



**Humphrey & Company Advocates v Busia Bottlers Limited**  
**(Commercial Miscellaneous Application 101 of 2023)**  
**[2024] KEHC 2291 (KLR) (Commercial and Tax) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2291 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL MISCELLANEOUS APPLICATION 101 OF 2023**

**PM MULWA, J**

**MARCH 7, 2024**

**BETWEEN**

**HUMPHREY & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**BUSIA BOTTLERS LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. This ruling is majorly a determination on whether or not there exists an Advocate-Client relationship between the parties herein. The applicant filed an Advocate-Client Bill of Costs dated 7<sup>th</sup> February 2023 with respect to Milimani High Court Income Tax Appeal No. E045 of 2021. In opposition to the said Bill of Costs, the respondent filed a replying affidavit sworn on 30<sup>th</sup> March 2023 and averred that it never instructed the applicant to represent it in the aforesaid matter as alleged in item No. 1 of the said Bill of Costs. In addition, its Director never executed the pleadings filed in the said matter. After all, the respondent asserted that it is a body corporate and it required a resolution to authorize the applicant to act on its behalf, which is not the case here as concerns Milimani High Court Income Tax Appeal No. E045 of 2021.
2. The applicant on the other hand contended that the respondent through its agent gave instructions for representation in Milimani High Court Income Tax Appeal No. E045 of 2021. And having duly acted as instructed, the applicant seeks to recover the resultant legal fees amounting to Kshs. 1,010,180.50 in the Advocate-Client Bill of Costs dated 7<sup>th</sup> February 2023.



3. Parties filed written submissions with regards to this matter. The applicant's submissions were filed by the law firm of Humphrey & Company LLP Advocates on 4<sup>th</sup> July 2023, whereas the respondent's submissions were filed on 9<sup>th</sup> June 2023 by the law firm of Mukele Ngaho & Company Advocates.

### **Applicant's Submissions**

4. Mr. Outa, learned counsel for the applicant placed reliance on the two cases of Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR and Uhuru Highway Development Ltd & others v Central Bank of Kenya & others (2) [2002] 2 EA654 (CAK) and submitted that the nexus between an advocate and his/her client is the advocate/client relationship which springs from instructions by the client to the advocate. This means that in the absence of such instructions a Taxing Officer will have no jurisdiction to tax an Advocate-Client Bill of Costs.
5. It was submitted by counsel that the law on the scope of an agent's authority is well settled, that an agent's authority may be actual or apparent. In cases where its actual, the agent has express powers to act for the principal. And where the principal either knowingly or even mistakenly permits the agent or others to assume that the agent has authority to carry out certain actions when in fact such authority does not exist, the principal is liable for such actions of the agent, if other persons believe in good faith that such authority existed.

### **Respondent's submissions**

6. Learned counsel Mr. Ngome cited the provisions of Sections 107, 108, 109 and 112 of the Evidence Act and submitted that the respondent's averments that it did not retain the applicant remain uncontroverted. In addition, the applicant did not adduce evidence to the effect that the respondent passed a resolution instructing the applicant to act on the respondent's behalf. That the applicant bears the burden of proving that there existed an Advocate-Client relationship, but had failed to discharge the said burden.
7. In re-iterating that the Court lacked jurisdiction to tax the Advocate-Client Bill of Costs dated 7<sup>th</sup> February 2023 tax, counsel also cited the case of Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited (supra). It was asserted that there was Advocate-Client relationship between the parties herein.

### **Analysis and Determination.**

8. In light of the foregoing, the following issues arise for determination:
  - i. Whether this Court is clothed with the requisite jurisdiction to determine the issue of retainer between the parties herein, and
  - ii. Whether there existed an Advocate-Client relationship between the applicant and the respondent.
9. The locus classicus on the issue of jurisdiction is the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. A decision made by a court of law without proper jurisdiction amounts to nullity ab initio.
10. A perusal of the Court record shows that on 13<sup>th</sup> September 2023 the learned Taxing Officer delivered a ruling where she held that she did not have jurisdiction to deal with the issue of retainer and directed that the matter be placed before the Presiding Judge of the Commercial and Tax Division for allocation to a Judge.



11. It is now an oft-trodden path that the Advocates Remuneration Order (ARO) gives the Taxing Officer jurisdiction to tax a bill of costs in instances where there is an established Advocate-Client relationship, and where there is no dispute as to retainer. The Court of Appeal in the case of Wilfred N. Konosi T/ A Konosi & Co. Advocates v Flamco Limited (supra), in dealing with a similar issue held that -

“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in Taparn vs Roitei [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The Advocates Act and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate 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.”

12. It is to be appreciated that questions on jurisdiction can also be raised by the Court suo moto, if it is apparent from the pleadings and the evidence before the Court that it does not have jurisdiction, as is the case herein. Before subjecting a Bill of Costs to taxation in cases where there is a dispute on retainer, the said issue has to be determined as a preliminary point before proceeding with the taxation. In doing so, the Court will be determining whether the jurisdiction of the Taxing Officer to tax the said Bill of Costs has been properly invoked. In determining the issue herein, this Court will attempt to answer the question of who between a Judge and a Taxing Officer has the requisite jurisdiction to determine a dispute on retainer.

13. Paragraph 13A of the ARO provides as follows: -

“For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

14. My considered view is that a Taxing Officer has the requisite jurisdiction to determine a dispute on retainer when raised and/or brought before him/her. This is an issue which the Taxing Officer can deal with, and it has to be determined at once. I find guidance in the Court of Appeal holding in the Wilfred Konosi case (supra) where it was held thus: -

“As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.” (emphasis added)

15. In light of the foregoing, I find that the Taxing Officer made an error in holding that she had no jurisdiction to determine the dispute on retainer. The import of the Wilfred Konosi case is that the



Taxing Officer, being the first port of call in matters taxation, ought to have exercised her discretion and determined this issue first, thereafter if any of the parties herein is aggrieved by her decision, they may appeal against the said decision to this Court. In such a case this Court exercises an appellate jurisdiction.

16. The upshot is that this Court does not have jurisdiction to hear and determine a dispute on retainer and matters of taxation generally as a Court of first instance. The Taxing Officer has jurisdiction to determine the issue of retainer. Consequently, I make the following orders: -

i. That this matter be remitted back to the Deputy Registrar/Taxing Officer for hearing and determination of the dispute on retainer and, subject to the outcome thereof, taxation of the Advocate-Client Bill of Costs dated 7<sup>th</sup> February 2023.

ii. There shall be no orders as to costs.

17 Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

.....  
**MULWA**

**JUDGE**

In the presence of:

Ms. Nderitu hb for Mr. Mbae for the Applicant

Mr. Mukele for the Respondent

Court Assistant: Carlos

