



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CASE NO. 939 OF 2010**

**KYALO MBOBU T/A KYALO &  
ASSOCIATES.....PLAINTIFF**

**VERSUS**

**PATRICK NJUGUNA  
NJOROGE.....DEFENDANT**

**RULING**

1. This is an Application brought by way of Chamber Summons dated 19 April 2011. The Applicant is a firm of advocates who had previously acted for the Respondent to uplift and sub-divide title No. Ngong/Ngong/5126 held in the name of the Respondent. The sub-division and sale of 2 acres portion of the land seems to have been necessitated by the wish of the Respondent to settle a debt of Shs.1.4 million due to the Co-operative Bank of Kenya Ltd. The Applicant drew up its Bill of Costs dated 4 October 2010 filing the same herein on the same date.

2. The Bill of Costs came for taxation on the 12 November 2010. Maina Njuguna & Associates came on record for the Respondents. Both parties were ordered to file their written submissions within 7 days, which did not happen but after a couple of false starts the taxation came before Mr. Kandet, the Deputy Registrar for hearing on 24 January 2011. The Deputy Registrar delivered his Ruling on the taxation on 17 February 2011. It is against this Ruling that the Applicant comes before Court way of the said Chamber Summons dated 19 April 2011 brought under the provisions of **Rule 11 (2)** of the *Advocate's (Remuneration) Order*.

3. The Application before Court is founded on the following grounds:

**“1. THAT in striking out the entire bill of costs ostensibly on the ground that the Applicant had not been instructed by the Respondent to act for him in the transaction, the Taxing Officer erred both in fact and principal by failing to find that the Respondent in his own letter dated 27<sup>th</sup> July, 2004 had instructed M/S Co-operative Bank of Kenya Limited (hereinafter referred to as “the Bank”) to release the title deed to the Applicant’s firm to proceed.**

**2. THAT in striking out the entire bill of costs, the Taxing Officer erred in principle by failing to appreciate that all correspondence by the Applicant were copied to the Respondent and he was all**

along aware that the Applicant's firm was acting for him and not for the Bank.

3. THAT the Taxing Officer erred and misdirected himself both in principle and facts by finding that some of the correspondences in light of the objection as to retainer appear confusing as to who the Applicant was acting for, i.e. whether he was acting for the Bank or the Respondent and in the same breath proceeding to hold that the issue of retainer had not been proved by the Applicant.

4. THAT further and without prejudice to the foregoing, the Taxing Officer erred and misdirected himself by disregarding the contents of the letters dated 26<sup>th</sup> May, 2010 and 31<sup>st</sup> May, 2004 which were crystal clear that the Respondent was the client of the Applicant. Further, the said letters were copied to the Respondent which he never objected to.

5. THAT the Taxing Officer erred and misdirected himself in principle by holding that the letter dated 24<sup>th</sup> April, 2004 by the firm of M/S Maina Nyangena to the Applicant was not an instruction to act on behalf of the Respondent to the applicant without giving consideration to the fact that the said firm being agents of the Respondent could and did instruct the Applicant to act on his behalf.

6. THAT the Taxing Master erred and misdirected himself by holding that the letter dated 24<sup>th</sup> May, 2004 to the Applicant by M/S Maina Nyangena & Company Advocates was clear that it was written on the Bank's and not the Respondent's advice which was not the case.

7. THAT in any event and without prejudice to the foregoing, the Taxing Officer erred and misdirected himself by failing to appreciate that the Applicant having confirmed instructions from the firm of M/S Maina Nyangena & Company Advocates on behalf of the Respondent, all the subsequent correspondences were addressed and/or copied to him (the Respondent) and at no time did he object to that representation.

8. THAT the Taxing Officer erred and misdirected himself in principle and fact by failing to consider the Applicant's submissions on the issue of retainer and more so on the fact that the Applicant could not have proceeded to give a professional undertaking on behalf of the Respondent if indeed he was not its client.

9. THAT the Taxing Officer erred and misdirected himself by finding that the copy of the sale agreement in respect of the transaction demonstrated that the Applicant was not the Advocate for the Respondent without considering that the said sale agreement was dated 10<sup>th</sup> November, 2008 whereas the services rendered the subject of the bill of costs herein started way back on 24<sup>th</sup> May, 2004.

10. THAT the Taxing Officer erred and misdirected himself by holding that the letter dated 7<sup>th</sup> January, 2009 to the Respondent referred to the Bank as the Applicant's client without appreciating that the Applicant had been retained to secure the discharge of charge on behalf of the Respondent upon giving a professional undertaking for registration so as to have the two titles issued whereafter the Respondent would realize the property and pay the Bank Kshs.1.4M out of the proceeds. The letters dated 30/11/05, 23/11/05, 11/10/05 and 23/9/05 are clear on this.

11. THAT the Taxing Officer erred and misdirected himself both in fact and principle by finding that if the Applicant was not acting for the Bank there was no need for the Bank to know the progress of the sale from the Applicant without appreciating the fact that upon a professional undertaking by the Applicant, the Bank released the original title documents for sub-division of the suit property whereafter the Respondent would sell part of it in settlement of a debt owed to the Bank and thus the Bank was within its rights to seek such advice from the Applicant.

12. THAT it is needless to say that the Ruling herein shows no appreciation of the fact that an Applicant as an advocate of the High Court is entitled to a fair remuneration for the legal services rendered to the Respondents.

4. The Application was supported by an Affidavit sworn by Kyalo Mbobu dated 19 April 2011. Apart from attaching the typed copy of the Deputy Registrar's Ruling dated 17 February 2011, that Affidavit sets out and is a repeat of the grounds in support of the Application as set out above.

5. The Applicant filed its submissions herein on 2 November 2011. It identified what it termed as 2 issues for determination by this Court:

(i) Whether the Taxing Officer erred both in principle and law by finding that the issue of retainer had not been proved and proceeding to strike out the Applicant's bill of costs to the Respondent.

(ii) Whether the Taxing Officer exercised his discretion judicially in striking out the entire bill of costs.

On issue (i), the Applicant maintained that the Taxing Officer had erred by striking out the entire bill of costs on the basis that it had not demonstrated that the firm had instructions from the Respondent. To this end, the firm relied upon its submission as delivered to the Taxing Officer filed in court on 21 January 2011. The Applicant referred to a letter from the Respondent addressed to the Co-operative Bank of Kenya (hereinafter "*the Bank*") dated 27 July 2004 at page 77 of the annexure to the said submissions filed on 21 January 2011. That letter detailed in the last paragraph thereof:

**"Kindly do facilitate the release of the title deed to Ms. Kyalo & Associates, Advocates, to enable them to proceed".**

The letter was copied to the Applicant, who maintains that it was not considered or mentioned by the Taxing Officer in his said Ruling.

6. The Applicant then referred to a further letter in the said Annexure being a letter dated 24 April 2004 at page 9 thereof. That letter was addressed to the Applicant by the firm of Maina Nyangena & Co. Advocates who the Applicant states are on record herein for the Respondent. The Applicant details that the letter was instructing the Applicant to act on behalf of the Respondent. The Applicant further stated that it confirmed its instructions to act vide its letter of 24 May 2004 at page 10 of the said Annexure. The Applicant maintains that further letters at pages 71, 59, 63, 64, 68, 75, 76 and 87 of the Annexure along with a letter dated 19 November 2004 at page 73 thereof, all evidenced the fact that the Applicant was acting for the Respondent and at no time did the Respondent object to that representation.

7. The Applicant also referred this Court to a letter written by the Bank to the Respondent dated 15 August 2005 at page 70 of the said Annexure complaining of the Applicant's frustrations and further letter from the Bank at page 89 dated 31 May 2004 urging the Applicant to contact the Respondent to provide it with an appropriate undertaking to allow the Bank to release the Title Deeds to the Applicant. Interestingly, that letter in its heading, refers to a completely different property to the one at Ngong, being Nairobi/Block 82/2718. The professional undertaking was provided by the Applicant to the Bank vide its letter dated 23 June 2004 at page 87 of the said Annexure and is given as regards the Title to the Ngong property. The Applicant maintained that it could not give a professional undertaking to the Bank on behalf of the Respondent if indeed he was not the Applicant's client.

8. The Applicant commented upon the Taxing Officer's observations in his said Ruling that some of the correspondence appeared confusing as to whom the Applicant was acting for. It maintained that the Bank's interest in the transaction was that after the Respondent had allowed to dispose of part of his land charged to the Bank, the Respondent would offset his liabilities to the Bank. The Applicant also criticized the Taxing Officer's finding that the Applicant firm's name was not on the Agreement for Sale dated 10 November 2008 which was an indication that the Applicant was not acting for the Respondent. The Applicant maintained that it had commenced acting for the Respondent 4 years earlier in 2004 and it was only after the discharge of the Charge of the Title documents that the Respondent proceeded to instruct Messrs. Maina Nyangena & Co. to draw up a sale agreement.

9. The Applicant was at pains to point out that the letter dated 7 January 2009 (not 7 September 2009) referred to in the Taxing Master's Ruling as detailing the Bank as the Applicant's client applied to "totally different scenarios". The Applicant maintained that its said letter address to the Respondent was to advise him to release the funds to the Bank to discharge the professional undertaking. Finally, the Applicant, in its submissions, commented that the Taxing Master did not exercise his discretion judiciously in proceeding to strike out the Applicant's entire bill of costs. It criticized the Respondent's stated position that it had not addressed specific items in its bill of costs as per the case of *HCCC No. 1068/01 H.F.C.K. vs. Embakasi Youth Development Project*. The Applicant requested this Court to distinguish that case and relied upon the authorities it had cited before the Taxing Officer.

10. In its submissions filed herein on 11 November 2011, the Respondent pointed out the provisions of **Rule 11 (1) and (2)** of the *Advocates (Remuneration) Order* which to my mind are worthy of detailing as below:

**"11. (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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 ground of his objection".**

The Respondent observed that the Rule required 3 things:

- (a) There must have been a bill of costs filed.
- (b) That bill must have been taxed.
- (c) Certain items therein must have been objected to.

It was the Respondent's point that the Taxing Officer's order striking out the Applicant's bill of costs cannot be challenged by a reference under Rule

11. He relied upon the **HFCK vs. Embakasi Youth Development Project** case as authority for this premise.

11. I have carefully read through all the correspondent exhibited to the Affidavit in support of the Application as the Bundle of Exhibits marked "A" through to "D". This task has not been easy in that the correspondence has been jumbled up, is not in date order and to my mind presented to this Court in order to confuse. What I believe is apparent, is that the Bank was reluctant to release the Respondent's Title documents to Messrs. Maina Nyngena & Co. Advocates as it did not know that firm but did release the same to the Applicant. The latter certainly acted for the Bank, as one might expect and as the correspondence in 2006 reveals, in the Discharge of the Bank's Charge over the Respondent's Ngong property. There is also evidence of considerable confusion over the sub-division documentation and the applications to the Kajiado Land Control Board for consent to sub-divide. The correspondence also reveals that the Respondent owed the Bank approximately Shs.2 million and that the proceeds of the one sub-divided half of the Respondent's Ngong property was only going to raise Shs.1.4 million. The balance owing of approximately Shs.600,000/= would be secured by a Charge over the other sub-divided half of the property.

12. I have noted that as regards the Applicant's own internal payment vouchers in 2006 its file name is that of the Bank but those change in 2008 when it became necessary for the Kajiado Land Control Board consent to the sub-division to be renewed as the original consent had expired/lapsed on 30 June 2005. It seems apparent that the Applicant firm forwarded the application to the Land Control Board for renewal to the Respondent to obtain as per its letter to the Bank of 27 January 2006. All in all therefore and

particularly as regards the Applicant's letter to the Respondent dated 7 January 2009, I find myself in full agreement with the Deputy Registrar's Ruling of 17 February 2001 that the Applicant was in fact acting for the Bank not the Respondent.

13. Even if, on the facts before this Court, I had not found myself in agreement with the Deputy Registrar. I do have to take cognizance of the persuasive Judgement of Ojwang Ag. J (as he then was) in the **HFCK vs. Embakasi Youth Development Project** (supra). That case, to a large extent, dwelt upon the legal status of the Defendant but paragraphs 9, 10, 11, 12 and 13 of the learned Judge's finding are relevant to this matter:

**"9. It is recognized 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.**

**10. Counsel for the plaintiff stated that the plaintiff had elected not to lodge such an appeal. What is the implication of this? I believe the implication is that it had not been the perception of the plaintiff that the taxing master had erred in law.**

**11. But that is inconsistent with the claim in the reference which the plaintiff filed by Chamber Summons of 16<sup>th</sup> August, 2004. In the reference, it is asserted that:**

- **"the taxing master misdirected herself in law in that she reached decisions that are untenable in law";**
- **"a non-legal person is not entitled to any costs in any proceedings";**
- **"the taxing master misdirected herself on points of law";**
- **"her ruling was contrary to the rule of law".**

**12. The effect of such prayers is to ask the court to sit on appeal over the decision of the taxing master.**

**13. It is not possible in law for a judge to consider granting such prayers unless they come in the form of an appeal".**

The grounds in support of the application in that case are, in essence, very much along the lines of the Applicant's grounds in this matter as set out above.

14. I also take on board the Respondent's submission as regards **Rule 11 (1) and (2)** of the *Advocates (Remuneration) Order* as I have set out above. I share the opinion that what the Applicant was restricted by the Rule in doing here, was to detail those items in a bill of costs upon which it objected to the Taxing Officer's findings. As the Deputy Registrar struck out the Applicant's bill of costs as a whole, the provisions of Rule 11 were not open to the Applicant to come before this Court thereunder. In my view, the 2 authorities cited by the Applicant herein being *HCCC No. 654 of 2006 Ochieng' Onyango Kibet & Ohaga, Advocates vs. Adopt a Light Ltd.* and *Nderitu & Partners, Advocates vs. Mamuka Valuers (Management) Ltd. HC Misc. Appl. No. 463 of 2004*, do not assist the Applicant in this matter. The question of a retainer does not in my opinion arise in this case.

15. In conclusion therefore, I refuse the Applicant's Application by way of Chamber Summons dated 19 April 2011 as regards prayers 1 – 3. Further I award the costs of this Application to the Respondent. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 19<sup>th</sup> day of January, 2012.**

**J. B. HAVELOCK**  
**JUDGE**