Omulele & Tollo Advocates v Magnum Properties Limited (Civil Appeal 301 of 2018) [2022] KECA 560 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 560 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 301 OF 2018

RN NAMBUYE, HM OKWENGU & PO KIAGE, JJA

APRIL 28, 2022

BETWEEN

OMULELE & TOLLO ADVOCATES .... APPELLANT

AND

MAGNUM PROPERTIES LIMITED .... RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Thuranina, J) delivered on 31st July, 2018 in HC Misc. Application No. 590 of 2014)

JUDGMENT

1. This appeal originates from an Advocates-Client Bill of Costs that was filed in the High Court of Kenya at Nairobi on August 27, 2014 in Misc Application No 590 of 2014, by Omulele and Tollo advocates (the appellants). The Bill of costs was in regard to services offered to Magnum Properties Limited (the respondent) in defending it in Suit No 559 of 2011.

2. The respondent filed written submissions which were served on the appellant on November 20, 2014. In the submissions the respondent opposed the Bill of Costs contending that it violated section 51 of the *Advocates Act* as the appellant had no instructions from the respondent; that the respondent had been represented by Omulele & Co Advocates who filed the defence in the suit; that the relationship between Omulele & Co Advocates was a monthly retainer of Kshs. 150,000 which was fully paid; and that the relationship between the firm of Omulele & Co Advocates and the respondent was terminated in October 2012.

3. The appellant filed a reply to the respondent's submissions in which it maintained that it was entitled to the amount as per the Bill of Costs as it had instructions from the respondent to act for it; that a notice of change of advocates was filed on January 16, 2014; that both Mr. Omulele and Tollo (the advocates in the appellant firm) were present in court when the suit came up for hearing on May 27, 2014 but was adjourned; that the Bill of Costs was filed on August 27, 2014; that the appellant is a registered

firm and the addition of a partner did not in any way change that fact; and that there was no written retainer agreement with the respondent and the appellant should therefore be paid in accordance with the Bill of Costs.

4. By a notice of motion dated February 27, 2015, the respondent sought orders to stay the taxation of the appellant's Bill of Costs and for the court to give directions and determine whether a retainer existed between the appellant and the respondent, and dismiss the application for taxation filed by the appellant. In support of the application, Ashok Doshi swore an affidavit in which he maintained that the respondent did not instruct the appellant firm, but had instructed Omulele & Co. Advocates with whom they had agreed on a monthly retainer, which was paid.

5. The appellant filed grounds of opposition to the respondent's motion dated February 27, 2015 maintaining that the application was misconceived and an abuse of the court process; that the respondent had submitted on the Bill of Costs; and that the Deputy Registrar had considered the Bill and the matter was as at that time pending for his decision and not taxation. In the meantime, the matter had come before the taxing officer (Deputy Registrar) on 25th March 2015, and he directed that the issue regarding the retainer should be resolved before the taxation could proceed. He therefore directed that the application dated February 27, 2015 be heard first.

6. The respondent's motion dated February 27, 2015 was subsequently heard by Njuguna J, who delivered a ruling dated February 18, 2016 in which she found that there was an advocate-client relationship between the appellant and the respondent; that up to the month of September 2012, there was a retainer agreement on fees payable to Omulele and Co. Advocates every month, and from then on, though the said firm continued offering legal services after inclusion of the new partner, it was not clear whether their fees was paid or not. The learned judge therefore concluded that there was a retainer between the appellant and the respondent and that the filing of a notice of change of advocates was just a mere legal procedure, which cannot disentitle the appellant from their legal fees, and therefore the taxation pending before the taxing officer should proceed. The learned judge therefore dismissed the respondent's motion.

7. Subsequently on April 19, 2016 the Deputy Registrar delivered what he titled as "Ruling and Reasons for Taxation" in which he taxed the Bill of Costs at Kshs. 33,321,431. On the instruction fee, the Deputy Registrar calculated the amount based on the alternative prayer for judgment which was for Kshs. 1.2 billion and taxed that item at Kshs. 15,082,000. The taxing officer at item 60 allowed getting up fees calculated at one-third of the instruction fees. The taxing officer issued a certificate of taxation dated 19th April 2016 in regard to the advocates-client Bill of Costs, certifying the amount due to the appellant from the respondent as Kshs. 33,321,431.

8. By a notice of motion dated April 19, 2016, the appellant filed a notice of motion under section 51 of the *Advocates Act*, and Order 50 of the *Civil Procedure Rules* and sections 1A, 1B and 3A of the *Civil Procedure Act*, seeking judgment in its favour for the taxed amount.

9. On May 4, 2016, the respondent through its advocate, Kadima Co. Advocates, filed a letter in court objecting to the taxation by the Deputy Registrar on the following grounds:

> " (a) that the Hon. Deputy Registrar failed to take into account vouchers filed in court showing payment of legal fees on monthly basis pursuant to an existing retainer and wrongly considered item No. 1.
>
> (b) the failure to take into account the payment vouchers filed in court misled the Honourable court into treating the Bill as if there was no monthly retainer which had been settled.

(C) the failure to take into account monthly payment resulted into taking into account item No. 60

(d) The cumulative effect of the above has resulted into an injustice to the objector/respondent.

(e) the certificate of costs ordered by the Deputy Registrar be set aside and the matter be referred for a fresh taxation.

10. In addition to the letter the respondent filed a notice of motion dated May 17, 2016 under certificate of urgency, in which it sought to have the appellant's motion dated April 19, 2016, stayed pending the determination of a reference in regard to the Bill of Costs. The respondent complained that despite writing to the court in accordance with section 11 of the *Advocates Remuneration Order* (Cap 16 Laws of Kenya), the taxing officer had not given reasons for the taxation as required by law, and the respondent would be prejudiced if judgment was entered against it and execution proceeded.

11. The respondent's application dated May 17, 2016 was heard and an order issued by Sergon, J. on May 27, 2016 staying the hearing of the appellant's motion dated April 19, 2016 for 90 days pending the hearing and determination of the intended reference in regard to the taxation.

12. By a motion dated on August 19, 2016 the respondent moved the court for orders in the main, as follows:

"(a) That the Honourable court be pleased to stay application to review orders allowing bill of costs, and determine this application first.

(b) The Honourable court be pleased to strike out the award/certificate of costs/ certificate of taxation dated April 19, 2016 in favour of Omulele & Tollo Advocates the applicant/respondent for work done by the purported firm of Omulele & Co. Advocates.

(c) The Honorable court be pleased to declare that the firm of Omulele & Co. Advocates had no legal capacity in terms of *registration of Business Names Act* (Cap 499. Laws of Kenya to trade as such for lack of registration of the same."

13. The application was anchored on the contention that Omulele & Co. Advocates was not registered under the law before August 10, 2016, and the firm of Omulele & Tollo Advocates was not a merger of two firms, since the firm of Omulele & Co. Advocates was not in existence at the time the said partnership was registered and that the firm of Omulele & Tollo Advocates was registered as a new business name on June 7, 2013.

14. The appellant objected to the respondent's motion dated 19th August 2016 through grounds of opposition dated September 7, 2016 in which they maintained that the motion is a disguised appeal against the ruling delivered by Njuguna J. on February 18, 2016, and that the court was *functus officio* with regard to the orders sought in the respondent's motion dated August 19, 2016. The appellant urged that the application would result in a miscarriage of justice as it would be denied the right to be heard if the ruling on its motion dated April 19, 2016 is not first delivered before other applications are heard.

15. In the meantime by an application dated July 21, 2016, which was filed in Court on August 30, 2016, the respondent moved the court under Rule 11(1)&(2) of the *Advocates Remuneration Order* seeking to set aside the ruling of the taxing officer dated and delivered on April 19, 2016, and to have the matter

referred back for taxation by another taxing officer. The application was anchored on the grounds that item No. 1 in regard to the instruction fees was based on the value of the subject matter that was not ascertained; that the main prayers in the main suit were clear as they sought an injunction restraining the 2nd defendant in the suit from dealing with LR. No. 209/3850 IR 56396; that there was no valuation report to support the Kshs. 1.2 billion which was in the alternative prayer; and that the taxing officer failed to take into account the monthly retainers already received and not disputed. In addition, that the matter not having taken off for hearing, the getting up and preparing for hearing did not arise; and that the appellant did not earn any legal fees after filing notice of change, as the only work they did was filing the notice of change of advocates.

16. Once again the appellant filed grounds of objection dated September 13, 2016 opposing the application dated July 21, 2016. On 28th September 2016, the parties sought directions from Sergon J. who directed that the motion dated July 21, 2016 which could be regarded as a reference, and should be fixed for *inter partes* hearing before the court could deliver its ruling on the motion dated April 19, 2016. Sergon, J. therefore deferred his ruling to await determination of the motion dated July 21, 2016.

17. Subsequently, the notice of motion dated July 21, 2016 and the one dated August 19, 2016 were both heard by Thuranira Jaden, J. whose Ruling is subject of the appeal before us. We have endevoured to give the comprehensive background to this appeal as it relates to a simple matter which has been complicated by the multiplicity of the applications that were before the Court.

18. In her Ruling, Thuranira, J allowed the respondent's motion dated July 21, 2016, finding that there was sufficient reason to interfere with the taxation as the taxing officer did not follow the principles for taxation of instruction fees as laid by this Court in *Joreth Limited v Kigano & Associates* [2002] 1EA 92, and Republic v Minister for Agriculture & 2 others exparte Samuel Muchiri W'Njuguna & 6 Others* [2008] eKLR. She therefore directed that the matter be referred back to another taxing officer for taxation. She dismissed the application dated August 19, 2016 finding that Njuguna J. had ruled that there was a retainer between the appellant and the respondent, and the respondent was therefore estopped from raising the issue, as it was an attempt to circumvent the Ruling of Njuguna, J.

19. The appellant has faulted the Ruling of Thuranira, J. on 5 grounds. That is, that the learned judge erred: in failing to hold that the issues raised in the respondent's reference, had not been raised before the taxing officer, and therefore the reference could not succeed; in holding that the taxing officer's Ruling dated April 19, 2016 did not mention the alleged payment made to the respondent, and failing to realize that the alleged payments made were irrelevant matters in taxation, which could not have affected the outcome of the taxing officer's decision; in holding that the liquidated prayer of Kshs. 1.2 billion being an alternative prayer in the plaint, filed in the main suit, should not have been taken to be the subject matter in the taxation by the taxing officer; in failing to consider the main issues for determination and the appellant's submissions in the reference; and in holding that there were sufficient reasons to interfere with the taxing officer's decision delivered on April 19, 2016.

20. Both parties filed written submissions which were duly highlighted by counsel during the hearing of the appeal. The appellant submitted that the respondent's reference raised matters that were not argued or raised during the hearing of the appellant's Bill of Costs. That the only issues raised by the respondent were: whether the appellant had instructions to defend the respondent in the main suit; whether the firm of Omulele & Co. Advocates was on a monthly retainer; and whether the relationship between Omulele & Co. Advocates and the respondent was mutually ended.

21. The appellant further argued that the respondent did not raise an issue concerning the calculation of instruction fees in the Bill of Costs, nor did it question the subject matter in the main suit or the value thereof, and that the Ruling of the learned Judge was anchored on the issue of instruction fees which

was not argued before the taxing officer, and the issue relating to the payments made by the respondent to the appellant, which were not relevant.

22. In addition, the appellant argued that the learned Judge did not demonstrate how the taxing officer's failure to mention the alleged payments in her Ruling of April 19, 2016 would have affected the outcome of the taxation; that the existence of a retainer agreement that sets monthly payments for scope of work would have removed the jurisdiction of the taxing officer, but there was no such agreement and the jurisdiction of the taxing officer was not challenged; and that while the respondent claimed that the appellant had no instructions, it contradicted this by claiming that the appellant had been fully paid.

23. With regard to the issue of alternative prayer in the main suit, the appellant argued that this was not raised by the respondent in the hearing of the Bill of Costs, and the prayers in the plaint were explicit in seeking the current value of the land as Kshs. 1.2 billion; and that the learned Judge failed to consider the main issue that was before her for determination. This was whether the issues raised in the reference before her had been raised before the taxing officer.

24. Further, the court failed to consider the fact that the respondent had filed its reference without requesting for reasons from the taxing officer, and therefore the process of filing the reference had not been properly set in motion. The appellant contended that the respondent was in fact out of time in filing its reference, as the same ought to have been filed 14 days after the taxing officer's Ruling of April 19, 2016. The appellant concluded that there were no sufficient reasons to warrant the learned judge disturbing the decision of the taxing officer, and therefore urged that the appeal be allowed in its entirety.

25. On its part, the respondent submitted that its written submissions dated November 4, 2014 with regard to the advocate-client Bill of Costs, indicated the issues to be determined as the pre-requisites for taxation, and these issues were similar to what was raised in the reference; that the annextures dated January 15, 2015 were to demonstrate the existence of a retainer between the appellant and the respondent; and that the conduct of the parties demonstrated that there was a retainer agreement pursuant to which the respondent paid the appellant Kshs. 150,000 a month for legal services, and this was ignored by the taxing officer which resulted in a gross miscalculation.

26. The respondent argued that the taxing officer's failure to mention the alleged payments resulted in his considering the alternative claim for Kshs. 1.2 billion, and not the main prayer in the claim which was for injunctive orders, and therefore, the learned Judge had no reason to refer to the alternative prayer when the main prayers were clear. The respondent maintained that it filed its notice of objection to the taxation in accordance with Rule 11 of the *Advocates Remuneration Order*, but the taxing officer failed to give reasons. Regardless of this, the respondent filed a reference and it cannot be held responsible for that omission. The respondent urged that the leaned Judge had sufficient reason to interfere with the taxing officer's decision, and therefore the appeal should be dismissed.

27. With the above background in mind we have carefully considered this appeal and the submissions made before us, as well as the authorities cited. The appeal concerns the exercise of discretion by a taxing officer. The learned Judge properly directed herself by referring to *Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya & another* [2014] eKLR in which Mwera J (as he then was) articulated the principles.

28. In *Kamunyori & Co. Advocates v Development Bank of Kenya Limited* [2015] eKLR, this Court highlighted the principles as follows:

> Authorities on taxation show that a judge will normally not interfere with the taxing officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside...... The predecessor of this Court emphasized in *Arthur v Nyeri Electricity* [1961] EA 492 that 'where there has been an error in principle, the Court will interfere, but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases.'

29. We are also in agreement with the exposition of Ringera J (as he then was) in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR that :

> It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment

30. In a nutshell, the taxing officer exercised a discretionary power and in a reference, the learned Judge could only interfere with the exercise of that discretion if the decision of the taxing officer disclosed an error of principle. The jurisdiction of the taxing officer was simply to tax the Bill. He was not concerned with the so called pre requisite, and this is why he properly deferred the taxation for the issue of retainer to be resolved.

31. It is not disputed that the taxing officer taxed the Bill of Costs and certified the amount of Kshs. 33,321,431 as due to the appellant. The learned Judge set aside the order of the taxing officer and remitted the Bill of Costs for taxation by another officer. The issue that we must determine is whether the taxing officer committed any error of principle in exercising his discretion and whether the learned Judge had sufficient reason to interfere with the exercise of that discretion.

32. In their written submissions in support of the respondent's application dated 21st July 2016 which was filed in Court on 30th August 2016, seeking to set aside the ruling of the taxing officer, the appellant identified the issues for determination as follows:

    (a) Whether or not the respondent/applicant filed the application herein out of time.

    (b) Whether there was a fee agreement between the respondent and the appellant.

    (c) Whether the court can interfere with the decision of the taxing officer delivered on 19th April 2016, and if so whether the court should refer the matter back for taxation by an independent taxing officer.

    (d) Who bears the costs.

33. On its part the appellant in its submissions, maintained that there was only one issue for determination, which was whether the respondent can raise issues that it did not raise before the taxing officer. The appellant maintained that the only issue raised before the taxing officer was whether he failed to take into account invoices and payments that had been made by the respondent.

34. Rule 11 of the *Advocates Remuneration Order* provides the procedure where a party is not satisfied with the decision of the taxing officer in a taxation. First, the party has to give notice in writing within 14 days to the taxing officer identifying the items of taxation to which he objects. Secondly, upon receipt of such notice, the taxing officer is under a duty to forthwith give reasons for his decision on those items. Thirdly, if the party upon receipt of the reasons given by the taxing officer, is still dissatisfied, he shall within 14 days apply to the Judge through chamber summons, setting out the grounds of his objection. And finally, any party aggrieved by the decision of the Judge, may with leave of the Judge appeal to the Court of Appeal.

35. In the matter in dispute, the taxing officer, upon considering the Bill of Costs delivered what he called "Ruling and Reasons for Taxation", on April 19, 2016. In the letter dated May 3, 2016 which was delivered to the registry on May 4, 2016, the respondent through its advocate expressed its objection to the taxation, and specifically identified item No. 1 and item No. 60 as the subject of its dissatisfaction. Notwithstanding the letter dated 4th May 2016, the taxing officer did not give any reasons for the taxation on these items as required under Rule 11 of the *Advocates Remuneration Order*. It would appear that the taxing officer had anticipated the request for reasons and provided for it in his ruling, and therefore saw no reason to respond to the letter.

36. In addition to the letter of objection, the respondent filed a notice of motion on 17th May, 2016 in which he sought a stay of the Bill of Costs pending a reference. Although the procedure followed by the respondent was not strictly the procedure provided under the Advocate's Remuneration Order, the respondent was not entirely to blame, and this is one situation in which Article 159 (2)(d) of the *Constitution* would be applicable. In her ruling the learned Judge noted that Sergon, J in the ruling of May 27, 2016 gave the applicant 90 days within which to file the reference and that the respondent filed the reference 5 days after the timeline that was given to it, but held that the delay was not inordinate and therefore proceeded to determine the reference on merit. The appellant has not raised any issue in this regard.

37. The appellant's main complaint is that the learned Judge in addressing the reference dealt with issues that were not before her. We have carefully perused the submissions that were filed by the parties in regard to the Bill of Costs which were made by the parties before the taxing officer in regard to the Bill of Costs. The respondent focused on what it called 'pre-requisites to taxation'** and in a nutshell, maintained that it was not liable to the appellant, because the appellant had no instructions to act for it; that the former firm of advocates who was retained by the respondent, was on a monthly retainer and had been fully paid; and that the Bill of Costs should be dismissed and/or struck out.

38. The respondent did not specifically address the items in the Bill of Costs because as far as it was concerned, it was not liable to the appellant. The appellant's reply to the respondent's submission was also on the same issue. The focus of the parties in the submissions was therefore whether the Bill of Costs was properly before the Court. The issue of retainer was resolved by the ruling of Njuguna, J. dated February 18, 2016, in which she held that there was a retainer agreement between the appellant and the respondent, and ordered that the taxation pending before the taxing officer should proceed. This ruling has not been challenged nor appealed against, so the taxing officer was bound by it

39. It would appear that the respondent did not file any further submissions in regard to the Bill of Costs following the ruling of Njuguna, J. The issue is whether the respondent is estopped from contesting

any item on the bill, not having specifically raised an issue in that regard in their submissions. The Bill was before the taxing officer for taxation, and it is obvious that the respondent was objecting to the bill. In taxing the bill, the taxing officer specifically identified items 1 and 60 and gave his calculations showing how he arrived at the amount that he allowed. This is what the respondent took issue with in the objection filed on May 4, 2016.

40. The respondent in challenging the decision of the taxing officer on the instruction fees, was addressing the exercise of discretion by the taxing officer on that particular item, and had the right to question the exercise of that discretion, regardless of the fact that the taxing officer may not have been specifically addressed on the issue. It is clear that the taxing officer addressed the issue of the instruction fees and made a decision on it. The exercise of that discretion was not simply dependent on the submissions made by the parties but included the exercise of the taxing officer's judicial discretion anchored on the law and the facts before him. Therefore, the learned Judge in determining the reference was right in considering whether the taxing officer properly exercised his discretion.

41. Under Schedule 6 of the *Advocates Remuneration Order*, instructions fees are calculated based on the subject matter of the suit. In *Jeroth Limited v Kigano (supra)* this Court stated as follows:

> "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement, (if such be the case). But if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances."

42. According to the plaint that was filed in ELC No. 559 of 2011, which was the suit that the appellant was instructed to defend, the prayers sought against the respondent were as follows:

    (a) A permanent injunction against the 2nd defendant (respondent herein) restraining the 2nd defendant or their agents from occupying, dealing with or developing, or transferring or charging the suit land herein L.R. No. 209/3850 I.R No. 56396 Processional way, Nairobi.

    (b) Cancellation of the transfer and Grant of title registered in favour of Magnum Properties Limited and rectification of the Register to have the plaintiff as the Grant of L.R. No. 209/3850 I.R No. 56396.

    (c) A declaration that the plaintiff is the registered proprietor of L.R. No. 209/3850 I.R No. 56396 Processional way, Nairobi.

    (d) In the alternative the plaintiff prays for judgment against the defendants jointly and severally for the current market value of L.R. No. 209/3850 I.R No. 56396 Processional way, Nairobi being Kshs. 1.2 billion plus interest at commercial rates from the date of filing suit.

    (e) Costs of the suit and interest

    (f) Any other relief that this honourable court may deem fit so to grant."

43. In his ruling, the taxing officer without assigning any reasons, calculated the instruction fee on the alternative prayer of Kshs. 1.2 billion. He allowed Kshs. 77,000 for the first 1 million and Kshs. 15,005,000 on the balance of Kshs. 1,119,000,000 to arrive at a total of Kshs. 15,082,000 as instruction fees. In regard to item 60 for getting up, he allowed one-third of the instruction fees of Kshs.

15,082,000. The question is whether the taxing officer properly exercised his discretion in allowing the sum of Kshs. 15,082,000 as instruction fees.

44. The value of the subject matter of the suit could not be ascertained from the main prayers in the plaint set out as (a) to (c) in paragraph 42 above. The taxing officer therefore ought to have exercised his discretion in assessing such instruction fees, but the taxing officer simply adopted the alternative prayer, i.e. (d) which had a value of Kshs. 1.2 billion. The taxing officer has not given any explanation as to why he adopted that prayer.

45. From a reading of the plaint, the suit property was an allocation to Green Tea Lodge Limited, who had agreed to sell the property to the respondent at Kshs. 120 million. The figure of Kshs. 1.2 billion in the alternative prayer was given as the current market value of the suit property. No evidence of any judgment or settlement was provided but assuming that the ELC was to consider the alternative prayer, the so called market value would be subject to proof and until such was done the subject matter in the plaint could not be said to be ascertainable.

46. In addition, the following extract from the Ruling of Njuguna, J delivered on February 18, 2016 is instructive:

> " The advocate/client relationship between the applicant and the respondent continued after 2012 and this is evidenced by Mr Tollo Advocate's attendance in court on May 27, 2014, but going by the evidence available to the court up to and including the Month of September 2012 there was a retainer fees of Kshs. 150,000/- per month. The same dates back to the year 2009 and they were sent every month until September 2012.
>
> In my view this means that up to the month of September 2012, there was a retainer agreement on fees payable to Omulele & Co Advocates every month but from then hence though the said firm continued offering legal services even after the inclusion of the new partner it is not clear whether they were paid or not.
>
> It is therefore the finding of this Court that there was retainer between the applicant and the respondent and the filling of a notice of change was just a mere legal procedure which should not disentitle the applicant their legal fees and in the circumstances the appropriate order is to allow the taxation pending before the taxing officer to proceed."

47. The defence in Civil Suit 559 of 2011 was filed on 4th November 2011 during the time when the retainer agreement as found by Njuguna, J was in existence, the learned Judge cannot be faulted in finding that in failing to take into account the payments that were made by the respondent on account of the retainer agreement, the taxing officer did not properly exercise his discretion. These were matters relevant to the instruction fees, and failure to take them into account resulted in an error of principle that vitiated the exercise of the taxing master's discretion.

48. We have taken note of *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR, a judgment of this Court which was delivered on May 27, 2016 in which the Court sought to draw a distinction between a retainer relationship and a retainer agreement. That judgment was delivered after the ruling of the learned Judge subject of the appeal before us. Secondly, we are not sitting on appeal in regard to the judgment of Njuguna, J which, as we have already stated, was not challenged.

49. We come to the conclusion that the learned Judge was right in finding that the taxing officer did not properly exercise his discretion in taxing the Bill of Costs. The learned Judge cannot therefore be faulted for allowing the reference and referring the Bill of Costs to be taxed by another taxing officer.

For these reasons we find no merit in this appeal. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR