



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO 201 OF 2017

MWADUMBO & COMPANY ADVOCATES.....APPLICANT/ADVOCATE

-VERSUS-

JOSEPH MAINA KIMANI T/A

ARPRIM CONSULTANTS.....RESPONSENT/CLIENT

RULING

1. This ruling relates to Notice of Preliminary objection dated 18th September 2017, premised on the following grounds;

a) That the Honourable Judge lacks the requisite jurisdiction to hear and determine the Application dated 22nd May 2017, by virtue of the provisions of Section 51 of the Advocates Act and paragraphs 10, 13 and 13A of the Advocates (Remuneration) Order, which provide that all applications and matters regarding taxation fall within the jurisdiction of the taxing officer (Deputy Registrar) and not the Judge;

b) That by virtue of paragraph 11 of the Advocates (Remuneration) order, jurisdiction of the Judge can only be exercised after the taxing officer (Deputy Registrar) has given reasons for his or her decisions and no such decisions has been rendered herein;

c) That the said application had been drawn under the provisions of the Civil Procedure Act and the Civil Procedure Rules which provisions do not apply in taxation matters which are governed by the Advocate's Act and the Advocates (remuneration) Order.

2. The parties disposed of the application by filing submissions. The Applicant submitted that, Paragraph 13A of the Advocates (Remuneration) Order provides as follows:-

“13A. Powers of taxing officer 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.”

3. It is argued that the above provisions of the law are couched in mandatory terms. That the application dated 22nd May 2017, seeks to strike out the bill of costs dated 26th April 2017, on the grounds that the Advocate did not have instructions to act for the client. Therefore, in light of the foregoing provisions of the law, it is clear that the jurisdiction to hear and determine matters to do with remuneration of Advocates has been bequeathed to the Taxing Officer who is defined as the Deputy Registrar therefore the application dated 22nd May 2017 can only be heard and determined by the Deputy Registrar.

4. The Applicant relied on the case of; *Lumumba Mumma Kaluma v Sachin Shaha* [2013] eKLR where the Court held as follows:-

“What is before the Court is the taxation of the Applicant/Advocates' Bill of Costs dated 30th July 2012. That Bill is before the Court under the provisions of the Advocates (Remuneration) Order. The judicial officer who has the responsibility for such taxation is the Deputy Registrar of the Court. I concur with the submissions of the Applicant/Advocates when they say that until the decision of the Deputy Registrar, as taxing officer, is delivered, this Court has no jurisdiction under the provisions of the Advocates (Remuneration) Order.”

5. Further that, by virtue of paragraph 11 of the Advocates (Remuneration) Order, jurisdiction of the judge can only be exercised after the Taxing Officer has given reasons for his or her decisions and there being no decision of the Taxing Officer in this matter, the jurisdiction of the Court has not yet been invoked.

6. Reliance was placed on the case of; Cecil G Miller t/a Miller & Company Advocates v Parin Shariff & 3 others [2012] eKLR where the Court held as follows:-

“In this case, if the High Court were to accommodate the said application, the opportunity to object to the decision which is available if the decision is made by the Deputy Registrar would be lost. As was held by Ringera, J (as he then was) in Re: Leisure Lodges Limited Nairobi (Milimani) HCWC No. 28 of 1996, a party who is aggrieved by any decision of the taxing officer whether interlocutory or final and whether it be on the quantum awarded on the bill as a whole or any items thereof has a recourse to the High Court by way of a reference under paragraph 11 of the Advocates Remuneration Order. A decision made by a Taxing Officer on an application such as the one the subject of the objection herein would clearly be an interlocutory decision and, according to the Judge, whose decision I, with respect associate myself, amenable to challenge under paragraph 11 aforesaid”

7. Finally, it was submitted that the subject application dated 22nd May 2017 is fatally defective since it has been drawn under the provisions of the Civil Procedure Act, which provisions do not apply in taxation matters which are governed by the Advocate’s Act and the Advocates (Remuneration) Order. The Applicant relied on the case of; Machira & Company Advocates –VS- Magugu [2002]2 EA 428 as was quoted in the Cecil Miller Case supra.

8. The Respondent filed submissions in response to the application in which it was argued that the Application dated 22nd May 2017, was filed seeking to have the bill of costs filed on 26th April 2017 by the Advocate struck out on the grounds that the Advocate did not have instructions to file the pleadings in HCCC No. 564 of 2016, Edwin Ngonge Kogwe –vs- Pinkertons Kenya Ltd & Others, the subject matter of taxation and/or the Advocate/Applicant acted without instructions and even forged the Respondent’s signatures.

9. The bill was placed before the Hon. Deputy Registrar on the 16th May 2017, and once the question of want of instructions was raised by the Respondent’s Counsel, the Deputy Registrar made a ruling to the effect that the matter ought to be referred to the Judge for determination on the question of want of instructions since the same was in dispute, which gave rise to the Preliminary objection herein

10. That the applicable law herein is found under Paragraph 12 (1) of the Advocates (Remuneration) Order which provides that; the Taxing Officer may refer any matter in dispute arising out of the taxation of a bill of costs for the opinion of the High Court and that Paragraph 12(2) thereof provides the procedure for such reference shall follow that of a case stated but shall be to a Judge in Chambers. That it therefore follows that the Taxing Officer has the discretion to refer any matters in dispute arising out of the taxation of a bill of costs to the Court for its opinion and according to the Taxing Officer, the issue of retainer arose and in her ruling dated 24th May 2017, she held that she could not proceed to tax the bill when the issue of retainer is disputed.

11. The Applicant relied on the case of; Khan & Katitu Advocate –vs- Central Electrical International Ltd [2005] eKLR, where the Court held that;

“But in my view that power and discretion must relate to the core business of the taxing officer and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation it is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a situation may arise such as the present one, were the advocate’s instructions are only partly disputed. Here it is contended by the Client that the Advocate had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate’s instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds”

12. Further reference was made to the case of; Mugambi & Co. Advocates –vs- John Okal Ogwayo & another [2013]eKLR , where the Court held inter alia that:

“That 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 Court. See paragraphs 2, 10 and 13 of the remuneration order.”

13. The Respondent submitted that a “Court” is defined under Section 2 of the Advocates Act, Cap 16 of the Laws of Kenya as the High Court. “Court” is thus not the Taxing Officer or a Deputy Registrar of the Court. Further, in the case of; Wafula Simiyu & Co. Advocates –vs- East Land Hotel Ltd [2016] eKLR the Court held that, where a dispute as to retainer is raised, the Court being the High Court, must first determine the question by way of oral evidence before the taxing master can exercise his powers to tax the bill of costs in question.

14. The Respondent further submitted that the Civil Procedure Act and Rule cited provide how a party ought to approach the Court. The Advocates (Remuneration) order does not provide the manner the application ought to be presented before Court. Thus it goes without saying that the enabling provision of law is the Civil Procedure Act and Rules. That notwithstanding the above, the application is also premised on paragraph 12 of the Advocates (Remuneration) Order which is clear and visible under the heading Notice of Motion.

15. Therefore, the Preliminary objection is a mere red herring and a diversionary tactic by the Applicant in an effort to cloud issues that are before Court for determination. That, even if the Application was not premised on any provision of the law, the same cannot be defeated on a mere technicality in view of Article 159 of the Constitution that provides that justice shall be administered to parties without regard to technicalities of procedure.

16. I have considered the application and the submissions thereto and I find that the whole issue in this matter rests on the power of the Taxing Officer in relation to taxation of bills. Rule 13(A) of the Advocates (Remuneration) Order quoted herein provides for these powers whereby the Taxing Officer has wide and discretionary power as stated therein. However it suffices to note that Rule 12 thereof provides

that;

“With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court. The procedure for such reference shall follow that of a case stated but shall be to a judge in chambers”.

17. It is therefore clear from these two provisions that where the Taxing Officer finds that a dispute arises out of a matter under taxation, the Taxing Officer can refer the matter to the Judge for determination. The question is, what matter would this be? Does the issue in dispute herein fall under such matters? In answer to these questions one must have regard to the issues raised in the Notice of Motion dated 22nd May 2017. The basis upon which the Applicant therein seeks for the striking out of the bill of costs dated 26th April 2017 ex debito justitiae is that the Advocates did not have instructions.

18. In my considered opinion, the said Advocate/Client bill of costs can only be founded on instructions to the Advocate, and therefore the issue of whether the instructions were given or not must be determined before the bill is taxed. That issue is not a pure issue of taxation. As rightly observed in the cases cited by the Respondent, it is a matter of fact which does not go to the general powers of the Taxing Officer in taxation of bills. It is an issue that should be determined by a Judge to pave way for taxation of the bill depending on the findings of the Judge. If indeed the Court finds that there was no instructions, the Bill will be rendered obsolete. It suffices to note that, the relationship between the Advocate and the Client is contractual and fiduciary in nature. It also hinges on “Agency” thus the fees payable is founded in Law. That is not a pure Taxation issue. On that basis, I find that the Preliminary objection has no merit and I dismiss it.

19. The costs thereof will abide the outcome of the Notice of motion application to be heard.

20. Those are the orders of the Court.

Dated, delivered and signed in an open Court this 11th day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Ms Obade for Mr. Mwadumbo for the Applicant

No appearance for the Defendant

Langat Court Assistant