



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO.445 OF 2015**

**GEORGE NGANG'A MBUGUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARY MARGARET PHILOMENA SOARES.....DEFENDANT/RESPONDENT**

**RULING**

1. George Nganga Mbugua t/a Mbugua Nganga & co. Advocates (the Advocates) have filed this suit against Margaret Philomena Soares also known as Mary Margaret Philomena Soares (the Client), for payment of Khs.3,524,680/= being the costs taxed in favour of the Advocates.

2. The parties herein have asked Court to determine two Applications. The first in time is the Notice of Motion dated 2<sup>nd</sup> February 2016 in which the Advocates seeks the following Orders:-

**1. The Defendant's Statement of Defence be and is hereby struck out and judgment be entered as prayed in the Plaintiff.**

**2. The Cost of this Application be awarded to the Applicant.**

3. In the second Application which is dated 21<sup>st</sup> March 2016, the Client seeks the following substantive prayers;-

**3. THAT the Defendant/Applicant be granted leave to file a Reference out of time.**

**4. THAT there be a stay of execution of Certificate of taxation in Misc. Application No. 243 of 2015 and Misc. Application No. 244 of 2015 pending hearing and determination of the reference.**

4. The second Application has been met with a jurisdictional challenge raised in the Grounds of Opposition filed by the Advocates on 30<sup>th</sup> March 2016. The objection is raised as follows;-

**“The jurisdiction to extend time under paragraph 11(4) of Advocates Act can only be invoked in the mater giving rise to the taxation objected to ie. Misc No.243 and 344 of 2015 and not otherwise. Jurisdiction is thus contested”.**

I propose to deal with this objection as a prefatory issue.

5. In the submissions made to Court by the Advocates they argue as follows:-

**“There is no jurisdiction provided to set aside or vary a certificate of costs save for that provided under the Advocates Act and the Advocates (Remuneration ) Order. Under those provisions, a reference should be filed from the decision of the taxing master to the High Court and where there is need to enlarge time, that application can only be mad in that cause and not in a different suit such as the present one. Accordingly, the present application, to the extent that it is filed in this suit, is misplaced and untenable as the same ought to have been made in the respective Misc, Causes being High Court Misc. Cause 243 of 2014 and High Court Misc. Cause 244 of 2014”.**

Other than reiterating that this is the correct forum to file the Application, the Client does not point to any law or authority to anchor his argument.

6. This action is brought for recovery of fees taxed in Nrb Misc. Civil Applications No.243 of 2015 and 244 of 2015. The Power of the High Court to enlarge the time fixed for filing a Reference from a Taxation is found in paragraph 11(5) of The Advocates Remuneration Order and expressed as follows:-

**“The High Court shall have power in its discretion by Order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such order may be made by Chamber Summons upon giving to every other interested party not less than three clear days notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired”.**

7. A Reference or Objection to the decision on Taxation under the provision of paragraph 11 of The Advocates Remuneration Order is filed in the same matter in which a Bill is taxed. Necessarily, an application to enlarge the time fixed for the filing of the Reference/objection must be in the matter in which the Bill sought to be challenged was taxed.

8. In the dispute at hand the Decisions of the Taxing officer which the Client seeks to challenge were made in Misc. Applications No.243 and 244 of 2015. It is in those two matters that the Applications for enlargement of time should have been filed. While this suit is in a sense related to the two taxation matters in that it is an action for recovery of the fees found to be due there, this action is commenced by way of Plaint. The Action is for a substantive claim and it would be an aberration of procedure to entertain a paragraph 11(5) application herein. Whilst the Courts are directed to hear and determine matters without undue regard to technicalities (Sections 1A and 1B of Civil Procedure Act and Article 159 of The Constitution), this is a jurisdictional issue. The jurisdiction of the High Court to hear and determine an Objection under the Provisions of paragraph 11 of the Advocates Remuneration Order cannot exercised in an action for recovery of fees and as a corollary the Court would not have jurisdiction to entertain an application for enlargement of time to file an Objection in an action for recovery. There is merit in the Advocate’s Objection and that would be the end of the road for the Notice of Motion dated 21<sup>st</sup> March, 2016. It is hereby struck out with costs.

9. I turn to the Notice of Motion dated 2<sup>nd</sup> February 2016. The Advocates emphasize that the Client did not file a Reference against the taxation and the same is a final assessment of quantum of fees payable to the Advocates. In their submissions the Advocates argue that the Certificate of Costs made pursuant to the taxations have not been set aside or varied in any way. This Court is asked to give due regard to Section 51(2) of The Advocates Act which provides:-

**“The Certificate of the Taxing Officer by whom any Bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such Order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.**

10. The Court is asked to strike out the Defence as it is untenable as the two Certificates of Costs are final

as they have not been set aside or altered by the Court. The Court was referred to the decision of Khan & Katiku Advocates Vs. Cosmas K. Muthembwa [2006] eKLR where the Court held;

***‘To put it another way, the Defendant ought to demonstrate that he has a defence that raises some triable issues. As already pointed out, when entering judgement the court was satisfied that there was no dispute as to the retainer and that the Certificate of Taxation had not been set aside or latered...there was no evidence that the Defendant had challenged the taxation under Rule 11 of the Advocates Remuneration Order..’***

11. The Client argued that the taxation proceedings were *ex parte* and she did not get an opportunity to respond to the same as they were never served upon her. It was her plea that she be granted Leave to file her Reference out of time. The Client argued that the taxed fees were grossly overtaxed. She argued that the agreed fees, at least in respect to the taxation in Misc. Application No. 243/2010, was Ksh.500,000 which she paid in full.

12. The Advocates on the other hand submitted that they could not wait indefinitely for the Client to challenge the taxations. They submitted,

**“In this case, the Defendant seeks to challenge a Taxation yet she has not even sought from the Taxing Officer, the reasons for the taxations and furnished the grounds upon which she objects. It is clear to even a casual observer that she is not serious objector to the taxations but a party who has determined to frustrate recovery of costs by an advocate who diligently undertook his duties and rendered services to her. The particulars of these services are not disputed and the replying Affidavit sworn in response to her application has not been controverted on the facts deposed thereon”.**

13. On the alleged Agreement for fees, Counsel for the Advocates submitted that it was not an agreement for fees as the advocate was not a party to it. That at any rate the issue regarding the alleged Agreement for fees should have been raised before the Taxing Officer and not before this Court.

14. This is the Courts view of the matter. In paragraph 5 of the Statement of Defence the Client avers;-

**“The Defendant contends that she is in the process of filing a Reference at the High Court of Kenya challenging both certificates of taxation, these being Misc.Application No. 243 of 2015, Mbugua Ng’ang’a & Company Advocates versus Margaret Philomena Soares and Misc. Application No. 244 of 2015, Mbugua Ng’ang’a & Company Advocates versus Margaret Philomena Soares”.**

15. As it turned out, the Client was already out of time and the Client never sought to file an application to enlarge time until confronted with the present application for striking out. In the mean time the Court has struck out the Application for Leave for reasons given earlier. However the Court has not determined whether or not the lateness in filing the Reference and or in bringing the application for enlargement was explained or excusable. In other words the merits of the Application were not considered.

16. For that reason, the Client can still remount her plea for enlargement of time through a fresh application in the proper forum. What this Court must now determine is whether it should strike out the Statement of Defence at this stage or give the Client an opportunity of taking a shot at Reference.

17. The client made a pitch that in respect to fees taxed in Nrb Misc. Civil Application No. 243 of 2015, she had paid the legal fees in full at an agreed amount of Kshs.500,000/= and there was no basis for taxation. Is this a serious argument if she were to get through to a Reference?

18. It is not in contention that on or about 23<sup>rd</sup> December 2013 the Client instructed the Advocates to act for her in the sale of her property being L.R No.330148 Lavington, Nairobi to Chahoh limited. The purchase price was Ksh.260,000,000/=. That transaction was captured in the Agreement of Sale dated 23<sup>rd</sup> December 2013 and the Supplemental Agreement for Sale dated 30<sup>th</sup> December 2013. Clause 10 of

the Supplemental Agreement for sale reads;-

**“The legal fees payable to the Advocates is Kenya Shillings one Million (Ksh.1,000,000’=) to be shared equally by the parties”.**

It is in this clause that the Client sees an agreement for fees. The Advocates do not think so because they were not party to the Agreement.

19. Section 45 of the Advocates Act is on agreement with respect to Remuneration and Section 45 (1) provides as follows:-

**“ Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—**

**(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;**

**(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;**

**(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf”.**

That Section seems to be in respect to Remuneration for contentious Business whether in a Civil Court or otherwise and in any proceedings in a Criminal Court or a Court military. Under Section 2 of **The Act, Contentious Business means ‘any business done by an advocate in any court, civil or military, or relating to proceedings instituted or intended to be instituted in any such court, or any statutory tribunal or before any arbitrator or panel of arbitrators’.**

20. The Business conducted by the Advocates was clearly non-contentious. However, paragraph 2 of the Advocates Remuneration Order (2009) (the law applicable to the matters) would seem to allow agreement of fees even in respect of non-contentious Business where scale fees is in excess of Kshs. 10,000/=.

21. True the Advocates were not party to both the Main and Supplemental Agreements. However both agreements were drawn by the Advocates and attested by them. Section 45 requires an agreement for remuneration to be in writing and signed by the client or his agent duly authorized on that behalf. There is no requirement for signature by the Advocate. By parity, it can be argued, that this would be true for Remuneration Agreements for non-contentious business.

22. In finding that the stance of the Client that there was an agreement for fees is an arguable point (should a Reference be permitted), I have considered the following sentiments of the Court of Appeal in Adopt A Light Limited vs. OChieng, Onyango, Kibet & Ohaga Advocates [2016] eKIR.

**....“An advocate has a higher bargaining power than that of a client when it comes to negotiating an agreement to fees, therefore it will place a special and substantial premium on the advocate in the event he/she wishes to opt out of the agreement. In any case, it is also important to give notice of the intention to rescind, or not be bound by the agreement, early enough, so that the client can make a wise decision. Here there was no notice to the client of the intention to opt out, and like all valid agreements, it is mandatory for a party to serve the necessary notice.....”**

**...The respondent however, contends that the said letter did not amount to a valid agreement on fees since it was not signed by the appellant, and that it was merely an offer by the**

**respondent, which offer was not accepted. As herein above noted, Section 45(1) of the Advocates Act recognizes and regulates agreements on fees between advocates and clients. We note that the section does not provide for the format that such an agreement should take, but only states that such an agreement ought to be in writing and signed by the client or by his/her agent”.**

23. Even if it were to be argued for the Advocates that the agreed fee was illegal as being less than provided under The Advocates Remuneration Order, there could still be a counter argument that the Advocate should not be allowed to secure a benefit by invoking the illegality of the retainer Agreement (**See Kimaru J. in D. Njogu & Company Advocates vs. National Bank of Kenya Ltd. [2009] eKLR.**

24. This Court is therefore minded not to strike out the Defence in respect to the fees taxed in Misc.243 of 2015 and shall afford the Client an opportunity to exhaust her chances in the Taxation proceedings. But that opportunity cannot be open ended. Undue delay will certainly prejudice the Advocate. For that reason the Court shall impose a time limit within which the Client can apply to file her Reference out of time.

25. That is in respect to fees in Misc. Civil Application No.243 of 2015. In respect to the fees determined in Misc. Civil Application No. 244 of 2015, the Client simply stated that **“it was grossly overtaxed and excessive for the drawing of a power of Attorney”**. No attempt was made to demonstrate that the fee was excessive. By failing to do so, the Client failed to persuade the Court that the intended Reference from this Taxation was arguable. This Court is therefore not persuaded that there is a reasonable Defence in respect to the fees taxed in Misc. Civil Application No. 244 of 2015.

26. Yet there is still another aspect of the fees in Misc. Civil Application No. 244 of 2015 that the Court must consider. The Plaintiff claims interest thereon at 14% per annum from 17<sup>th</sup> August 2014. The basis for that interest is set out in paragraph 15 of the Plaint as follows:-

**“The Plaintiff further claims interest accruing as provided under the Advocates (Remuneration) Order, of 14% per annum from the lapse of thirty (30) days from the date when he rendered his fee-note to the Defendant for payment and until payment in full.**

In paragraph 6 of her Defence the Client takes a view that interest should commence from the date of Notice of Taxation and not from the date the Fee Notice was presented to the Defendant.

27. That issue is easily resolved by paragraph 7 of The Advocates Remuneration Order (2009) which provides:-

**“An Advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his Bill to the Client, provided such claim for interest is raised before the amount of the Bill has been paid or tendered in full”.**

The position taken by the Advocates is the correct one. However the Advocates have failed to provide evidence on when the Bill was delivered to the Client. And as the matter is contested, the date from when interest accrued has not been proved.

28. Ultimately I make the following Orders:-

**1) The Notice of Motion of 21<sup>st</sup> March, 2016 is struck out with costs to the Advocates.**

**2) In respect to the Notice of Motion of 2<sup>nd</sup> February 2016-;**

**2.1) The Defence in respect to costs taxed in Misc Civil Application No.244 of 2015 is hereby struck out and judgement is entered in favour of the Advocates for Ksh.399,680/= with costs.**

**2.2) Interest on 2.1 will have to await proof by the Advocates.**

**2.3) In respect to Costs taxed in Misc Civil Application No. 243 of 2015, judgement shall be entered in favour of the Advocates in the event that the client fails to file an application under paragraph 11(5) of The Advocates Remuneration Order within 14 days.**

**2.4) In the event that the Client files the Application referred to in paragraph 2.3 above within the time set out above, further orders herein shall await the outcome of the said Application.**

**Dated, Signed and Delivered in Court at Nairobi this 6<sup>th</sup> day of September ,2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Chege for Njenga for Plaintiff/Applicant

Mathenge (Miss) for Respondent/Defendant

Alex - court clerk