



**Muri Mwaniki & Wamiti Advocates v Orongo (Miscellaneous Application
7 of 2018) [2024] KEELC 7066 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 7 OF 2018**

JG KEMEI, J

OCTOBER 24, 2024

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES APPLICANT

AND

MARK ODUOGO ORONGO RESPONDENT

RULING

1. By way of Chamber Summons dated 12/8/2021 expressed under Paragraph 11(1) &(2) of the [Advocates Remuneration Order](#), the Applicant/Advocate seeks Orders THAT;
 - a. This Hon Court be pleased to set aside the ruling of the Deputy Registrar Hon F. Mutuku delivered on 28th January 2021 and any resultant Certificate of Taxation to the extent that it relates to the reasoning and determination pertaining to taxation of the whole of the Advocate/Client Bill of Costs dated 16th April 2018.
 - b. This Honorable Court be pleased to tax the Bill of Costs dated 16th April 2018.
 - c. In the alternative to Prayer 2 above, this Hon Court do remit the whole of the Bill of costs dated 16th April 2018 to another Taxing Officer for taxation with direction on taxation.
 - d. The Advocate/Applicant be awarded costs of this application.
2. The application is based on the grounds that the Taxing Officer erred in law and in principle and misdirected her discretion by wholly dismissing the Applicant's Bill of costs; the Taxing Officer failed to consider and find that Section 2 of the [Advocates Act](#), the definition of 'client' includes any person who is or may be liable to pay an Advocate any costs; the Taxing Officer failed to consider Para 31 of the [Advocates Remuneration Order](#) which provides that the borrower (in this case the Respondent) is responsible for payment of the costs of investigation of title and perfecting the security which arose at the borrower's request and that the Taxing Officer erred in finding that there was no evidence of work



from the Respondent yet there were a list and bundle of documents in support of the work done and attendant charges.

3. The Application is supported by the Affidavit of even date of Martin G. Mwaniki Advocate on behalf of the Applicant. Rehashing the above grounds, copies of the Bill of costs dated 16/4/2018, the impugned Taxing Officer Ruling and reasoning dated 28/1/2021, a letter of offer dated 25/2/2015 signed by the Respondent and Applicant's List of documents dated 16/4/2018 in support of the Bill of Costs were annexed and marked MGM 1, MGM 3, MGM 4 and MGM 5 respectively.
4. Despite service as shown by Affidavit of Service sworn on 5/4/2024 the application is not opposed.
5. On 23/5/2024 directions were issued for parties to prosecute the application by way of written submissions. The firm of Muri, Mwaniki Thige & Kageni LLP filed the Applicant's submissions dated 12/6/2024. The Respondent did not file any submissions.
6. Rehashing the contents of its application, the Applicant submitted that it is the practice in taxation to give effect to Paragraph 31 of the Advocates Remuneration Order such as in *Milimani ELC Misc. Application No. 102 of 2016: Muri Mwaniki and Wamiti Advocates v Azal Limited & African Banking Corporation Limited* where the Court, according to the Applicant, held the 1st Respondent (the borrower) liable for costs in view of Para.31 of the Advocates Remuneration Order. This decision was not annexed by the Applicant and a search for the same revealed a Ruling in respect of the said parties delivered on 13/4/2023 in respect of an application dated 15/8/2022 or regularization of pleadings filed and not a reference as the case herein. I therefore find it inapplicable. Even if it were annexed, I would venture to say that the same is distinguished going by the Applicant's quotation of the authority at para.12 of its submissions that the 1st Respondent therein (borrower) was not a party to the proceedings before Court yet the bank was clearly sued unlike the instant case.
7. The germane issue for determination is whether the application is merited.
8. The application before Court invokes the appellate jurisdiction of this Court vide a Reference as provided for under Para. 11 (1) & (2) of the *Advocates Remuneration Order* which provides;

“ 11. Objection to decision on taxation and appeal to Court of Appeal

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

9. The principles of varying or setting aside a Taxing Officer's decision are well crystalized. In making such reference, a party is required to show that its case meets the principles set in jurisprudence for interference with the exercise of discretion by the Taxing Master. These principles were succinctly enunciated in *First American Bank of Kenya v Shah and Others* [2002] E.A.L.R 64 at 69 in which Ringera J (as he then was) observed as follows:

“ This Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle... it



would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...”

10. The Applicant seeks to set aside the Ruling of Hon. F. Mutuku Deputy Registrar dated 28/1/2021 dismissing the Applicant’s Bill of costs on the grounds *inter alia* that there was lack of evidence of retainer between the Respondent and the Applicant. That the Respondent did not issue instructions to the Applicant to so act to warrant the Bill of Cost raised against him. In assailing this finding, the Applicant faults the Taxing Officer for failing to consider the provisions of Para. 31 [Advocates Remuneration Order](#).
11. It is trite, 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 v 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)

12. Para. 31 of the [Advocates Remuneration Order](#) is to the effect that;

“31. Costs of mortgage to be paid by borrower

The costs of a mortgagee for the investigation of title and the preparation, completion and registration of his security or of any discharge or assignment thereof made at the request of the borrower, whether or not the transaction is completed, shall be payable to the borrower, but any commission due to the mortgagee’s Advocate for negotiating the loan shall be payable by the mortgagee.”



13. A glean of Item 1 of the Applicant’s Bill of Cost dated 16/4/2018 expressly refers to receiving instructions from Bank to prepare, register and perfect a charge of Kshs. 900,000/= over Title Number Ruiru/Ruiru East Block 4/7370. The Taxing Officer reasoned that the instructions to act were issued by the aforesaid unnamed Bank but from the filed documents, it emerged that the name of the Bank was Jamii Bora bank. That accordingly, the instructing client was Jamii Bora Bank as opposed to the Respondent herein. That absent any evidence of instructions from the Respondent to the Applicant, there was no basis to assess the Bill of Cost filed before the Taxing Officer hence the dismissal with no orders at to costs.

14. Para. 24(b) *Advocates Remuneration Order* states that a mortgage of charge is prepared by the Advocate of mortgagee or charge who in the circumstances is Jamii Bora Bank. Faced by similar scenario of demand for Advocate fees from the borrower the Court in *Njuguna Matiri & Company Advocates v National Bank of Kenya* [2015] eKLR in dismissing the bank’s objection to the Bill of Cost by the Applicant, the Court emphasized that;

“Section 31 of the *Advocates Remuneration Order* 2014 – quoted above, rightly states that the fees for the preparation and registration of a security made at the request of the borrower shall be payable by the borrower.

In my view, the above provision clearly indicates that the request made by the borrower – can only mean, a request to the bank, not to the Advocates, meaning, the bank ought to debit the borrowers account to the order of the Advocates fees when it becomes payable and or demanded. This is informed by the fact that there exists no privity of contract between a borrower and an Advocate for the bank.

It is the borrower who enters into a contract with the bank for advancement of finances against securities that the Bank commissions its lawyers, as its agents to prepare and perfect. In such scenario, the Bank then enters into another contract between itself and the Advocate for payment of its fees, upon completion, or on whatever terms of payment of legal fees, but not with the borrowers who at this point are strangers to the Advocates ...”

15. Earlier in the case of *National Bank of Kenya Limited v Kangethe George T/A Kangethe & Company Advocates* Misc. Application No. 718 of 2014 (2012) KLR, in very similar circumstances, the Court held that there can be no privity of contract between a borrower and an Advocate instructed by the bank. The client was held to be the instructing bank and ordered that an Advocate-Client Bill of Costs be filed.

16. Section 45 of the *Advocates Act* provides as follows with respect to retainer agreements:

“Subject to section 46 and whether or not an order is in force under section 44, an Advocate and his client may—

- (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the Advocate’s remuneration in respect thereof;
- (b) before, after or in the course of any contentious business in a civil Court, make an agreement fixing the amount of the Advocate’s instruction fee in respect thereof or his fees for appearing in Court or both;
- c. before, after or in the course of any proceedings in a criminal Court or a Court martial, make an agreement fixing the amount of the Advocate’s fee for the conduct thereof; and such agreement shall be valid and binding on the parties



provided it is in writing and signed by the client or his agent duly authorized in that behalf. (Emphasis added)

17. The Court has pronounced itself on the threshold required to prove the existence of a retainer agreement under Section 45 of the Act. The Court of Appeal was faced with an almost similar situation in a case of an unwritten agreement between a firm of Advocates and its client in the case of Omulele & Tollo Advocates v Mount Holdings Limited, [2016] eKLR. In dismissing the claim of an oral retainer agreement, the Court held that for the retainer agreement to exist, the terms of the agreement must have been reduced into writing, which was not the case.
18. It is trite that he who alleges must prove. The Applicant sought to recover Advocate/Client Bill of Cost and was obliged to prove existence of such a relationship to give rise to the retainer. The Applicant failed to do so. Instead the Applicant argues that there was an implied retainer arising from the works undertaken to perfect the surety for the Respondent's benefit. I have perused the clause on Costs as contained at page 3 in the Letter of Offer dated 25/2/2015 (MGM 4) which states;

“All legal, valuation, stamp duties (except those stamp duties relate to execution of acknowledgement of debt as hereinbefore specified) all other fees, costs and expenses incurred by the Lender in connection with this facility or any proceedings for recovery are to be for the account of the Borrower and are payable on demand.”
19. My understanding of the above clause is that such legal fees such as instruction fees in this case, are incurred by the Lender in this case Jamii Bora Bank and recovered from the borrower's (Respondent) account on demand. I say so because the said Letter of Offer is exclusively between Jamii Bora Bank and the Respondent. The clause does not provide for the Advocate to recover directly from the Borrower. If that was to be the case, nothing would be easier than the clause to expressly state so.
20. The Applicant sought to rely on the definition of a client as provided under Section 2 of the Advocates Act. It provides;

“client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an Advocate and any person who is or may be liable to pay to an Advocate any costs.”
21. The above definition aptly describes the instance of an Advocate/Client relations in this case in two aspects; the first is the undisputed relationship between the Applicant and Jamii Bora bank as confirmed in the issuance of instructions described in the Bill of Costs. The second scenario is the one contemplated by the Applicant with the Respondent in this case as a potential client liable to pay Advocates costs. Again, the import of the letter of offer is that the legal fees are recoverable on demand by the lender from the borrower
22. The upshot of the forgoing is that I find no misdirection on the Taxing Officer's Ruling and final orders.
23. The reference is bereft of merit and it is dismissed with no orders as to costs.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI



JUDGE

Delivered online in the presence of;

Owiro for the Applicant

Respondent - Absent

Court Assistant – Phyllis

