



REPUBLIC OF KENYA



Angela Mulwa t/a Mulwa and Partners Advocates v Mookosio (Miscellaneous Application E282 of 2023) [2024] KEHC 2282 (KLR) (Commercial and Tax) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E282 OF 2023

JWW MONG'ARE, J

MARCH 5, 2024

BETWEEN

ANGELA MULWA T/A MULWA AND PARTNERS ADVOCATES ... ADVOCATE

AND

MARTIN LEMAIYAN MOOKOSIO CLIENT

RULING

1. On 11th August 2023, the Client/Applicant filed a reference brought by way of a Chamber Summons Application pursuant to Article 25(c), 27(1), 50(1) and 259 of *the Constitution* of Kenya, Section 44 of the *Advocates Act*, paragraph 11 of the *Advocates Remuneration order*, section 3A of the *Civil Procedure Act* seeking the following orders:-
 1. Spent
 2. That the Honourable Court be pleased to order that the entire ruling delivered by the Hon. S. Githongori Bett, the taxing officer, on 28th July 2023 in relation to the Advocate/Respondent's bill of costs dated 5th April 2023 be set aside.
 3. That the Honourable Court be pleased to refer all the contested issues for determination and/or for re-taxation all items being item 1 & 2 of the Advocate s/Respondent's bill of costs dated 5th April 2023 by another Taxing Officer other than Hon. S. Githongori Bett.
 4. That costs of this Application be provided for.
2. The said application is predicated on the grounds set on its face and the supporting affidavit sworn by Martin Lemaiyan Mokoosio on 11th August 2023. The application was opposed and the Advocate / Respondent filed a replying affidavit sworn by Angela Mulwa on 1st September 2023. The Advocate also filed a Notice of Preliminary Objection to the reference.



3. Subsequent to the filing of this Application and on 1/9/2023, the Advocate filed a Notice of Motion Application seeking for orders that the Certificate of Costs emanating from the Ruling dated 28th July, 2023 in MISC. APP, No. E282 of 2023- Angela Mulwa T/a Mulwa & Partners Advocate S vs Martin Lemaiyan Mokoosio be adopted as a judgment and Decree of this court for Kshs.17,422,080/=. The said application was supported by a supporting affidavit of Angela Mulwa sworn on the same date. By way of reply, the Client/Applicant filed a Notice of Motion dated 22nd September 2023, seeking to stay the execution of the decree emanating from the said certificate of taxation. The same was opposed by the Applicant who maintained that the decree could only be confirmed by the court once the reference filed by the Client/Applicant was disposed off.
4. The Applications were disposed off by way of written submissions with parties appearing before the court to highlight the same on 3/10/2023.

Background to the Reference

5. The reference filed herein emanates from a ruling by the taxing officer pursuant to a Bill of Costs filed by the Advocate /Respondent on 5/4/2023. Subsequently the court rendered its decision on the said Bill on 28/7/2023 and provided its reasons for the decision therein. The Client/Applicant being dissatisfied the Client filed a reference herein seeking to overturn the decision of the court on the said bill that was taxed at the sum of Kshs.17,422,080/=. It is this reference and the subsequent motions flowing from the reference and the taxed bill that this court seeks to determine.
6. As stated above, parties filed their submissions in response to the Reference and the other two motions filed herein. I have upon careful consideration of all the pleadings filed herein and the supporting affidavits and responses thereto and the rival submissions arrived at a finding that this court needs to determine two issues that arise thereto, to wit:-
 1. Whether the taxing master committed an error in principle in proceeding to tax a bill without jurisdiction.
 2. Whether the taxing master committed an error in principle by taxing a bill that was filed out of time.
7. As to “Whether the taxing master committed an error in principle in proceeding to tax a bill without jurisdiction.” A perusal of the pleadings filed herein indicate that the Advocate -Client Bill of costs was filed by the Advocate to collect her fees pursuant to a Joint Venture Agreement drawn by the Advocate on 19th January 2009 between the Client and HIMS Homes Limited, a company associated with the Advocate herein by virtues of being a director. The Applicant argues that the said Joint Venture agreement was aimed at establishing a contractual agreement between the parties and that the Advocate was to be remunerated for services rendered in the subsequent sales of the houses so developed under the joint venture agreement.
8. The Applicant further argued that the Advocate was to be paid for rendering services towards the perfection of the transfers for the houses that were to be developed on the said property. The Client argues that the Advocate was fully remunerated in line with the Joint Venture agreement for the said services. It is further argued that there was no agreement as to the payment of fees for drawing the joint venture and that at no one time was the Advocate required to superintend over the performance of the Joint Venture. The Applicant argued that the taxing master lacked jurisdiction to tax the Bill of Costs as filed as there was no agreement in form of a retainer by the Client to the Advocate for payment of fees relating to the drawing the Joint venture agreement and to proceed.



9. The Client raised a Preliminary Objection on this issue during the proceedings on the taxation of the Bill of costs and argues that the taxing master failed to consider the same but proceeded to tax the Bill anyway. The Client further contends that it is wrong for the Advocate to elect to tax the Bill against one party and yet the Joint Venture agreement was between the Client and her company. The Client argues that in taxing this Bill, the taxing master acted ultra vires her jurisdiction as there was no retainer exhibited to demonstrate that the Advocate was entitled to fees and neither was there any provision in the Joint venture agreement detailing that the Client was obligated to pay any fees for services rendered on the joint Venture by the Advocate. The Client urged the court to find that the taxing master committed an error of principle by proceeding to tax the bill without proof that there was indeed established an Advocate -Client relationship and that the Advocate had rendered services for which she was entitled to fees. The Applicant urged the Court to set aside the certificate of taxation.
10. The Advocate opposed the Application and filed a replying affidavit. The Advocate maintained that the taxing master was right in taxing the Advocate-Client Bill of costs as she did as she had earned the fees when she drew and prepared the Joint Venture Agreement and that she had continued to supervise and oversee the joint venture contract. She urged the court to find that the reference application was incompetent and incurably defective for failing to comply with Paragraph 11 (1) of the Advocates Remuneration order which requires that a party seeking to file a reference first serve a notice of objection before proceeding to file the Reference in the High Court.
11. I have considered carefully the rival arguments by the parties herein. I note that on 28th July 2023 the taxing master rendered her decision which included the reasons. The heading therefore reads “Ruling and Reasons for Ruling” and in the body therein she proceeded to determine the Preliminary Objections raised by the Client. I am satisfied therefore that there was no need for the Client to issue the Notice of objection and call for reasons as the same had already been provided by the taxing master. This point was reinforced by Justice Odunga in the case of Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited(2012)EKLR where the court noted:-

“However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reason. The sufficiency or otherwise is not necessarily a bar to the filing a reference since insufficiency may be the very reason for preferring the reference.”

Flowing from the above reasoning, I am satisfied that the reference is properly before this court.

12. The jurisdiction of a taxing officer is conferred by the existence of an Advocate - Client relationship. In bringing the Bill of Costs, the Advocate argues that she was retained in 2013 to prepare a Joint Venture Agreement between the Client and a company known as HIMS Homes Limited, which agreement was for the development and sale of houses constructed on Land Reference Ngong/ngong/13113. It is this agreement that the Advocate argued entitled her to be paid fees for drawing the agreement and subsequent superintending the same until 2023 when the relationship was discontinued.
13. In order to determine whether indeed an Advocate - Client relationship existed I have carefully perused the said Joint Venture Agreement. I note under the heading titled “Sales and Selling” clause 5 reads as follows:-
 5. the law firm of Messrs Mulwa 7 Partners Advocate s shall handle all sales transactions of the unit houses offered for sale to 3rd parties.



6. the firm shall undertake to render legal services at an Advocate’s fee of 1.5% (one. decimal five) inclusive disbursements and shall procure necessary completion documents for the transfers therein expeditiously.
 9. legal fees and estate agency fees shall be payable from the sale proceeds. Neither fees shall be paid in full until receipt of full purchase price from the purchasers.”
14. Nowhere in the body of the said joint venture agreement is an obligation created that the Client will be responsible for fees emanating from the drawing of the said Joint Venture Agreement and nor does any of the clauses thereto create an obligation to the firm of Mulwa & Partners Advocates to supervise and superintend the implementation of the Joint Venture. It is instructive to note that the Bill of Costs as filed was done against one party to the Joint Venture, i.e Martin Lenaiyan Mokoosio. I note that there is no evidence attached to the application to demonstrate if at any one time between 2013 and 2023 when this Bill of Costs was filed, a demand for payment of interim fees raised. I also note that there is no demonstration that HIMS Homes Limited paid their portion of the fees for the services rendered to them. No explanation has been rendered to explain why the Bill of costs is being preferred against one party and not both.
15. As held by the court of appeal in the case of *Wilfred Konosi & Co Advocates v Flamco Limited*(2017)EKLR:-
- “On taxing a bill of costs, it must be established that there exists an Advocate /Client relationship and that the Advocate was instructed as per law provided. Since the Applicant failed to demonstrate the above, I find that there is no basis for varying or setting aside the taxing officer’s orders. Even if the bill went to another taxing officer, it would suffer the same fate. For this reason, I dismiss the Application with costs to the respondent.....the nexus between the Advocate s and his or her Client is the Advocate /Client relationship which springs from instructions by the Client to the Advocate. Absent such relationship, the taxing officer would be bereft of jurisdiction to tax a bill.”
16. Having perused the joint venture application, I am persuaded that the same did not create an Advocate -Client relationship for which fees accrued to the Advocate. My reading of the Joint Venture Agreement establishes that the Advocate was to benefit from fees earned in the process of implementation of the agreement through the selling of the houses developed thereto. I find therefore that the taxing master acted without jurisdiction in taxing the bill of costs filed when no Advocate -Client relationship existed and therefore committed an error in principle by proceeding to consider the said Bill of Costs.
17. The second issue that this court identified for determination was “whether the taxing master committed an error in principle by taxing a bill that was filed out of time.” I note from the bill of costs and upon perusing the Joint Venture Agreement the services for which the bill was raised was for services rendered in drawing a Joint Venture Agreement that was drawn on 19th March 2013. The Advocate argues that she continued to superintend and supervise the implementation of the Joint Venture Agreement thereto until 2023, when she determined the relationship and filed the Bill of Costs against the Client. I have looked carefully at the documents provided by the Advocate in support of her argument that there was a continuing contract until 2023 from 2013. None has been availed to the court to confirm if indeed it was the correct position and that there was indeed a relation for which fees was earned by the Advocate. It is trite that a relationship between an Advocate and their Clients are contractual and therefore subject to the *Limitation of Actions Act*. Section 4(1) provides as follows:-
1. The following actions may not be brought after the end of six years from the date on which the cause action accrues



a. Actions founded on contract.....”

18. The court in *P.M. Wamae & Company Advocates v. Ntoitha M’mitthiaru* (2016)eKLR stated:-

“As to whether the Advocate’s bill of costs is time barred under section 4 of the Limitation of Action, it is important to note and it is trite law that an Advocate’s claim for costs would be based on the contract for professional services between him and his Client. It is therefore a claim founded on contract for legal services. An action to recover such costs would therefore be subject to the limitation period stipulated under section 4(1) of the *Limitation of Actions Act*, Cap 22 laws of Kenya.”

19. The record before me reflects that the Joint Venture Agreement which is the basis upon which the Bill of Costs was drawn was done on 19th March 2013. The Advocate did not produce any evidential material before this court or the taxing master to demonstrate that there was a continuing relationship post 19th March 2013 related to the Joint Venture Agreement implementation and that if any services were rendered, they were directly related to the Joint Venture Agreement and not other separate legal services. No material has been placed before this court and subsequently before the taxing master to demonstrate that this was not a single act, carried out in 2013 and where no fees having been agreed upon none were charged because there were other considerations as brought under clause 5,6 and 8 of the Joint Venture agreement under the heading “Selling and Sales”. I am therefore satisfied that if at all there was a contractual agreement created by the parties herein, the same was done in 2013 and therefore the window within which the Advocate could have brought a claim under the said contract closed in 2019. The Bill of costs filed in 2023 was therefore, in my view, filed out of time and the taxing master committed an error in principle in proceeding to tax the same.

20. In conclusion I hold and find that the application by the Client has merit and I shall allow the same. The Bill of Costs herein and the subsequent certificate of taxation are hereby struck out in their entirety with costs to the Client.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Mr. Opwaka holding brief for Wesonga for the Client/Applicant.

Mr. Ochieng Oginga holding brief for Mr. Nyandieka for the Advocate/Respondent.

Amos - Court Assistant

