



**Orege t/a Orege J & Associates v Nthiga (Miscellaneous Civil Application E367 & E368 of 2019 (Consolidated)) [2024] KEHC 9855 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9855 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E367 & E368 OF 2019 (CONSOLIDATED)  
JWW MONG'ARE, J  
JULY 25, 2024**

**BETWEEN**

**JULIUS ORENGE T/A ORENGE J & ASSOCIATES ..... ADVOCATE**

**AND**

**KENNEDY MILTON NTHIGA ..... CLIENT**

**RULING**

**Introduction And Background**

1. The advocate filed an Advocate-Client a Bill of Costs that was subsequently amended on 10<sup>th</sup> September 2019 in Misc. E367 of 2019 and a Bill of costs dated 5<sup>th</sup> September 2019 in Misc. E368 of 2019. Through a ruling dated 21<sup>st</sup> March 2023, the taxing officer taxed the bills at Kshs. 2,711,409/= for Misc. E367 of 2019 and Kshs.3,203,949/= for Misc. E368 of 2019 respectively. The two Bills of Costs arose from services rendered two separate suits being HCCC No. 358 of 2017 and HCCC No. 1 of 2015.
2. Dissatisfied, the Client filed a Chamber Summons application dated 18<sup>th</sup> April 2023 seeking to set aside the taxation ruling (the 1<sup>st</sup> Application). On its part, the Advocate filed a Notice of Motion dated 18<sup>th</sup> April 2023, seeking judgment in terms of the taxed costs (the 2<sup>nd</sup> Application).

**1st Application**

3. Through the first application, the Client seeks an order setting aside the order of taxation. In the alternative, the Client seeks an order directing the taxing officer to conduct an inquiry to determine the total amount of money paid to the advocate and that the advocate be required to refund the money due to the Client together with interest within 14 days together with costs.



4. The application is based on the grounds set out on its face, the annexed affidavit of Kennedy Milton Nthiga and written submissions dated 16<sup>th</sup> September 2023. The main grounds are that the taxing officer did not consider Mr. Musyoka's viva voce evidence to the effect that the Advocate, Mr. Orange, visited the offices of the Client's adversaries and received Kshs.500,000/= in order to compromise the case; that the taxing officer who rendered the decision did not hear the evidence and that the request to have the file reverted to the taxing officer who heard the evidence was declined. Thus, the taxing officer did not consider whether the Client instructed Mr. Orange, a salaried employee of the firm of M/S. Malonza & Co. Advocates at the time, and whether it was justifiable for Counsel to seek payment for not providing services to the client.

### **Response**

5. In his response, the Advocate filed a replying affidavit sworn by Julius Orange Advocate on 4<sup>th</sup> May 2023 and written submissions dated 25<sup>th</sup> September 2023. The Advocate's key contention was that a matter of misconduct by an Advocate cannot be dealt within a bill of costs because a taxing officer lacks the relevant jurisdiction to consider and make appropriate finding on such an issue. The Advocate insisted that he was properly instructed in both matters and that the pleadings in the two suits were drawn and filed by J. Orange & Co. Advocates and both had verifying affidavits signed by the Client.

### **2<sup>nd</sup> Application**

6. The Advocate filed a motion dated 18<sup>th</sup> April 2023, seeking judgment in terms of the taxed costs.

### **3<sup>rd</sup> Application**

7. The Advocate also filed a motion dated 25<sup>th</sup> January 2024, under Order 45 of the *Civil Procedure Rules*, seeking that the ruling and orders of the Court made on 11<sup>th</sup> January 2024 be reviewed and set aside and the Court proceeds to deliver its ruling on the substantive prayers of the reference. The 3<sup>rd</sup> motion is based on the grounds that there is an order of stay of execution and the Court granted an order of stay of execution on 23<sup>rd</sup> April 2023 in terms of prayer 2 of the first application; that the orders were severally extended pending hearing of the substantive prayers and that although the directions on the hearing of the reference were given on 8<sup>th</sup> May 2023 and parties complied, on 11<sup>th</sup> January 2024, the Court delivered a ruling and granted stay of execution and gave a mention date for 14<sup>th</sup> March 2024 for hearing of the reference. The 3<sup>rd</sup> application was unopposed.

### **Analysis and determination**

8. I have considered the pleadings, submissions and authorities filed by the respective parties. The issues for determination are:-
  1. Whether the Advocate has met the threshold for review of the Ruling and Orders of 11<sup>th</sup> January 2024.
  2. Whether the taxing officer had the jurisdiction to tax the bill of costs in the circumstances in the two miscellaneous applications.
9. I shall first consider the third application which is unopposed. Guided by Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Act*, I find that the Advocate has met the threshold for the grant of review orders in that there is an error on the face of the record. This is because the substantive prayers of the first application were not considered.



10. Moving on to the 1st application, the guiding principle is that this Court will not interfere with a taxing officer's exercise of discretion unless it is demonstrated that the taxing officer wrongly exercised the discretion and took into account a wrong principle. See *Muthaura Mugambi Ayugi Advocates v Musimba Investments Limited* (Miscellaneous Application E830 of 2020) [2023] KEHC 20668 (KLR) (Commercial and Tax) (21 July 2023) (Ruling).
11. The Client submitted that the taxation ruling ought to be set aside because the taxing officer failed to consider the viva voce evidence that in filing and withdrawing HCCC No. 1 of 2015, the Advocate acted without the authority and instruction of the Client; the money that the Advocate admitted to having already received from the Client; the professional misconduct by the Advocate in taking instructions through his law firm, J. Orange & Co. Advocates while he was a partner at Malonza & Co. Advocates at the time and in receiving money from the Client's adversaries to compromise the case.
12. On the other hand, the Advocate argued that the taxing officer lacked the jurisdiction to determine matters of professional conduct which are reserved for the Advocates' Complaints Commission and the High Court.
13. The position of the law is that jurisdiction flows from either the *Constitution* or statute and that a court cannot arrogate itself jurisdiction. The Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application No. 2 of 2011) [2012] eKLR, observed that:-
  - “(68) A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
14. Under section 56 of the *Advocates Act*, only the Chief Justice or a Judge can deal with misconduct or with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge. Therefore, I am inclined to agree with the Advocate's submission that the taxing officer lacked jurisdiction to determine matters of professional conduct. Hence, the taxing officer cannot be faulted for failing to consider those matters.
15. Apart from allegations of professional misconduct, the Client also refuted that there was an Advocate-Client relationship and asserted that the Advocate was not entitled to any costs emanating from the two



matters. It has been held that where the issue of whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, it ought to be first determined by the High Court.

16. In *Mugambi & Co Advocates v John Okal Ogwayo & another* (Misc Application No 447 of 2010) [2013] eKLR, the Court held that:-

“ 10. The main thrust of the Clients’ chamber summons dated 28<sup>th</sup> February 2011 was that there was no advocate/client relationship between the Advocate and the Clients, and that therefore the Advocate was not entitled to any costs from the Clients that could be taxed. In other words, the Clients by their application were challenging the retainer claimed by the Advocate.

11. The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2, 10 and 13 of the remuneration order.

12. Where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court. “Court” is defined in section 2 of the *Advocates Act*, Cap 16 as the High Court. “Court” is thus not the taxing officer or a deputy registrar of the court.

13. I therefore hold that the taxing officer did not have jurisdiction to hear and determine the Client’s chamber summons dated 28<sup>th</sup> February 2011 to strike out the Advocate’s bill of costs because the issue being canvassed in the application was whether or not the Advocate was entitled to costs in the first place from the Clients.” See also *Agn Kamau Advocates v Chabrin Agencies Limited* [2021] eKLR.”

17. I agree with the above holding of the court. Accordingly, I find that the taxing officer lacked jurisdiction to hear and determine the Bills of costs before this Court determined whether there was an Advocate-Client relationship.

18. In conclusion, I make the following orders:-

1. The Advocate’s application dated 25<sup>th</sup> January 2024 is allowed.
2. The Client’s application dated 18<sup>th</sup> April 2023 is partly allowed.
3. The Ruling of the taxing officer of 21<sup>st</sup> March 2023 is set aside.
4. The issue of retainer be determined by this Court before the Advocate’s Bills of Costs can be considered.
5. The Advocate’s application dated 18<sup>th</sup> April 2023 is dismissed.
6. Each party shall bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

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**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Mr. Ogode holding brief for Mr. Orege for the Advocate.
2. Mr. Mutuku for the Client.
3. Amos - Court Assistant

