



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 447 OF 2010

MUGAMBI & CO ADVOCATES.....ADVOCATE

VERSUS

1. JOHN OKAL OGWAYO

2. RUTH REBECCA AUMA.....CLIENTS

RULING 'B'

1. By a ruling dated 26th and delivered on 27th January 2012 the Court herein (Waweru, J) overruled a preliminary objection to the Advocate's **chamber summons dated 8th August 2011** and directed that the application be heard and disposed of on merit. In so ruling the Court observed that the said chamber summons could not be properly brought under **paragraph 11** of the **Advocates (Remuneration) Order** as there was no taxation of the Advocate's bill of costs. The Court also observed that the Clients' application to strike out the bill of costs (chamber summons dated 28th February 2011) which resulted in the ruling by the taxing officer challenged in the Advocate's chamber summons was essentially under the inherent power of the court, and that therefore the Advocate could thus have properly applied under the same inherent power of the court to set aside the order of the taxing officer.

2. The chamber summons dated 8th August 2011 is thus deemed to have been brought under the inherent power of the court, not the stated paragraph 11 of the Advocates (Remuneration) Order. That application is the subject of this ruling.

3. The application seeks two main orders –

- (i) That the decision of the taxing officer of 29th March 2011 (by which the Advocates bill of costs dated 22nd September 2010 was struck out) be set aside.
- (ii) That the said advocate/client bill of costs be taxed by any other taxing officer of the Court.

4. The grounds for the application appearing on the face thereof include –

- (i) That having appreciated that there was a retainer agreement that bound the Clients to pay the Advocate's fees, the taxing officer erred in striking out the bill of costs.

(ii) That the taxing officer misinterpreted paragraph 62A (1) & (2) of the Advocates (Remuneration) Order.

(iii) That the taxing officer's ruling is "inconsistent in its reasoning and in its findings".

5. There is a supporting affidavit sworn by the Advocate which sets out the history of the relationship and the dispute between him and the Clients. The affidavit also in essence argues the application. One of the arguments advanced is that the taxing officer did not have jurisdiction to hear and determine the Clients' application by chamber summons dated 28th February 2011. The proceedings before the taxing officer and the ruling of 29th March 2011 are annexed to the supporting affidavit.

6. The Clients opposed the application by notice of preliminary objection dated 3rd October 2011, and also by replying affidavit filed on the same date. As already observed the preliminary objection was disposed of by ruling dated 26th and delivered on 27th January 2012.

7. The replying affidavit is sworn by the Clients' learned advocate, **Prof. Kiama Wangai**. The grounds of opposition emerging from the replying affidavit include –

(i) That there was no advocate/client relationship between the Advocate and the Clients.

(ii) That in fact it was his (Prof Kiama Wangai's) law firm - Kiama Wangai & Co Advocates - which was instructed by the Clients in Nairobi HCCC No 381 of 2009 and not the Advocate.

The other grounds of opposition in the replying affidavit were canvassed and determined in the preliminary objection.

8. I have considered the submissions of the learned counsels appearing. Learned counsel for the Advocate also relied on the Advocate's **list and bundle of documents dated 9th December 2010**.

9. I consider the following to be the main issues to be decided in this application –

(i) Whether the taxing officer had jurisdiction to hear and determine the Clients' chamber summons dated 28th February 2011?

(ii) Whether there was an advocate/client relationship between the Advocate and the Clients?

(iii) Whether the Advocate's bill of costs dated 22nd September 2010 should proceed to taxation?

Issue No 1: Did the taxing officer have jurisdiction to hear and determine the Clients' application?

10. The main thrust of the Clients' chamber summons dated 28th February 2011 was that there was no advocate/client relationship between the Advocate and the Clients, and that therefore the Advocate was not entitled to any costs from the Clients that could be taxed. In other words, the Clients by their application were challenging the retainer claimed by the Advocate.

11. 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 and 13** of the remuneration order.

12. 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 a deputy registrar of the court.

13. I therefore hold 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 Advocate’s 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.

Issue No. 2: Was there an advocate/client relationship between the Advocate and the Clients?

14. The Advocate’s list and bundle of documents dated 9th December 2010 contains some 40 documents. The very first document is a retainer agreement between the Advocate and the Clients dated 21st March 2009. It is duly signed by the two Clients and by the Advocate. By this retainer agreement the Advocate was instructed -

“to file suit for recovery of general and special damages arising out of the negligent acts of Dr. Peter W. Masinde, Dr. Andrew C. Kibet and Karen Hospital resulting into the death of Master Nevil Sira Okal”.

15. Indeed the Advocate filed such suit on behalf of the Clients vide **Nairobi HCCC No. 381 of 2009** where the two Clients are the plaintiffs and Dr. Peter W. Masinde, Dr. Andrew C. Kibet and the Karen Hospital Ltd are the defendants. The plaint and the accompanying documents are all drawn by the Advocate. Appearance was entered by the defendants. They also filed their defence. All these documents were served upon the Advocate as the plaintiff’s advocate on record.

16. The Clients have not disowned this suit. What they did subsequently was to withdraw instructions from the Advocate. Thereupon the Advocate was entitled to tax his bill of costs against the Clients. And to do this he did not have to wait for the suit to be heard and determined first. Paragraph 62A of the Advocates (Remuneration) Order is not a bar to such an advocate/client bill of costs during pendency of a suit. That paragraph prohibits multiple *party and party* bills of costs where costs have been awarded in contentious matters. It does not bar an advocate whose instructions have been withdrawn in a contentious matter from taxing his advocate/client bill of costs before the matter is heard and finally decided.

Issue No: Should the Advocate’s bill of costs dated 22nd September 2010 proceed to taxation?

17. For the reasons already given, I find nothing to prevent the Advocate’s bill of costs dated 22nd September 2010 from proceeding to taxation. The order of the taxing officer dated 29th March 2011 by which the Advocate’s bill of costs was struck out must be, and is hereby, set aside. The Clients’ chamber summons dated 28th February 2011 is hereby dismissed with costs to the Advocate.

18. In the result the Advocate’s application by chamber summons dated 8th August 2011 is allowed with costs to the Advocate. His bill of costs shall proceed to taxation in the usual way before a different taxing officer. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF DECEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013