



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. CIVIL APPLICATION NO. E096 OF 2021**

**BETWEEN**

**CHRISTOPHER O. KENYARIRI t/a**

**KENYARIRI & ASSOCIATES ADVOCATES.....ADVOCATES/APPLICANT**

**AND**

**FIRST COMMUNITY BANK LIMITED.....CLIENT/RESPONDENT**

**RULING**

1. Before the court is an application by way of a Notice of Motion dated 12<sup>th</sup> May 2021 filed by the Applicant/Client (“the Bank”) where it seeks an order that the Respondent’s (“Advocates”) Bill of Costs dated 9<sup>th</sup> February 2021 be struck out. The Advocates have opposed the application by filing a Notice of Preliminary Objection dated 3<sup>rd</sup> June 2021 and also filed an application dated 31<sup>st</sup> May 2021 seeking an order that the Bank’s application be placed before the court in **HC Civil Suit No. E145 of 2021** involving the parties.
2. At the center of the dispute is a claim by the Advocates for the balance of legal fees in respect of legal services rendered to the Bank. The parties do not dispute that they entered into a Retainer Agreement dated 15<sup>th</sup> April 2019 (“the Retainer Agreement”) which the Advocates seek to enforce in **HC Civil Suit No. E145 of 2021**. The Advocate states that they filed this application in order to tax their Bill of Costs on the basis that the Bank denied the existence of the Retainer Agreement in **HC Civil Suit No. E145 of 2021**. It contends that the Bank is blowing hot and cold as it now admits the Retainer Agreement in a bid to deny the Advocates their properly earned fees.
3. I am in Agreement with the Advocates that the Bank admits the existence of the Retainer Agreement. It urges the court to determine the dispute based on **section 45** as read with **section 46** of the *Advocates Act (Chapter 16 of the Laws of Kenya)* and not through taxation of the Bill of Costs. **Section 45(5)** of the *Advocates Act* allows an advocate who is a party to a retainer agreement and who has acted diligently for the client to sue and recover the whole retainer fee should his client default in payment thereof. An Advocates is entitled to the sum agreed under a retainer hence he need not tax his bill of costs unless the agreement so provides (see *National Bank of Kenya Limited v Otieno Ragot & Company Advocates KSM CA Civil Appeal No. 36 of 2017 [2020] eKLR*). This is the route the Advocates have taken in **Civil Suit No. E145 of 2021**. It follows therefore, that the instant taxation proceedings are unnecessary and the parties are bound by the terms of the Retainer Agreement and cannot have recourse to the *Advocates Remuneration Order*. Where there is a Retainer Agreement, a Taxing Officer lacks jurisdiction to tax a Bill of Costs (see *Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited ML HC Misc. Application No. E250 OF 2019 [2020] eKLR* and *Omulele & Co. Advocates v Synresins Limited MSA HC Misc. Application No. 27 of 2013 [2013] eKLR*).
4. Having the Bill of Costs filed herein and the attendant proceedings running parallel to the suit in **HC Civil Suit No. E145 of 2021** is an abuse of the court’s process. All matters relating to the Retainer Agreement must be heard and determined in **HC Civil Suit No. E145 of 2021**. The effect of this is that the Advocates’ Bill of Costs dated 9<sup>th</sup> February 2021 and all consequent proceedings are hereby struck out.
5. As both parties are engaged in shadow boxing, there shall be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2021.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Dr Kenyariri instructed by Kenyariri and Associates Advocates for the Advocates.

Mr Issa instructed by Issa and Associates Advocates for the Respondent.