



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E1220 OF 2020

BETWEEN

CORPORATE INSURANCE COMPANY LIMITED.....CLIENT/APPLICANT

AND

KANG'ETHE AND MOLA ADVOCATES.....ADVOCATES/RESPONDENT

RULING

1. By the instruction letter dated 28<sup>th</sup> October 2009, the Applicant engaged the Respondent (“the Advocates”) to represent and defend it in **Milimani PMCC No. 7380 of 2008, John Mwaua Makumi v Isaac Muthunga Gikeri & Alfred Njami Njihia** (“the Suit”). The Suit was dismissed for want of prosecution on 22<sup>nd</sup> November 2016. Thereafter the Advocates raised a Final Fee Note dated 26<sup>th</sup> May 2020 for the sum of KES. 88,550.00 which indicated on its face that it will be attracting interest at 14% per annum until fully settled. The Fee Note was not immediately settled by the Applicant and this prompted the Advocates to issue a demand by the letter dated 31<sup>st</sup> August 2020 informing the Applicant that failure to settle the Fee Note within 7 days from the date of the letter, the Advocates would proceed to file a bill of costs. On 16<sup>th</sup> November 2020, the Advocates filed the Bill of Costs dated 11<sup>th</sup> November 2020 claiming a total of KES. 266,158.00 from the Applicant.

2. The Applicant settled the Final Fee Note on 4<sup>th</sup> November 2020 by paying KES. 88,550.00 but the Advocates proceeded to file an Advocate/Client Bill of Costs because the amount due as at 6<sup>th</sup> November 2020, when they received the Applicant’s cheque, was KES. 92,682.42. They claimed that the Applicant failed to settle the fees in full together with interest thereon which still accrues to date. The Advocates assert their right to file the Bill of Costs on the ground that they have not received the full fees.

3. The Applicant has filed the Notice of Motion dated 14<sup>th</sup> January 2021 and made, inter alia, under **section 45(6)** of the *Advocates Act (Chapter 16 of the Laws of Kenya)* seeking to strike out the said Bill of Costs on the ground that it has already settled the Advocates’ Final Fee Note and that the Advocates are estopped from seeking further legal fees. The Application is supported by affidavit of its Legal Officer, Linda Olweny. The Advocates oppose the application through the Replying Affidavit of their Managing Partner, Nancy Kangethe Ikinu, sworn on 16<sup>th</sup> February 2021. The Applicant has also filed written submissions in support of its position.

4. The Advocates oppose the application on the ground that this court does not have jurisdiction to hear this matter as it is not seized of the taxation itself. They state that there is no appeal or reference as provided for by **Paragraphs 11(1) and 12** of the *Advocates Remuneration Order* and the taxation is not a suit filed in the High Court for recovery of costs. The Advocates submit that the Applicant seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that this court cannot take upon itself and that since the court is not seized of jurisdiction in this matter, the application ought to be struck out with costs.

5. The Advocates raise the alternative argument that the fee note served upon the Applicant indicated that it shall be attracting interest at 14% as provided in **Paragraph 7** of the *Advocates Remuneration Order* until its settlement and as such the fees owed to the Advocates together with interest remains unsettled. The Advocates contend whether they had already been paid their full fees for work done, is an issue to be determined by the taxing officer after hearing both parties and analysing the evidence and the court ought not usurp this jurisdiction. Further, that it is the obligation of the taxing officer to take into account whatever monies, if any, the Applicant had paid to the Advocates and credit the same while taxing the bill and that the Applicant has recourse to file a reference to the Court once all matters in issue are ventilated and the Deputy Registrar makes a determination.

6. In my view, two issues fall for determination from the application, depositions and submissions. First, whether the court has jurisdiction to entertain the application and second, whether the Advocates’ Bill of Costs ought to be struck out.

7. Although the High Court is clothed with unlimited original jurisdiction in criminal and civil matters under **Article 165** of the Constitution of Kenya, that jurisdiction is not exercised willy-nilly but according to the law; the Constitutions and legislation. In this respect, matter concerning Advocates fees are governed, in the main, by the **Advocates Act** and the **Advocates Remuneration Order**. Under statutory framework, the Deputy Registrar, as taxing officer, is granted jurisdiction to determine the quantum of costs due to the Advocate from a client should a dispute arise. The question in this case is whether this court may intervene and determine whether the Bill of Costs should have been filed in the first place.

8. The Applicant submits that the Deputy Registrar lacks jurisdiction to determine an application brought under **section 45(6)** of the **Advocates Act**. It relies on the case of **Abincha & Co Advocates v Trident Insurance Co Ltd NRB HC Mis. App. No. 527 of 2011 [2013] eKLR** where the Deputy Registrar was confronted with an application brought under **section 48(1)** of the **Advocates Act** and **section 4** of the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)** seeking to strike out the suit on the ground that the Advocate's bill of costs was statute barred and that the advocate was estopped from claiming any further costs. While striking out the bill of costs observed as follows on the issue of jurisdiction:

17. The main issues raised in the notice of motion dated 20th February 2012 were challenging the Taxing Officer's jurisdiction to tax the bill of costs before him. Those issues were whether the Advocate's bill of costs was statute-barred under the Limitation of Actions Act and whether the Advocate was estopped from claiming any further costs? Did the Taxing Officer have jurisdiction to deal with those issues?

18. Those issues were raising one fundamental issue, to wit, whether there were any costs due to the Advocate that the Taxing Officer could tax? I hold that it was an issue that could only be determined by a Judge. It is the kind of issue that the Taxing Officer, with the consent of both parties, should have referred to the opinion of the High Court.

19. Only after determination of that fundamental issue by the High Court, that is, whether or not there were any costs due to the Advocate that could be taxed, would the bill of costs be referred back to the Taxing Officer for taxation, if it is found that there were costs that were due to the Advocate.

9. The Court of Appeal in **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited NRB CA Civil Appeal No. 154 of 2014 [2017] eKLR** cited the aforesaid decision with approval but distinguished it from the present case by holding that the Deputy Registrar had jurisdiction to determine, as a preliminary issue, whether an advocate/client relationship existed as a prelude to taxation as follows:

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.

10. In resolving the question of jurisdiction thereof, the court must appreciate what is before the Deputy Registrar. In this case the Applicant has invoked **section 45(6)** of the **Advocates Act** which provides as follows;

45. Agreements with respect to remuneration

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

11. It is not in dispute that the Advocates' Fee Note dated 26<sup>th</sup> May 2020 was received by the Applicant on 2<sup>nd</sup> June 2020 at least going by the Applicant's receiving stamp on the face of the Fee Note and that the same was settled on 4<sup>th</sup> November 2020 where the Applicant paid the indicated sum of KES. 88,550.00. It is also not in contention that the Advocates' Bill of Costs was filed in court on 16<sup>th</sup> November 2020 after the Fee Note has been settled. As I understand, the only issue outstanding in the Fee Note is the claim for interest.

12. I therefore settlement of the Advocates Fee Note constituted an agreement on the terms proposed in the fee and based on the first principles of the law of contract, the offer by the Advocates contained in fee was accepted by the Applicant who paid the consideration by way of settling it. If there is any outstanding interest, the Advocates are entitled to claim it through a suit for recovery. In other words, I find that the issue of fees was duly settled when the fee note was paid as such the Deputy Registrar does not have jurisdiction to tax the bill under **section 45(6)** of the **Advocates Act** as the settlement constitutes an agreement between the parties.

13. The consequence of the above findings is that the Applicant's application dated 14<sup>th</sup> January 2021 is allowed and the Advocates' Bill of Costs dated 11<sup>th</sup> November 2020 be and is hereby being struck out.

14. Since the Applicant failed to settle the fee note on time, I decline to award it costs.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2021**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mutubwa and Company Advocates for the Applicant

Kang'ethe Mola and Company Advocates for the Respondent