



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLICATION NO. 500 OF 2016**

**MASORE NYANG'AU & CO. ADV.....APPLICANT/ADVOCATE**

**-VERSUS-**

**KENSALT LIMITED.....RESPONDENT/CLINET**

**RULING**

**PRELIMINARY OBJECTION**

By Notice of Preliminary Objection application dated 18<sup>th</sup> May 2019 and filed 20<sup>th</sup> May 2019, pursuant to paragraphs **11, 12, 13, and 13A of Advocates (Remuneration) Order** and the Court's order of 14<sup>th</sup> May 2019, the Applicant raised Preliminary objection. The Applicant objected to the hearing and disposal of this suit on the basis that the Court lacks jurisdiction; specifically the Notice of Motion filed on 22<sup>nd</sup> March 2018 seeking to strike out the Advocates Bill of Costs dated 30<sup>th</sup> November 2016 by this Honourable Court on the following grounds;

- a) That Taxing Officer does not require an order to tax costs as between advocate and client. The High Court does not have jurisdiction to stay or strike out such advocate and client bill of costs;*
- b) That striking out a bill of costs is a form or a way of taxing a bill of costs as, in the process of taxing the bill, the Taxing Officer either strikes out or taxes off an item in the bill. In addition or, alternatively, the Taxing Officer may, in appropriate situations as in HC Misc. Application No. 190 of 2015 (attached to the supporting affidavit of the application dated 22<sup>nd</sup> March 2018), strike out a bill of costs in its entirety. The High Court does not have original jurisdiction to strike out a bill of costs. To purport to do so is to descend into the province of a taxing officer;*
- c) That the High Court only becomes seized of a matter emanating from taxation through a reference by either party, pursuant to paragraph 11 of the Advocates (Remuneration) Order or from the reference by the Taxing Officer, with the consent of both parties in a form of a case stated, as per paragraph 12 of the Advocates(Remuneration) order. Since there is no reference from either party or case stated from the Taxing officer, the application is incompetent and an abuse of the process of the court;*
- d) That in taxation matters, the High Court is in the position of an appellate Court. It can never be the first port of call;*
- e) That when the taxing Officer struck out ELC Misc Application No 190 of 2015, for the reason that the bill of costs was filed in a wrong court, the Taxing officer granted leave to the advocate to file a fresh bill of costs in the proper court – giving rise to the instant bill of costs. As the client did not appeal against the said order, this court lacks jurisdiction to stay or struck out the fresh bill;*
- f) That alternatively, but without prejudice to the foregoing grounds, whether or not there were instructions to file the parent suit, can only be determined after the Taxing Officer has rendered his decision.*

**SUBMISSIONS BY APPLICANT:**

The issue before this court, at this stage is not whether or not the Applicant was the Respondent's Advocate at the time he rendered legal services the subject of the Bill of Costs, indeed he was. It is not of retainer or lack of it. The issue is whether this court can stay or strike out an advocate and client's Bill of Costs for whatever reason, before a taxing officer before whom the bill is pending, has taxed or rendered a decision on the Bill of Costs.

The Applicant's Preliminary Objection is purely on points of law as the same relates to the court's interpretation of the cited paragraphs of the Advocates (Remuneration) Order. There are no disputed facts to be ascertained. The Applicant represented the Respondent in the mother

file. If, as the Respondent argues, there were no instructions to file the parent suit and that there has already been a taxation of the services in another related file, then a Taxing Officer has the jurisdiction, as we show below, to dispose of that application.

**Rule 13(1) of the Advocates (Remuneration) Order** provides as follows with regard to an advocate and client bill of costs being presented without any court order:-

***“The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client...” (emphasis added)***

Since there is no requirement that there be an order for costs in an advocate and client bill of costs before a bill can be presented for taxation, the High Court Judge cannot have power to stop taxation by either striking out a bill of costs or dismissing the same. To do so would be in breach of paragraphs **11,12 & 13 of the Advocates (Remuneration) Order**. The Respondent wants the court to set a precedent that before an advocate and client Bill of Costs is taxed, the Judge must determine first whether the Bill of Costs qualifies to be presented for taxation, or that the judge must first grant an order awarding costs to the advocate. There is no power to do that. To do so will fly in the face of the paragraphs of Advocates (Remuneration) Order.

In support of ground 2 of the Preliminary Objection, the Applicant submitted that the role of a Taxing officer is not just to reduce the figures or increase them as presented before him/her. The Taxing Officer has power to strike out a figure or strike out the entire bill of costs, what the Respondent wants this court to do. This is the purport of paragraph 13A of the Advocates (Remuneration) Order as read with paragraph 16. These provide as follows:-

***“13A. For the purposes of any proceeding before him, the Taxing Officer shall have the power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt such other proceedings as may be necessary for the determination of any matter in dispute before him”***

If there is a dispute as to whether the Applicant was instructed to file the suit, which is the basis of the bill of costs, clearly this can only first be determined by the Taxing Officer as he has power to summon and examine any witness regarding the same and to direct and adopt all such other proceedings as may be necessary with respect to any matter in dispute before him.

Counsel submitted that the judge of the High Court cannot usurp the power of a Taxing Officer to start investigating and purport to determine at this stage a dispute or matter that is before the Taxing Officer. To purport to do so is to descend to the level of a Taxing officer.

There are only three ways through which the jurisdiction of a judge in taxation matters is invoked under the law. These are:-

- a) Through a reference by either of the parties to a bill of costs as is provided under **paragraph 11 of the Advocates Remuneration order**;
- b) Through a reference by the Taxing officer with the consent of both parties in the form of a case stated as provided under **paragraph 12 of the Advocates Remuneration Order**;
- c) Where

***“...party and party costs have been incurred improperly or without reasonable cause, or that by reason of any undue delay in proceedings under any judgment or order, or of any misconduct or default of the advocate, any costs properly incurred have proved fruitless to the party on whose behalf the same were incurred...”***

pursuant to **paragraph 61 of the Advocates (Remuneration) Order**. This clearly refers to a party and party scenario where the Advocate through delay, negligence, or misconduct causes his client, who has been successful in a suit and has been awarded costs but is unable to recover the said costs. Whatever the scenario, the said costs in question in paragraph 61 must necessarily have in the first place been taxed or assessed by a Taxing Officer.

The paragraph does not apply to the instant matter as the suit the basis of which the bill of costs was filed was withdrawn before the defendant therein was served with the plaint, summons to enter appearance, and the application for an injunction.

In the instant matter there has been no reference filed by either party to invoke the jurisdiction given under **paragraph 11 of the Advocates (Remuneration) Order** and there has been no reference by the Taxing Officer, with the consent of the parties, pursuant to the power given in paragraph 12. Paragraph 61 is inapplicable in an advocate and client bill. Consequently, the Respondent’s application is incompetent, or premature, and indeed, an abuse of the process of the court.

That, bills of costs are taxed by

***“... the registrar or district or deputy registrar of the High Court,”*** pursuant to power granted by **paragraph 10 of the Advocates (Remuneration) Order**.

As Deputy Registrars of the High Court, they are courts for purposes of taxation of the bills. **Order 49 Rule 6 of the Civil Procedure Rules** –special powers of Registrars – deems a registrar exercising the given powers in a High Court to be a civil court. It was the Applicant’s submission that ‘**Court**’ in taxation matters in the High Court does not necessarily mean or is confined to proceedings presided over by a

judge. It includes and, indeed under **paragraph 12, 13 and 13 A, of the Advocates (Remuneration) Order** means the Taxing Officer exercising the power of taxation in a bill of costs filed in the High Court.

In the case of *Misc. Appl. No. 342 of 2011: Evans Thiga Gaturu Advocate –vs- Kenya Commercial Bank Ltd*, the parties moved before a Judge after the Taxing Officer had taxed the bill of costs and not before. The judge in that case opines, quite contrary to **paragraph 13 of the Advocates Remuneration Order**, that it would be proper to obtain leave of the court before filing a bill of costs for taxation and that it is at that stage that the issue of retainer can be raised. Since leave was not applied for, where the Respondent could have raised the issue of retainer, which as we have submitted is necessary, the Respondent's application at this stage is a non-starter.

The said paragraph clearly provides that an advocate does not need an order to file an advocate and client bill of costs. Be it as it may, no leave was sought in the instant case hence the Respondent cannot raise that issue at this stage, not before a Judge.

### **THE RESPONDENT'S SUBMISSIONS**

The Respondent submitted that the test of what constitutes a Preliminary Objection was set in the case of *Mukisa Biscuit Manufacturing Co. Limited –vs- West End Distributors Limited [1969] E.A. 696* to mean a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained.

That the powers of a Taxing officer are provided for under **paragraph 13A of the Advocates Remuneration Order**. A taxing officer has no powers to determine the question of retainer where retainer is disputed as is the present case.

That the client relies on the case of *Mugambi & Co. Advocates –vs- John Okal Ogwayo & Another [2013] eKLR* at **paragraphs 11 and 12 of the Advocates Remuneration Order** for the proposition that;

- a) the jurisdiction of a taxing officer is to tax bills 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 and;
- b) 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, then that issue ought to be determined first by this court.

That the client further relied on the case of *Evans Thiga Gaturu, Advocate –vs- Kenya Commercial Bank Limited [2012 eKLR]* for the proposition that it would save judicial time by having the issue of retainer determined early in the taxation proceedings instead of running the risk of having to go through the elaborate process of taxation only for the process to come to nought on the ground of lack of a retainer at the end. The client submitted that that question of retainer can only be determined by this court and not by the taxing officer.

### **DETERMINATION**

This Court considered detailed written and oral submissions of learned Counsel for parties' with regard to the Preliminary Objection.

The issue for determination is whether the Court presided by Judge of the High Court can stay or strike out Advocate's/Client's Bill of Costs for whatever reason before the matter is handled by the Taxing Master and a decision is rendered on the matter.

A recap of the proceedings culminating to the instant preliminary objection was that on 1<sup>st</sup> April 2019 the day of hearing the Notice of Motion of 23<sup>rd</sup> November 2018 seeking this Court to stay taxation proceedings and/or strike out the Bill of Costs filed; there arose contention on whether this Court had/lacked jurisdiction to hear and determine the instant application, The matter was adjourned to pursue the Preliminary Objection on this Court's jurisdiction.

The Court finds as follows;

**Paragraphs 10 11 12 13 13A & 16 of Advocates (Remuneration) Order** refer to the Taxing Officer as Deputy Registrar/registrar of the Court; and outlines the process of taxation the Taxing Officer should undertake.

Of importance, No legal requirement for an order is prescribed before the Bill of Costs is filed by the advocate or client as expressly provided by **Rule 13 (1) Advocates (Remuneration) Order**.

**Rule 13 A & 16 Advocates (Remuneration) Order** outline the Taxing Officer's power and authority to exercise in taxing Bill of costs and what costs and expenses should be lawfully allowed.

The import of these provisions is that the Taxation of Bills of Costs commence before the Taxing Officer/Registrar/Deputy Registrar of the Court or any other Officer designated by Chief Justice to carry out these duties. The Taxing Master/Officer may hear and record preliminary issues with regard to taxation of Bill of Costs and where there is jurisdiction determine and if not now refer to the Judge of the High Court.

This Court read *Misc Application 447 of 2010 Mugambi & Co Advocates vs John Okal Ogwayo & Ruth Rebecca Auma*; where the High Court dealt with the question whether there was a retainer to act for the party or not. The matter was to contest the Taxing Master's Ruling of 20<sup>th</sup> March 2011 where the Advocate's Bill of Costs was struck out by the Taxing Officer. After appreciating that there was Retainer Agreement, the Taxing Master struck out the Bill of Costs. Also it was argued that the Taxing Officer lacked jurisdiction to hear and determine the application whose thrust was retainer. The claim was that there was no advocate/Client relationship between Advocate and Clients and the Advocate was not entitled to costs from the Clients to be taxed.

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 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.....”***

Similarly, in ***Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd Misc Application 343 of 2011***, the Court dealt by consent of parties with 2 applications namely; one application seeking orders for entry of judgment of certificate of taxation and the other application on setting aside the Ruling by the Taxing Officer. The Court considered competing interpretations of **Section 13 of Advocates Remuneration Order**; some Courts hold that leave should first be obtained to file Bill of Costs during which the issue of Retainer may be raised and canvassed while other Courts interpret literally, that no leave should be sought.

From the provisions of law and case law considered above, this Court holds the view that no leave or order should be sought as condition precedent to filing the Bill of Costs as Section 13 is explicit that no order should be sought first.

Secondly, a reading of the **Advocates Remuneration Order** more particularly **10 13 13a & 16** place the first port of call as the Taxing Master/Officer in any Bill of Costs filed. It is during the hearing of the Bill of Costs that preliminary issues may be raised including the issue of Retainer. The 2 cited cases above demonstrate that the matters were considered before the Judge of the High Court after the same were canvassed before Registrar/Deputy Registrar and Ruling was contested one under **Rule 11 Advocates Remuneration Order** and the other based on inherent jurisdiction of the High Court.

In the instant matter, Counsel submitted that the contention to the Bill of Costs is that the advocate did not have instructions to file 2 suits **HCC 247 of 2014 and/or ELC 810 of 2014**. These facts are slightly different from the contention that there were no instructions at all.

Therefore, in light of all the legal provisions and case-law cited, the Preliminary Objection has merit, this Court lacks jurisdiction at this stage to consider the pending application. The journey ought to start from Taxing Officer and it is the decision of the Taxing Officer that shall be subject of the High Court hearing and determination. If Taxing Master in exercise of **Rule 13 & 13A Advocates Remuneration Order** finds that there is a dispute on Retainer then the same maybe determined by the Judge of the High Court.

#### **DISPOSITION**

- 1. The Preliminary Objection is upheld**
- 2. The Bill of Costs be placed before the Taxing Officer; Commercial & Tax Division.**
- 3. Each Party to bear its own costs.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 20<sup>TH</sup> SEPTEMBER 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MASORE NYANG’AU FOR APPLICANT/ADVOCATE**

**COUNSEL FOR RESPONDENT/CLIENT**

**MS JASMINE - COURT ASSISTANT**