



**Muri Mwaniki & Wamiti Advocates v Caritas Mariana Holy Family Children’s Home
(Miscellaneous Application 74 of 2017) [2023] KEELC 809 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 74 OF 2017**

JG KEMEI, J

FEBRUARY 13, 2023

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES APPLICANT

AND

CARITAS MARIANA HOLY FAMILY CHILDREN’S HOME RESPONDENT

RULING

1. What is before me is a Preliminary Objection filed by the Respondent dated the March 30, 2022 on the following grounds;
 - a. That the application is time barred under para 11 of the Advocates Remuneration Order.
 - b. There is no Advocate -Client relationship between the Applicant and the Respondent.
 - c. The application is a non-starter.
2. The Objection was provoked by the Applicant’s Chamber Summons dated is the Ruling of August 12, 2021 filed on the September 23, 2021 seeking the following orders;
 - a. The Hon Court be pleased to set aside the Ruling of the Hon Deputy Registrar V Kachuodho delivered on the March 7, 2019 and any resultant certificate of Taxation to the extent that it relates to the reasoning and determination pertaining to the taxation of the whole of the Advocate/Client Bill of costs dated the October 13, 2017.
 - b. The Hon Court be pleased to tax the bill of costs dated the October 13, 2017.
 - c. In the alternative to prayer No b above the Court do remit the whole of the Bill of Costs to another Taxing Officer for the taxation with direction on taxation
 - d. The Advocate /Applicant be awarded the costs of this application.



3. The application is supported by the grounds annexed thereto and the supporting affidavit of Martin G Mwaniki, Advocate having conduct of the matter on behalf of the Applicant.
4. That his law firm filed a bill of costs on the October 13, 2017 for taxation for fees payable to it upon being retained by the Respondent. That upon the said bill having been dismissed entirely by the Taxing Master vide the Ruling of the March 7, 2019 they wrote to the Taxing Master vide the letter dated the March 21, 2019 seeking the reasons for the said dismissal for which a certified copy of the said Ruling was received on the August 3, 2019.
5. Under para 5 the Applicant has set out the grounds on which it is objecting to the decision of the Taxing Master.
6. On the May 11, 2022 directions were taken in which the parties elected to canvass the objection by way of written submissions. As at the time of writing this Ruling it is only the Respondent who complied while the Applicant failed to so comply with the orders of this Court notwithstanding that it is the mover of the summons. That said, the Court will determine the application based on what was placed before it on record and on its merits.
7. It was submitted on behalf of the Respondent that any objection to the decision of the Taxing Master should be made in writing within 14 days of the date of the decision. It was contended by the Respondent that the Applicant was aware of the reasons of the Taxing Master as contained in her decision delivered on the March 7, 2019. That time starts running from the date of delivery and not the July 29, 21 when the Applicant sought a certified copy of the Ruling. It was of the opinion that the reference should have been filed not later than March 21, 2019, 14 days after the delivery of the Ruling on the March 7, 2019. That the Applicant has not complied with the provisions of Para 11(2) of the *Advocates Remuneration Order* (ARO). Either way, the Respondent submitted that the Applicant did not seek for the enlargement of time to bring this application and consequently the same is time barred and urged the Court to strike it out with costs.
8. Further it was submitted that there is no Advocate - Client relationship between the Applicant and the Respondent to warrant a bill of costs seeing that the Applicant was instructed by a bank and not the Respondent. In addition the Respondent has argued that according to para 3 of the letter of offer dated the May 18, 2011, before the disbursement of the loan, the bank had to debit the legal fees from the Respondents account and hence there is no legal obligation to pay fees to the Applicant and therefore the reference ought to be dismissed.
9. The key issue for determination is whether the Preliminary Objection is merited.
10. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
11. In this regard I adopt the words of Sir Charles Newbold P. in Mukisa Biscuit case (Supra) which are applicable in the present circumstances.

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing



but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop.”

12. The gist of the Respondents objection is that the chamber summons dated the 12/8/2021 is time barred under para 11 of the ARO. For the Court to determine whether or not the application is time barred or not, it has to apply its mind on the evidence on record as regards when the Ruling was delivered vis a vis when the actual application was made and consider if the same was within the ambit of para 11 of the ARO which states as follows;
 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 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 those reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”
13. According to the decision of the Court in Mukhisa Biscuit above, a Preliminary Objection cannot be raised if any fact has to be ascertained by reference to evidence. This Court has held in a number of cases now that the best way of raising objection is by way of a notice of motion so that the affidavit evidence is placed for the perusal by the Court.
14. The question as to whether or not the parties have an Advocate – Client relationship is also a question to be ascertained from the facts of the case.
15. In sum the Court finds that this is not a pure point t of law and the objection consequently is unmerited.
16. Final orders;
 - a. The Preliminary Objection is bereft of merit and the same is hereby dismissed with costs payable by the Respondent.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwaniki for Applicant

Dr. Kenyariri for Respondent

Court Assistants – Esther / Kevin

