



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

MISC. CIVIL APPLICATION NO. 177 OF 2017

NGUGI MWANGI & CO. ADVOCATES.....PLAINTIFF/APPL

VERSUS

ALLOY STEEL CASTINGS LIMITED.....DEFENDANT/RESP

R U L I N G

This is a ruling on reference brought by way of Chamber Summons dated 19th December 2017. It seeks to review, quash and/or set aside Taxing Master's decision dated 15th December 2017 and the Bill of Costs be substituted with this Court's decision or in the alternative Bill of Costs dated 10th April 2017 be dismissed with costs.

Grounds on the face of the application are as follows:-

- That the instruction fees and other cost/fees allowed by the Taxing Master are excessive, unfair and unjust and ought not to have been awarded as the Advocate failed to prove retainer after the same was denied by the client.
- That the Advocate had acted without instructions from the client.

In response, the Respondent filed Replying Affidavit dated 2nd July 2018. He adopted submissions filed on 19th October 2017 in response to the opposition of the Bill of Costs.

He averred that the issue of retainer has been raised to deny the Advocates their fee and prolong this matter further.

He averred that the Respondent has been settling other bills taxed and the issue of retainer does not therefore arise.

He averred that if the Applicant wanted the issue of retainer to be determined before taxation, it would have referred the matter to the High Court to converse it; that it would not be prudent for this Court to quash the Bill of Costs as it has power to stay the bill and determine the issue of retainer between the parties.

The Respondent averred that the Applicant never sought reasons from the Taxing Master before filing this application; that the Respondents should be blamed for failure by either the Taxing Master or the Applicant to refer the issue of retainer to the High Court for determination.

I have considered arguments by both parties herein. What I wish to consider is whether the issue of retainer was raised and whether it ought to be determined.

I have perused the affidavit in response to the Bill of Costs and note that the Respondent averred that it do not know the firm of Ngugi Mwangi & Co. Advocates and that it never instructed the said firm to represent the company in the matter that was being taxed.

On perusal of proceedings, before the Taxing Master and note that he dismissed the Applicant's opposition of retainer of the Respondent herein. The question that arises is was the Taxing Master seized with jurisdiction to make a determination on the issue of retainer.

I refer to the case of **Abincha & Company Advocates Vs Trident Insurance Company Ltd (2013) e KLR** Waweru J where the issue was whether the Taxing Officer had jurisdiction to determine the question as to whether the advocate's bill of costs was statute barred.

The Court held that, it was on issue that could only be determined by a Judge and that it was the kind of issue that the Taxing Officer should have referred to the High Court for opinion, with the consent of both parties,. The Learned Judge further held:

“ Only after determination of that fundamental issue by the High Court, that is whether or not there were any costs due to the advocate that could be taxed, would the Bill of Costs be referred back to the taxing officer for taxation. It is found that there were costs that were due to the advocate. I therefore hold that even the taxing officer of the Court did not have jurisdiction to hear and determine the main prayers of the Notice of Motion dated 20th February 2012.”

I agree with the above High Court decision that the Taxing Master is not seized with the jurisdiction to determine issue of retainer.

The issue of the determining whether Advocate/Client relationship existed once raised, ought to have been referred to High Court for determination before taxation of the bill by the Taxing Master. Having found that the Taxing Master acted without jurisdiction, I find that it would be in the interest of justice to allow the parties herein address the High Court on the issue. Pending determination on the issue of retainer, I do stay consequent proceedings before the Taxing Master.

Ruling dated, signed, and delivered at Nairobi this 18th day of October, 2018.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

ODHIAMBO H/B FOR MULI: FOR CLIENT/APPLICANT

NO APPEARANCE FOR ADVOCATE/RESPONDENT