



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC MISC. APPLICATION NO. 162 OF 2015
CONSOLIDATED WITH ELC
MISC. NO. 163 OF 2015, ELC MISC. NO. 164 OF 2015,
ELC MISC.NO. 165 OF 2015 AND ELC MISC. NO. 166 OF 2015

ANTHONY THUO KANAI T/A THUO KANAI ADVOCATES.....APPLICANT

=VERSUS=

CANNON ASSURANCE LIMITED.....1ST RESPONDENT

JOSEPH CHEBOROR.....2ND RESPONDENT

JUDGMENT

Background

The applicant was employed by the 1st respondent with effect from 1st January, 2007 as a legal officer through a letter of employment dated 1st November, 2006. The applicant was engaged on a starting salary of Kshs. 190,000/= per month and on other terms and conditions that were contained in his letter of employment aforesaid. The applicant's duties and responsibilities were spelt out as follows;

- (a) "Assisting the company with interpretation and application of all statutes e.g Insurance Act, Companies Act, Income Tax Act, Employment Act etc.
- (b) Keep abreast of amendment/developments to the law and especially where it may impact the business of the company and advise the company appropriately.
- (c) Give legal opinion and interpretation and application of all insurance covers issued by the company.
- (d) In respect of claims arising out of insurance cover provided, give legal opinion supported by case history and assist the claims department in handling the same.
- (e) Negotiate claims with 3rd parties on behalf of the company with a view to reaching amicable settlement.
- (f) Study and advise the company on all legal matters and assist with drafting letters/instructions to external lawyers and other parties.
- (g) Institute legal proceedings on behalf of the company in claims, debt recovery and any other matter.
- (h) Enter defence on behalf of the company where the company is being sued and vigorously and competently ward off such suits.
- (i) Assists the company in debt collection including filing suit as necessary.
- (j) Advise and undertake to deal with legal issues the company may face from time to time in the course of its business.

- (k) Giving legal opinion on all company matters where such opinion is required.
- (l) Supervising and coordinating all legal work given to external lawyers to ensure fast and favourable conclusion.
- (m) Conducting legal research.
- (n) Supervision of staff in the department.
- (o) Any other duties assigned from time to time by the Management.”

The said letter of employment dated 1st November, 2006 was forwarded to the applicant under cover of a letter dated 1st November, 2006 in which the 1st respondent informed the applicant that in all successful claims in which he would represent the 1st respondent directly, he would be allowed to retain 25% of the party/party cost and that the 1st respondent had allowed him to continue handling the cases that he was then handling in court which could not be handed over to other lawyers or were at advanced stage provided that the same would not affect his efficiency and quality of his work.

The applicant accepted the terms of his employment with the 1st respondent and commenced work. After successfully completing probationary period, he was confirmed with effect from 1st July, 2007. In addition to his salary, the applicant enjoyed other benefits of employment such as life insurance cover, accident insurance, staff pension, medical benefits and staff loan at preferential terms. The applicant’s salary rose over the years. As at 1st January, 2010 his salary was Kshs. 304,745/= per month and his job title was changed to Manager – Legal Affairs.

The applicant worked for the 1st respondent as an employee until November, 2012 when his services were terminated. As at the time of his exit, the applicant was on a monthly salary of about Kshs. 336,747/=. The 1st respondent paid for the applicant’s practising certificate and subscription to the Law Society of Kenya during his employment with the 1st respondent.

The dispute before the court:

On 19th June, 2015, the applicant filed five (5) separate Advocates/Client bills of costs namely, ELC Misc. Application Nos. 162/2015, 163/2015, 164/2015, 165/2015 and 166/2015 for taxation. The bill of costs in ELC Misc. Application No. 162/2015 was against both respondents herein while bills of costs in ELC Misc. Application Nos. 163/2015, 164/2015, 165/2015 and 166/2015 were against the 1st respondent only. The bill of costs in ELC Misc. Application No. 162/2015 related to the services said to have been rendered to the respondents herein in respect of the agreement for sale and transfer of a property known as C. R No. 21697, Mombasa valued at Kshs. 12,700,000/= between 17th July, 2009 and 26th August, 2009. The bill of costs in ELC Misc. Application No. 163/2015 related to the services said to have been rendered by the applicant to the 1st respondent in respect of a lease of Town House No. 3 on L.R No. 2951/105, Nairobi between 10th July, 2009 and 15th July, 2009.

The bill of costs in ELC Misc. Application No. 164/2015 related to the services said to have been rendered to the 1st respondent in respect of a lease over property known as Town House No. 3 on L.R No. 2951/105, Nairobi between 13th June, 2011 and 21st August, 2011. The bill of costs in ELC Misc. Application No. 165/2015 related to the services said to have been rendered by the applicant to the 1st respondent in respect of a lease of property known as Town House No. 2 on L. R. No. 2951/105, Nairobi – between 29th October, 2009 and 13th November, 2009. The bill of costs in ELC Misc. Application No. 166/2015 related to the services said to have been rendered by the applicant to the 1st respondent in respect of a lease of a property known as Town House No. 2 on L.R No. 2951/105, Nairobi between 7th October, 2011 and 30th November, 2011. The respondents filed a replying affidavit in response to the said bills of costs and the applicant filed affidavits in support of the same.

The five (5) bills of costs were consolidated on 16th September, 2015 with ELC Misc. Application No. 162/2015 as the lead file. The respondents objected to the taxation of the applicant’s bills of costs on the ground that the applicant was an employee of the 1st respondent and as such there was no advocate/client relationship between them to warrant the filing of the bills of costs. The said objection was heard by the taxing officer, Hon. S. Mwayuli on affidavit evidence and written submissions. In his affidavit in support of the five (5) bills of costs, the applicant averred that while he was rendering the services in respect of which he had filed the subject bills of costs, he was still an advocate of the High Court of Kenya trading in the name and style of A. Thuo Kanai Advocates and/or A. Thuo Kanai & Co. Advocates.

The applicant averred that the 1st respondent was all along aware that he was operating a registered law firm and had engaged his firm in August, 2006 before his employment with the 1st respondent to act for it in court cases. The applicant averred that his engagement and instruction by the 1st respondent to act for it in court and in conveyancing matters preceded his employment with the 1st respondent as a legal officer in January, 2007. The applicant averred that his employment by the 1st respondent as a legal officer was a separate, distinct and independent engagement from the professional services which he rendered as an advocate of the High court of Kenya through his law firm.

The applicant averred that the 1st respondent had allowed him to continue operating his law firm A. Thuo Kanai Advocates and/or A. Thuo Kanai & Co. Advocates which is the law firm through which the 1st respondent had instructed him to render professional legal services in respect of which he had filed the bills of costs in dispute. The applicant averred that the said instructions created an advocate/client relationship between him and the 1st respondent while he was in the employment of the 1st respondent. The applicant averred that the 1st respondent held out his law firm to be acting for it to third parties in correspondence and would use the name of his law firm when instructing him on professional legal services.

The applicant averred that there was advocate/client retainer relationship with the 1st respondent in respect of the services that he had rendered to the 1st respondent which was the subject of the bills of costs in dispute. The applicant averred that the said services were not within the scope of the duties and responsibilities that he was supposed to undertake for the 1st respondent. The applicant averred that he was employed by the 1st respondent as a legal officer and not as an advocate of the High Court. The applicant averred that the conveyancing work that he undertook on behalf of the 1st respondent went beyond his contract of employment and had to be remunerated under the Advocates Act and not under his employment contract with the 1st respondent.

The applicant averred that the 1st respondent had acknowledged and facilitated the applicant to practice law through his law firm which was a separate engagement from the applicant's employment with the 1st respondent and that the 1st respondent issued him with a professional indemnity cover for any claims that could arise while he was working as an independent professional legal advisor for the 1st respondent.

The applicant averred that the 1st respondent did not employ A. Thuo Kanai Advocates and as such when it obtained legal services from the firm, it had to pay for the same in accordance with the Advocates Act. The applicant averred that the 1st respondent was aware that he was entitled to fees and indeed charged the same but in breach of section 43 of the Advocates Act refused to release the same to the applicant. The applicant averred that the 1st respondent obtained money from its tenants by false pretense that the fees paid would be released to A. Thuo Kanai Advocates.

The applicant averred further that the salary that was paid to him by the 1st respondent under his contract of employment did not cover the professional legal services that he rendered to the 1st respondent as an advocate that was regulated under the Advocates Act such as conveyance and court matters which were over and above his duties and responsibilities under the contract of employment with the 1st respondent. The applicant averred that he was not under an obligation to reimburse the 1st respondent for the use of its facilities while rendering the services for which he had sought payment in the absence of an agreement that he would set off his profit costs with such expenses.

The respondents opposed the applicant's bills of costs through a replying affidavit and further affidavit sworn by its Human Resource Manager, Ms. Evelyn Olalo on 17th August, 2015 and 23rd September, 2015 respectively.

The respondents contended that the applicant's bills of costs had no basis since there was no advocate/client relationship between the applicant and the 1st respondent. The respondents contended that the 1st respondent did not at any time instruct the applicant to act for it in respect of the matters which were the subject of the applicant's bills of costs. The respondents averred that at all material times, the applicant was an employee of the 1st respondent having been engaged as a legal officer through a contract made on 1st November, 2006. The respondents averred that the employment relationship between the applicant and the 1st respondent subsisted until it was terminated on 13th November, 2012. The respondent averred that the contract of employment between the applicant and the 1st respondent provided for the duties and responsibilities that the applicant was to undertake which included advising and dealing with legal issues which the 1st respondent could face from time to time.

The respondents averred that the services which the applicant rendered to the 1st respondent which were the subject of his bills of costs were performed by the applicant in the course of his employment and could not be treated as instructions to the applicant's law firm. The respondents averred that at all material times, the applicant acted for the 1st respondent in his own name as an employee of the 1st respondent. The respondents averred that the 1st respondent did not issue any instruction to the law firm of A. Thuo Kanai Advocate and that the applicant operated from the 1st respondent's premises and both his physical and postal address were of the 1st respondent.

The respondents averred that the applicant was remunerated for all the services that he rendered to the 1st respondent as an employee until 13th November, 2012 when his services were terminated and that a refund was made to him for all the fees he paid for annual practicing certificates. The respondents averred further that the 1st respondent paid all the expenses that were necessary to facilitate the applicant's work such as court filing fees, office space, secretarial services, stationery and commuter services. The respondents averred that the applicant was also using the 1st respondent's support services as well as infrastructure which included vehicles, messenger, rider, stationery, photocopying services, telephone and training that was offered to staff. The respondents averred that the applicant and other staff employed in the Legal Department undertook all legal work which the applicant did not allocate to the external lawyers.

The respondents averred that as at 2009 when the applicant undertook the services for which he had filed bills of costs, he was earning a monthly salary of Kshs. 260,468/= which amounted to Kshs. 3,125,616/= annually. The respondents averred that this payment was remuneration for the duties that the applicant performed for the 1st respondent as an employee in accordance with his terms of contract. The respondents averred that if the applicant received instructions from the 1st respondent other than as an employee then he was not entitled to any salary and he should refund all the expenses incurred on his account including the salary and office space.

The respondents averred that the applicant was fully remunerated for the work done as agreed under the contract of employment between the parties and that no advocate/client relationship existed between the applicant and the 1st respondent.

The deponent of the respondents' affidavits in opposition to the applicant's bills of costs, Evelyn Olalo was summoned to court at the request of the applicant and was cross-examined by him on her affidavits. The parties thereafter filed written submissions.

The submissions:

In their submissions filed on 15th July, 2016 the respondents reiterated the contents of the affidavits filed in opposition to the applicant's bills

of costs. The respondents submitted that the applicant was the 1st respondent's employee and not an independent contractor since he was subject to the command of the 1st respondent and to the rules and procedures of the 1st respondent. The respondents submitted further that the applicant was not in business on his own account but worked for the 1st respondent who took all the risks of loss and chance of profit and that he was under an employment contract in which the applicant and the 1st respondent had made mutual commitments to maintain an employee employer relationship over a period of time. In support of this submission, the respondents relied on the case of Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR.

In his submissions in reply, the applicant submitted that there was advocate/client retainer relationship between the applicant and the 1st respondent in respect of all the conveyance matters that he undertook for the 1st respondent through his law firm A. Thuo Kanai Advocate which are the subject of the bills of costs that he had filed. The applicant submitted that he was duly instructed through his law firm to act for the 1st respondent in the transactions which were the subject of the said bills of costs. The applicant reiterated that the 1st respondent's engagement of the firm of A. Thuo Kanai Advocates and/or A. Thuo Kanai & Co. Advocates was a separate and distinct retainer relationship separate from the applicant's employment as a legal officer by the 1st respondent. The applicant reiterated that the 1st respondent did not employ his law firm.

The applicant submitted further that the existence of advocate/client relationship could be inferred from the conduct of the parties, correspondence and the documents that were prepared by the firm of A. Thuo Kanai & Company advocates as acting for the 1st respondent. The applicant submitted that the said documents did not indicate that they had been prepared by the 1st respondent's legal officer or legal manager. In support of his submissions, the applicant relied on the case of Uhuru Highway Development Ltd. v Central Bank of Kenya (2) [2002] 2 E. A. 654 at 658.

The applicant submitted further that Section 34 of the Advocates Act prohibited the 1st respondent which was unqualified person from practising law and from directly or indirectly taking instructions or preparing or drawing documents or instruments relating to conveyance matters. The applicant submitted that the 1st respondent could not practice law directly or indirectly through employment of a qualified advocate to perform the duties normally performed by advocates for it under an employment contract. The applicant submitted that practice of law is not a lawful business for unqualified persons and as such, such persons cannot practice law by employing an advocate as his employee. In support of this submission, the applicant relied on In Re Co-operative Law Co., 92 (N.Y). 15 referred to in the Yale Law Journal, Volume 20 No. 4 (February 2011) pp. 309-311 at pages 309 to 310.

The applicant submitted further that he could not have performed the conveyancing work for the 1st respondent as its employee because Section 35(1) of the Advocates Act requires that an advocate who prepares a conveyance document must endorse it with his name or the name of his firm and that in the documents which were prepared by the applicant for the 1st respondent and which were the subject of the bills of costs in contention, it was indicated that the same were drawn by the firm of A. Thuo Kanai Advocates for the 1st respondent.

The applicant submitted that the 1st respondent having held the applicant out as its advocate and not as an employee was estopped from denying the retainer relationship between them in respect of the services the subject of this bills of costs in dispute. The applicant submitted further that the 1st respondent was aware that the applicant was entitled to legal fees and in fact received fees on behalf of the applicant but instead of remitting the same to the applicant converted the same to its income contrary to the provisions of the Advocates Act that prohibited the 1st respondent from practicing law. The applicant submitted that the 1st respondent could not use the employment contract it entered into with the applicant to defeat the provisions of a statute and that when there is a conflict, the contract must give way.

The applicant submitted further that the respondent's objection to this bills of costs was res judicata since the issue as to whether or not the applicant was entitled to legal fees was determined in High Court Petition No. 433 of 2013, Cannon Assurance Ltd. v Anthony Thuo Kanai & The Attorney General which decision was upheld by the Court of Appeal in Court of Appeal at Nairobi Civil Appeal No. 77 of 2014.

The applicant submitted that as a practising advocate of the High Court of Kenya he was entitled to equal protection and benefit of the law under Article 27 (1) of the Constitution as a legitimate and fundamental right. The applicant submitted that he was entitled to similar rights and privileges accorded to all advocates including remuneration under the provision of the Advocates Act.

In further submissions on the issue of res judicata, the applicant relied on a ruling that was delivered in Nairobi Misc. Application No. 125 of 2013, A. Thuo Kanai Advocates v Cannon Assurance Ltd. The applicant submitted that in this case, another taxing officer had ruled that the applicant was entitled to be paid legal fees by the 1st respondent for the professional services that he rendered and that the employment contract was not an instruction to an advocate. The applicant urged the taxing officer to dismiss the respondent's objection and allow the applicant to tax his bills of costs.

The respondents filed further submissions on 27th April, 2017 in reply to the applicant's submissions. The respondents reiterated that there was no advocate/client relationship between the applicant and the 1st respondent. The respondents submitted that the applicant was not entitled to derive a salary as an employee and at the same time charge legal fees under the Advocates Act. The respondents submitted that the applicant was only entitled to the remuneration that was provided for in his contract of employment. The respondents submitted that as at the time of termination of his employment in 2012, the applicant had not raised any fee note and had not demanded payment of any fees from the 1st respondent, which was an indication that he was aware that he was not entitled to any salary. On the issue of res judicata, the respondents submitted that the objection against the bills of costs by the applicant was not res judicata since the issue raised in the objection that was before the taxing officer was whether there was advocate/client relationship between the applicant and the 1st respondent which issue was not raised in the decisions relied on by the applicant. The respondents also cited decision by another taxing officer, in Nairobi Commercial and Admiralty Division Misc. Application Nos. 289, 290 and 291 between the parties in which the 1st respondent's objection on similar grounds had been upheld.

In conclusion the respondents submitted that under Section 44 of the Advocates Act, the Chief justice is required to make rules for

remuneration of in house counsel. The respondents submitted that during the applicant's employment with the 1st respondent, no such rules had been made and as such the applicant was not entitled to any further remuneration by way of fees over and above his employment package.

Ruling by the taxing officer:

The taxing officer, Hon. S. Mwayuli considered the objection to the bills of costs, oral and affidavit evidence, submissions of counsels and delivered a ruling on 16th October, 2017. The taxing officer upheld the respondents' objection and dismissed the applicant's bills of costs. The taxing officer found that the objection by the respondents raised only one issue for determination which she framed as follows: -

“Whether or not the relationship between the applicant and the respondent between the periods within which the Bills of Costs reflect was an Employer – Employee relationship or it was an independent contractual relationship?”

The taxing officer found that from the evidence that was adduced before the court, the applicant was an employee of the 1st respondent between 1st November, 2006 and 13th November, 2012 and was earning a salary and a commission on some types of work or assignments. The taxing officer found that the bills of costs which were the subject of the objection related to the services rendered by the applicant to the respondents between 2009 and 2011 during the subsistence of the applicant's contract of employment with the 1st respondent. The taxing officer held that the court could not condone a practice where an advocate would work as an employee and at the same time be running a law firm in his place of work at the same time. The taxing officer found that one could not have his cake and eat it at the same time. The taxing officer held that the applicant could not be an employee and an independent contractor at the same time over the same subject matter. The taxing officer held that the applicant could only be entitled to file bills of costs for taxation if he was an independent contractor. The taxing officer held that since the applicant was the 1st respondent's employee between 1st November, 2006 and 13th November, 2012 he was not entitled to file bills of costs for taxation for the services rendered to the 1st respondent during that period. With those findings, the applicant's bills of costs were accordingly dismissed.

The reference to this court:

The applicant was dissatisfied with the decision of the taxing officer and brought the present reference by way of Chamber Summons dated 7th November, 2017 filed on 8th November, 2017. In the application, the applicant sought the following orders:

1. That the court be pleased to set aside the taxing officer's ruling dated 16th October, 2017 in its entirety and reinstate the applicant's Advocate/Client bills of costs in Misc. Application Nos. 162, 163, 164, 165 and 166 all of 2015.
2. That the court does order that the applicant was entitled to the taxation of the said bills of costs pursuant to the advocate/client relationship between the applicant and the respondents.
3. That the costs of the application be provided for.

The applicant's reference was brought on the grounds set out on the face thereof and on the supporting affidavit of the applicant sworn on 7th November, 2017. The decision of the taxing officer was challenged on among others the following grounds;

1. The taxing officer failed to apply her mind to the provisions of Section 44 of the Advocates Act and Rule 4(ii) of the Advocates Practice Rules which entitled the applicant to be paid legal fees when rendering professional services as an advocate of the High Court of Kenya which was distinct from being an employee.
2. The taxing officer erred in law when she misdirected herself by failing to consider and apply the principle of law that there could be no estoppel against statute nor could a contract override a statute.
3. The taxing officer erred in making a finding contrary to Section 34 (1) of the Advocates Act which prohibits unqualified person from drawing instruments or documents relating to conveyance of property for which a fee is prescribed under section 44 of the Advocates Act and not finding that the applicant could not have acted in conveyance matters as an employee of the 1st respondent but as an independent advocate of the High Court.
4. The taxing officer erred by failing to address her mind to the issue of res judicata and to the principle of stare decisis.
5. The taxing officer erred in failing to apply and give effect to the provisions of sections 31, 34, 35, 39 and 43 of the Advocates Act by implying that the applicant rendered the services in question as an employee of the 1st respondent while unqualified persons are prohibited from rendering legal services directly or indirectly.
6. The taxing officer erred when she failed to consider that the applicant acted for both respondents in the agreement for sale and transfer in respect of a property known as CR No. 21697, Mombasa while he was not an employee of the 2nd respondent.
7. The taxing officer erred in law and fact by failing to find that the services that the applicant rendered through his law firm were outside his terms of employment and were not rendered by him as an employee.
8. The taxing officer's decision was against the weight of evidence adduced by the applicant on his right to be paid legal fees.

The applicant's reference was heard by way of written submissions. The applicant filed his submissions on 18th January, 2019 while the respondents relied on the submissions on record that they had filed in the proceedings before the taxing officer.

Determination:

I have considered the record of the proceedings before the taxing officer in its entirety, the decision of the taxing officer and the grounds of objection put forward against the same. I have also considered the submissions made by the applicant in support of the reference. I will consider all the grounds upon which the applicant has challenged the decision of the taxing officer together as they address only one issue namely; whether there was advocate/client relationship between the applicant and the respondents that would have entitled the applicant to charge legal fees the subject of the bills of costs in contention.

The following is my view on the matter. In this country, persons who are qualified to practice law as advocates of the High Court of Kenya are either employed or are in private legal practice. The advocates who are employed serve either in the public or private sector. They serve in positions that require their specialised legal training, knowledge and experience. Whereas the advocates who are employed are remunerated by way of a salary and other benefits, those in private practice are remunerated by way of fees charged for their services. Every advocate of the High Court of Kenya has freedom to choose his or her career path depending on individual circumstances and conditions. The practice of law whether in employment or in private practice is regulated by the Advocates Act, Chapter 16 Laws of Kenya.

It was common ground that the applicant was employed by the 1st respondent as a legal officer with effect from 1st January, 2007 on terms and conditions that were set out in the contract of employment dated 1st November, 2006. The said contract of employment provided that the applicant was to be paid a monthly salary of Kshs. 190,000/= together with other benefits which were set out in the contract. The contract also provided that the applicant was to work Monday to Friday from 8:00a.m. to 5:00p.m. with a one-hour lunch break from 1:00p.m. to 2:00p.m. It was also a term of the applicant's employment that the applicant was not to engage in any other employment whether paid or unpaid voluntary or otherwise without specific approval in writing from the 1st respondent.

It was common ground that the applicant enjoyed the benefits of his contract of employment until November, 2012 when his employment was terminated. In the reference before the court, the applicant has faulted the taxing officer for holding that as an employee of the 1st respondent he was only entitled to a salary as his remuneration for the services that he rendered to the 1st respondent or on the 1st respondent's instructions and that he could not charge legal fees for the said services. The taxing officer was also faulted for her finding that as an employee of the 1st respondent, the applicant could not run a law firm from his place of work. The applicant has contended that Rule 4(ii) of the Advocates Practice Rules allowed him to charge fees while he was in the 1st respondent's employment in respect of what he referred to as **"the professional services that he rendered to the 1st respondent as an advocate of the High Court of Kenya."**

I have looked at the Advocates Practice Rules 1966 as amended more particularly Rule 4(ii) on which the applicant has based his fees claim. In my view Rule 4(ii) of the Advocates Practice Rules does not provide that an advocate who is employed and is receiving a salary as remuneration for his services is entitled to charge his employer legal fees for the same services for which he is being paid a salary. Rule 4 of the Advocates Practice Rules prohibits advocates from sharing profit costs with unqualified persons in respect of any contentious or non-contentious work. Rule 4(ii) of the practice rules gives an exception to that prohibition. It allows an advocate who is in the employment of unqualified person and who has agreed with his employer that he can charge fees over and above his salary to set off his profit costs received from the opponents of his employer(emphasis added) in respect of contentious work or the costs paid to him as the advocate for the employer by third parties in respect of non- contentious work against the salary paid or payable to him; and the reasonable office expenses incurred by such employer in connection with such advocate.

Rule 4(ii) of the Advocates Practice Rules does not give an employed advocate a right to charge his employer legal fees for the services rendered by the advocate to his employer in the course of employment and for which he is paid a salary. It only provides exceptions to the rule against sharing of profit costs between an employed advocate and his employer where there is an agreement between them on the charging of fees and setting off of the same against salary and expenses.

In the case before the court, there was no evidence placed before the taxing officer that the applicant and the 1st respondent had agreed that the applicant could charge fees for the services rendered to the 1st respondent or to third parties on the instructions of the 1st respondent and that he could set off such fees against the salary that he was receiving from the 1st respondent and the office expenses. In any event, even if there was to be such agreement, it could only be in relation to the profit costs received from the opponents of the employer in contentious matters and for the costs paid by third parties to the applicant as an advocate for the employer. There is correspondence to the effect that the applicant had an arrangement with the 1st respondent that the applicant would retain 25% of the costs paid in contentious matters in which the applicant acted for the 1st respondent. There was also evidence that the applicant received such payment from the 1st respondent. In his submissions before the taxing officer, the applicant denied the existence of such agreement or arrangement. I am of the view that in the absence of any agreement between the applicant and the 1st respondent that the applicant would charge fees for services rendered to the 1st respondent in the course of his employment, there was no basis upon which the applicant could charge fees under Rule 4(ii) of the Advocates Practice Rules.

The applicant had contended that the agreement that they reached with the 1st respondent on fees could be inferred from the correspondence and documents that were drawn by the applicant. From all the correspondence placed before the taxing officer, there was none in which the 1st respondent had agreed that it was to pay to the applicant fees over and above the salary for the services that the applicant rendered to it in the course of his employment. It is my finding that at all material times, the relationship between the applicant and the 1st respondent was that of an employee and employer and that the services that the applicant rendered to the 1st respondent or to third parties on the instruction of the 1st respondent were performed by the applicant in the course of his employment.

I am in agreement with the applicant that the services that he rendered to the respondents which were the subject of his bills of costs were

reserved for advocates under the Advocates Act. I am however not in agreement with the applicant that he was working for the 1st respondent in two capacities; one, as a legal officer and the other as an advocate of the High Court of Kenya, so that for the services he rendered as a legal officer he was earning a salary and other benefits and those he rendered as an advocate of the High court of Kenya, he was charging legal fees. It was common ground that when the applicant was employed by the 1st respondent, he was already an advocate. Most of duties which he was supposed to perform according to his employment contract could only be performed by an advocate of the High Court of Kenya. I doubt if the 1st respondent would have employed the applicant as a legal officer if he was not admitted as advocate of the High Court of Kenya. I do not understand therefore the applicant's argument that he was performing some of his duties as an advocate of the High Court of Kenya and others as a legal officer.

I am of the view also that nothing turns on the use of the name of the applicant's law firm in the documents and instruments that he drew on behalf of the 1st respondent. The law allows an advocate to practice in his name or in the name of a firm. As at the time of his employment, the applicant had registered a law firm under the name A. Thuo Kanai & Co. I am in agreement with the applicant's contention that the 1st respondent employed him but not his law firm. However, from the evidence on record, A. Thuo Kanai & Co. was a sole proprietorship which meant that Anthony Thuo Kanai t/a A. Thuo Kanai & Co. and Anthony Thuo Kanai Advocate was one and the same person. No evidence was led before the taxing officer that after the applicant was employed by the 1st respondent he continued to run a law firm within or outside his employment. The applicant had argued that the 1st respondent had allowed him to continue running a law firm. In my view, there is no evidence that the applicant was running a law firm in his place of work. As I have stated earlier, what the applicant called practising law was performance of the work that he was employed to do.

I am not in agreement with the applicant that preparation of leases, sale agreements and instruments of transfer were beyond the scope of his work as a legal officer. The applicant could render the services provided no fees was charged and retained by his employer. Rule 4A of the Advocates Practice Rules prohibits an advocate employed by unqualified person from drawing documents or rendering other services to his employer for which fees are charged directly or indirectly by his employer to any other person and retained by that employer. It is clear from the services that the applicant allegedly rendered to the 1st respondent and which are the subject of the applicant's bills of costs that the applicant breached Rule 4A of the Advocates Practice Rules. The services for which the fees are claimed in the said bills of costs as I have stated earlier in the judgment concerned preparation of the agreement for sale and transfer of property known as C. R No. 21697, Mombasa, preparation of leases in respect of Town House No. 2 on L.R No. 2951/105, Nairobi on two (2) occasions and preparation of leases in respect of Town House No. 3 on L.R No. 2951/105, Nairobi on two (2) occasions.

The evidence that was placed before the taxing officer by the applicant showed that the 1st respondent charged fees for all these services with the knowledge and concurrence of the applicant who in some cases, participated in the negotiation of the fees payable. It was not in dispute that the 1st respondent retained the fees that was received for these services as its income and that the applicant did not raise a finger or any objection while he was in the 1st respondent's employment. The applicant waited until his contract of employment ended to cry foul. I am of the view that the applicant engaged in an illegality when he drew documents and rendered other services for which his employer charged fees to third parties and which it retained as income. The applicant in effect aided and abetted the 1st respondent which was unqualified to act as an advocate contrary to section 31 of the Advocates Act. Breach of Advocates Practice Rules is a professional misconduct that renders an advocate liable to sanction by the Advocates Disciplinary Tribunal while violation of Section 31 of the Advocates Act is an offence which is punishable under Section 85 of the Advocates Act with a fine or imprisonment. Can the applicant be allowed to benefit from his professional misconduct and from aiding and abetting the commission of a criminal offence? The answer is no. The services which are the subject of the applicant's bills of costs having been rendered by the applicant contrary to Rule 4A of the Advocates Practice Rules, this court cannot allow him to charge fees in respect thereof. Section 34 (2) of the Advocates Act provides that any money received by unqualified person is recoverable by the person by whom the same was paid as a civil debt recoverable summarily. This means that the applicant cannot purport to be seeking to recover the money that was paid by third parties and retained by the 1st respondent as income for the legal services that were rendered by the applicant.

The applicant had faulted the taxing officer for not finding that the objection by the respondents was res judicata. I am in agreement with the respondents that the applicant's res judicata argument had no merit. The issue that was raised before the taxing officer had not been raised earlier between the same parties and determined conclusively. The taxing officer was also not bound by the decisions of the other taxing officers. As concerns Petition No. 433 of 2013 and Court of Appeal Civil Appeal No. 177 of 2014, again, the issue as to whether or not an advocate/client relationship existed between the applicant and the respondents was not determined in the two cases.

Finally, I am in agreement with the applicant that the taxing officer failed to consider all the issues that were raised before her. I am of the view however that even if she had considered the same as I have done, she would have arrived at the same conclusion that there was no advocate /client relationship between the applicant and the respondents and as such the applicant's bills of costs were misconceived and were liable for dismissal. The applicant had contended that the taxing officer failed to appreciate that he was not an employee of the 2nd respondent and as such he was entitled to tax the bills as against him. It is correct that the 2nd respondent was not the employer of the applicant. However, the services that the applicant rendered to the 2nd respondent according to the evidence on record were rendered by him as an employee of the 1st respondent which charged the 2nd respondent fees for the same. There was no evidence that the 2nd respondent engaged the applicant to act for him in any transaction. As I have stated above, the applicant who knowingly allowed the 1st respondent to charge and retain legal fees for his services cannot purport to charge fees to third parties who dealt with him as an employee of the 1st respondent and who paid the fees that was charged by the 1st respondent.

Conclusion:

In conclusion, I find no reason to disturb the decision of the taxing officer, Hon. S. Mwayuli made on 16th October, 2017. Consequently, the applicant's Chamber Summons application dated 7th November, 2017 is dismissed with costs to the respondents.

Delivered and dated this 30th Day of January 2020

S. OKONG'O

JUDGE

Judgment read in open court before:

Mr. Thuo for the Applicant

Ms. Obwangi for the Respondents

C. Nyokabi-Court Assistant