



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION NOS. 12 AND 13 OF 2017

NDUNGU NJOROGE & KWACH ADVOCATES.....ADVOCATE

=VERSUS=

UNITED STATES INTERNATIONAL UNIVERSITY.....CLIENT

RULING

1. On 18/12/2018, the parties in Nairobi ELC Miscellaneous Application Number 13 of 2017 who are also parties in Nairobi ELC Miscellaneous Application Number 12 of 2017 recorded a consent in Nairobi ELC Miscellaneous Application Number 13 of 2017 to the effect that their respective submissions relating to the client's notice of motion dated 16/3/2018 in Nairobi ELC Miscellaneous Application Number 13 of 2017 will apply to the client's similar application of even date in Nairobi ELC Miscellaneous Application Number 12 of 2017. The consent further provided that the ruling on the client's application dated 16/3/2018 in Nairobi ELC Miscellaneous Application Number 13 of 2017 would apply to the client's application dated 16/3/2018 in Nairobi ELC Miscellaneous Application Number 12 of 2017. It is for this reason that this ruling bears the two suits.

2. The two suits were brought by M/s Ndungu Njoroge & Kwach Advocates (the advocate) as miscellaneous applications (bills of costs) within the framework of the Advocates Act and the Rules made thereunder. Both of them were initiated through two separate advocate/client bills of costs, both dated 25/1/2017 and filed on 26/1/2017. The two bills of costs were drawn consequent to services rendered by the advocate in Nairobi ELC Case Numbers 771 of 2016 and 840 of 2016 respectively. The advocate itemized its costs totaling Kshs 76,226,057.50 and Kshs 76,236,543.50 respectively.

3. Subsequent to the filing of the two bills of costs, on 3/3/2017, the client brought two separate motions in the two suits, both dated 3/3/2017, seeking orders staying the taxation of the bills of costs pending the hearing and determination of the respective suits in which the advocate had rendered the services giving rise to the two bills of costs. The motions also sought orders to the effect that, owing to their non-disclosure of material facts to the client, the advocate was not entitled to fees against the client. Through separate identical consents dated 10/7/2017 and filed in the two miscellaneous applications, the clients' two applications were disposed in the following verbatim terms:

3. The Notice of Motion dated 3rd March 2017 and filed in court on the same day by the Respondent, United States International University be and is hereby withdrawn with no order as to costs.

4. The parties shall agree on the issue of costs or have the same determined by this Honourable Court"

4. On 16/3/2018, the client brought two separate applications in the two suits, both dated 16/3/2018, seeking the same orders as those it had sought in the two preceding and already compromised applications dated 3/3/2017. The said two subsequent applications dated 16/3/2018 are the subject of the present ruling. The tenor and import of the two applications is that, once more, the client seeks orders staying the taxation of the respective bills of costs pending the hearing and determination of the respective suits in which the advocate rendered professional services. Secondly, the client seeks orders to the effect that, owing to their non-disclosure of material facts to the client, the advocate is not entitled to fees against the client.

5. The case of the client is contained in the grounds set out in the two applications, the supporting affidavits and the client's written and oral submissions. In summary, the case of the client is that the advocate failed to disclose to the client their prior dealings and/or involvement in the suit property before the client acquired it and the non-disclosure denied the client the opportunity to make an informed decision on whether or not to retain the services of the advocate. The client's position is that the advocate is, on that basis, not entitled to fees and the taxing officer does not therefore have jurisdiction to tax the bills. Secondly, the client contends that in the absence of a determination of the value of the suit property by the court, the bills of costs are speculative and premature. Thirdly, the client contends that the client having terminated the services of the advocate on account of non-disclosure of material facts, the advocate has no right of lien over the client's documents and should be ordered to release the documents forthwith.

6. The advocate vehemently opposed the two applications through replying affidavits sworn by Paul N Ndungu, written submissions and oral submissions. The case of the client is, firstly, that the plea for orders of stay of taxation is *res judicata* because the issue whether or not to

stay taxation of the two bills was settled by the respective consent orders recorded in the two suits and by dint of the provisions of Section 7 of the Civil Procedure Act, that issue is *res judicata* and cannot be re-litigated. Secondly, the advocate contends that the plea for stay is without any legal basis and that the cited rules of procedure do not confer jurisdiction upon the court to grant that plea. Thirdly, the advocate argues that they are not parties to the two substantive suits in which the advocate rendered services and there is therefore no basis for a stay order. Fourthly, the advocate contends that retainer is not disputed, and that upon termination of retainer, the advocate is entitled to fees. Lastly, the advocate's case is that they are entitled to exercise a right of lien over the client's documents until their fees is settled in full.

7. I have considered the tenor and import of the two applications, the parties' respective affidavits and rival submissions, and the relevant legal framework and jurisprudence on the key issues in the two applications. It is common ground that the two applications are identical in all aspects save the fact that the advocate's services were rendered in two different suits relating to the same suit property. Three key issues fall for determination in the two applications. The first issue is whether the client's plea for stay orders is *res judicata* by dint of the consent orders recorded by the parties on the issue of the advocate's costs. The second issue is whether there is any legal basis for stay orders in relation to the taxation of the two bills of costs. The third issue is whether, at this point and in the present suits, the plea for orders directing the advocate to release the client's documents is tenable. I will make determination on the three issues sequentially in that order. Before I do that, I will make brief pronouncements relating to the jurisdiction of a judge of a third tier superior court *visa vis* the jurisdiction of the taxing officer within the context of the prevailing legal framework and the two suits before the court. I make the pronouncements because the jurisdiction of the court to grant the orders sought was questioned by the advocate.

8. The two suits in which the two applications were brought are bills of costs brought as miscellaneous applications within the framework of the Advocates (Remuneration) Order 1962 as amended from time to time. Jurisdiction under the said legal framework is exercisable in the first instance by the taxing officer. This court's jurisdiction on questions relating to taxation is defined under Rules 11 and 12 of the Advocates (Remuneration) Order 1962. There are two instances when this court has jurisdiction to deal with questions relating to taxation of bills of costs. The first instance is when it is seized of an objection by way of reference under Rule 11, challenging the taxing officer's decision. The second instance is when parties, by consent, refer to the judge a matter in dispute arising out of taxation, for the opinion of the judge. The reference by consent takes the form of a case stated.

9. I have taken time to outline the jurisdiction of the judge *visa vis* that of the taxing officer because I have been invited to grant substantive orders in taxation matters where the taxing officer has not made any decision and the parties have not presented a case stated for my determination. On that ground alone, the two applications would fail.

10. Even if I were wrong on my interpretation of the jurisdiction of this court, my answers to the three issues framed above would not favour grant of the orders sought. I say so on account of the reasons set out in the succeeding paragraphs which deal with the issues?

11. The first issue is whether the client's plea for orders of stay is *res judicata* by dint of the consent dated 10/7/2017. It is not disputed that the client brought two similar applications seeking orders staying taxation of the advocates' bills. The said applications were compromised and disposed in the terms set out in paragraph 3 above. Significantly, the consents required the parties to agree on the issue of costs and in the absence of a mutual agreement, the same was to be determined by this court as by law provided. There being no dispute on retainer, the forum for determination of those costs is taxation before the taxing officer of the court. My understanding of the identical consents filed in the two miscellaneous applications is that the issue of stay of taxation was resolved and the parties were to either mutually agree on the advocate's costs or have the costs taxed by the court. Those consents have not been vacated and are binding court orders on the parties. They were adopted by this court on 9/10/2017. The net result of the adoption of the consents as orders of the court is that, as long as the consent orders remain in place, the issue as to whether taxation should be stayed is *res judicata* and cannot be re-litigated. Consequently, I am in agreement with the advocate that the plea for stay of taxation is *res judicata* by dint of the consent orders and the provisions of Section 7 of the Civil Procedure Act.

12. The second issue is whether there is any legal basis for stay orders in relation to the taxation of the two bills of costs. Of significance to the issue is the fact that the advocate is not a party to the primary suits. Secondly, no relief is sought against the advocate in the primary suits. There is therefore no legal basis why assessment of the advocate's costs should be stayed pending the hearing and determination of those suits. In my view, in the absence of contestation against retainer, this court has no basis for staying taxation of the advocate's bills of costs.

13. The last issue is whether the plea for orders directing the advocate to release the client's documents is tenable at this point and in the present miscellaneous applications. What is before court are bills of costs by the advocate. Retainer has not been contested in the two bills of costs. The client has not brought any substantive suit seeking any substantive order against the advocate to form the basis of the application for a declaratory order such as the one sought by the client. The plea for a declaratory order directing the advocate to release the client's documents without settlement of the advocate's costs, in my view, cannot ensue at this point and in the present miscellaneous applications which are bills of costs by the advocate.

14. For the above reasons, I find no merit in the two applications, by the client. I accordingly dismiss the two applications, both dated 16/3/2018, brought in Nairobi ELC Miscellaneous Application Number 12 of 2017 and Nairobi ELC Miscellaneous Application Number 13 of 2017 respectively. The advocate shall have costs of the two applications.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13 TH DAY OF JUNE, 2019

B M EBOSO

JUDGE

In the presence of:-

Mr Ashitiva for the Client

