



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 432 OF 2018

IN THE MATTER OF TAXATION OF ADVOCATE CLIENT COSTS

MWANIKI GACHOKA & CO ADVOCATES.....APPLICANT

VERSUS

ARISTIDE BRILLIANT NKOUMONDO.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Chamber Summons application dated 12th August 2018 and filed on 13th August 2018 was filed pursuant to the provisions of Paragraph 11 (1) and (2) of the Advocates Remuneration Order and Sections 3A and 63 (e) of Civil Procedure Act and all other enabling provisions. It sought the following orders:-

1. THAT this court be pleased to review, vary or set aside the Ruling of the Taxing Master delivered on 31st May, 2018 upholding the Respondent's Preliminary Objection dated 23rd March 2018.

2. THAT the Bill of Costs filed by the Applicant herein be taxed on merit.

3. THAT the costs of this application be provided for.

2. The Applicant's Written Submissions and List of Authorities were dated 29th October 2018 and filed on 30th October 2018 while those of the Respondent were dated 5th December 2018 and filed on 10th December 2018.

3. The Parties requested this court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

4. The Applicant's application was supported by an Affidavit of Paul Mwaniki Gachoka that was sworn on 13th August 2018.

5. Its case was that the Taxing Master Hon F Rashid, erred in her Ruling delivered on 31st May 2018 when she upheld the Respondent's Preliminary Objection to the effect that there was a valid and binding Agreement between it and the Respondent, which it stated was not true. It was emphatic that the Taxing Master had no jurisdiction to determine the issue of retainer as parties were not in agreement about the existence of the same between them. It averred that once the issue of validity of the alleged agreement came into question, the Taxing Master ought to have referred the Preliminary Objection to a Trial Judge (**sic**) for hearing and determination.

6. It therefore urged this court to exercise its discretion and interfere with the exercise of the Taxing Master's powers which was unmerited and greatly prejudiced it as its fees arising out of legal services rendered it rendered the Respondent in several cases remained unpaid.

7. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

8. In response to the said application the Respondent swore his Replying Affidavit on 3rd October 2018. It was filed on 4th October 2018.

9. He stated that, through various correspondences exchanged between him and the Applicant, they agreed on fees of Kshs 7,500,000/= for legal services it was to render for him. He said that he paid the agreed fees in full thus extinguishing its right to tax the Bill of Costs. He was categorical that where there was an agreement for payment of advocates' fees, the advocates' fees would not be subject to taxation.

10. He termed the present application as mischievous and an abuse of the court process and urged this court to dismiss it with costs to him.

LEGAL ANALYSIS

11. The Applicant relied on the cases of **Mugambi & Co Advocates vs John Okal Ogwanyo & Another [2013] eKLR** and **Hezekiel Oira t/a H Oira Advocates vs Kenya Broadcasting Corporation (KBC) [2015] eKLR** where Hatari Waweru and Aburili JJ held that the Taxing Master's jurisdiction was limited to determining any matter in dispute between him only in relation to items in the bill of costs.

12. It was its argument that the Taxing Master ought to have downed her tools as she had no jurisdiction to hear and determine the Preliminary Objection. It referred to the case of **Motor Vessel "Lillian S" vs Caltex Oil Kenya [1989] eKLR** in this regard.

13. It also relied on other case law to buttress its argument that no retainer agreement existed between it and the Respondent herein.

14. On the other hand, the Respondent argued that the Taxing Master had jurisdiction to hear and determine the Preliminary Objection. He relied on the case of **Francis Mwanza Mulwa vs George Mutuku Masai [2016] eKLR** where Ogola J held that it was the duty of a Taxing Master to determine the existence of an advocate - client relationship.

15. He also referred to the case of **Nyamongo & Nyamongo Advocates vs Pan Africa Insurance Co Ltd & Another [2016] eKLR** where Aburili J held that a Taxing Master had to determine whether she had jurisdiction to tax the bill before taxing or declining to tax a bill.

16. He also relied on several other cases to support his argument that there existed a fee agreement between him and the Applicant.

17. This court carefully considered the parties' Written Submissions and though it noted the detailed submissions on the question of existence or otherwise of the retainer agreement, it did not analyse the same as the question that was really before it was whether or not the Taxing Master had jurisdiction to hear and determine the Respondent's Preliminary Objection.

18. It appeared to this court that the holdings the Respondent relied upon to buttress his argument that the Taxing Master had jurisdiction to hear and determine his Preliminary Objection were distinguishable from the facts of this case. The cases seemed to deal with the question of the existence or otherwise of an advocate-client relationship and taxation of a bill of costs *vis -a-vis* assessment respectively. The cases relied upon by the Applicant, however, were relevant to its case.

19. Paragraph 13A of the Advocates Remuneration Order provides as follows:-

“For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

20. These powers relate to the Taxing Master's duty to tax bill of costs as envisaged in Paragraph 13 of the Advocates Remuneration Order. These powers do not include hearing and determining disputed points of law relating to a relationship between the parties before him. Once a Preliminary Objection is raised, the Taxing Master ought to refer the matter to a judge for hearing and determination and if the Preliminary Objection is dismissed, the matter is then referred and/or remitted back to the Taxing Master to tax the bill of costs.

21. Indeed, the reference filed at the High Court under Paragraph 11 of the Advocates Remuneration Order relates to the decision of a Taxing Master in the taxation of a bill of costs and not determining points of law as would be in other cases brought to in the High Court on appeal for the hearing and determination of a matter on both matters of fact and/or law.

22. Accordingly, having considered the Written Submissions and the case law that the parties relied upon, this court came to the firm conclusion that the Taxing Master misdirected herself when she heard and determined the Preliminary Objection. It ought to have been referred to the High Court for hearing and determination. She had no jurisdiction to proceed with the matter and ought to have downed her tools immediately as was held in the case of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd** (Supra).

DISPOSITION

23. For the foregoing reasons, the upshot of this court's Ruling was that the Applicant's Chamber Summons application dated 12th August 2018 and filed on 13th August 2018 was merited and the same is hereby allowed in terms of Prayer No (1) therein. Costs shall be in the cause.

24. It is hereby directed that the Respondent's Preliminary Objection dated 23rd March 2018 and filed on 29th March 2018 be referred to a judge of the High Court prior to the taxation of the Applicant's Bill of Costs. The parties are therefore hereby directed to move the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division appropriately.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of May 2019

J. KAMAU

JUDGE