



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO.472 OF 2013; MISC. NO 466 OF 2013 AND MISC. 520 OF 2013;**

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA AND THE ADVOCATES (REMUNATION) ORDER, 1997 LEGAL NOTICE NO.550 OF 11/12/1997 AND LEGAL NOTICE NO.159 OF 17/11/2006**

**MWANGI KENGARA & COMPANY ADVOCATES .....ADVOCATE**

**VERSUS**

**INVESCO ASSURANCE & COMPANY LIMITED.....CLIENT**

**ARISING FROM**

**THE CHIEF MAGISTRATES COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 1833 OF 2005**

**JOSEPH MUYA WAWERU.....PLAINTIFF**

**VERSUS**

**DAVID MANYI.....1<sup>ST</sup> DEFENDANT**

**PAUL KIMANI.....2<sup>ND</sup> DEFENDANT**

**This is a consolidated ruling of Misc. No. 466 of 2013; Misc No. 520 of 2013 and Misc. No.472 of 2013.**

**CONSOLIDATED RULING**

The application before this Court is the Chamber Summons dated 18<sup>th</sup> December 2013 brought under Rule 11 (2) of the Advocates (Remuneration) Order, the Advocates seeking for orders that the decision of the taxing officer made on 24<sup>th</sup> October 2010 be set aside in its entirety and the Bill of Costs dated 29<sup>th</sup> April 2013 be remitted back to any other taxing officer for taxation/assessment. The applicant also seeks costs for this application. This application is premised on the grounds stated on the face of the application and salient among them was that the taxing officer’s decision was unreasonable and without any legal basis and foundation in law for laying her decision on the provisions of Order 9 Rule 13 (1) of the Civil Procedure Rules in a taxation matter which provisions do not apply to taxation. That the taxing officer

was wrong in law and in principle in finding that the advocate was still on record in a matter that judgment had already been made and that the taxing master's decision that required the applicant to first cease acting before the taxing of the bills of cost was wrong. That the taxing master failed to exercise her powers and discretion vested in court by Rule 13A of the Advocates Remuneration Order before arriving at its decision occasioning grave injustice.

This application was by the supporting affidavit of Mercy Nduta Mwangi an advocate who has been on record for the respondent who states that after a ruling was delivered on 24<sup>th</sup> October 2013 dismissing the bill of costs that she had filed, she wrote to the taxing master objecting to the ruling made which solicited a response from the taxing master who informed her that the reasons the applicant sought for in the dismissal of the bill of costs were stated in her ruling. She also averred that the judgment that gave rise to the taxation was entered on 7<sup>th</sup> March 2013 as borne out by the bundle of correspondences from the plaintiff and from her firm to the respondent and that if the taxing officer was dissatisfied with the materials that had been placed before her she should have called for the original file to establish the facts. She further averred that judgment was entered in CMCC No.1833 of 2005 in the sum of Ksh 1,222,850 plus costs and interest. She believes that there is no requirement under the Advocates Act for an advocate to cease acting before taxation of an Advocate /Client Bill of Costs.

In opposing this application, the defendant through its Claims Manager Joshua Orangi deponed filed its Replying Affidavit. He stated that the learned taxing master was right in law in staying the applicant's bill of costs dated 29<sup>th</sup> April 2013 which decision was reasonable and within the law. That the bill of costs was filed before the matter in Milimani CMCC No 1833 of 2005 was concluded therefore the applicant ought to have filed an application to withdraw from acting on behalf of the respondent before filing her bill of costs which was largely based on presumptions therefore the taxing master was right in finding that the applicant ought to have ceased acting for the respondent before filing her bill of costs. That the taxing master was right in considering the Respondent's submissions which the applicant substantively responded to in her submissions thus accorded all parties equal chances to be heard. He also contended that the matter herein was not consolidated with any other as alleged by the applicant. The ruling in HCC Mic Apln. No 466,472 and 473 of 2013 were similar but each was arrived at based on individual circumstances and merits.

This application is also replicated in **Misc. 466 of 2013**, and **Misc. 520 of 2013**.The decision in this ruling will also be the decision in the stated applications.

Having carefully considered the pleadings, the affidavits in support and against the reference herein, the oral and written submission by counsel for both the Applicant and the Respondent and case law, the main issues for determination are whether the applicant in this matter is entitled to her costs; and if so, at what stage can she tax her bill?

It is not disputed that the relationship between the applicant and Respondent was that of retainer. The nature and duration of a retainer were explained in **Halsbury's laws of England, Paragraph 98, Volume 36, 3rd Edition** that, "*The general rule is that a solicitor when retained by a client undertakes to finish the business for which he is retained. The retainer is, speaking generally, an entire contract, that is to say, a contract to do certain business, to finish that business, and to be remunerated at the completion of the business; the consequence is that remuneration cannot be recovered on a quantum meruit where the solicitor withdraws without legal justification, nor, of course can costs be recovered in these circumstances ... but the rule is not an absolute one and yields to special circumstances. Thus a retainer may expressly or by necessary implication fix the period for which it is to endure, or the nature of the business may justify an inference, in the absence of express agreement, that the parties did not intend the retainer to be a contract to finish the business ...*" The above principles were stated in the case of **Underwood, Sone and Piper V. Lewis [1894]2 QB 306**, where it was held that, "*When a client employs a solicitor in a lawsuit, he does not employ him to take merely on step in the action and to wait for fresh instructions before taking another, and so on. The solicitor is employed to act on behalf of the client in the suit. ....It was the view taken by judges in former days that in the case of an ordinary retainer of a solicitor in a lawsuit without any specific terms, the implication was that the contract was to carry on the litigation to its conclusion. A retainer of a solicitor in a common law suit has always been held to*

*be one entire contract, so that, unless some recognized exception to the rule arises, the solicitor cannot sue for his bill of costs until his obligation under the contract has been fully fulfilled ...” Further , A. L. Smith L.J. held that ,“If there is one thing clearer than another from the authorities ... it is that the contract of a solicitor with his client upon a retainer ... is an entire contract, and it is his duty to go on with the action until the litigation is finished.”*

On the facts of this case, the applicant was retained by the Respondent retained to conduct various cases on its behalf and she has not denied that she there was a retainer between her firm and the Respondents. Further there has been no indication from the applicant in her pleadings that she has ceased acting. Her claim is that the cases which she is seeking taxation had been concluded but she has not shown evidence that these matters were indeed concluded. Having perused the pleadings the applicant filed and the annexures therein what this court found were written submissions filed by both the plaintiff and defendant. Why then couldn't the applicant file a copy of the judgment and decree? On the other hand the Respondents have insisted that the matters have not been concluded and since they were pending in court she ought to have ceased acting in these matters before filing for taxation.

This court is of the view that where an advocate is under a retainer and the relationship of the advocate and client is severed, the advocate is at liberty to fix and tax her bill of costs. The Advocates Act unlike the Civil Procedure Rules does not provide for any requirement that an advocate should first cease acting before filing her bill of costs. In the case of **Macharia and Co Advocates –vs- Magugu [2002] EA** Ringera J(as he then was) held that, *“Paragraph 62A of the Advocates Remuneration Order does not bar an advocate from taxing his bills against his client for whom he had ceased acting before the conclusion of the suit. The Principle is that no litigant should be unduly burdened with costs incurred as a result of change of advocates by the adverse party”* This court also notes that the Advocates Act together with the Advocates Remuneration Order is a complete code and there is no provision that requires the invoking of the Civil Procedure Rules. This fact is buttressed further in the case of **Republic-vs- Public Procurement Complaints Review and Appeals Board, ex parte Invesco Assurance Co. Ltd Civ. Apln. No 996 of 2003 (Unreported)** where the court held that, *“Where there is a special jurisdiction or power conferred or any form of procedure prescribed by or under any other law, the provisions of the Civil Procedure Act are inapplicable.”*

The taxing master erred by invoking the Civil Procedure Rules in reaching a decision on these matters. An Advocate is entitled to fees for the services rendered to the client. Therefore whether an advocate decides to cease acting or services terminated by the client the advocate should charge a fee for the services already rendered until the time their relationship came to an end. I therefore order that the taxation of the Bill of costs in **Misc Apln No 472 of 2013** dated 29<sup>th</sup> April 2013, **Misc Apln. No 466 of 2013** dated 26<sup>th</sup> April 2013 and **Misc Apln. No 520 of 2013** dated 16<sup>th</sup> May 2013 do proceed as provided under the Advocates Remuneration Order before any taxing officer. Costs to the applicant.

Orders accordingly

Dated, signed and delivered this 31<sup>st</sup> Day of **October 2014**.

**R.E. OUGO**

**JUDGE**

In the Presence of:-

..... For the Applicant

.....For the Respondent

.....Court Clerk