



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. E 250 OF 2019

RACHUONYO & RACHUONYO ADVOCATE.....APPLICANT/ADVOCATE

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT/CLIENT

BEING ADVOCATE/CLIENT BILL OF COSTS IN HCCC NO. 313 OF 2016

MWANIKI WA NDEGWA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

By a Notice of Motion application dated 18th November 2019, pursuant to **Order 51 Rule 1 of the Civil Procedure Rules and Rule 71 of the Advocates (Remuneration) (Amendment) Order 2009 section 1A, 1B, 3A and 63(c) of the Civil Procedure Act**, the Applicant/Advocate sought Orders;

- a) That leave be granted to the Advocate/Applicant to amend its Bill of Costs dated 24th June 2019
- b) That the draft Amended Bill of Costs filed herewith be deemed duly filed upon the grant of leave.

The Application is supported by an affidavit of Clifford Owour Rachuonyo a Partner in the firm of Rachuonyo & Rachuonyo Advocates the Applicant/Advocate herein. He asserted that a Bill of Costs was filed on behalf of the Firm on 24th June 2019 against National Bank of Kenya Limited (“the Client”). From a further scrutiny of the subject Bill and perusal of the written submissions made on behalf of the Client and filed on 15th October 2019, it is necessary to take into account the uncontested manner of calculation of Advocate-Client fees provided for under **Schedule 6B, (b) of the Advocates’ (Remuneration) (Amendment Order 2014 (ARO)**, and to thereby simplify and ease the process of taxation, beyond unnecessary contestation.

The Applicant stated that it was not in dispute that party to party costs were mutually agreed and determined at Ksh 1.5 million. The Applicant annexed copies of the Plaintiff’s Bill of Costs dated 30th May 2018, the Order recorded by consent in respect thereof and dated 12th June 2018 and the remittance of payment in settlement thereof marked “COR- 1”, “COR-2”, & “COR-3” respectively.

He stated that the proposed amendment was necessary to assist the court to arrive at the correct fees payable to the Firm. No disadvantage or prejudice of whatsoever nature would be visited upon the Client if the application for leave to amend was granted. Marked “COR-4” is a copy of the proposed Amended Bill of Costs.

REPLYING AFFIDAVIT

The application was opposed vide an affidavit filed in court on 16th December 2019, sworn by Chrispus Maithya a Legal Officer at the Respondent/Client Bank (Herein “National Bank of Kenya Limited”). The Respondent averred that at all material times, the Applicant/Advocate was retained by the Bank in its panel if lawyers vide a Service Level Agreement which set out the terms of the retainer. Marked “CM-1” is a copy of the Service Level Agreement.

That Part IV (1) of the Service Level Agreement provided that legal fees would be charged in line with **Section 45 (1) (a) and (b) of the Advocates Act, Chapter 16** Laws of Kenya.

He stated that pursuant to the Agreement, the Advocates raised a Fee Note dated 24th November 2016 seeking the sum of Ksh 1,624,400/- for representing the Bank in **HCCC No. 313 of 2016 (Mwaniki wa Ndegwa –vs- National Bank of Kenya Limited)** to the conclusion of the matter. Marked “**CM-2**” is a copy of the Fee Note.

The Respondent affirmed that the Bank accepted the Fee Note and paid the Applicant the sum of Ksh 1,624,400.00 which payment was acknowledged by the Advocate vide its letter dated 28th May 2018. Marked “**CM-3**” is a copy of the said letter.

The Respondent stated that the Service Level Agreement constituted an agreement on fees and having received his fees as under the Agreement, the Advocate is estopped from reneging on the same.

The Respondent stated that **Section 45 (6) of the Advocates’ Act** provides that where there is an agreement on fees, an advocate’s costs shall not be subject to taxation. Further that, there having been a valid fee agreement herein, the Hon. Deputy Registrar does not have the jurisdiction to tax the Bills of Costs.

APPLICATION OF 4TH FEBRUARY 2020 BY RESPONDENT

The Respondent filed the above stated application on 4th February 2020 and sought the following orders;

a) A declaration to issue that the Taxing Officer does not have jurisdiction to tax Bill of Costs dated 24th June 2019 by dint of **Section 45(6) of the Advocates Act**.

b) The Court strikes out and dismisses [with costs] Bill of Costs of 24th June 2019.

The Respondent/Applicant deposed that the Applicant’s and Respondent’s relationship was governed by Retainer Agreement.

Part IV (1) of the Service Level Agreement provided that legal fees would be charged in line with **Section 45 (1) of the Advocates Act, Chapter 16 LOK**.

Pursuant to the Agreement, the advocate raised Fee Note dated 24th November 2016 and sought payment of Ksh 1,624,400/- for representing the Bank in **HCCC No. 313 of 2016 (Mwaniki Ndegwa vs National Bank of Kenya Limited)** to the conclusion of the matter.

The bank accepted the Fee Note and Paid the amount of Ksh1,624,400/- which the Applicant/Respondent acknowledged vide letter dated 28th May 2018.

The Service Level Agreement constituted an agreement on Fees and having been paid his Fees as under the Agreement, the advocate is estopped from reneging the same.

Section 45 (6) Advocates Act specifically precludes the taxation of Advocates-Client costs, where there exists an agreement on remuneration.

The Respondent/Applicant Bank’s supporting Affidavit sworn by Mr Crispus Maithya reiterated the above grounds and annexed copy of Level Service Agreement dated 9th October 2013 marked ‘**CM- 1**’. He also annexed the Advocate’s Fee Note as ‘**CM-2**’ and the Letter from Applicant Advocate Mr. Rachuonyo confirmed receipt of Ksh 1,624,400/- marked ‘**CM- 3**’.

REPLYING AFFIDAVIT

The Application was opposed by an affidavit of Clifford Owour Rachuonyo a Partner in the law Firm of Rachuonyo & Rachuonyo Advocates, dated 5th February 2020. The Respondent stated that the issues raised by the Client in the application had been raised by the Client inside its reply to an outstanding application by the Advocate dated 18th November 2019 in which the Advocate sought to amend its Bill of Cost.

In addition, the Respondent stated that the letter which the Client produced as evidence of an alleged agreement on fees under **Section 45(1) and 45(6) of the Advocates’ Act (Chapter 16 Laws of Kenya)** does not amount, and was never intended by any of the parties to be an agreement on fees, as contemplated under these provisions. That the provision specifically requires the parties to “fix the amount” of the Advocates’ Remuneration for a specific task or undertaking either before, during or after the task has been undertaken.

The Respondent asserted that the Fee Note referred to by the Client and the deposit received by the Advocate were the subject of a comprehensive explanation by the Advocate at paragraph 4, 5, and 6 of the affidavit he swore in respect of the Application for leave to amend the Bill of Costs. The deponent adopts and makes as part of this affidavit entirely his statements in these paragraphs.

The Respondent stated that it was obvious from the communication that there was no independent and separate agreement of the nature contemplated by **Section 45(1) and 45 (6) of the advocates’ Act** between the Client and the Advocate. Moreover, the Client and the Advocate had not fixed the actual amount payable to the Advocate in a document or agreement signed by the parties for any of the services

rendered in the matter giving rise to the taxation.

Further that, a valid and binding agreement on fees would be constituted either by;

- i) A written Agreement from, and signed by the Client, addressed to the Advocate, setting out the exact amount payable for the services identified or specific task to be undertaken.
- ii) An Agreement on fees emanating from the Client duly signed by both parties, specifying the actual sum payable for the specific tasks identified to be undertaken.
- iii) An agreement comprised by exchange of correspondence, mutually setting out the actual fees payable for the specific tasks. The offer has to emanate from the Advocate and has to be duly accepted by the client.

The Respondent stated that the letter of inclusion, on its face at paragraph 5 expressly provided for the Client's obligation to pay legal fees, either on the basis of a negotiated and agreed amount or in the absence, scale fees.

That there was no contemplated general agreement implied by statute or by conduct of the parties as wrongly implied, and no unwritten agreement on fees can be implied, let alone be capable of enforcement under the law, as wrongly misapprehended by the Client in its application.

In an Affidavit dated 4th February 2020 sworn by Clifford Owour Rachouonyo a Partner in the law Firm of Rachouonyo & Rachouonyo Advocates, responded to the issues raised herein as follows;

- a) That referring to the document exhibited by the Client in its Replying Affidavit, purported to be the Agreement on fees, being the letter dated 9th October 2013 titled "*terms and conditions for appointment to the Bank's Panel of Lawyers 2013*". He stated that the said letter was a document of inclusion into the Bank's panel of advocates, and does not constitute a contract on the quantum fees to which the Advocate would be legally bound, for specific legal service rendered. On its face, there is no provision whatsoever relating to quantum of fees. The only reference to entitlement of fees states that the Advocate is entitled to charge "*scale fees*" or a "*mutually negotiated*" fee. There was no negotiation or agreement on the fees payable to the Advocates in the specific matter which gave rise to this taxation.
- b) That upon the Advocates receiving the Client's instructions to act for it on 9th August 2016, the Advocates requested the Client for a deposit of Ksh 1,624,400/- vide a Fee Note dated 24th November 2016. At that stage, the case had been fully prepared for hearing, and the Case Management Conference had been set for 2nd December 2016. The case was confirmed as ready for trial and a hearing date fixed for 14th December 2016. Marked "**COR-1**" is a copy of instructions and the fee note and covering letter marked "**COR-2**".
- c) That they did not receive payment and they sent several reminders, in which it was clearly indicated that the request was for an interim deposit. Marked "**COR-3**" is a copy of one of the various reminders sent between 2016 and 2018.
- d) That having concluded the oral hearing of the case and the highlighting of submissions on 6th and 7th March 2018, the Advocates rendered a final Fee Note. At that date, only Judgment was pending and was to be delivered on 8th May 2018, but was rescheduled to an earlier date, 3rd May 2018. Marked "**COR-4**" a copy of the forwarding letter and the final Fee Note.
- e) That instead of the Client settling the final Fee note, the Client made a remittance to the Advocates' account of the sum of Ksh 1,624,400/- on or around 30th March 2018. There was no written notification or communication whatsoever accompanying the remittance.
- f) That the Advocates then requested for settlement of the difference between the initial Fee Note and the Final Fee Note on not less than eleven (11) occasions between January 2018 and April 2019, which were all ignored. Marked **COR-5** are copies in a bundle.
- g) Ultimately on 16th August 2018 the Client wrote a letter to the Advocates stating that it was of the opinion that the deposit paid constituted full and adequate remuneration. Marked "**COR-6**" is a copy of the letter. At no time did the Client allege or hold out that it had made the payment pursuant to an agreement on fees as now alleged. In the letter, the Client purported to carry out a "taxation" of the Advocates fee note and to arrive at a basic instruction fee determined from its own opinion. The Respondent replied to the Client, firmly rejecting its opinion. Marked "**COR-7**" is a copy of the reply.
- h) That the Respondent was completely taken by surprise by the Client's new allegation, made inside these proceedings for the first time, that the deposit it paid constitutes an agreed fee. This allegation is contrary to the aforesaid correspondence and is clearly an afterthought.
- i) That after delivery of judgment on 3rd May 2018, the Advocates were again instructed, and did take up an appeal to the Court of Appeal and to file and prosecute an application for stay of execution pending appeal. To the Advocates' utter surprise, the Client completely refused to make any payment whatsoever in respect of that application and the appeal. This resulted in the advocates withdrawing from representing the Client in the appeal, and a separate taxation for the appeal, in which the Client has similarly denied that it was obliged to pay the Advocates, notwithstanding that the appeal had been partly heard by the Court of Appeal. Marked "**COR-8**" is a bundle of copies of letters relating to the appeal.

He stated that he could not believe that the present denial is part of a pattern of conduct by the Client, in which it solicits legal services and thereafter actively takes steps to improperly avoid payment of legal fees which have fallen due, relying on falsehoods and technicalities. It is instructive that the Client has voluntarily and without any contestation, settled party and party costs to the successful Plaintiff's advocates in the sum of Ksh 1,500,000/-. Marked "COR -9" are copies of relevant documents.

DETERMINATION

The Court considered the pleadings and submissions filed by parties through their respective advocates and find the issues that emerge for determination are;

- a) Was there Retainer and/or Retainer Agreement between the parties?
- b) Does the Taxing Officer have jurisdiction to tax the Bill of Taxation filed by the Applicant?
- c) Is the Applicant granted leave to amend the Bill of Costs and have the Proposed Amended Bill of Costs filed as part of the Court record?

ANALYSIS

Section 45 of Advocates Act prescribes as follows with regard to Agreements with respect to remuneration;

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business [Civil or Criminal Court] make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b)

(c)

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

In Misc Application 447 of 2010 Mugambi & Co Advocates vs John Okal Ogwayo & Ruth Rebecca Auma, there was a contest to the Taxing Master's Ruling of 20th March 2011 where the Advocate's Bill of Costs was struck out by the Taxing Officer. It was argued that the Taxing Officer lacked jurisdiction to hear and determine the application on whether there was a Retainer or not. The Court held;

"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 the Court...."

Where the very fundamental issue is 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 defined by Section 2 of the Advocates Act Cap 16 as the High Court....."

Therefore, this Court has jurisdiction to determine the question of whether there was a Retainer or not.

In the case of Omulele & Tollo Advocates vs Mount Holdings Ltd C.A.75 of 2015; the Court held;

"A retainer means the instruction, employment or engagement of an advocate by his client.

On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship....."

As the Section [45 of Advocates Act] indicates, under such agreement, the parties fix or put a cap on the advocates instruction fees....both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer Agreement.....It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent. It is erroneous as submitted By Counsel for the Respondent that retainer and retainer agreement mean one and the same thing."

APPLICANT'S SUBMISSIONS

The Applicant of the application of 18th November, 2018 submitted that grant of leave to amend the Bill of Costs is a legal right under the law and would not prejudice the Respondent.

The Applicant objected to Respondent's claim that the document titled "**Terms & Conditions for Appointment to the Bank's Panel of Lawyers 2013**" amounts to a Retainer Agreement. The Document contains no quantum of fees and reference is made to scale fees or mutually negotiated fee. There had been no negotiations or agreement to the amount of fees payable.

The Respondent asserted that Ksh 1,624,400/- paid by the Respondent to the Applicant was deposit arising out of a Fee Note dated 24th November 2016.

The Applicant annexed copy of instructions marked **COR – 1**, Fee Note Covering Letter marked **COR -2**. Reminders for payment as shown in annexed letter marked **COR – 3**. The Applicant sent the Final Fee Note annexed and marked **COR- 4**. It is thereafter, that the Respondent settled the earlier Fee of Ksh 1,624,400/-

The Applicant requested settlement of the difference between the initial Fee Note and Final Fee Note as shown by copies annexed as **COR - 5**.

The Applicant reiterated that Fee Note for Ksh 1,624,400/- was before, the hearing of the suit and delivery of judgment and instructions to file appeal as shown by documents annexed as **COR-9**.

The Applicant submitted that in other similar cases against the Respondent, the issue has been the contentious contract/agreement between the Bank and Advocate(s) on remuneration.

The Applicant referred to ;

D.M Njogu & Co vs National Bank Of Kenya Ltd Misc 730 of 2006 in the High Court.

D.M Njogu & Co Vs National Bank Of Kenya Ltd Misc 165 of 2007 [2016]eKLR the Court of Appeal held;

“an advocate who willingly and knowingly enters into an agreement for fees that is contrary to the Advocates Remuneration Order cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the court to tax his advocate/client bill of Costs in accordance with the Advocates Remuneration order.”

Abuodha & Ominion Advocates vs Kakuta Mai Mai Hamisi Misc App 46 of [2015]eKLR, the Court observed;

“...In my view for a document to constitute a valid and binding agreement for fees for the purposes of section 45 of the advocates Act, the same must not only be so as to bar the advocate from taxing his costs more so as there is no evidence that the client accepted the proposal by the advocate even if it were to be found that the letter dated 20th June 2013 was a proposal on the final fee note. An agreement must contain an offer and acceptance and where one condition is not satisfied there is no binding agreement...”

RESPONDENT'S SUBMISSIONS

The Respondent submitted as follows;

The Fee Note Dated 24th November 2016 represented as follows;

*“To our Fee for Professional Services rendered in receiving instructions and acting for you in a claim..... **to generally handling the matter to its logical conclusion.**”*

It is understandable therefore that the client was surprised to receive a further Fee Note for Ksh 3,136,464.00. The letter of 16th August 2018 was an indication that the Bank upon receiving the Fee note dated 24th November 2016 considered that under the Advocates Remuneration Order (ARO) for full representation the costs would be at Ksh 1,349,048/- and decided to settle the amount of Ksh 1,624,400/-.

By the Applicant's statement cited above in the Fee Note of 24th November ,2016, after the Respondent settled the Legal Fees as shown in the Fee Note the matter was settled. The Applicant is estopped from further Legal Fees by virtue of the state in the Fee Note **“to generally handling the matter to its logical conclusion.”**

The Respondent relied on **Section 120 of Evidence Act Cap 80 that provides;**

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

Which was referred to in the case of **Basco Products KY Ltd vs Machakos County Government [2018] eKLR**.

The Terms & Conditions of Appointment to the Bank's Panel of Lawyers dated 9th October, 2013 formed the basis of the Advocate –Client relationship between the Applicant and Respondent. The Applicant and Respondent duly executed the Agreement.

In the said Agreement level service Agreement at **Part IV Legal Fees & Costs** it provides;

1. **The Bank's remuneration on fees shall be negotiated as per provisions of Section 45(a) & (b) of the Advocates Act (Chapter 16, Laws of Kenya).**

2.

3.

4.

5. **For Litigation matters, you will charge Fees (scale or agreed as may be applicable) and the Bank will settle the same as set out below;**

- **Upon filing Plaintiff/Defence- 20%**
- **Upon completion of discovery and inspection processs-20%**
- **Upon Hearing and issuance of Judgment/Decree-40%**
- **Taxation/Execution/Drawing of Appeal Notices as may be applicable – 20%**

Section 46 (c) of Advocates Act provides for illegal contracts to include;

“that any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof;

ANALYSIS

The Terms & Conditions of Appointment to the Bank's Panel of Lawyers 2013; letter of 9th October 2013 amounts to a Retainer agreement as it is in writing prescribing the terms of engagement of an advocate/Law firm by his client, including fees payable. It reads;

“Further to our letter dated 2nd October, 2013 we are pleased to advise having retained your firm to our Panel of Lawyers providing legal services to the Bank subject to the following terms and conditions:...”

The Parties were at liberty to enter into agreements with respect to remuneration under **Section 45 of Advocate Act** and if in writing and signed by the client –advocate it would be valid and binding. **Section 46 of Advocates Act** outlaws any agreement that pegs remuneration to success of the case, but the Applicant contracted to the same under **Section 45 of Advocates Act** and deprived itself of legal protection. The Advocates Act protects advocates fair remuneration on the basis of taxation based on the Advocates Remuneration Order but also in the same vein grants parties freedom of negotiation and agreement on remuneration in a written Agreement and is valid and binding as long as it is in writing and executed by the client/advocate. The parties are bound by the terms of the contract. The intention of the parties in the Service Level Agreement was to carry out litigation and remuneration to be paid according to the terms of the Agreement. Where scale fees exceeded Ksh 500,000/- the Bank would be first notified; in litigation matters the Advocates Remuneration Order (ARO) scale or agreement would be used to confirm the percentages sought in the Agreement.

The Respondent's view that the Service Level Agreement was not a Retainer Agreement is not borne out by the facts because it specifies the mode of calculating remuneration, it does not specify exact figures but it outlines legal services and/or litigation processes with attendant percentages of fees payable in terms of remuneration. The Service Level Agreement contains various terms of engagement among them Legal Fees and Costs. The parties are bound by terms of their contract.

The Respondent's assertion of Ksh 1,624,400/- paid was a deposit arising out of a Fee Note dated 24th November 2016 is not borne out by evidence on record. The letter of 24th November 2016 is titled Fee Note (not Deposit or Interim Fee Note). The Applicant outlined various/numerous legal services rendered and litigation processes that culminated to Ksh 1,624,400/-.

The Court adopts the reasoning and finding of the case of **D.M Njogu & Co vs National Bank of Kenya Ltd Misc 730 Of 2006 & Misc 165 of 2007 [2016] eKLR** both in the High Court and quoting from the Court of Appeal decision;

In our view, an advocate who willingly and knowingly enters into an agreement in regard to the payment of his Fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal contract by reverting to Court to tax his advocate/Client Bill of Costs in accordance with The Advocates Remuneration Order.....this Court cannot come to the Appellant's aid as the Appellant is estopped by his conduct from seeking the Court's intervention.

Similarly, in the instant case, the Applicant and Respondent entered into a contract on legal services and remuneration. The parties are bound by the terms of the Retainer Agreement and the Appellant is estopped from seeking intervention from taxation under the Advocates Remuneration Order. Where there is a Retainer Agreement the Taxing Officer lacks jurisdiction to tax the Bill of Costs. The Bill of Costs of services rendered following the appeal is in the Court of Appeal and not High Court and shall be dealt with in that court.

With regard to the application by the Applicant seeking to amend the Bill of Costs the Applicant sought to amend the Bill of Costs under **Order 8 of CPR 2010** which allows amendments generally in all Civil Proceedings.

The Respondent objected to the amendment because it would prejudice the Respondent and deprive it of accrued Defence or right. The amendment would amount to introducing a new matter; that is remuneration sought under **Schedule 6B (b) of Advocates Remuneration Order (ARO)** which provides for the fees ordered by the court, increased by 50%; instead of **Schedule 6B (a) of ARO** which provides for the fees prescribed in A above, increased by 50% both are completely different; the first is already determined under the Act, the other which would be brought in through an amendment of pleadings would be by a hearing in Court and would be the beginning of fresh proceedings.

In ***Diamond Trust Bank Ky Ltd vs Garex K Ltd ,Fire Stone & James Mwangi Gitau T/A Fore Front Agencies HCCC 1474 of 2001*** the Court Observed;

“The usual principles which attend amendment of pleadings also apply to amendment to Bill of Costs. The Court must see whether the amendment will prejudice or deny the Respondent an accrued Defence or Right; whether the amendment is introducing a new matter; whether the amendment is/are necessary and will assist the Court determine real issues in controversy completely and effectually. Delay in bringing the application is also an aspect of prejudice to the Respondent and should be considered.”

The respondent raised the following grounds to object to the amendment of Bill of Costs,

The Applicant filed Advocate/Client Bill of Costs on 24th June 2019 for Ksh 3,221,893,24/-. The Respondent’s Submission in opposition of the Bill of Costs filed on 15th October 2019 considered and analysed each item of the Bill of Costs according to the scale of **Advocates Remuneration Order**, which significantly reduced the Bill to Ksh 1,473,167.72/- The Respondent having paid the Respondent Ksh 1,624,400/- would not be under a duty to pay more. It is only then, thereafter that, the Applicant filed the application seeking amendment of Bill of Costs on 18th November 2019 and relied on Party to Party Costs where consent was recorded on 12th June 2018 and the Applicant was the advocate who signed the Consent.

So, the application for amendment is a reaction to the Respondent’s Defence /Right, after parties filed submissions on the filed Bill of Costs and these factors would prejudice the Respondent.

Although, the law, **Order 8 CPR 2010 & Paragraph 71 of Advocates Remuneration Order** allows for amendments to pleadings generally, the amendment should not prejudice any party. The amendment was sought 5 months after filing the Bill of Costs on 24th June 2019. The parties had filed pleadings and submissions to the Bill of Costs. To seek amendment at this stage would amount to a whole new matter for determination on Payment of legal fees different from the one already filed in court. The Respondent paid Ksh 1,624,400/- of the Applicant’s Fee Note. The Respondent paid Ksh 1,500,000/- as Party to Party Costs. All these factors are borne out by the Court record. The amendment sought is to introduce new provisions of the Advocates Remuneration Order to have the Court assess Fees against the Respondent even after payment had been made under the Level Service Agreement. To ask the Court/Taxing Officer to tax a Bill of Costs where monies had been paid as per fee note by the Respondent would amount to having another bite at the cherry. The application is denied.

DISPOSITION

- 1. The application of 19th November 2019 seeking amendment of Bill of Costs is denied and dismissed.**
- 2. The application of 4th February 2020 for Declaration that the Taxing Officer lacks jurisdiction to tax the Bill of Costs of 24th June 2019 by dint of Section 46 (6) of the Advocates Act is granted as the Level Service Agreement amounts to a Retainer agreement between the Applicant & Respondent.**
- 3. Each Party to bear own Costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH NOVEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS MWANGI FOR THE CLIENT/RESPONDENT

MS RIUNGA RAIJI & CO. ADVOCATES FOR APPLICANT/ ADVOCATE

COURT ASSISTANT - TUPET

MR. KARURA: I wish to pray for leave to appeal.

COURT: Leave to appeal granted and the Applicant be availed certified copies of the proceedings and Ruling upon payment of requisite

fees.

M.W. MUIGAI

JUDGE