great store on the proposition that the Applicant’s remedy as regards the decision of the Taxing Officer lay in an appeal against the Ruling dated 20th June 2013 and not by way of a reference under **Rule 11** of the *Advocates (Remuneration) Order*. In answer to this submission, the Applicant maintained that there was no provision for an appeal under the Advocates Act on matters touching on an advocate/client Bill of Costs. It submitted to this Court that the Advocates Act was a complete statute in itself and, as such, a party could not invoke the provisions of the Civil Procedure Act or the Rules made thereunder. The Applicant referred this Court to the finding of the Court of Appeal in the aforementioned case of **Machira & Co Advocates**. The Applicant quoted from that case as follows:

**“10. The appellate jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to 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 taxing master’s decisions. Rule 11 thereof provides for ventilation of grievances from such decision 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. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in 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 decisions on advocates’ bill of costs through references under rule 11 to a judge in Chambers”.**

It is the Court’s view that this finding of the Court of Appeal is binding upon it and there is no appeal from taxing master’s decisions except under the provisions of **Rule 11** of the *Advocates (Remuneration) Order*.

11. Even if the Applicant had been in time with its Application before Court, there would have been little merit in the prayers that it seeks based on the Bill of Costs that it has filed dated 30th October 2012. The Applicant freely admits both in its submissions and in the Supporting Affidavit of John Wacira Wambugu sworn on 12th of July 2013 that the transaction for which it was instructed by the Bank stalled. As a result, the Applicant would not have been entitled to the full fees that it claimed by way of retainer based on the provisions of Schedule 1 of the *Advocates (Remuneration) (Amendment) Order, 1997*. **Rule 18** subparagraph (f) of the Order is self-explanatory in that it reads:

**“in respect of any business referred to in subparagraph (a) and (c) of this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assets and instruments vesting property in new trustees, and all other business of the non-contentious nature, the remuneration for which is not herein before provided, the remuneration is to be that prescribed in Schedule V.”**

Quite obviously, the business to which the Applicant was instructed by the Bank related to matters in subparagraph (a). In my view, the Applicant has based its said Bill of Costs largely on Schedule

1 and, as a result in the premises, the learned Taxing Officer was quite right in finding that no retainer applied. The Applicant referred to paragraph 31 of the Advocates (Remuneration) Order as authority for its proposition that the Respondents should bear the costs of a mortgagee whether or not the transaction is completed. That is as may be but this point was covered by the Taxing Officer in his said Ruling dated 20th of June 2013 when he stated:

**“There is no dispute in law that before an advocate raises an issue on costs and expenses to be paid for professional legal services rendered thereto a relationship of engagement has to be established.”**

Later in his Ruling the Taxing Officer considered as to just who issued the instruction to create an employment relationship with the Applicant. In this regard, the Taxing Officer found:

**“The question that begs for an answer on the above instructions is who issued the instruction to create employment relationship to the applicant. Under careful consideration there is no dispute that Ms. Development Bank of Kenya ltd vide letter dated 2.7.2007 pursuant to letter of offer dated 2.3.2007 wrote to the applicant law firm to execute the above instructions. That instruction gave rise to a retainer as between the applicant and Development Bank of Kenya.”**

I cannot accept the submission of the Applicant in this connection when it referred to the **Ochieng, Onyango, Kibet & Ohaga** and **Ahmednasir, Abdikadir** cases (supra) that where there has been no written retainer, the Court may imply the existence of a retainer from the acts of the parties in the particular case. Here the retainer was very clearly put into writing by the Bank. Further, I consider it necessary to remind the Applicant of the observation of **Ojwang Ag J.** in the **Housing Finance Company of Kenya** case as above:

**“Taxation of costs is the responsibility of the taxing master and not of the judge.”**

12.To conclude therefore, I would dismiss the Applicant’s Chamber Summons dated 12th July 2013 with costs to the Respondents. I would endorse the finding of the learned Taxing Officer to the effect that the Applicant’s remedy lies elsewhere and not with the Respondents to compensate it for professional legal services rendered.

**DATED and delivered at Nairobi this 24<sup>th</sup> day of April, 2014.**

**J. B. HAVELOCK**

**JUDGE**