



**Lubulellah & Associates Advocates v St. Bakhita Daycare & Kindergarten Limited  
(Miscellaneous Application E044 of 2021) [2022] KEELC 3175 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3175 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E044 OF 2021**

**MD MWANGI, J**

**MAY 26, 2022**

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

**BETWEEN**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... ADVOCATE**

**AND**

**ST. BAKHITA DAYCARE & KINDERGARTEN LIMITED ..... CLIENT**

**RULING**

*In respect of Notice of Motion Application dated 11<sup>th</sup> November, 2021 seeking entry of judgement in favour of the Client against the Advocate for an alleged overpayment of the assessed advocate-client fee).*

**Background**

1. This ruling is in respect of the Client/Applicant's Notice of Motion dated the 11th November, 2021 seeking for Orders that:-
  - A. The Honourable Court be pleased to direct the Advocate to deliver a cash account of all monies received by the Advocate with respect to the transaction known as Sale and Purchase of L.R. Number 209/xxxx-Michael Njau Njoroge & Catherine Njeri Njoroge to St. Bakhita Daycare & Kindergarten Limited for purposes of reconciliation as directed by the Honourable L.N. Barasa D.R. on 5th October, 2021.
  - B. Upon such delivery and reconciliation, this Honourable Court be pleased to find that the Client has over paid the Advocate in the sum of Kshs. 911, 821.52.



- C. The Honourable Court be pleased to enter Judgement in favour of the Client in the sum of Kshs. 911,820.52 together with interest at the rate of 14% from the 21st May, 2015 until payment in full.
  - D. A decree be issued upon the entry of the aforesaid Judgement and that the Applicant be at liberty to execute for recovery of the same.
  - E. The costs of this Application be in the cause.
2. In opposition to the application, the Advocate/Respondent filed Grounds of Opposition dated the 31st January, 2022 in which he contended that: -
- a. The application is misconceived, mischievous, in bad faith, an abuse of the process of Court and fatally defective.
  - b. That the Court lacks jurisdiction to entertain the application and grant the orders sought.
  - c. That there is no legal or factual basis to grant the orders sought.
  - d. Further, that the Application is incompetent as there is no judgement or decree against the Advocate for the sum of Kshs. 911,820.52.
  - e. The Claim for refund against the Advocate can only be made by way of a Plaint or an Originating Summons but would nonetheless, be barred by the *Limitation of Actions Act*.
  - f. The transaction the subject of the taxation was made on 13th January, 2014, therefore, any payments made before then could not be in respect to the transaction thereof.
  - g. That ‘Without prejudice’ communication is sacred, privileged and inadmissible in evidence.

### **Court’s Directions**

- 3. On the 14th March, 2022 the Court directed that the Application be disposed of by way of written submissions. Both parties have complied. The Client/Applicant filed its submissions dated 24th March, 2022 whereas the Advocate/Respondent filed his submissions dated the 5th May, 2022. The court has had the opportunity through the rival submissions.

### **Issues for Determination**

- 4. Having considered the application, the grounds in opposition to the application and the rival submissions by the parties herein, the key and central issue for determination in this Court’s opinion is whether the Court has the jurisdiction to determine the application as brought the Applicant.

### **Analysis and Determination**

- 5. In the *locus classicus* case on this subject, *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR, the Court of Appeal expressed itself in the following words:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



6. The Client/Applicant in the Application states that the Taxing Master taxed the Advocate's Bill of Costs in the sum of Kshs. 659,179.48 *vide* the Ruling delivered on the 5th October, 2021 and advised that parties would be at liberty to approach the Judge in case they were unable to reconcile the accounts for the monies allegedly paid over the taxed costs. That forms the basis of the Client's application herein.
7. Paragraph 11 of the *Advocates Remuneration Order* provides that:

“Where a party is aggrieved by the decision of a Taxing Master, he is required to object in writing by requesting the Taxing Master to give reasons for the items of taxation that he is objecting to and thereafter file reference before a Judge.”
8. Section 51 (2) of the *Advocates Act* on the other hand provides that;

“The certificate of the taxing officer 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 the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
9. In the case of *Lubullellah & Associates Advocates vs N. K. Brothers Limited* [2015] eKLR the court observed that;

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs”.
10. The Client/Applicant has not filed a reference to challenge the ruling of the Taxing Master. A reference is initiated by way of a chamber Summons as required by the provisions of paragraph 11(2) of the *Advocates Remuneration Order*. That is not what is before this Court. Instead, the Client/Applicant seeks to recover the alleged overpayment made to the Advocate/ Respondent.
11. The Client/Applicant's application is informed by, as he states, the decision by the Deputy Registrar that “if the parties are unable to settle the accounts between themselves, the Respondent would be at liberty to come before the Judge.”
12. I have keenly looked at the ruling of the Deputy Registrar dated 5th October, 2021. The Deputy Registrar in the last paragraph thereof stated that, “parties are at liberty to settle accounts between themselves. If the Respondent is found to have paid more than the taxed costs, the Respondent is at liberty to recover the overpayment from the Applicant.”
13. The question that the Respondent ought to have solemnly pondered before moving to court is how to recover the overpayment, if at all. The modality adopted by the Respondent is unknown in our law. Under the provisions of the *Advocates Act* and the *Advocates Remuneration Order*, this Court's mandate is only limited to entering judgement in favour of the Advocate upon issuance of a taxation certificate under Section 51 (2) of the *Advocates Act* and to handle references by Clients - to review, vary or set aside the decision of the taxing officer under rule 11 of the *Advocates Remuneration Order*. Nothing more, nothing less. In purporting to consider the application filed by the client herein, this court would be arrogating itself jurisdiction which it does not otherwise have.



14. In the case of *NW Amolo & another vs Samson Keengu Nyamweya* [2019] eKLR, Justice L. Njuguna faced with a similar case stated that;

“On the issue concerning the reconciliation of the accounts, it is noted that the application before me is limited to the entry of judgment pursuant to the certificate of taxation. In that case, I am of the view that this is not the proper forum for me to consider the payments made by the respondent, if any. The respondent is at liberty to move the court appropriately should he wish to address this issue.”

15. I agree with the Advocate/Respondent’s submission that this is not the appropriate forum in which to address the subject of reconciliation of accounts and recovery of overpayments, if any. The client may have to file a fresh suit where both parties will have the opportunity to adduce evidence and counter interrogate the evidence of the opposite party through cross-examination.

16. Accordingly, this Court lacks the jurisdiction to hear and determine the client’s application. Having held that the Court lacks jurisdiction, the Court must down its tools at this point in time as held in the case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (Supra)*.

17. The Notice of Motion Application dated the 11th November, 2021 by the Client/Applicant is therefore hereby dismissed with costs.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2022.**

**M.D. MWANGI**

**JUDGE**

**In the Virtual Presence of:-**

Mr. Edgar Wendoh h/b for Lubullelah for

Advocate/Respondent

Ms Ngeresa for the for the client/Applicant

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**

