



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 433 OF 2013**

**BETWEEN**

**CANNON ASSURANCE LIMITED .....PETITIONER**

**AND**

**ANTHONY THUO KANAI .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The basic facts leading to this petition are not in dispute. They arise from a relationship gone sour.
2. The petitioner is an insurance company while the 1<sup>st</sup> respondent (“the respondent”) is an advocate of the High Court. The respondent was employed by the petitioner as its Legal Officer. In that capacity he was expected to offer legal support, advice and defence of the petitioner. At the same time his firm was expected to provide legal services to it. He started working for the petitioner as an employee on 1<sup>st</sup> January 2007 while his firm provided legal services prior to his employment. His employment was terminated on 13<sup>th</sup> November 2012 whereupon he proceeded to file bills of costs for taxation for services rendered to the petitioner by his firm.
3. The issue in contention in this matter is whether the respondent is entitled to charge advocate/client fees on account of his position not only as an employee but also as an advocate providing legal services to the petitioner through his firm, *A. Thuo Kanai Advocates* and/or *A. Thuo Kanai and Company Advocates*, and whether such action constitutes a violation of the petitioner’s fundamental rights and freedoms under the Constitution.
4. Although the Attorney General is party to these proceedings, he did not participate meaningfully. Counsel instructed to act on his behalf, Mr Mohammed, submitted that the matter was a dispute between the petitioner and the 1<sup>st</sup> respondent.

**Petitioner’s Case**

5. The petitioner's case is set out in the petition dated the 29<sup>th</sup> August 2013. It is supported by the affidavit of John Ng'ang'a, the acting Chief Executive Officer, sworn on the same date and a further affidavit sworn on 18<sup>th</sup> September 2013. Three affidavits were sworn in support of the petition by Ageta Ogonda, Martha Mutoro and Jumbe Wyckly Otunde who were employees of the petitioner and who worked under the respondent at the time material to this suit.
6. The petitioner case is that its right to fair labour practices protected by **Article 41** of the Constitution was violated by the respondent who was acting in a dual capacity as an employee and as its advocate. The petitioner avers that while the contract of employment was being negotiated, the respondent advised that it would be lawful for him to represent the petitioner through his law firm and be compensated over and above his monthly salary by payment of 25% of the party and party costs on all successful claims where he represented the petitioner directly.
7. The petitioner submits that the respondent was not an independent contractor who would ordinarily be entitled to payment of fees for work done. It contends that the nature of their relationship was governed by an employment contract which excluded the possibility of an intention by the parties to consider the respondent an independent contractor. Counsel for the petitioner, Mr Regeru, cited several cases to show that the relationship between the parties was one between employer and employee among them *Nationwide Mutual Insurance Co. v Darden* 503 US 218, 112 S. Ct and *McKee v Reid's Heritage Homes Ltd* [2009] ONCA 916 (CanLII).
8. The petitioner calls in aid **rule 4 of the Advocates (Practice) Rules**, which prohibits an advocate from sharing profit costs with non-advocates, to argue that the employment contract violated this rule. The petitioner argues that they ought to have entered into an agreement under the **rule 4(ii)** of the said **Rules** which permit a non-advocate who has employed an advocate to receive costs from a third party provided that same are set off against the salary payable to the advocate or reasonable office expenses incurred by the employer in connection with the advocate.
9. The petitioner avers that it employed advocates and clerks to work under the respondent. The petitioner paid for the respondent's annual Practising Certificate and the mandatory professional indemnity cover. It also met his office and commuter expenses and other expenses including court filing fees, office space and secretarial services. As it did not require the respondent to reimburse these expenses from his salary, the petitioner maintains that the respondent cannot claim to be a separate entity from the law firm thereby entitling him to claim fees for work done while in the employ of the petitioner.
10. Matters between the petitioner and respondent came to a head following the enactment of the **Statute Law (Miscellaneous Amendments) Act No. 12 of 2012** which amended the **Advocates Act (Chapter 16 Laws of Kenya)** by inserting **sections 32A and 32B**. Prior to the enactment of **sections 32A and 32B**, the remuneration of all advocates was governed by **Part IX** of the Act. **Section 44 of the Advocates Act** provides that the Chief Justice may make orders, prescribe and regulate remuneration of advocates in respect of professional business upon recommendation by the Council of the LSK. In-house advocates *qua* advocates, were subject to regulation under the **Act** but the introduction of **sections 32A and B of the Act empowers the Chief Justice in consultation with the Council of the Law Society to specifically** regulate remuneration or the prescribe standards of work for in-house counsel.
11. As a result of the amendments to the **Advocates Act**, the respondent wrote an inter-office memo dated 7<sup>th</sup> September 2012 informing the petitioner of the amendments and seeking advice as to which firm of advocates he should hand over the matters which he was representing the petitioner. The petitioner avers that it replied on the 25<sup>th</sup> October 2012 requesting the respondent to provide a list of the matters he was handling as well as a list of the petitioner's external lawyers. The petitioner avers that the respondent only provided a list of the external lawyers and applied for his annual leave pending approval.

12. The petitioner avers that the respondent absconded from work on or about 9<sup>th</sup> November 2012 and as a result he was dismissed on 13<sup>th</sup> November 2012. The issue of dismissal is now subject of ***Anthony Thuo Kanai v Cannon Assurance Company, Industrial Court Cause Number 38 of 2013.***
13. Following the termination of employment, the respondent forwarded to the petitioner invoices for services rendered while in employment. He thereafter filed Bills of Costs in various matters for the assessment of his fees for work done on behalf of the petitioner between October 2006 and 13<sup>th</sup> November 2012.
14. The petitioner avers that in a ruling delivered on 25<sup>th</sup> June 2013, in ***High Court Miscellaneous No. 125 of 2013 A Thuo Kanai vs. Cannon Assurance Limited***, the Deputy Registrar dismissed the petitioner's objection to taxation and held that the respondent was an independent contractor entitled to charge fees under **section 44** of the ***Advocates Act*** and that there was no agreement for fees. The petitioner has now lodged an application for extension of time to object to the taxing officer's decision delivered on the 25<sup>th</sup> of June 2013.
15. The petitioner's contention is that the bills of costs filed by the respondent are invalid because the respondent relies on **sections 32A and 32B** of the ***Advocates Act*** yet the purported bills of costs and invoice raised relate to a period prior to the amendment of the ***Advocates Act***. The petitioner submits that the respondent was at all material times an in-house advocate and in the absence of any prescription made by the Chief Justice on the recommendation by the Council of the Law Society of Kenya under **section 32B** of the ***Advocates Act***, the bills of costs filed and invoices raised are premature and do not have a legal foundation.
16. The petitioner submits that the respondent is an independent contractor and he cannot be permitted to recover fees for matters handled while he was receiving a salary as this would amount to an unfair labour practice contrary to **Article 41** of the Constitution. In urging the court to accept this position, counsel for the petitioner, Mr Regeru, cited ***Elizabeth Washeke and 62 Others vs. Airtel Networks (K) Ltd and Another Industrial Court Cause No. 1972 of 2013[2013]eKLR*** where the court held that any understanding of fairness had to involve weighing up the respective interests of the employer vis-a-vis the employee as well as the interests of the public. As regards the public interest, Mr Regeru submitted that it would be in the public interest to delineate the entitlement of in-house legal counsel as companies and other organisations would suffer from unjustified fee claims from their employees.
17. The petitioner contends that the respondent cannot be allowed to retrospectively charge the petitioner fees as an independent contractor in addition to his salary earned in the period prior to the enactment of **sections 32A and B** of the ***Advocates Act***. It avers that this will amount to deprivation of property contrary to **Article 40** of the Constitution as the respondent cannot charge legal fees until the **sections 32A and B** of the ***Act*** are operationalised by rules issued by the Chief Justice.
18. In view of the foregoing the petitioner prays for the following:
  - a. *That pending the hearing and determination of this Petition conservatory orders do issue staying*
    - i. *Taxation by any court or any judicial officer of all such bills of costs filed by the 1<sup>st</sup> Respondent against the Petitioner arising out of the 1<sup>st</sup> Respondent's employment as In-House Counsel by the Petitioner and scheduled to come up for taxation from 30<sup>th</sup> August, 2013*
    - ii. *The filing in court of any Bills of Costs by the 1<sup>st</sup> Respondent against the Petitioner arising out of or connected in any way whatsoever with the 1<sup>st</sup> Respondent's employment as In-House Counsel by the Petitioner.*
  - b. *That Conservatory Orders in terms of Prayer 1 above be issued pending the inter partes hearing*

- and determination of the Notice of Motion filed herewith*
- c. That a declaration be issued to the effect that the 1<sup>st</sup> Respondent as an In-House counsel previously engaged as such by the Petitioner is not entitled to claim any legal costs against the Petitioner under Section 32A and/or 32B of the Advocates Act for any period prior to 12<sup>th</sup> July, 2012 when the said sections of the Act came into effect.*
  - d. That a declaration be issued to the effect that any Bills of Costs raised by the 1<sup>st</sup> Respondent against the Petitioner under the said Sections 32A and 32B of the Advocates Act in respect to services rendered to the Petitioner by the 1<sup>st</sup> Respondent as In-House Counsel prior to the commencement date of 12<sup>th</sup> July, 2012 are null and void in law to the extent that the same purport to apply the provisions of the said sections retrospectively.*
  - e. That a declaration be issued to the effect that until such time as the Honourable Chief Justice prescribes as required under Section 32B of the Advocates Act pursuant to recommendations received from the Council of the Law Society as required under Section 32B of the Advocates Act:*
    - i. There would be no proper lawful basis upon which any In-House Counsel could raise any Bill of Costs against his/her employee.*
    - ii. Any Bill of Costs filed prior to prescription by the Honourable Chief Justice of the standards of work that may be performed by a person employed as In house counsel and the criteria for determining the remuneration payable to the in house counsel would be premature and being devoid of any legal basis would be null and void ab initio, misconceived, incompetent and bad in law.*
  - f. That a declaration be issued to the effect that as the Honourable Chief Justice has not prescribed the standards of work that may be performed by a person employed as In-House Counsel and the criteria for determining the remuneration payable to the In-House Counsel as required under Sections 32B of the Advocates Act:*
    - i. There is no proper lawful basis upon which the 1<sup>st</sup> Respondent as in-house counsel previously employed by the Petitioner has raised various Bills of Costs against the Petitioner.*
    - ii. Consequently each and every Bill of Costs filed by the 1<sup>st</sup> Respondent against the Petitioner in respect of any legal services rendered to the Petitioner by the 1<sup>st</sup> Respondent as In-House Counsel for the period prior to 12<sup>th</sup> July, 2012 being the commencement date of the said Act is premature and being devoid of any legal basis is null and void ab initio, misconceived, incompetent and bad in law.*
  - g. That a Declaration that the 1<sup>st</sup> Respondents conducting matters that were assigned to him as an employee of the Petitioner through his law firm A Thuo Kanai Advocates, so as to entitle him fees under Section 44 of the Advocates Act while at the same time earning a reasonable salary from the Petitioner amounts to unfair labour practice and is therefore illegal and unconstitutional.*
  - h. That an order do issue striking out all the High Court Miscellaneous causes filed by the 1<sup>st</sup> Respondent for assessment of fees as listed on page 15 – 18 of the Petition.*
  - i. That an order of Prohibition do issue prohibiting and/or restraining the 1<sup>st</sup> Respondent from raising invoices and/or filing bills of costs for legal services rendered to the Petitioner in the course of his employment*
  - j. That costs of and incidental to this Petition be awarded to the Petitioner against the Respondents.*
  - k. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate*

### **1<sup>st</sup> Respondent's Case**

19. The respondent opposes the petition. He has filed a replying and further affidavit sworn on 3<sup>rd</sup> September 2013 and 17<sup>th</sup> October 2013 respectively. He also filed a notice of preliminary objection dated 3<sup>rd</sup> September 2013.
20. As to the preliminary issues, the respondent submits that the petition does not raise any

- constitutional issues and that these issues should be urged before the taxing officer. The respondent also assails the petition on the ground that fundamental rights and freedoms cannot be enforced against a private individual as the petitioner has done in this case. The respondent also contends that this matter which arises from an employer/employee relationship should be determined by the Industrial Court under **Article 162(2)** of the Constitution. He cites the case of **United States International University v The Attorney General and Others Petition Number 170 of 2012 [2012]eKLR** to urge that only the Industrial Court has exclusive jurisdiction to hear such claims. He further submits that following the case of **Kagenyi v Musiramo and Another [1968] EA 43**, the matter cannot be transferred to the Industrial Court in the event the court finds that it is an employer/employee dispute and it must be struck out instead.
21. The respondent states that he operated a law firm known as **A. Thuo Kanai Advocates** through which he rendered diverse legal services to the petitioner and it's insured in his capacity as an Advocate of the High Court Kenya whilst he was employed first as a Legal Officer and then Legal Manager. He avers that some of the legal services he rendered were not contemplated by the employment contract like handling conveyancing matters and preparing agreements for sale. For these matters, he submits that he could only be remunerated as an Advocate under section **44** of the **Advocates Act**. He submits that it would be a violation of his right to fair remuneration as enshrined in **Article 41 (2) (a)** of the Constitution for the petitioner to instruct him to undertake work beyond his contract and thereafter renege or evade payment for professional services rendered while being obligated to do so under the **Advocates Act**.
22. As regards the inter-office memo dated 7<sup>th</sup> September 2012, the respondent avers that he was advising the petitioner on its obligation to adhere to the **Advocates Act** and the **Advocates Remuneration Order** in matters concerning payment of fees. He therefore advised the petitioner to instruct other Advocates if they did not wish to follow the law as he did not wish to enter into an agreement on fees that was contrary to the **Advocates Act**. He avers that he did receive a response and there was no reference to an agreement for fees payable. The respondent adds that on 7<sup>th</sup> November 2012 he provided a list of the matters he was handling together with estimated fees but to date the petitioner has not appointed alternative Advocates in the majority of the suits prompting him to file application to cease acting in the matters where he was still on record.
23. The respondent contends that he filed the bills of costs pursuant to **section 44** of the **Advocates Act** by virtue of being an Advocate of the High Court of Kenya. He discounts the petitioner's argument that he filed the bills pursuant to **sections 32A** and **32B** of the **Advocates Act**. He submits that his bills were drawn in accordance with **section 44** of the **Advocates Act** which applied at all material times he rendered services to the petitioner.
24. The respondent denies that he has violated the petitioner's right to fair labour practices or deprivation of property under **Article 41** and **Article 40** of the Constitution respectively. He submits that it is he who is entitled to fair remuneration because the petitioner recognized his dual capacity and that it cannot be absolved from paying legal fees as the provisions of the **Advocates Act** as to payment of such fees cannot be ousted by the employment contract. He further submits that the petitioner's obligation to comply with the law regarding payment of legal fees as required by the **Advocates Act** for work done cannot amount to deprivation of property under **Article 40**.
25. The respondent submits that any agreement or contract on payment of his fees and expenses as an Advocate must be made in conformity with the **Advocates Act**. He cites **Ruth Gathoni Ngotho Kariuki v PCEA and Another Industrial Cause No. 509 of 2012 [2012]eKLR** where the Court held that unfair labour practices may arise in a situation where the employee exceeds contractual duties and the employer alleges that he is under no contractual obligation to pay. The respondent submits that the salary he earned was for the additional work that he put in on behalf of the petitioner over and above his professional legal services rendered by his firm. He avers that he is entitled to pay for work done and services rendered in fulfilment of his right to fair labour practices under **Article 41(1)** of the Constitution.
26. The respondent avers that the petitioner is estopped from denying that the petitioner is entitled to

fees on account of the fact that it issued him with the mandatory professional indemnity cover to insure him against claims whilst working as an independent professional legal adviser. He maintains that it is the petitioner who insisted that he act on its behalf as an Advocate and it represented to third parties that the respondent was its Advocate.

27. The respondent contends that as an Advocate he is entitled to equal protection and equal benefit of the law as provided for in **Article 27(1)** of the Constitution and as such he enjoys similar rights and privileges accorded to Advocates including remuneration in accordance with the **Advocates Act** and it would therefore be contrary to the provisions of **Article 27** for the petitioner to refuse and deny an obligation to pay him.
28. The respondent complains that the petition is intended to delay taxation of his bill of costs against the petitioner. He contends that the Taxing Officer before whom the bills of costs taxed is competent and alive to the obligations under the Constitution to deal and adjudicate any issues raised in opposition to the bills. He adds that the **Advocates Remuneration Order** has articulated the procedure regarding a reference before a Judge of the High Court who can address any allegation regarding the Constitution. He prays that the Petition be dismissed with costs.

### **Determination**

29. The crux of the petition is whether the respondent is entitled to remuneration both as the legal officer of the petitioner and separately as an independent professional. The filing of the petition was triggered by the respondent filing his bills of costs for taxation in the High Court.
30. A cursory study of the prayers in the petition I have outlined at paragraph 18 above show that the petitioner has sought declarations which relate to the nature of the relationship between the petitioner and the respondent. The petitioner seeks to strike out the bills of costs already filed in court and restrain the respondent from raising any invoices or filing any other bills of costs against it.
31. The taxation of bills of costs is governed by the **Advocates Act** and the **Advocates Remuneration Order**. The **Advocates Remuneration Order** provides an elaborate procedure for taxation of bills of costs and determination of all issues as between advocate and client relating to fees. Ringera J., in **Machira & Co. Advocates v Arthur Magugu and Another Milimani HC Misc. Civil Application No. 358 of 2001(Unreported)** held as follows, “...the *Advocates Remuneration Order* is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer and indeed order 42 of the Civil Procedure Rules is clear that appeals lie either as of right or with leave from orders made under the Civil Procedures Rules. No mention is made of orders made under the *Advocates Remuneration Order*. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, as I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with paragraph 11 of the *Advocates Remuneration Order*.”
32. The starting point for jurisdiction is that the Deputy Registrar as the taxing officer has delegated authority to tax bills. Waweru J., outlined the jurisdiction of the taxing officer and the Court in **Doonholm Rahisi Stores (suing as a firm) v East African Portland Cement Limited [2005] eKLR** as follows, “Taxation of costs, whether those costs be between party and party or between Advocate and client, is a special jurisdiction reserved to the taxing officer by the *Advocate (Remuneration) Order*. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the *Advocates (Remuneration) Order*. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of

costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the advocates (Remuneration) Order.”

33. The same point was emphasized by the Court of Appeal in **Sharma v Uhuru Highway Development Limited (2001) 2 EA 530** where Akiwumi J.A., stated as follows, “. . . (the High Court judge) not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and 12 of the Advocates (Remuneration) Order from a decision of the taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent’s application to strike out the (application for taxation). This by itself makes his hearing of and his ruling of 19<sup>th</sup> May 2000, of the Respondent’s application a nullity from the word go.”
34. All the cases I have cited buttress the argument that the law provides a sufficient and effective procedure for the resolution of any matter relating to the bills of costs between advocates and their clients. As I have pointed out, the issues raised by the petitioner are effectively arguments which are raised in opposition to the respondent’s bill of costs as such they are matter within the power of the taxing officer to address. In **Ratemo Oira Advocates v Kenya Steel Fabricators Ltd Busia HC Misc. 78 of 2008 [2014] eKLR**, the bill of costs was challenged by way of a Notice of Motion on the basis that the fees had been settled, that there was no demand for fees from the Advocate preceding the filing of the bill and that notice was issued by the Advocate to the client prior to the filing of the Bill of Costs. The taxing officer agreed the client and struck out the bill. On reference to the High Court, the Tuiyott J., noted that the challenge was akin to the taking of a preliminary objection to the bill. In dealing with the argument that the taxing officer had no jurisdiction to deal with the objection the learned judge stated, “[13] I am unable to locate any provision of statute or in Advocates Remuneration Order which bars the Deputy Registrar from dealing with such an objection before taxing of a Bill. ....[13] I hold that the issue as to whether the fees has been paid in full, just like the procedural questions of notice taken up in the motion, were matters that fell squarely within the purvey of the Taxing Master’s function in taxation. ...” I agree with these sentiments and I find and hold that dealing with objections of the kind raised by the petitioner to the bills are the bread and butter for taxing officers and once the a decision is made, it may be referred to the Judge under **Paragraph 11** of the **Advocates Remuneration Order**.
35. I am aware that the petition before the Court is one for the vindication of fundamental rights and freedoms brought under **Article 22** but I have found that in substance it raises grounds that are appropriately dealt with by the taxing officer dealing with each bill. This is not to say that the Court is turning a blind eye to the alleged violations, it is only grounded on the fact that fundamental rights and freedoms are realized and implemented through other laws and procedures and not necessarily through a direct application of the Constitution. **Article 21** of the Constitution imposes on the State and every State organ to, “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.” Thus, rights of due process, fair labour practices and the right to the protection of property are all given effect through the application of the ordinary laws and it is not necessary, in these circumstances, to have recourse to the Constitution to resolve the dispute between the parties.
36. The respondent attacked the petition on the basis that the matters raised by the petitioner are in the nature of a private commercial dispute disguised as a constitutional petition thereby obscuring the real issues in contention. The argument advanced by the respondent being that the court should not intervene in the matter as it is a private matter. Our Courts have now made it clear that the Bill of Rights applies vertically as well as horizontally (see **Satrose Ayuma and Others v The Registered Trustees of the Kenya Railways Staff and Other Nairobi Petition No. 65 of 2010 [2013]eKLR**). The real issue is not whether but to what extent the Bill of Rights is to apply to private relationships. The answer to this depends on the nature of the right and fundamental freedom and

the circumstances of the case. In *Isaac Ngugi v Nairobi Hospital Nairobi Petition No. 407 of 2012 [2013]eKLR* I observed that, “[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly.”

37. I am satisfied that the procedures under the *Advocates Remuneration Order* for taxation of bills of costs are effective in addressing all the objections raised to the respondents bill of costs and there is no need to have recourse to the provisions of **Article 22** of the Constitution. The approach I have taken is consistent with the general principle that has been established by our courts and whose pedigree can be traced back several cases including *Speaker of the National Assembly v Karume [2008] 1 KLR 425* where the Court of Appeal held that “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

38. My reasoning is fortified by the fact that the Deputy Registrar has addressed similar arguments that have been raised in this petition in *High Court Miscellaneous Application No. 125 of 2013* between the petitioner and respondent. The taxing officer after considering the bill of costs held as follows, “An Agreement for Remuneration must be signed by the Advocate and the Client. Under Section 45(a) the client and advocate can enter into an agreement for fees in the course of any contentious matter. The matter must be disclosed in the agreement. My finding is that the letter of appointment is not an agreement for remuneration. The letter of appointment is for employment as a legal officer. An advocate means any person whose name is entered in the roll of Advocates. An Advocate can represent his client in court. The applicant herein entered appearance in his business name in the parent suit. He did so in his capacity as an Advocate within the meaning of the Advocates Act.....In the present application it is clear that the applicant filed documents in his own name and he also made appearance in court as an Advocate. He was acting as an Independent professional legal advisor to his employer. He must earn his fees as an Advocate representing his clients. He cannot be denied fees on claims that he was earning a salary. Like I have stated hereinabove a letter of appointment as an Advocate is not and cannot be an agreement for fees.” Whether the learned Deputy Registrar was right or wrong is a matter to be determined by a reference filed in accordance with **Paragraph 11** of the *Advocates Remuneration Order*. In that regard the petitioner informs this Court that it has applied for extension of time to object to the said decision. This is the proper procedure to be followed in all the bills that have been filed and may be filed and the process cannot be short circuited by obtaining a decision in a petition filed under **Article 22** of the Constitution.

39. Before I conclude, I would like to state that the matters that have led to the filing of this case are the bills of costs filed in the High Court. The taxing officer is vested with jurisdiction to decide all matters including objection to the bills including whether or not they raise employment issues. The issue of employment of the advocate or the nature of the relationship between the parties is incidental to and an integral part of the determination of liability to pay fees under the bill of costs. In so far as the matter is grounded on the filing of bills of costs, it is not a dispute relating to or arising out of employment between an employer and employee within the meaning of **section 12(1)** of the *Industrial Court Act*. The principle enunciated in *United States International University (USIU) v Attorney General Nairobi Petition No. 170 of 2013[2012] eKLR* is inapplicable to specific bills of costs filed in the High Court as the jurisdiction to tax bills is derived specifically from the *Advocates Act* and not the *Industrial Court Act, 2011*.

40. It is clear from the findings I have made it is not necessary to address all the issues that have been raised by the parties as I have found that the same are better addressed in the appropriate forum. It is for the same reason that I have been circumspect in commenting on factual issues raised in the

matter.

### **Costs**

41. This leaves the issue of costs. The court has discretion to award costs notwithstanding that the matter is one for enforcement of fundamental rights and freedoms (see *John Harun Mwau and Others v The Attorney General Nairobi 65 of 2011 [2012]eKLR*). As I have set out above, it is apparent that the petition was filed to resist the bills of costs filed by the 1<sup>st</sup> respondent which is a private matter between the parties. That the decision would have had implications beyond the case is a normal incident of litigation and this does not make the matter one filed in public interest. This is a case where costs ordinarily follow the event. I therefore award costs to the 1<sup>st</sup> respondent.

### **Disposition**

42. The final order is that the petition be and is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of March 2014.**

**D.S. MAJANJA**

**JUDGE**

**Mr Regeru instructed by Njoroge Regeru and Company Advocates for the petitioner.**

**Mr Kanai instructed by A. Thuo Kanai and Company Advocates for the respondent.**

**Mr Mohamed, Litigation Counsel, instructed by the State Law Office for the 2<sup>nd</sup> respondent.**