



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISC. APPLICATION NO. 199 OF 2021

DAPHNE MUSYOKI MWOSE KITELE.....APPLICANT/CLIENT

VERSUS

O. N. MAKAU & MULEI ADVOCATES.ADVOCATES/RESPONDENT

ELIJAH MUSAU KITELE.....RESPONDENT

ELIZABETH NGII MAINGI.....RESPONDENT

RULING

1. By Chamber Summons 13th October, 2021, the Applicant herein seeks s--+substantially an order that the ruling of the taxing master dated 6th October, 2021 dismissing the Applicant's Preliminary Objection be set aside.

2. The facts of this case were that the Advocate herein instituted legal proceedings on behalf of the client vide Machakos CMCC No. 525 of 2017. Upon the determination of the said matter, the Advocate instituted High Court Miscellaneous Application No. 551 of 2019 against the Clients in which the Advocates sought to have their costs taxed. When the matter came up before the Deputy Registrar for taxation, the Clients took a preliminary objection challenging the jurisdiction of the Deputy Registrar.

3. The said objection was based on the fact that since the primary suit was instituted before the Magistrate's Court, the Bill ought to have been filed before the said Court and not in the High Court. The Learned Deputy Registrar heard the said objection and dismissed the same. It is that dismissal that provoked this reference.

4. Before dealing with the substance of the reference, it is noteworthy that these proceedings have been commenced in a matter other than the one in which the decision of the Deputy Registrar was made. The general practice is that references from the decisions of the taxing officer are made in the same cause. Nothing however turns on that issue.

5. The substance of the reference is that the Deputy Registrar erred in dismissing the preliminary objection challenging his jurisdiction. That submission is based on Paragraph 49 of the *Advocates Remuneration Order* as read with section 27 of the *Civil Procedure Act*. Section 27 of the *Civil Procedure Act* provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

6. That deals with the general powers of the Court relating to costs. It donates to the Court the discretion to determine by whom and out of what property and to what extent such costs are to be paid. To my mind that provision does not deal with taxation of costs. It must be remembered that section 3 of the *Civil Procedure Act* provides that:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction

or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

7. What I understand by that provision is that where there is a specific provision or special jurisdiction prescribed by any other law, the provisions of the **Civil Procedure Act** do not apply. Paragraph 2 of the **Advocates Remuneration Order** provides that:

This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.

8. Since paragraph 2 aforesaid is specific that in matters remuneration between advocate by his client and the taxation of the advocate's costs and taxation between party and party the **Advocates Remuneration Order** is the one that applies, it is my finding that there is no room for invocation of the provisions of the **Civil Procedure Act**. Section 27 of the said Act, in my view, deals with determination of who to pay costs, from where the costs are to be paid and the extent of payment of such costs but not the actual taxation. What I understand by the extent is that the Court may, for example, cap the amount payable but, unless the court itself determines the quantum of costs, in the exercise of its discretion, a process which strictly speaking is not taxation, taxation must be in accordance with the provisions of the **Advocates Remuneration Order**.

9. Accordingly, section 27 of the **Civil Procedure Act** does not apply to taxation.

10. As regards paragraph 49 of the **Advocates Remuneration Order**, the said provision provides that:

(1) This Part shall apply to contentious matters and the taxation of costs as between advocate and client and between party and party in contentious and other proceedings.

(2) In this Part, "the Court" means the High Court or any judge thereof or a resident magistrate's court or any magistrate sitting as a member of a resident magistrate's court

11. Though the Applicant's view is that the above provision donates the jurisdiction to tax bill to the magistrate's Court. With due respect, that provision only defines what is meant by "the Court" under that part. The definition of a court does not encompass the jurisdiction to tax bills. To support this position, paragraph 10 of the **Advocates Remuneration Order** provides that:

The taxing officer for the taxation of bills under this Order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule IV the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

12. It is therefore clear beyond peradventure that for the purposes of the **Advocates Remuneration Order**, the taxing officer is the registrar or district registrar or deputy registrar of the High Court and in their absence such other qualified officer as the Chief Justice may in writing appoint. Therefore, in the absence of such appointment, in this Court, the taxing officer can only be the Deputy Registrar since the other officers mentioned are not there.

13. The process of taxation must be distinguished from the process of determination of costs before the Magistrate's Courts as between the parties thereto. That process is called assessment of costs and not taxation. The Applicants have relied on **Nyamogo & Nyamogo Advocates vs. Pan Africa Insurance Company Limited & Another**, Nairobi Misc. Civ. Appl. No. 1121 of 2013 as supporting their position that the magistrate's Court have the power to tax costs as between Advocates and Clients in matters whose primary proceedings were in the Magistrate's Court. A reading of the holding in that case is clear that what the court was dealing with was party and party costs. The Court expressly held that:

"The proper procedure for the applicant herein would have been to file his party and party bill of costs before the subordinate court and in the same cause and if he was dissatisfied with the assessment in the subordinate court, he would still seek this court's intervention in challenging that assessment..." [Emphasis added].

14. It is therefore clear that the court was dealing with party and party costs which before the Magistrate's Court is, as the court rightly stated, by assessment not taxation. It is worthy of note that the Court stated that such bills are filed in the same cause. This is to be distinguished from the express provisions of paragraph 13 of the **Advocates Remuneration Order** which emphasizes the powers of the taxing officer thereunder by providing that:

(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bills of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof. [Underlining mine].

15. Therefore, whereas an assessment is to be undertaken in the same cause, taxation of an advocate and client bill of costs is to be

undertaken in a miscellaneous cause. The two processes are clearly distinguishable.

16. Although the Applicant relies on **Bernard Gichomba Njira vs. Kanini Njira Kathendu & Anor. Misc. Reference Application No. 4 of 2015** as supporting its position, in that case the court was clear in its mind that the power of the magistrate's Court is restricted to assessment as opposed to taxation of costs.

17. It is therefore my finding that the decision of the Deputy Registrar disallowing the preliminary objection cannot be faulted. However, the law and practice is that where the jurisdiction of the Taxing Officer is challenged, the matter ought to be referred to the Judge since the mandate of the Taxing Officer is limited to taxation. This was the position in **M/S Behan & Okeru Advocates vs. National Bank of Kenya Limited Kisumu HCMA No. 40 of 2007** in which the Court while citing with approval the decision in **Machira & Co. Advocates vs. Magugu [2002] 1 EA 428** held that the Deputy Registrar's jurisdiction as a taxing officer is limited to taxing the Bill of Costs and giving reasons for taxation. Therefore, where issues other than taxation of the bill such as the competency of the bill are raised, the matter ought to be referred to the Judge for determination.

18. However, in light of my finding in this reference, nothing turns on that issue.

19. Accordingly, this reference fails and it is dismissed.

20. As regards costs, on 6th December, 2021, I directed that the applicant files submissions within 7 days. Those days lapsed on 13th December, 2021. The submissions were however file one day late on 14th December 2021. As for the Respondents, they were supposed to file theirs within 7 days of service thereof the last day being 20th December, 2021. By 22nd December, 2021 no submissions had been filed by the Respondents. Accordingly, there will be no order as to the costs of this reference.

21. It is so ordered.

Ruling read, signed and delivered in Court this 9th day of February, 2022

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Ms Kamene for the Respondent

CA Susan