

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Cause 1005 of 2010

**MURIU, MUNGAI & CO. ADVOCATES.....ADVOCATE/RESPONDENT
VERSUS**

NEW KENYA CO-OP CREAMARIES LTDCLIENT /APPLICANT

R U L I N G

1. The Application for determination is a Notice of Motion dated 25th March 2011 and filed on the 5th April 2011. The Applicant (hereinafter “the client”) seeks orders for consolidation of Miscellaneous Causes Nos. 1006, 1007, 1008, 1009, 1010, 1012, 1013 and 1020 all of 2010 with this cause and that the Advocate-Client’s Bills of Costs therein be struck out with costs to the client.
2. The Motion is supported by the Affidavit of Peter Kennedy Ombati, the Legal Officer of the Client. In it, the Applicant contends that vide a letter dated 17th February 2005 the advocates/Respondent (herein after “the Advocate”) confirmed acceptance of instructions related to the buyback process of Assets belonging to the Kenya Co-operative Creameries Limited to be vested upon the client which is now owned by the Government of Kenya. The legal fee for the said services was agreed at Kshs. 11 Million and it was further agreed that the Client would cater for the disbursements and taxes emanating from the transactions. That further, a block fee note was issued by the Advocate and it is on this premise that the client acted on the Advocate’s representation and paid about 90% of the fees demanded. The client therefore contended that it is irregular for the Advocate to file separate bills of costs regarding every item of conveyance contained in the letter of instruction dated 17th February 2005. In its view, the Bills of Costs in these causes are unfair are being used by the Advocate to unjustly enrich themselves to the client’s detriment.
3. The Advocate opposed the Application vide a Replying Affidavit sworn by P. Munge Murage and Grounds of opposition both dated 7th June, 2011. The advocate contended that the Court does not have jurisdiction to entertain the application as presented before the court as the Miscellaneous Cause Nos. 1006 of 2010, 1007 of 2010, 1008 of 2010, 1009 of 2010, 1010 of 2010, 1011 of 2010, 1012 of 2010, 1013 of 2010 and 1020 of 2010 are before the Deputy Registrar for taxation, that the jurisdiction of the High Court can only be invoked through a reference, that the present application is not a reference and therefore the court should not entertain the same. The Advocate further contended that the Application is fatally defective as it does not include the pleadings of the suits/causes that the client seeks to consolidate with Miscellaneous Cause No. 1005 of 2010 herein. In the alternative the Advocate contended that the client has not fully satisfied the conditions for consolidation of suits as the instructions received by the Advocate in each of the Bills presented for taxation were separate and distinct and ought to be taxed separately as the items do not relate to each other. It was further asserted by the Advocate that there are numerous taxations that have been going on between the Advocate and the Client and that each of these matters, including the causes that are the subject of the Application, are at different stages of the hearing and hence consolidation at this point in time would yield undesirable results.
4. The Advocate further contended that the assertion that the Advocate was precluded from filing various Bills of Costs due to the fact that the Advocate had already issued a block fee note has been overtaken by events as both the client and the advocate have taxed other bills and even recorded consents in others, settling the said bills of costs. Moreover, that the same issue had been raised during the taxation proceedings in **MISC CAUSE NO. 365 of 2010, MURIU MUNGAI & Co –vs- NEW KENYA CO OPERATIVE CREMARIES LIMITED** where the issue was dealt with and determined by the Deputy Registrar. That in that cause, the Registrar had held that though there were numerous

correspondences as to the Advocates fees, the agreement had not been reduced into writing as required by Section 45 (1) of the Advocates Act Cap 16 Laws of Kenya. That it is on this basis that the Registrar had held that there was an agreement as to the Advocates fees but such agreement was not reduced in writing as required by law. That the Registrar had therefore held that such an agreement was not binding and was unenforceable and further that the agreement on the fees in the sum of Kshs. 12,760,000/= was therefore untenable. The Advocate therefore contended that this decision had not been appealed against by the Client and that it stood as binding on the parties. The Advocate therefore submitted that it was immaterial whether or not they had issued a block fee note and that they were fully entitled to full fees and had the right to submit itemized Bills of Costs. They had asked the court to strike out the application as being incompetent.

5. I have carefully considered the application, affidavits on record and the rival submissions by learned counsel. A number of issues arise for determination. The first of such issue is the question raised by the Advocate about the jurisdiction of this court to hear the present application as it involves taxation of a bill of costs. This cause as are all the other miscellaneous causes sought to be consolidated with this one concern Bills of Costs that are pending before the Deputy Registrar for taxation. It is well known that Jurisdiction is everything and the same has to be determined before embarking on the determination of other issues. It is the Advocate's contention that the court has no jurisdiction to entertain the present matter as taxation of the Bill of costs is a special jurisdiction provided for under Rule 11 of the Advocates Remuneration Order and is thus a preserve of the taxing master. Jurisdiction of this court can only be invoked through a reference to this court and the present application is not fashioned as such. I agree with the position that as a general rule matters touching on taxation are the preserve of the taxing master. There are a number of cases that illustrate this point. In **Lubullellah & Associates Advocates –vs- Nasser Ahmed t/a Airtime Business Solutions High Court at Nairobi (Milimani Commercial Courts) Miscellaneous Case 719 of 2009** Koome J. (as she then was) held that:

“.....Courts in Kenya are hierarchical, the jurisdiction of taxation of costs is vested upon the taxing master who should evaluate the matters placed before him/her and should do so independently. The jurisdiction that is vested in the High Court on the other hand is to deal with a reference emanating from the decisions of the taxing master.”

6. The question that arises is whether the circumstances of this application allow for the application of the above principles. It is clear from the motion that the Applicant has sought for consolidation of the bills of costs in question. Does this prayer require the Court to therefore step outside its mandate? I think not. The Court in this instance has only been called upon to deliberate on whether or not the subject Bills of Costs should be consolidated and whether in the circumstances of this case, they should be struck out. The court is not called upon the items for taxation but to deliberate on consolidation only. I believe consolidation of suits is done under the inherent powers of the Court. The purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. However, since the miscellaneous causes are before the Deputy Registrar, this court can only assume jurisdiction through a reference. The client should have had the bills consolidated by the taxing master before coming to this court.

7. The proper channel to have addressed the issues raised by the client would have been through a reference. The other issue is lack of the pleadings in the miscellaneous causes sought to be consolidated. These were not produced. In their absence, the court cannot be able to ascertain the efficacy of the application for consolidation. On these two grounds only, the application fails.

8. Having said this, I must state in passing that the client did raise very plausible arguments during the hearing of the application. However as already held the application was anchored in the wrong footing and since the jurisdiction of this court was not properly invoked. I cannot address them.

9. Consequently, the motion dated 25th March 2011 is hereby dismissed with costs to the Advocate. It is so ordered.

DATED and delivered at Nairobi this 22nd day of November, 2012.

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A. MABEYA
JUDGE