



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**MISC. CAUSE NO. 749 OF 2007**

**MURIU MUNGAI & CO. ADVO.....ADVOCATES/ APPLICANTS**

**-VERSUS-**

**NEW KENYA CO-OPERATIVE**

**CREAMERIES LIMITED.....CLIENT/ RESPONDENT**

**RULING**

**PLEADINGS**

The Applicant filed on **4<sup>th</sup> May 2007** an Advocate/Client Bill of Costs dated 2<sup>nd</sup> May 2007 on instructions from the Respondent to transfer all that property known as **Nakuru Municipality/ Block 12/ 112**, the subject matter herein, from the Kenya Co-operative Creameries Limited to the New Kenya Co-operative Creameries Limited.

The Respondent raised a **Preliminary Objection** dated 5<sup>th</sup> September 2007 and filed on 11<sup>th</sup> September 2007 challenging the taxation of the bill of costs, based on the grounds that the Respondent had withdrawn instructions from the advocate to act on their behalf.

**APPLICANT'S CASE**

The Applicant objected to the said **Preliminary Objection** in their submissions dated **30<sup>th</sup> November 2007** on the grounds that the question on whether the instructions were issued then withdrawn or not was a question of fact and must be proved to the requisite standard-balance of probabilities. The Applicant further stated that there was no credible evidence to demonstrate the withdrawal of instructions and as such, there existed a factual objection against the Preliminary Objection. The Applicant premised his argument on the case of **Mukisa Biscuits Manufacturing Co. Limited –vs- West End Distributors Ltd. [1969] EA 696** which defined Preliminary Objection as:-

***“A Preliminary Objection in law is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

The Applicant further stated that the issue of retainer was not in dispute as instructions were issued to them as evidenced in the Respondent's Preliminary Objection as per letter dated 22<sup>nd</sup> March 2006, which had instructions to transfer all that parcel of land known as **Nakuru Municipality/ Block 12/ 112**.

The Applicant further submitted that in determining the value of the land, they referred to the estimated average market value during the preceding three years, as valued by **Tyson's Limited** and as provided for by **paragraph 21(c) of the Advocates (Remuneration) Order**. The Applicant therefore submitted to the taxing master to rely on the value of **Kshs. 4,450,000.00**, while determining item 1 (Instruction fees) of the Bill of Costs.

On item 1 of the Bill of Costs (Instructions fees), the Applicant submitted that the question of liability to pay advocates' fees is consequent upon retention of an advocate. The Respondent having retained the Applicant as evidenced by the letter dated **22<sup>nd</sup> March 2006**, was therefore culpable to pay advocates' fees.

The Applicant further submitted in the affidavit annexed to the instant application of 21<sup>st</sup> July 2015, that he had carried out preliminary investigations on the title, prepared transfer documents and vesting orders and obtained statement of rates to facilitate the transfer. He averred

that once an advocate is instructed, he is entitled to the full instruction fees irrespective of whether or not the transaction was completed, as long as the advocate could show that substantial work had been done upon receiving instructions.

His argument was supported by the decision of the court of appeal in Joreth Ltd v Kigano & Associates [1999] LLR 1508 (CAK) which held as follows:-

***“(...) the respondent states that instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.”***

The Applicant submitted that though the Respondent allegedly withdrew instructions, substantial work had already been done upon receiving such instructions and hence, the Applicant would still be right to charge advocates' fees. The Applicant referred to **paragraph 18 (f) of the Advocates Remuneration Order** which provides that incomplete work may be taxed under **Schedule V** and relied on the decision in Hayanga & Co. Advocates –vs- Rayal Garden Developers Limited Misc. Appl. No. 305 of 2004 which held that:-

***“In effect, if an advocate was instructed to prepare an agreement of sale, he would have earned his full instruction fees as soon as the said agreement of sale was ready.”***

On **14<sup>th</sup> March 2008**, the Taxing Officer read the Ruling and upheld objection by the Respondent, struck out and dismissed the **Bill of Costs**. Thereafter, on **26<sup>th</sup> March 2008**, the Applicant filed a Notice of Objection to the decision of the Taxing Officer and requested for the reasons behind the Taxing Officer's decision/order. In the Taxing Officer's ruling dated **14<sup>th</sup> March 2008**, the taxing officer gave reasons as to why the Court declined taxing the bill in 2015. The Court took the view that the advocate billed their client for work that had not been done and it was only upon filing the Bill of Costs, that Applicant acted on the instructions.

### **APPLICATION**

On **21<sup>st</sup> July 2015**, the Applicant filed **Chamber Summons** dated **16<sup>th</sup> July 2015** seeking for orders that:-

1. The Order made by the Taxing Officer on **14<sup>th</sup> March 2008** striking out the Advocate/ Client Bill of Costs be set aside;
2. The Advocate/ Client Bill of Costs be referred back to the Taxing Officer with directions for taxation; and
3. The Costs of this application be provided for.

On the grounds that:-

1. The Taxing Officer erred in principle when she held that in the letter dated **30<sup>th</sup> April 2007**, the client withdrew the instructions in uncertain terms;
2. The Taxing Officer erred in principle by holding that by the time the purported withdrawal of instructions took place, no work had been done while the Bill of Costs showed that the advocate had rendered the services from 2005;
3. The Taxing Officer erred in law and principle when she held that the advocate billed the client for work that had not been done and it's only upon filing the Bill of Costs in Court that he went to act on the instructions given by the client while the Bill of Costs demonstrates the contrary; and
4. The Taxing Officer erred in law and principle by upholding the objection raised by the counsel for the Respondent and declined to tax the Bill of Costs.

On **19<sup>th</sup> October 2018**, the Applicant filed further Submissions dated **18<sup>th</sup> October 2018** stating that the Taxing Officer erred in Law by failing to tax the said Bill of Costs. The Applicant thus prayed to the Court to refer the Bill of Costs for taxation afresh before another Taxing Officer.

### **RESPONDENT'S CASE**

The Respondent raised a Preliminary Objection dated **5<sup>th</sup> September 2007** and filed on **11<sup>th</sup> September 2007** challenging the taxation of the bill of costs dated **2<sup>nd</sup> May 2007** and filed in court on **4<sup>th</sup> May 2007**.

The Respondent filed their submissions dated **16<sup>th</sup> January 2008** on **22<sup>nd</sup> January 2008**. In their submissions, the Respondent averred that on **21<sup>st</sup> August 2007**, the Applicant filed **'Applicant's Further List of Documents'** yet the Respondent had not yet been served by the earlier list and were therefore, not aware of the same. The Respondent stated that in the Applicant's Further List of Documents, the Advocates had not annexed any letter of instructions from the client advising them to proceed and transfer the property.

However, the Respondent noted that the Applicant had been instructed to act for the Respondent generally in the buy-back process of **KCC** and hence, it was presumable that the Applicant had been instructed to deal with the transfer of the subject matter (property).

The Respondent's main objection was that the Advocates undertook the work long after instructions had been withdrawn by the client and hence there was no Advocate-Client relationship between the two parties when the work was carried out. The Respondent claimed that in a letter dated 30<sup>th</sup> April 2007, their advocate-client relationship ceased to exist on 2<sup>nd</sup> February 2007. The Respondent further stated that the certificate of official search, receipt on transfer fees, receipt of search certificate were applied and obtained on 11<sup>th</sup> July 2007 and the certificate of lease on 18<sup>th</sup> July 2007 which was after instructions were withdrawn on 2<sup>nd</sup> February 2007.

The Respondent submitted that the Bill of Costs should be struck off in its entirety as the advocates received instructions but slept on their laurels until instructions were withdrawn and only then did they proceed to do the conveyance when they lacked the legal capacity to act.

On 19<sup>th</sup> September 2016, the Respondent filed **Grounds of Opposition** dated 16<sup>th</sup> September 2016 opposing the Applicant's Application dated 16<sup>th</sup> July 2015. The Respondent opposed on the grounds that the Applicant was seeking to set aside orders that were made over eight years ago. Having been defeated by time, the Respondent sought to have the application dismissed with costs.

On 17<sup>th</sup> January 2019, the Respondent filed Submissions in reference to the Applicant's Application dated 16<sup>th</sup> July 2015. The Respondent submitted that they rely entirely on their Grounds of Opposition filed on 19<sup>th</sup> September 2016 and that taxation was done on 14<sup>th</sup> March 2008 whilst the application was filed on 21<sup>st</sup> July 2015, which was 7 years after the said taxation. He further submitted that the Application was served to them on 8<sup>th</sup> September 2016, which was more than a year after filing the said application. The Respondent also demonstrated the Applicant's laxity in dealing with the matter and prayed the Court not to entertain such delay tactics by dismissing the application.

### **DETERMINATION**

Following the submissions by the parties, the following are the issues to be determined by the Court:-

1. Whether the Respondent instructed the Plaintiff/Applicant to transfer the suit property **Nakuru Municipality/Block12/112** from Kenya Cooperative Creameries to New Kenya Cooperative Creameries Limited;
2. Whether the Respondent formally withdrew instructions from the Applicant to represent them, hence terminating the advocate-client relationship over the matter; and
3. Whether the Applicant is entitled to fees accrued from work carried out after instructions were withdrawn by the Respondent.

The circumstances under this Court may interfere with the Taxing Officer's exercise of discretion were stated in the case of **First American Bank Of Kenya v Shah (2002) E.A.L.R.**, as follows:

- a) That the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;
- b) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
- c) If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- d) It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
- e) The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
- f) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; ...
- g) The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary...

**Whether the Respondent instructed the Plaintiff/Applicant to transfer the suit property Nakuru Municipality/Block12/112 from Kenya Cooperative Creameries to New Kenya Cooperative Creameries Limited.**

The Taxing Master stated as follows in the Ruling of 14<sup>th</sup> March 2008;

***"I am however of the view that the letter of 30<sup>th</sup> April 2007 withdrew instructions in no uncertain terms. By then no work had been done and indeed even by the time the Bill was presented to Court no work had been done.....It is apparent therefore that the***

***advocate billed the client for work that had not been done and it is upon filing the Bill of Costs that he went to do the work. I uphold the objection raised by Counsel for the client/Respondent and decline to tax the Bill.”***

The Court record confirms that the Plaintiff/Applicant was instructed on 22<sup>nd</sup> March 2006 a fact not denied by the Respondent. With regard to instructions, it is not denied that the Respondent gave the Applicant instructions to transfer the suit property, until 30<sup>th</sup> April 2007, when the instructions were formally withdrawn. The Taxing Master ought to have considered the instructions fee for the subject matter in conjunction with any work done towards fulfilling the transfer of property by the Applicant right up to 30<sup>th</sup> April 2007 when the advocate-client relationship was formally terminated. This Court finds that by overlooking and/or ignoring any work done by the Applicant prior to termination, the Taxing Master struck out the Bill of Costs on an error of principle,

**Whether the Respondent formally withdrew instructions from the Applicant to represent them, hence terminating the advocate-client relationship over the matter.**

By Letter dated 30<sup>th</sup> April 2007, the Respondent, in part stated;

***“Your action clearly implies that you have opted to terminate the Advocate/Client relationship that has been existing between yourselves and ourselves and we accordingly feel that we should let your wish prevail. Kindly therefore note that the advocate/client relationship between ourselves and yourselves ceased to exist on 2<sup>nd</sup> February 2007....”***

A reading of the whole letter revealed that the instant matter was among various assignments from the Respondent that were handed over to the Applicant to deal with according to instructions from the Respondent. Due to undisclosed dispute; the Applicant lodged various Bills of Costs on matters assigned. The turn of events did not sit well with the Respondent and hence by this letter acknowledged severing of advocate-client relationship. It should have stopped there as at 30<sup>th</sup> April 2007 but to unilaterally backdate the termination of the advocate/client relationship as at 2<sup>nd</sup> February 2007 without notice is illegal and unfair. There was no notice of termination until 30<sup>th</sup> April 2007 and that is where officially and legally the advocate/client relationship was terminated. With regard to instructions, it is not denied that the Respondent gave the Applicant instructions to transfer the suit property, until the letter of 30<sup>th</sup> April 2007, the Applicant was instituted any other interpretation was/is unconscionable. In spite of the dispute whose details this Court is not privy to, how would the Applicant have known that as at 2<sup>nd</sup> February 2007 the Respondent ended the advocate-client relationship without express notice? In light of these circumstances, legally, the termination of the advocate-client relationship was on 30<sup>th</sup> April 2007 and not before that as there was no notice to that effect.

At the time as deponed by the Applicant in Supporting Affidavit to the application; the following actions had been carried out before the 30<sup>th</sup> April 2007;

On 8<sup>th</sup> June 2006 the Applicant registered vesting order. They went to **Nakuru Municipal Council** (then) and obtained the Land Rent Assessment Rent demand and made payment on 15<sup>th</sup> February 2007.

On 26<sup>th</sup> June 2006 they attended **Central Police Station** to report loss of certificate of title to property and obtained Abstract.

The Applicant drew the application for provisional certificate of title, to the documents for execution to the client and then lodged them in **Nakuru Land Registry**.

These activities ought to have been taken into account as the Applicant undertook the exercise to transfer the suit property and worked towards the said goal until 30<sup>th</sup> April 2007 when the Respondent formally terminated the advocate – client relationship.

The letter of 14<sup>th</sup> March 2005 and 22<sup>nd</sup> March 2006 the Respondent gave instructions of transfer of suit property **Nakuru Municipality/Block12/112** from Kenya Cooperative Creameries to New Kenya Cooperative Creameries Limited.

***In Mereka & Company Advocates vs National Bank of Kenya Ltd HC Misc Appeal 391 of 2002; it was held that while the Taxing Master in exercise of discretion in determining the award in the Bill of Costs, The Taxing Master should consider the value of the subject matter as valued and pleaded in pleading, judgment or settlement.***

The instruction fee is charged once and the Taxing Officer ought to appreciate that an advocate is entitled to full instruction fees upon instructions and take into account the value of the subject-matter. Therefore in the instant case the suit property was/is valued by **Tyson** at **Ksh 4,450,000.00**.

**Paragraph 21 of the Advocates (Remuneration) Order provides;**

***“In calculating scale charges, basis of charges shall, unless otherwise provided in the schedules...if no consideration or only nominal price or ...the value of the subject matter effected by deed , shall be deemed to be;***

***a) The value fixed for purpose of stamp duty;***

***b) The last price at which the sale has taken place within 10 years from the date of the transaction;***

***c) The estimated average market value during the preceding 3 years.***

It is the Applicant's case that there was an error in principle in the Taxing Officer's ruling as certain relevant factors were not considered when the Taxing Officer objected to the taxing of the bill of costs. The instructions fee ought to be considered in taxing the Bill as the Respondent did not deny instructing the Applicant.

It is not in dispute that there existed an advocate-client relationship between the parties prior to 2<sup>nd</sup> February 2007. This is envisaged in the Respondent's letter dated 22<sup>nd</sup> March 2006 instructing the Applicant to represent him in the transfer of the subject matter herein. However, a retainer (advocate-client relationship) can be terminated in various ways as stipulated in **Harlsbury's Law of England 94<sup>th</sup> Edition**, v 44 (1) pgs 114 – 119; by **completion of business, change of advocates, withdrawal of instructions, incapacitation of either party, lapse of time and frustration of the contract**. The concept of termination of advocate-client relationship is canvassed under **Rule 3 sub-rule 59 of the Code of Conduct & Ethics for Advocates**, which provides that a client may, if need be, withdraw instructions and move on to another Advocate. In light of this, the Respondent sent to the Applicant a letter dated 30<sup>th</sup> April 2007 which revoked the advocate-client relationship between them. This then answers the question as to whether the Respondent formally withdrew instructions for the Applicant to represent them. The Respondent did as at 30<sup>th</sup> April 2007.

**Whether the Applicant is entitled to fees accrued from work carried out after instructions were withdrawn by the Respondent.**

The question then is, was the Applicant right to charge fees for services rendered after instructions were withdrawn?

The advocate is the representative of his client. Representation by the Advocate depends on instructions. This is to say that an engagement of an advocate comes to an end when the client becomes unable to give instructions. Thus, the withdrawing of instructions by the Respondent marked the end of the advocate-client relationship between himself and the Applicant. In simple terms, what that means is that the advocate was no longer authorized to act on behalf of the client and his actions could in fact be construed as professional misconduct. Consequently, the Bill of Costs drawn by the Applicant was to cover instruction fees and only legal costs and expenses incurred while acting under instructions and not those incurred after the advocate-client relationship was terminated.

**DISPOSITION**

- 1. The Order made by the Taxing Officer on 14<sup>th</sup> March 2008 striking out the Advocate/ Client Bill of Costs be set aside and all consequential orders.**
- 2. The Advocate/ Client Bill of Costs be revised by the Applicant to only cover instructions fees and legal costs and expenses incurred while acting under instructions of 30<sup>th</sup> April 2007**
- 3. The revised Advocate/ Client Bill of Costs be referred back to the Taxing Officer for taxation; and**
- 4. Each Party to bear own costs**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 11<sup>th</sup> MARCH 2019.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MS ROTICH FOR APPLICANT**

**MS WALUANGA FOR RESPONDENT**

**COURT ASISSTANT JASMINE**