IN THE COURT OF APPEAL

AT NAKURU

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 154 OF 2014

BETWEEN

WILFRED N. KONOSI T/A

KONOSI & CO. ADVOCATES…….....……..…...APPELLANT

AND

FLAMCO LIMITED..... ……..…....…. RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nakuru (Wendoh, J.) dated 4th May, 2012

in

Misc. Civil Application No. 500 of 2010)

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JUDGMENT OF THE COURT

The appellant, **Mr. Wilfred N. Konosi,** is an advocate practicing law under the name and style of **Konosi & Co Advocates.** He was a party to the taxation proceedings that drifted to an appeal from the Taxing Officer to the High Court (Wendoh, J.) whose decision on 4th May 2012 in Nakuru in **Miscellaneous Application No. 500 of 2010** (**Wilfred Konosi T/A Konosi & Co Advocates versus Flamco Limited**) dismissing the appellant's Chamber Summons application seeking to set aside or vary the decision of the Deputy Registrar (W. Kagendo,) dated 31st December 2010 striking out the appellant's Bill of Costs against Flamco Limited, is the subject matter of this appeal.

The background to this litigation shows that when the Bill of Costs by the appellant came up for taxation before the Deputy Registrar (W. Kagendo), the respondent client, Flamco Ltd, filed an application dated 21st December 2010 seeking to dismiss it on the ground that Flamco Ltd had never instructed the appellant to act for it whereupon the Deputy Registrar gave directions on the hearing of the objection and the appellant filed a bundle of correspondence in an attempt to show that it was instructed by Flamco Ltd to draw a Discharge of Charge in a conveyancing transaction. The Deputy Registrar also directed the appellant and Flamco Ltd to file written submissions, documents and authorities on the issue whether there was an advocate/client relationship between the appellant and the respondent. On 4th May 2011, the Deputy Registrar struck out the Bill of Costs with costs to Flamco Ltd, on the ground that the

appellant had failed to show existence of an advocate client relationship.

The appellant challenged that decision in the High Court by way of Chamber Summons dated 4th July 2011 as provided in Rule 11 of the **Advocates Remuneration Order,** a subsidiary legislation under **The Advocates Act**, Chapter 16 of the Laws of Kenya.

It was contended by the appellant in the High Court that the Deputy Registrar failed to exercise her powers properly when she struck out the appellant's Advocate/Client Bill of Costs; that the Deputy Registrar (DR) erred in not taxing the said Bill and exceeded her mandate by striking it out, that the DR erred in finding that there was no Advocate/Client relationship between the appellant and the respondent; that the DR erred in not appreciating that as the respondent had paid part of the fees demanded, the issue of instructions to the appellant by the respondent did not arise; and that finally the decision of the DR was wrong.

On his part, counsel for the respondent urged that it was too late for the appellant to object to the DR's jurisdiction to strike out the Bill; and that there was no advocate/client relationship between the appellant and the respondent.

After considering the application by the appellant, the learned Judge, guided by the reasoning and holding of Kimaru J. in the case of **County Council of Bureti vs. Kennedy Nyamokeri T/A Nyamokeri & Co Advocates [2006] eKLR (Misc 102 of 2005)** that *"it is imperative that the instructions of a public authority be in writing, just like in the case of a company or a public corporation because such Public Authority can only act through its established organs...."*, came to the conclusion that because the respondent is a limited liability company whose decisions are made through resolutions, there should have been a resolution made to appoint the appellant as its advocate or written instructions signed by the directors. The learned Judge reasoned that the appellant could not rely on the part-payment made because there may have been disputes between directors as to whether or not they were appointed to act or not. In the learned Judge's view, the appellant should have shown exhibited written instructions from the respondent, Flamco Ltd. The learned Judge further reasoned that in the circumstances of the case, it was the firm of Jones & Jones Advocates which, under Rule 24 of the Advocates (Remuneration) Order was entitled to prepare the Discharge of Charge as the Advocates of the party in whose favour the discharge was being given. In dismissing the appellant's Chamber Summons application dated 14th July 2011the learned judge stated:

> ***"For the taxing officer to embark on taxing a bill of costs, it must be established that there exists an Advocate/Client relationship and that the advocate was instructed as per law (sic) provided. Since the applicant failed to demonstrate the above, I find that there is no basis for varying or setting aside the taxing officer's orders. Even if the bill went to another taxing officer, it would suffer the same fate. For this reason, I dismiss the application....., with costs to the respondent."***

The appellant has proffered six grounds of appeal in his Memorandum of Appeal. In a nutshell, the appellant contends that the learned Judge erred in law and fact in failing to find that the DR did not exercise her powers properly when she refused to tax the Bill; that the DR exceeded her mandate and had no jurisdiction to strike out the appellant's Bill of Costs; that the DR was enjoined to give reasons why she did not tax the Bill; that the DR acted *ultra vires* by finding that there was no Advocate/Client relationship between the appellant and the respondent.

When the appeal came up for hearing before us on 30th May 2017, learned counsel **Mr. Wilfred N. Konosi** appeared for the appellant while learned counsel **Mr. Kamau Chomba** appeared for the respondent.

Mr. Konosi correctly submitted that the issue before the DR and the learned Judge was whether Advocate/Client relationship obtained between the appellant and the respondent to justify the claim for fees for legal services in respect of the Discharge of Charge. Mr. Konosi put emphasis on the fact that the respondent made part-payment of Kshs 110,000/= as deponed in the affidavit of Hasmukh Raichand

Shah, a director of the respondent sworn on 21st December 2010 which was filed in the High Court in Misc Civil Application No. 500 of 2010 in which the impugned ruling was made. Paragraph 9 of the said affidavit stated:

> ***"That Wilfred N. Konosi, Advocate, has obtained payment of Kshs 110,000/= from Flamco Limited and Flamco Limited will seek redress and refund by way of separate legal action against the said Wilfred N. Konosi, Advocate. Annexed hereto marked "HRSII" is a copy of the said cheque."***

The said cheque was drawn on 26th June 2010 for Kshs 110,000/= on Diamond Trust Bank (DTB) by Flamco Limited in favour of Wilfred Nyaundi Konosi.

Mr. Konosi contended that the DR was under a duty to tax the Bill and further that the issue of whether an Advocate/Client relationship obtained between the appellant and the respondent fell outside the amplitude of the powers of the DR in taxation of Bills of Costs. In Mr. Konosi's view, if the issue of such relationship arose during taxation, it would behove the DR to refer it to a Judge for taxation. In Mr. Konosi's view, the DR's mandate to tax Bills does not encompass or include determination of the question whether there is a retainer or not. It was Mr. Konosi's submission that there is no law that instructions given to an advocate must be in writing although, he conceded, it is good practice to have written instructions. In counsel's view, instructions to an advocate can be in writing or oral; or they can be inferred from conduct of parties. Our attention was drawn by Mr. Konosi to the decision in the case of **Uhuru Highway Development Ltd and Others versus Central Bank of Kenya and others (2) [2002] 2 EA654 (CAK)** where this Court held that:

> ***"Whether the plaintiffs were the counsel's clients may be discerned from a careful consideration of the correspondence on record and in particular a fee-note and notice of taxation and as in this case conclude that the relationship between them was that of an advocate and client."***

Mr. Konosi made heavy weather of the fact that in the case of **Uhuru Highway Development Ltd** (supra) the Court observed that:

> ***"In the present case, the second plaintiff paid to the counsel his costs. In all the above circumstances, therefore, it was perhaps with respect, a misdirection on the part of the learned Judge to find: "I see no possibility of being convinced that either the first and*** *(sic)* ***second plaintiff became clients of Messrs Oraro and Rachier Advocates".***

The decision of **Omulele & Tillo Advocates vs. Mount Holdings Limited [2016] eKLR** which learned counsel (Mr. Konosi) further relied on is clearly distinguishable from the instant matter because, there, the contest was not about the existence or otherwise of the advocate/client relationship between the parties, the advocates having been retained and acted in several matters and also received payment of fees for services rendered. What was in dispute there was whether the relationship between the advocates and the client was based on a retainer or a retainer agreement and what the remedies available were to the parties in the event of the retainer relationship breaking down.

In the case of **Abincha & Co Advocates versus Trident Insurance Co. Ltd [2013] eKLR,** the matter before the Deputy Registrar as the Taxing Officer was an application by notice of motion brought under **Section 48 (1) of the Advocate's Act** and **Section 4** of the **Limitation of Actions Act, Cap 22** and the main issues raised were whether firstly, the Advocate's bill of costs was statute barred under the Limitation of Actions Act (Cap 22) and secondly, whether the advocate was estopped from claiming any further costs. The issue was whether the Taxing Officer had jurisdiction to deal with those issues. The Court held that as there was no taxation, there was nothing to challenge, the decision impugned in the application not being a decision on taxation. The High Court correctly found and held that the bill of costs filed by the advocate more than 6 years after completion of the work which the advocate was retained by the client to do or after lawful termination of the retainer in respect of such work is statute barred by virtue of **Section 4(1)(a)** of the **Limitation of Actions Act**. The High Court also held that the advocate

was estopped in law and in equity from turning round to raise final bills of costs after between 8 and 11 years. Clearly, the decision in the case has no relevance to the situation in the appeal before us. The decision in **Doge vs. Kenya Canners Ltd [1989] KLR 127** was also not relevant.

Mr. Kamau Chomba, learned counsel for the respondent opposed the appeal. Unlike counsel for the appellant, Mr. Kamau Chomba did not file written submissions nor did he file a list of authorities. On a point of law, he contended that there was no material in the record of appeal to show that the relationship of advocate and client obtained between the appellant and the respondent. He submitted that the taxing officer had power to deal with and determine the issue whether the advocate-client relationship obtained if it emerged in the course of taxation. At any rate, contended counsel, discharge was to be prepared by Jones & Jones Advocates, who were the advocates for the debtor. It was his contention that the case of **Omulele** (supra) which the appellant relied on had no relevance. He urged that the appeal had no merit and sought its dismissal.

This is a first appeal from the High Court on a matter relating to taxation. In tandem with the principle in the case of **Selle Vs. Associated Motor Boat Company [1968] EA 123,** we are enjoined to re-appraise and re-evaluate the matter as we shall do and come up with our own conclusions.

The appellant placed before the DR his advocate/client Bill of Costs with a view to having it taxed. The DR struck it out on the ground that the appellant/advocate had failed to establish existence of an advocate-client relationship between him and Flamco Limited against which the bill was intended to be taxed. On reference to the High Court against the order striking out the Bill, the learned Judge made a finding that as the fees sought to be taxed related to legal services for preparation of a Discharge of Charge and as Rule 24 of the Advocates Remuneration Order provides that unless otherwise agreed, the Release of Discharge of Charge is to be prepared by the advocate of the party in whose favour such release or discharge is given, it was the firm of Jones & Jones Advocates which was entitled to prepare the Bill and if necessary file the Bill of Costs. The learned Judge held-

> "**For the Taxing Officer to embark on taxing a Bill of Costs, it must be established that there exists an advocate-client relationship and that the advocate was instructed as the law provided. Even if the Bill went to another taxing officer, it would suffer the same fate. For these reasons, I dismiss the application dated 14th July 2011 with costs to the respondent."**

The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the **Advocates Act** and the **Advocates Remuneration Order**. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in **Taparn vs Roitei [1968] EA 618** that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The **Advocates Act** and the **Advocates Remuneration Order** confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered.

The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.

As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction. As Nyarangi, JA. stated in the memorable words in the "**MV Lilian S**" **[1989] 1 KLR** case-

> **"Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

In this appeal, the only shred of evidence on the basis of which the appellant claims that the respondent was his client is cheque No. 000118 dated 26th June 2010 drawn on Diamond Trust Bank Limited by the respondent, Flamco Limited, in favour of Wilfred Nyaundi Konosi for Ksh110,000/-. That cheque was exhibited not by the appellant but rather by the respondent in an affidavit filed by a director of the respondent who alleged in the said affidavit that the appellant obtained the payment, without elaborating the circumstances under which the appellant obtained it, save that refund would be sought. On his part, the appellant failed in his affidavit sworn on 14th July 2011 to make averments to show the existence of advocate-client relationship if it ensued. He merely emphasized that he had filed the advocate-client Bill of Costs and that the respondent had paid Ksh.110,000/= to him without indicating the circumstances in which the payment by cheque was made. Unless the circumstances in which the payment of Ksh.110,000/= were made known, the mere fact of payment *per se* cannot constitute or give rise to advocate-client relationship. Not a single letter by the appellant to the respondent was exhibited to demonstrate that the relationship of advocate-client obtained. The onus reposed on the appellant. It was not discharged. In the absence of proof that there existed advocate-client relationship, the Taxing Officer was justified in striking out the Bill of Costs as she did and the learned Judge of the High Court was right to uphold the decision of the Taxing Officer. We find no merit in any of the grounds of appeal. We dismiss the appeal with costs to the respondent.

Dated and delivered at Nakuru this 12th day of July 2017

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR