



**Kimani v Harry Karanja & Co Advocates (Miscellaneous Civil Application  
E174 of 2023) [2024] KEELC 4210 (KLR) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS CIVIL APPLICATION E174 OF 2023**

**JA MOGENI, J**

**MAY 13, 2024**

**BETWEEN**

**AUSTIN MAINA KIMANI ..... CLIENT**

**AND**

**HARRY KARANJA & CO ADVOCATES ..... ADVOCATE**

**RULING**

1. I have a Notice of Motion Application before me dated 29/01/2024 brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Section 1A, 1B & 3A of *Civil Procedure Act* and Rule 13A of the Advocates Remuneration Order. The Applicant seeks for the following orders:
  1. Spent.
  2. Spent.
  3. That the Honourable Court be pleased to find that there was no and has never been any retainer agreement between the Applicant and Respondent.
  4. That the Honourable Court be pleased to issue an Order dismissing the Bill of Cost dated 22/06/2023 for want of a retainer agreement between the Applicant and Respondent.
  5. Costs of this Application be provided for.
2. The application is based on the grounds on the face of it and on the supporting affidavit of one Austin Maina Karanja dated 31/01/2024, the Applicant herein.
3. The Applicant argues that there is no retainer agreement between him and the Respondent. He claims that the Respondent was instructed and retained by the Applicant's father, not by the Applicant himself. Furthermore, the Applicant states that he was only introduced to the Respondent after his father had already instructed them, without his knowledge or consent. The Applicant's father agreed



to cover all legal fees as the Applicant is a student with no income. Therefore, the Applicant contends that there is no retainer between him and the Respondent. He believes that the Bill of Cost is a scheme orchestrated by the Respondent and his father to manipulate the Applicant into aiding their agenda against the Applicant's mother. Additionally, he argues that the Bill of Cost is an attempt to exploit the Applicant, who is a university student without any income. The Applicant requests that the Bill of Cost be struck out and/or dismissed with costs awarded to him.

4. Opposing the application, the Respondent filed 5 grounds of opposition dated 6/02/2024 together with a Replying Affidavit sworn by Harry Karanja, director of the Advocate/Respondent herein on 16/02/2024. The grounds were as follows:
  1. The Application discloses no reasonable cause of action in law, it is frivolous and vexatious designed to delay the fair trial of this suit, and is an abuse of the process of court.
  2. The issue of jurisdiction is res judicata as the court has already pronounced itself as to its jurisdiction to determine the question of retainer.
  3. The issues raised in the Application are issues already under consideration in the main suit which had previously been raised by the Applicant and have been comprehensively addressed by the Advocate/Respondent in its affidavit and submissions and this application adds nothing new to their determination
  4. The Client/Applicant is seeking a dismissal of the bill of costs which is a relief in the nature of a final order at the interlocutory stage of this suit, which if granted would be highly prejudicial to the Advocate/Respondent.
  5. The Respondent will rely on its Submissions dated 4/12/2023 mutatis mutandis in further support of these grounds of opposition.
5. It is the Respondent's case that the Applicant was served with a Bill of Costs and responded with a Ground of Opposition and Preliminary Objection regarding retainer. This issue was set for directions by the DR on 8/02/2024. However, the Applicant filed a similar application on 29/01/2024, just before the scheduled directions. The Respondent argues that this application is an attempt to delay the matter's resolution. He claims that all relevant issues were previously raised and are under consideration. The Respondent asserts that the Applicant's actions are aimed at prolonging the trial unfairly, constituting an abuse of the court process. He requests that the application be dismissed with costs. Additionally, he argues that the Applicant's request for dismissal of the bill of costs at this stage would unfairly prejudice him.
6. The Court directed that the Application be canvassed by way of written submissions and both parties duly submitted. The Client/Applicant filed his written submissions dated 19/04/2024 on the even date. The Advocate/Respondent filed its submissions dated 29/02/2024 on 17/04/2024.

### **Analysis and determination**

7. I have considered the Application, the rival affidavits, grounds of opposition and the written submissions filed by both parties supported by cited authorities. In my view, the issue for determination which arise from this application are whether the Application dated 29/01/2024 is merited.

### **Whether the Application is merited**

8. The Applicant mainly contends that he had not issued instructions to the Respondent to represent him in Nairobi ELC E076 of 2022 – Mary Wacuka Kimani vs Mark Ng'ang'a Kimani, Austin Maina



Kimani and another. He raised this issue after he was served with the Respondent's Bill of Costs dated 22/06/2023. The question that this argument raises then is whether this Court can properly entertain the Applicant's contention that there was no agreement or retainer in place as he never engaged the Respondent's services or provided instructions to the Respondent to represent him in ELC E076 of 2022.

9. But before I delve into that, I need to determine whether the Taxing Officer has the jurisdiction to determine the issue of retainer noting that the same issue was an issue in contention before the Deputy Registrar. In my view, the Advocates Remuneration Order gives the taxing officer jurisdiction to tax the bill of costs where there is an established client/ advocate relationship, and where there is no dispute as to retainer (See paragraphs 2,10,13 of the Advocates Remuneration Order.)
10. It is trite, I believe, that the existence of an Advocate-Client relationship is central as it gives jurisdiction to the Taxing Master to entertain a bill of costs. In Wilfred N. Konosi T/A Konosi & Co. Advocates v Flamco Limited [2017] eKLR, the Court of Appeal stated as follows:

“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.” (Emphasis added)

11. The Respondent's case is that the issue of jurisdiction is res judicata as the same was raised before the Deputy Registrar and was scheduled for directions on 8/02/2023. This Court disagrees with the Respondent's contention that the issue of jurisdiction is res judicata as this issue was definitely not heard and finally decided on merits.
12. The Respondent argues that the Applicant's recent application mirrors previous grounds of opposition, suggesting an intent to prolong the case. They claim that since similar issues were raised earlier and are still being considered, the new application is premature. Additionally, they assert that the Applicant's request for dismissal of the bill of costs at this stage would unfairly prejudice them as it seeks a final order during the interlocutory stage of the suit.
13. I have read the record of proceedings before the Taxing Master and the respective documents filed by the parties. I note that in response to the Respondent's Bill of Costs, the Applicant filed a Replying Affidavit together with grounds of opposition and preliminary objection raising the issue of lack of a



retainer. He raised the issue of instructions before the Taxing Master. There is no ruling on the issue of jurisdiction regarding the retainer on the Court record. I note that when the parties appeared before the Taxing Master on 11/12/2023, the Hon. Deputy Registrar gave directions that the Applicant herein is to file a formal application on the issue of the retainer within 7 days. The Respondent herein was at liberty to file a response within 10 days upon service. She then gave a mention date before her Court. When the matter came up for directions on 8/02/2024, the Hon. Deputy Registrar was informed that the Applicant herein had filed an application to have the matter heard before the Judge.

14. The Applicant submitted that on 8/02/2024, both parties appeared before the Honorable Deputy Registrar to confirm filing of the application as directed. The Applicant's counsel confirmed filing the application, which is the current application before the court. The Deputy Registrar acknowledged the lack of jurisdiction to determine the issue of retainer and transferred the file to the current court. raising the issue of retainer in the Grounds of Opposition and Notice of Preliminary Objection dated 14/11/2023, the Applicant herein challenged the jurisdiction of the Honorable Taxing officer warranting the instant application to be determined by this Honorable Court. I disagree. The Deputy Registrar did not acknowledge the lack of jurisdiction to determine the issue of retainer and transferred the file to the current court.
15. The Applicant herein did not give the Taxing Master the opportunity to determine the issues raised before her. I reiterate that from the proceedings before the Hon. Deputy Registrar on 11/12/2023, she only directed the Applicant herein to file a formal application on the issue of retainer. She did not direct that the application should be filed before a Judge. The issue of retainer was brought up before the Taxing Master in opposition to the taxation of a bill of costs.
16. I have read the documents filed before the Deputy Registrar and I note that the Applicant herein raised the issue of lack of a retainer in all of his pleadings. The Client chose to respond to the Bill of Costs through a replying affidavit sworn on 10/11/2023 and the issue of a retainer, which is an issue of fact, was raised therein at paragraph 3. The issue was also broached in his grounds of opposition and preliminary objection dated 14/11/2023 filed in opposition to the Advocate/Respondent's bill of costs. on the matter. It is only when the Client denies the retainer that the Advocate is called upon to prove it (see *Omulele Tollo and Company Advocates v Mount Holdings Ltd MSA CA Civil Appeal No. 75 of 2015*).
17. The issue of the retainer was in contention before the Deputy Registrar. The Client needs to give the Deputy Registrar the opportunity to give her determination on the issues raised before her and if the Client will not be happy with the decision of the Taxing Master, then he is at liberty to file a reference before the High Court. The issue of the retainer can then be raised in a reference because it will have been an issue that was in contention before the Deputy Registrar since a reference is in the nature of an appeal. The High Court determining a reference can entertain a matter that was raised before the Deputy Registrar.
18. In the present case, it is evident that the Applicant/Client raised the question of instructions before the trial court. In the circumstances, I am guided by the Court of Appeal's decision in the case quoted herein above, *Wilfred N. Konosi T/A Konosi (Supra)* wherein it was found that 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. It is my finding that the Applicant should have given the Taxing Master the opportunity to determine the issue of retainer first seeing that the same was raised in response to the bill of costs which is within her jurisdiction to determine. In my view, the Taxing Officer has the jurisdiction to hear and determine the issue of retainer as it is a core issue on whether a matter can be sustained or not.



19. In any event, Paragraph 12 (1) of the Advocates (Remuneration) Order provides that; the Taxing Officer may refer any matter in dispute arising out of the taxation of a bill of costs for the opinion of the High Court and Paragraph 12(2) thereof provides the procedure for such reference shall follow that of a case stated but shall be to a Judge in Chambers. It therefore follows that the Taxing Officer has the discretion to refer any matter in dispute arising out of the taxation of a bill of costs to the Court for its opinion.
20. In view of the foregoing, I find that the Application dated 29/01/2024 is devoid of merit. It is hereby dismissed with costs to the Respondent.
21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY 2024**

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**MOGENI J**  
**JUDGE**

In the Virtual presence of:

Mr. Mumo holding brief for Mr. Karanja for Advocate/Respondent

Mr. Gitahi for Applicant

Ms. C. Sagina: Court Assistant

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**MOGENI J**  
**JUDGE**

