REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC CAUSE NO 394 OF 2008

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

KAGWIMI KANG'ETHE & COMPANY ADVOCATES…… APPLICANT

Versus

PENELOPE COMBOS……1ST RESPONDENT

ANTHONY COMBOS……...2ND RESPONDENT

RULING

Entry of judgment on certificate of taxation

[1] The Applicant, a firm of Advocates has applied through a Motion dated 27th November 2012 which is expressed to be brought under Section 51 (2) of the Advocates Act and Section 1A, 1B and 3A of the Civil Procedure Act for the following reliefs:-

i. **THAT judgment to be entered against the Respondents jointly and severally for the sum of Kshs. 947,485.42 in terms of the Certificate of Taxation dated 27th January, 2009 together with interest thereon at the rate of 14% per annum from 27th January, 2009 until payment in full.**
ii. **THAT the costs of the application be borne by the Respondents.**

Applicant's case

[2] The Motion is based on the grounds set out in the application, namely that:-

i. The Applicant's Bill of Costs dated 21st May, 2008 was taxed on 27th January 2009 and allowed in the sum of Kshs. 947,485.42.
ii. A Certificate of Taxation for the said sum of Kshs. 947,485.42 was issued by the Deputy Registrar on 19th November, 2012.
iii. The said Certificate of Taxation has not been set aside or altered by the Court and is thereby final

as to the costs certified to be due to the Applicant in this matter.

iv. Retainer is not disputed.

v. The Respondents have failed to pay the said sum of Kshs. 947,485.42 to-date and the Applicant is entitled to be awarded interest thereon from the date of Taxation.

vi. It will suit the interests of justice to enter judgment for the sum certified to be due together with interest and costs as prayed herein.

[3] The Notice of Motion is supported by three (3) Affidavits of GEORGE KANG'ETHE: - 1) Supporting Affidavit sworn on 27th November 2012; 2) Further Affidavit sworn and filed herein on 22nd February 2013 and 3) Supplementary Affidavit sworn and filed herein on 13th February, 2014. The Applicant also filed two (2) sets of List of Authorities in support of the application.

[4] The Applicant states at paragraph 2 of the Supporting Affidavit that the Bill of Costs dated 21st May, 2008 was filed and duly served upon the Respondent in respect of services rendered by the Advocate to the Respondents. A copy of the Bill of Costs is attached as exhibit "GK1". The said Bill of Costs was taxed on 27th January, 2009 by the Deputy Registrar Mr. K.L. Kandet at Kshs. 947,485.42 against the Respondents. A copy of the Ruling of the Taxing master is exhibit "GK2" in the said Affidavit. Then a Certificate of Taxation for the said sum of Kshs. 947,485.42 was issued by the Deputy Registrar on 19th November 2012. A copy of the said Certificate is annexed as exhibit "GK3". The said Certificate of Costs has not been set aside or altered by the court and it is thereby final as to the cost certified to be due to the Applicant in this matter and that retainer to act in the matter is not disputed by the Respondents.

[5] The Applicant further deposes at paragraph 7 and 8 of the Supporting Affidavit that he is entitled to be awarded interest at court rates on the taxed costs from the date of taxation until payment in full.

[6] The Applicant appreciates that the Respondents do not dispute that the Applicant Advocate was instructed to act in two cases, namely HCCC No. 440 of 2003 Penelope Combos & Anthony Combos -vs- National Bank of Kenya and HCCC No. 565 of 2005 – O –Lerai Nurseries Limited – vs- National Bank of Kenya Limited. Except, there were other cases wherein the Advocate was instructed to act. What the Applicant has taken issue with the Respondents is their contention that they paid a total sum of Kshs. 5,356,885/- as fees. The Applicant submitted that none of the alleged payments (if any) were made by the Respondent after the taxation of the Applicant's Bill of Costs in both cases. All the payments were allegedly made prior to the filling and taxation of the Bill of Costs as evidenced by the respective dates the Respondents have given.

[6] The Applicant, however, admitted that HCCC Misc. No. 393 of 2008 (Kagwimi Kang'ethe & Company Advocates –vs- Olerai Nurseries) was taxed by the Taxing Master at Kshs.2,864,623.03 and a credit of Kshs.1,500,000/- being monies paid by the client was given. However, the Applicant brings to the attention of the court that the said case is a separate proceeding and it does not concern the current case now before the court. The Applicant also admits that Kimaru J. heard an appeal thereto and by a Ruling dated 15th July 2009 reduced the award. The Ruling of Kimaru J. marked **"AC8"** is clear and self-explanatory. However, the Applicant contends, the said case is a separate and independent proceeding from this particular case before court.

[7] The Applicant disputes the allegation by the Respondents that following the Ruling of Kimaru J. aforesaid and taking into consideration the credit of Kshs. 1,500,000/- paid by the client, the account with O-Lerai Nurseries is in credit of Kshs. 507,846.87 as tabulated in paragraph 14 of the Respondents Replying Affidavit. According to the Applicant that assertion by the Respondent is wrong and misguided. The Ruling of Kimaru J. merely reduced the instructions fees from the total of Kshs. 900,000/- to 730,750/- and also disallowed getting up fees of Kshs. 599,799.54. The Ruling is also expressly clear that the learned judge agreed with the findings of the Taxing Master when he gave credit for Kshs.1.5 Million to the Respondent and declined to

accept the Respondents contention that they had paid the Advocate the total sum of Kshs. 5,535,000/- as alleged in their Affidavits. The said Kshs. 5,535,000/- is the same credit which the Respondents now purport to claim in this case. Nonetheless, it is reiterated that the Ruling of Kimaru J. in the said case has no relevance to this case and does not have the effect of altering the Taxed costs in this case. Therefore, the Respondents' submission that it has fully paid the Applicant and any order to pay a further sum of Kshs. 947,485.42 will enrich the Applicant unjustly is unfounded.

[8] The Applicant's response to the above issues raised by the Respondents is that; 1) the issues raised in the Respondent's Affidavits are irrelevant for the purpose of the application before this honourable court in that the Applicant's Bill of Costs was taxed on 27th January 2009 and allowed in the sum of Kshs.947,485.42 by the Honourable Mr. Kandet; 2) the Respondents being dissatisfied with the Ruling of the Taxing Master filed a Reference/Appeal dated 8th November, 2011 challenging the award of the Taxing Master. The Reference was dismissed with costs on 10th October, 2012 by the Honourable Mr. Justice Mabeya. The court is referred to exhibit **"GK1"** and **"GK2".** Following the dismissal of the Applicant's Reference, the Certificate of Taxation was signed and issued on 19th November, 2012 for the taxed amount of Kshs. 947,485.12. The said Certificate of Taxation has not been altered or set aside by this Honourable court or any other court of competent jurisdiction and it is thereby final as to the costs certified to be due to the Applicant in this matter. To-date, the Respondents have not paid a single cent to the Applicant towards settlement of the amount certified to be due in the Certificate of Costs dated 27th January, 2009. All the payments allegedly made by the Respondents as contended in the Replying Affidavit were made prior to the filing and Taxation of the Applicant's Bill of costs and due credit was given to the Respondents by the Deputy Registrar. The Ruling of the Taxing Master dated 27th January 2009 shows that the issue of the alleged payments was raised by the Respondents during the taxation and the Taxing Master considered the issue and he allowed a credit of Kshs. 400,000/- only but declined to give full credit of the alleged payments of Kshs. 5,535,000/- for lack of sufficient proof by the Respondents. The Respondents did not raise the issue of the alleged payments and/or credit before the judge but they now purport to do so at this late stage. The Applicant submitted that the issue is res judicata and cannot be re-opened. Furthermore, the issue of the alleged credits and/or payments were yet again raised by the Respondents in **HCCC Misc. No. 393 of 2008** at the taxation level and the Taxing Master (Hon. V.W Wandera) considered the issue and gave a credit of Kshs. 1,500,000/- only to the Respondents as shown in his Ruling dated 29th January, 2009 attached as **exhibit "AC7"** in the Replying Affidavit filed herein by the Respondent. The Respondent being dissatisfied with the Ruling of the Taxing Master in **HCCC Misc. No. 393 of 2008** filed a Reference/Appeal by way of Chamber Summons dated 24th February, 2009 challenging the award. The Respondents also raised the same issue of the alleged payment/credits amounting to Kshs. 5,535,000/- and further pleaded that the Taxing Master should have given full credit for the same. Please refer to the exhibit marked **"GK4"** being a copy of the Chamber Summons dated 24th February, 2009.

[9] The Applicant referred the court to the contents of the Applicant's Replying Affidavit filed on 13th March, 2009 in opposition to the Reference dated 24th February, 2009 attached as exhibit **"GK 5"** wherein it explained the reasons why the Respondents were not entitled to the alleged credit. The said Reference in **HCCC Misc. No. 393 of 2008** was partially allowed by the Hon. Mr. Justice L. Kimaru in his Ruling dated 15th July, 2009 (exhibit "AC8" in the Respondent's Replying Affidavit) and he reduced the instructions fees and getting up fees. However, the Honourable judge declined to give the Respondents credit for the alleged payments amounting to Kshs. 5,535,000/- for reasons, inter alia, that it was clear from the Advocate to undertake various legal work other than the present suit and the client cannot therefore claim that the entire amount that was paid to the Advocate was in respect of fees in that suit. The Respondents did not Appeal against the said Ruling and the same is binding to-date.

[10] In view of the foregoing, the Applicant submitted that it is manifestly clear that the issues

of the alleged payments raised in the Respondent's Affidavits has previously been considered and disallowed by the taxing master at the taxation level. The issue was also raised, canvassed and decided in HCCC Misc. No. 393 of 2003 and the same is res-judicata and cannot be re-opened again as purported. In line with the finding of Kimaru J., the Respondents cannot seek full credit for the monies paid to the Advocate as fees for this particular file yet they have been given credit separately in each file as reflected in the Bill of Costs filed in each case. There is no any genuine dispute on accounts, neither is it necessary to order a reconciliation of accounts as alleged in paragraph 21 of the Respondent's Affidavit since the Respondents have not demonstrated that they have paid any money towards settlement of the Certificate of Costs issued in this suit.

[11] The Applicant reproduced Section 51 (2) of the Advocates Act Cap 16 of the Laws of Kenya as follows:-

> "**The Certificate of the taxing master by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of costs covered thereby, and the court may take such order in relation thereto as it thinks fit, including, in a case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."**

[12] According to the Applicant, section 51 (2) above, a Certificate of costs is final as to the amount of costs indicated therein and the court has power to enter judgments upon a Certificate of taxation if an Applicant satisfies two (2) conditions, namely; 1) The retainer of the Applicant is not disputed; and 2) The Certificate of costs has not been set aside or altered by a competent court. The Applicant is of the view that it has fulfilled all the conditions of section 51 (2) and is entitled to judgment as prayed for in the Notice of Motion filed herein. Retainer of the Advocate/Applicant is not disputed by the Respondents. To wholly credit previous payments to this file and/or HCCC Misc 393 of 2008 amount to double credit. The Respondents did not raise in the Reference/Appeal dated 8th November, 2011 the issue of the alleged payments and/or credit as they now purport to do in their opposition to the motion now before court. It is not within the jurisdiction of the judge to re-open and /or consider the issue of accounts at this level. That is the jurisdiction of the Taxing Master and the Respondents submissions were duly considered and declined before the Deputy Registrar who proceeded to give credit for Kshs.400,000/- only.

[13] The Applicant relied on the case of **MACHARIA NJERU ADVOCATE v COMMUNICATIONS COMMISSION OF KENYA HCCC NO. 1029 OF 2002,** wherein **Njagi J.** found as follows at page 12 of the Ruling:-

> **"Counsel for the Defendant argued that since the matter had been referred to a judge under Rule 11 of the Advocates (Remuneration) Order, there was a dispute as to the amount. Unfortunately this view does not enjoy the support of any provision in the law. For one, reference of the matter to a judge does not constitute a setting aside of the certificate, nor does it amount to an alteration of the certificate. The words of Section 51 (2) are very clear. Since the certificate has neither been set aside nor altered by the court and since there has been no order of stay, it is as clear as daylight that this certificate is final as to amount of costs covered thereby. And seeing that it is final as to amount, it cannot be said at the same time that there is a dispute as to that amount. Saying so would amount to a contradiction of express and mandatory statutory provisions.**
>
> **In these circumstances, I find that the Plaintiff's claim is in respect of a liquidated demand and it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff as certified in the certificate of costs. I also find no triable issue in respect of that certificate which derives its sanctity from law itself"**

And also the case of **AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES v NATIONAL BANK OF KENYA LIMITED – HCCC MISC. APPLICATION NO. 752 OF**

2004, the **Azangalala J (as he then was)** held that if a client against whom a Certificate of costs had been issued wished to prevent judgment being entered, he had the option of either staying the taxation or filing a Reference before a judge and seeking a stay of further proceedings. He held at page 7 and 8 of the Ruling as follows:-

> **"The client's complaints in my view are not an answer to the Advocates' application which clearly meets the requirements of Section 51 (2) of the Advocates Act. The complaints should have been made before the Deputy Registrar at the time the advocate/client's bill of costs was taxed. The client did not breathe a word of the present complaints at all. The client had another option. If it believed that no fees were due to the advocates on the basis of an agreement between it and the advocates, it could have filed a suit for a declaration to that effect even before the said bill was taxed. It could have sought stay orders in the suit. The client had yet another option. It could have filed a reference to the High Court and sought stay of further proceedings including these proceedings. None of the above options were taken by the client. It participated full in the taxation without raising the issues now being raised. In my view the client goofed. I would agree with Honourable L. Njagi J's interpretation of Section 51 (2) of the Advocates Act in Macharia Njeru Advocate –vs- Communications Commission of Kenya HCCC No. 1029 of 2002 (UR) and Nyakudi and Company Advocates –vs- Kenyatta National Hospital Board HCCC No. 416 of 2004 (UR). The Learned Judge held that the wordings of the said Section were very clear that where a certificate of taxation had neither been set aside nor altered by the court and where there was no order of stay, the certificate was final as to amount of costs covered thereby and to allege a dispute at summary judgment stage would amount to contradiction of express and mandatory statutory provisions."**

[13] The Applicant also relied on the authorities below:

1. **MAMICHA & COMPANY ADVOCATES v MOTEX KNITWEAR MILLS LTD.HCCC MISC. APPLICATION NO. 426 OF 2004 – NAIROBI**
2. **MEENYE & KIRIMA ADVOCATES v KENYA COMMERCIAL BANK LTD**

   HCCC MISC. APPLICATION NO. 946 OF 2002 – NAIROBI

3. **KALONZO MUSYOKA AND PAUL M. WAMBUA(PRACTICING AS MUSYOKA & WAMBUA ADVOCATES) v RUSTAM HIRA (PRACTICING AS RUSTAM HIRA ADVOCATES) – HCCC MISC. APPLICATION NO. 444 OF 2004**
4. **AHMEDNASIR ABDIKADIR & CO. ADVOCATES v NATIONAL BANK OF KENYA LIMITED – HCCC MISC. APPLICATION NO. 752 OF 2004.**
5. **D. NJOGU & COMPANY ADVOCATES v CITY COUNCIL OF NAIROBI HCCC MISC. APPLICATION NO. 921 OF 2003.**
6. **MACHARIA NJERU ADVOCATE v COMMUNICATION COMMISSION OF KENYA HCCC NO. 1029 OF 2002 – NAIROBI.**

[14] The Applicant, therefore, submitted that a mere allegation that accounts are in dispute does not constitute a setting aside, alteration or stay of the Certificate of costs which was issued by the Deputy Registrar on 27th January, 2009 in this matter. The Reference filed by the Respondents was dismissed by Mabeya J. on 10th October, 2012 and the Respondents have not appealed, stayed or set aside the said Ruling. The certificate is therefore final and judgment should be entered against the Respondents for the sum of Kshs.947,485.42 together with interest at court rates from the date of the Certificate until payment in full. The Applicant also prayed for the costs of the application.

The Respondents did not take it lying down

[15] The Respondents vehemently opposed the application and made submissions: That the

Applicant represented them in HCCC 440 of 2003, Penelope Combos and Another v National Bank of Kenya in which the respondents sought to restrain National Bank from selling their matrimonial home. A disagreement arose between the Respondents and the Applicant and the Applicant filed their bill of costs. The taxing master delivered his ruling on 27th January, 2009 awarding Kshs. 947,485.42 to the Applicant. The Applicant is now seeking for orders that judgment be entered against the Respondents for the sum of Kshs. 947,485.42 with interest of 14% from the date of judgment until payment in full.

[16] The Respondents opposed the application on the grounds that there needs to be a reconciliation of accounts. The Applicant has failed to deduct amounts that were paid to him and there are therefore substantial issues for the Court to determine which it cannot do without reconciliation on accounts. The subject of accounting for the amounts received by the Applicant has been an ongoing dispute between the parties and indeed is what drove the Respondent to request the Applicant to file his bill of cost. In the glaring absence of a clear and proper explanation for how the funds were used, the Respondents' claims raise questions as to the Applicant's breach of their fiduciary duty to their client. These issues are not irrelevant and it would be unjust to turn a blind eye to them, especially since they touch on the final award that the Court may issue to the Applicant. The Respondents submitted that they have demonstrated in the replying affidavit dated 19th February, 2013 and further affidavit dated 7th February 2014, by way of receipts, banks statements and copies of cheques issued, that the Applicant herein has received a total of Kshs. 5,535,000 as a enumerated in paragraph 5 and 6 of the Respondent's replying affidavit signed on 19th February, 2013 and in the Respondent's further affidavit dated 3rd February, 2014 and the exhibits therein. As an explanation to the amounts received, the Applicant relies on a replying Affidavit signed on 13th March, 2009 filed in Miscellaneous Cause 393 of 2008 Kagwima Kang'ethe versus O-lerai Nurseries Limited and attached as exhibit GK5 to his further affidavit to the present application. At paragraph 12 of the said affidavit the Applicant states that he represented the Respondent in four matters, namely: HCCC No. 565 of 2005 (Olerai Nurseries Limited versus National Bank of Kenya Limited), HCCC No. 440 of 2003 (Penelope Combos versus National Bank of Kenya Limited), Civil Application No. NAI 287 of 2007 (Penelope Combos and Another versus National Bank of Kenya Limited). In the same affidavit, the Applicant enumerates the payments received for the four matters. In summary the Applicant admits to having received a total of Kshs. 3,050,000/- in respect of the four matters. From the above, it is evident that there is an amount of Kshs. 3,635,000/- that the Respondent paid to the Applicant that is yet to be accounted for. The reasons brought forward by the Applicant for not crediting the same vary from blatant denial of having received any payments, to admissions of having received part payment. In all, the Applicant's contentions have previously hinged on the fact that Respondent was unfortunately, but to the Applicant's advantage, not able to prove that the payments had been made. A situation the Respondent has gone to great pains to clarify to enable this court to come to its decision.

[17] The Respondents submitted further that they do not deny the fact that instructions were giving to the Applicant to act in various matters. But the Court should note that issues between the parties went sour after the Respondent requested for an explanation in relation to what the deposits were being utilized for. This prompted the Respondent to ask the Applicant to file his bill of cost. A request made with the belief that amounts deposited with the Respondent would be deducted. To this end, the Respondent had in their personal capacity and through their Advocates, asked the Applicant to account for the deposits that he had received (Exhibit AC 9 and AC 10) which did not reflect in the bills prepared by the Applicant. There is sufficient proof that payments were received. An explanation as to how all the funds were utilized has not been provided. Therefore, the answer to the question as to whether there is a dispute on accounts is clearly in the affirmative.

[18] The Respondents posit that there is need for a reconciliation of accounts as the apportionment of the deposits as provided by the Applicant do not equate to the deposits the Respondents paid. The Court may indeed find the certificate of the taxing master final as to the amount of costs; however, the respondents are not asking the Court to re-visit the issue of costs;

they are instead praying for a reconciliation of accounts in order that the Court may set-off or take into account, in issuing its judgment, amounts demonstrated to have been received by the Applicant. Section 51 (2) provides that "The court may make such order in relation thereto as it thinks fit…' which allows the Court in certain circumstances to use its discretionary powers. And Court in the present circumstances is urged by the Respondents to use its said powers to reach a decision that will not unjustly benefit one party. The deposits which were made towards the Advocate's fees are disputed and can only be taken into account in a reconciliation of accounts. The Court should arrive at a decision that the Applicant reconciles his account or in the alternative files a suit in which both parties will be at liberty to canvass their respective positions. The Respondents contend that they have raised serious issues with regard to accounts between them and their erstwhile Advocates, the Applicant herein. Injustice will be caused should the court not order for a reconciliation of accounts or for a suit to be filed. Waweru J in **MENYEE AND KIRIMA ADVOCATES v KENYA COMMERCIAL BANK** stated:

> **'… the Client herein has raised serious issues with regard to accounts as between it and the Advocate … Where it appears to the Court that issues have been raised that ought to be investigated and ventilated in a proper trial, then the Court ought to refuse to enter judgment under subsection (2) of section 51 of the Advocates Act, even if there is no dispute as to retainer'.**

The Respondents submit that neither party will suffer any substantial loss if the Court were to order reconciliation or if this matter were to be canvassed by way of suit. The overriding objective of the Civil Procedure Act is to facilitate a just, expeditious, proportionate resolution of disputes. The Court in **CALTEX OIL LIMITED v EVANSON WANJIHIA** had this to say regarding sections 1 A and 1 B of the CAP 16

> **"…the overriding objective provides that the purpose of the two Acts and the rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims, the principal aim is for Court to act justly in every situation either when interpreting the laws or overriding its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective."**

The Respondents stated that because they had no alternative, they seek recourse from this Honourable Court which they believe will come to a decision that would encourage transparency and accountability in the legal profession and more specifically as pertains to the receipt of and use of deposits. Therefore, they urged this Honourable Court to order for a reconciliation of accounts.

COURT'S RENDITION

Strained relationship

[19] The tone and pitch of the submissions of the parties is reminiscent of a relationship which went awry sour. But it is encouraged that parties who were once in a fiduciary relationship of Advocate-client should always maintain a dignified mood. I hope that advice will be heeded to by the parties herein and other who may be in similar situation.

Issues

[20] Quite apart from that digression, the Applicant is asking the court to enter judgment in accordance with the Certificate of Taxation dated 27th January, 2009 together with interest thereon at the rate of 14% per annum from 27th January, 2009 until payment in full. The Respondents on the other hand, have made a particularly pointed submission that:

> **The Court may indeed find the certificate of the taxing master final as to the amount**

> **of costs; however, the respondents are not asking the Court to re-visit the issue of costs; they are instead praying for a reconciliation of accounts in order that the Court may set-off or take into account, in issuing its judgment, amounts demonstrated to have been received by the Applicant.**

Accordingly, the two submissions delineate the issues for determination, i.e. whether the court should enter judgment as per the Certificate of Costs issued by the taxing master, or order a reconciliation of account between the parties herein. But there are specific arguments which need settlement in this decision.

[21] The issues herein are governed by the Advocates Act and revolve around section 51(2) in particular, for it is upon that section that the application before me is premised. Section 51 (2) of the Advocates Act of the Laws of Kenya provides as follows:-

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

[22] Section 51(2) of the Advocates Act and case law, indicate that the court may refuse to enter judgment on a Certificate of Costs: 1) Where there is a dispute on the retainer; or 2) Where it appears to the Court that issues have been raised that ought to be investigated and ventilated in a proper trial, even if there is no dispute as to retainer**.** See Waweru J in **MENYEE AND KIRIMA ADVOCATES v KENYA COMMERCIAL BANK.** There is no dispute on the retainer. What is in issue is whether a reconciliation of accounts should be ordered by the court or be canvassed in a substantive suit. It seems the Respondents are taking advantage of the second limb above; **Where it appears to the Court that issues have been raised that ought to be investigated and ventilated in a proper trial, even if there is no dispute as to retainer.** And they have placed great reliance on the decision of Waweru J in the case of **MENYEE AND KIRIMA ADVOCATES v KENYA COMMERCIAL BANK.** I should, however, quote the entire passage being relied upon by the Respondents for completeness:

> **Having said that, however, it is clear that the Client herein has raised serious issues with regard to accounts as between it and the Advocate. The Advocate has admitted that he has retained money belonging to the client. The Client asserts that it is entitled to raise a set-off on account of this money. In my view the Client is so entitled, and it can do so only in a substantive suit commenced by plaint. Where it appears to the court that issues have been raised that ought to be investigated and ventilated in a proper trial, then the Court ought to refuse to enter judgment under subsection (2) of section 51 of the Advocates Act, even if there is no dispute as to retainer. The present is such case.**

[23] In the above case of **MENYEE AND KIRIMA ADVOCATES v KENYA COMMERCIAL BANK,** the Client raised serious issues with regard to accounts as between it and the Advocate. The Advocate admitted that he had retained money belonging to the client. And, therefore, the Client insisted it was entitled to raise a set-off on account of the money held by the advocate. On that basis, the learned Judge took the view that the Client was so entitled, and could do so only in a substantive suit commenced by plaint. Of course such contentious matters require full scale evidence and consideration of merit which is not possible in a summary procedure provided under section 51(2) of the Advocates Act. But the question would be; is the present case a case where a substantive suit is necessary?

[24] The present case is different altogether in that the alleged payments to the advocate in the sum of Kshs. 5,535,000 were raised and became the subject of almost all the taxations and References on taxation between the Applicant and the Respondents; the claims were considered by

the respective courts and appropriate decision was made in relation to the issues raised. Credits were given on the items which were proved and other claims were disallowed. These were happening in different causes on taxation of bills relating to different cases handled by the Applicant. A reference on the taxation which is the subject of this application was filed but was dismissed by Mabeya J. Of importance, Respondents did not miss a chance to raise the issue of payments to the Applicant in fora that I think were appropriate and right. On the subject of taxing of payments made to the advocate before the taxation of the bill of costs, I am content to adopt a work of this court in the case of **NBI HCCC NO 723 OF 2012 NJERU NYAGA & CO. ADVOCATES v GEORGE NGURE KARIUKI** where it rendered itself thus:.

> **Another important issue: Any payments made to the advocate are usually taxed off by the taxing master during the taxation. And any dispute thereof does not constitute a dispute on the retainer; such disputes on the payments are to be determined by the taxing officer under the powers in Paragraph 13A of the Advocates (Remuneration) Order which provides as follows:**
>
> > **13A For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper 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.**

[25] The fact that the issue of payment to the advocate was raised by the client in the taxation or in a reference, and a decision was made one way or other, different principles kick in. The situation becomes a kind of a squirm, and the court may not tell which part of the payments, if at all, related to this case or the other. Ultimately, the law will prevail and the court may not be able to entertain the issues being raised by the Respondents in these proceedings. Perhaps, the Respondent may have to resort to the general right to account, and demand for a final account from their advocates rather than ask the court to order a reconciliation in such unclear situation. That process is completely apart from the one obtaining in these proceedings. On that premise, the court it is not shown to the satisfaction of the court that there exists serious issues of accounts between the parties herein which would prevent the court from entering judgment pursuant to section 51 (2) of the Advocates Act. I must, however, commend the Respondents for having acted accordingly and avoided chastisement as in the case of **AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES v NATIONAL BANK OF KENYA LIMITED – HCCC MISC. APPLICATION NO. 752 OF 2004,** where Azangalala J (as he then was) stated:-

> **"The client's complaints in my view are not an answer to the Advocates' application which clearly meets the requirements of Section 51 (2) of the Advocates Act. The complaints should have been made before the Deputy Registrar at the time the advocate/client's bill of costs was taxed. The client did not breathe a word of the present complaints at all. The client had another option. If it believed that no fees were due to the advocates on the basis of an agreement between it and the advocates, it could have filed a suit for a declaration to that effect even before the said bill was taxed. It could have sought stay orders in the suit. The client had yet another option. It could have filed a reference to the High Court and sought stay of further proceedings including these proceedings. None of the above options were taken by the client. It participated full in the taxation without raising the issues now being raised. In my view the client goofed. I would agree with Honourable L. Njagi J's interpretation of Section 51 (2) of the Advocates Act in Macharia Njeru Advocate –vs- Communications Commission of Kenya HCCC No. 1029 of 2002 (UR) and Nyakudi and Company Advocates –vs- Kenyatta National Hospital Board HCCC No. 416 of 2004 (UR). The Learned Judge held that the wordings of the said Section were very clear that where a certificate of taxation had neither been set aside nor altered by the court and where there was no order of stay, the certificate was final as to amount of costs covered thereby and to allege a dispute at summary judgment stage**

would amount to contradiction of express and mandatory statutory provisions."

[26] I too will hold in line with the above holding that:

> **I would agree with Honourable L. Njagi J's interpretation of Section 51 (2) of the Advocates Act in Macharia Njeru Advocate –vs- Communications Commission of Kenya HCCC No. 1029 of 2002 (UR) and Nyakudi and Company Advocates –vs- Kenyatta National Hospital Board HCCC No. 416 of 2004 (UR). The Learned Judge held that the wordings of the said Section were very clear that where a certificate of taxation had neither been set aside nor altered by the court and where there was no order of stay, the certificate was final as to amount of costs covered thereby and to allege a dispute at summary judgment stage would amount to contradiction of express and mandatory statutory provisions."**

The upshot is that I find and hold that the complaints by the Respondents do not yield much at this stage and cannot be said to be real disputes in accounts for which the court could refuse to enter judgment under section 51(2) of the Advocates Act. A reconciliation of accounts between the parties herein is, therefore, not a feasible option in law. And, accordingly, I allow the application dated 27th November 2012.

[27] But before I make the specific final orders, I should state that I have allowed the prayer for costs and interest purely on the basis of the law. On costs see the following rendition of this court in **NBI HCCC NO 191 OF 2008 ORIX** where the court stated:

> **In any event, even if costs had not been awarded the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do. See SUPERMARINE HANDLING SERVICES LTD. v KENYA REVENUE AUTHORITY [2010] eKLR, ALEZANDER – TRYPHON DEMBENIOTIS v CENTRAL AFRICA CO. LTD [1967] E.A 310 and DEVRAM MANJI DALTANI v DANDA [1949] 16 EACA 35,**

[28] On Interest and when it should start to run see the case of **PREM LATA v PETER MUSA MBIYU [1965] E.A 592** that:

> **"… The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. <u>Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment…"</u>[underlining mine]**

Across the border, the High Court of Uganda in the case of **PAN AFRICAN INSURANCE COMPANY (U) LTD. v INTERNATIONAL AIR TRANSPORT ASSOC. (HCT-00-CC-CS-0667 OF 2003)** was as categorical that,

> **"As regarded interest, the principle is that where a party is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another party, he should be awarded interest from the date of filing the suit. <u>Where however, damages does not arise until they are assessed, in such event, interest is only given from the date of judgment."</u>[underlining mine]**

ORDERS

[29] I, therefore, make the following orders:

> **a) THAT judgment is entered against the Respondents jointly and severally for the sum of Kshs. 947,485.42 in terms of the Certificate of Taxation dated 27th January, 2009 together with interest thereon at the rate of 12% per annum from 27th January, 2009 until payment in full.**
>
> **b) THAT the costs of the application shall be borne by the Respondents.**

Dated, signed and delivered at Nairobi this 19th day of June, 2014

F. GIKONYO

JUDGE