

fees. The Plaintiff's case is therefore that he is not liable to pay any further fees to the Respondents. He is therefore challenging liability and not quantum. This challenge in Counsel's view is outside the jurisdiction of the taxing officer. For this proposition Counsel relied upon the following authorities.

1) City Finance Bank Ltd –v- Samwel Maina Karanja T/a Maina Karanja Advocates: HCCC No.132 of 2004 (UR)

2) Southern Credit Banking Corporation Ltd –v- Kipkorir Titoo & Kiara Advocates: HCCC No.332 of 2003 (UR)

3) Muthoga Gaturu & Co. Advocates –v- Corporate Insurance Company Ltd: HCCC No. 483 of 2000 (UR)

Mr. Kiplangat in the light of the above submissions argued that the Applicant had made out a case for stay of Misc. Application No.740 of 2004 pending the hearing of this case.

Responding to the above submissions Counsel for the Respondent argued that the application has no merit as indeed the Applicant instructed the Respondents in respect of services for which taxation is sought in HC MISC. Application No.740 of 2004. Counsel submitted that in fact documents exhibited by the Applicant showed that the Respondent was instructed by the Applicant and further that the requisite fees for the said services had not been paid by the Plaintiff. In Counsel's view the Plaintiff is challenging quantum of fees payable which challenge, the taxing officer has jurisdiction to handle. The Taxing Officer under the Advocates Remuneration Order can take evidence and the Plaintiff will be at liberty, to offer whatever documents he deems fit to advance his case before the Taxing Officer.

Counsel for the Respondents relied on the following authority:- E.N. Ng'ang'a & Co. Advocates –v- Joseph Kiarie Mbugua & 2 Others Nairobi Misc. Appl. No.492 of 2003 (Un Reported) for the proposition that the Taxing Officer has power and authority to summon and examine witnesses, to administer oaths, to direct the production of books papers and documents and to direct and adopt all such proceedings as may be necessary for the determination of any matter in dispute before him. Counsel therefore prayed that this application be dismissed with costs.

In a brief reply Mr. Kiplangat distinguished the decision in the case of E.N. Nganga and Co. Advocates –v- Joseph Kiarie Mbugua & 2 Others (supra) on the basis that that decision was made in a reference and not a suit as in this case. He reiterated his position that the applicant is entitled to the order sought.

I have considered the Application, the Affidavits and their annexures. I have also carefully considered the submissions by the Learned Counsels appearing. Having done so I take the following view of the matter. In my view, where there is a valid agreement on fees and such fees has been settled, it is not open to an advocate to apply for taxation of his costs in an attempt to be paid more than the amount in the agreement. In the case at hand however, I am unable on a *prima facie* basis to find that such agreement existed between the applicant and the Respondents in respect of any service rendered by the Respondents to the Applicant. If this application depended on this question alone, I would have had no hesitation in dismissing the application for being without merit. I hasten to add that this finding is not definitive as the rival positions have only relied on affidavits and the documents exhibited have not passed the test of cross-examination. This finding should therefore not fetter the trial judge.

I am also of the view that where no instructions have been given by a client his remedy is in a suit. With all due respect to Counsel, for the Respondents, the Plaintiff's allegation that he never gave instructions for some of the services allegedly rendered by the Respondents is not altogether without merit. This finding is on the basis that certain services were in respect of transactions to which the Plaintiff was not a party. For instance the Transfer of L.R. No.36/11/1039 was between Suleiman Enterprises Limited and one Mohamed Koriow Nur: The Transfer of L.R. No.209/8294/265 was between one Issa Ahmed Abdulhafidh and one Ibrahim Mohamed and the Conveyance of L.R. No.330/560 was between one Hassan Hamed and one Asha Abdullahi. There are also two agreements one dated 5th October 2002 and an undated one in respect of guarantee and transfer of shares in Intertrade Impexco Limited (C.71522)

and Intertrade Limited respectively which documents do not seem to have been executed by the Plaintiff. I have not traced any written instructions emanating from the Plaintiff in respect of the transactions that did not involve him. Instructions may or may not have been given orally. This controversy cannot be determined definitively now. That will be the function of the trial Judge. For now however, it may very well be possible that the Respondents have included in the Bill of Costs pending taxation services for which no instructions may have been given. These allegations cannot be determined by the Taxing Officer during the Taxation of the Respondents' Bill of Costs. In the circumstances, I have to decide whether or not I should let the taxation proceed. In my view the interests of justice lean in favour of granting a stay of taxation. The reason is that taxation determines the quantum payable. It does not address the issue of whether or not any fees has been earned. Taxation can therefore wait. The main adverse consequence is that the Respondents will be delayed in realizing the fruits of their labour. On the other hand if taxation proceeds and subsequently the Plaintiff succeeds in this action he would have in the meantime been burdened with an unnecessary. financial liability. I appreciate the Respondent's concern at the obvious delay that a stay of taxation will occasion. However, this is a small price to pay in our efforts to get to what is just. At the end of the day if the Respondents believe in their case they stand to earn costs in this suit as well.

In the result I allow the Plaintiff's application dated 24th November, 2004 in terms of prayer 2. The costs shall be in the suit.

Either party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2005.

F. AZANGALALA

JUDGE