



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 471 OF 2012

LUMUMBA MUMMA KALUMA ADVOCATE/APPLICANT

VERSUS

SACHIN SHAHA CLIENT/RESPONDENT

R U L I N G

1. On 20th February 2013, the advocates for the Client/Respondent filed what they described as a Notice of Preliminary Objection to the taxation of the Advocate/Client Bill of Costs arising from *HCCC No. 593 of 2012*. The purported client **Sachin Shaha** was taking objection to the taxation proceedings on the grounds that he had only given instructions to the firm of **Lumumba & Lumumba, Advocates** not to the firm of **Lumumba, Mumma & Kaluma, Advocates** to act for him in the aforementioned suit. The client was of the opinion that, as a result, this Court had no jurisdiction to tax the Advocates' Bill of Costs. When parties appeared before this Court 4th June 2013, it was agreed that the Preliminary Objection to the taxation would be heard and determined first. Indeed, the parties agreed that they should put in written submissions as regards the Preliminary Objection.
2. Prior to this Court considering those submissions, one **Thomas K'Bahati** swore, on 3rd June 2013, what he termed a Replying Affidavit to the Client's Notice of Preliminary Objection dated 20th February 2013. In that Replying Affidavit, the deponent detailed that he was an advocate of this Court and a partner in the firm of **Lumumba, Mumma & Kaluma Advocates**. He maintained that his firm had received instructions from the client to represent him in 3 matters being:
 - a. HCCC No. 593 of 2010: Sachin Shaha v Jagat Mahendra Shah.
 - b. Constitutional Petition No. 284 of 2010: Jagat Mahendra Shah v The Commissioner of Police & 3 Others.
 - c. Constitutional Petition No. 215 of 2011: Mitesh Mahendra Shah v The Commissioner of Police & 3 Others.

The deponent maintained that the client failed to pay the firm's legal fees which led to the firm filing the Bill of Costs which was now for taxation. He further noted that when the client was served with the said Bill of Costs, he had instructed his new advocate to write to his firm to release the files in respect of the above matters. Mr. K'Bahati maintained that the client would not have done so, if his firm had not received instructions to act. He further noted that the client was initially a joint client of Prof. Lumumba and Mr. Kaluma and the documentation was filed in the name of **Lumumba & Lumumba Advocates**. However, the deponent maintained that all the work carried out on behalf the client was done by the firm

of **Lumumba, Mumma & Kaluma**. Upon the instruction of the clients, that firm took full charge of the client's matters with the agreement of Prof. Lumumba. The advocate, who appeared in the various matters on behalf on the client, was Mr. Kaluma who was neither an associate or a partner of Lumumba & Lumumba, Advocates but is and was a partner of Lumumba, Mumma & Kaluma, Advocates.

3. The client's submissions were filed herein on 20th June 2013. They commenced by the client detailing what he termed the factual background but which put forward the submission that the Advocate/Applicant purporting to recover legal fees was doing so without having been the advocates who were properly instructed in *HCCC No. 593 of 2012*. As the client saw it, the issues that this Court should determine were firstly, whether the Advocate/Applicant was instructed by the client/Respondent and secondly, whether this matter was based solely on fact. The client maintained that, in his Affidavit sworn on 18th March 2013, he had indicated that he had instructed Prof. Lumumba of Lumumba & Lumumba, Advocates and not the Advocate/Applicant herein. It had also been confirmed in the Ruling of my learned brother Judge Odunga dated 13th February 2012 in the aforesaid suit, that the firm of Lumumba & Lumumba, Advocates were on record for the client. As a consequence, the client maintained that the Deputy Registrar of this Court did not have the jurisdiction to hear and determine the issue on retainer. He referred the Court to the (Ugandan) case of **Uganda Commercial Bank v Akamba (U) Ltd HCCC No. 592 of 1992** but unfortunately failed to attach a copy of the said authority to his submissions. However, the client insisted that there was no concrete evidence that he had, in reality, instructed the Advocate/Applicant. There was no agreement that the Advocate/Applicant could produce to show that Prof. Lumumba had agreed that the firm should take charge of the matter as alleged. Further, no Notice of Change of Advocates had been filed. As regards whether the matter was based solely on fact, the client referred this Court to the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd (1969) EA 696** which had been quoted in **Cecil G. Miller T/A Miller & Company Advocates v Parin Shariff & 2 Ors (2012) eKLR**. The client submitted that the objection to the jurisdiction of the Deputy Registrar to hear and tax the Advocate/Applicant's Bill of Costs where there was no retainer of those advocates, constituted a valid point to be argued as a Preliminary Objection in order to dispose of the Bill of Costs from the outset. There needs to be an end to the client is being subjected to taxation of costs for which the advocate was never the intended entity to receive instructions and to act thereon.
4. The Applicant/Advocates' submissions were filed herein on 28th June 2013. The Applicant/Advocates' preliminary issue was that on the 19th March 2013, their Advocate – Client Bill of Costs had come before the Deputy Registrar of this Court and in view of the Preliminary Objection, she was of the view that it should be taken before a Judge. The Applicant/Advocates' view was that the Judge was not seized of the matter. They opined that until the taxation of the said Bill of Costs had been completed, a Judge had no jurisdiction to deal with this matter, including the Preliminary Objection, the result of which would interfere with the jurisdiction of the Deputy Registrar as the taxation officer. To this end, the Applicant/Advocates referred to **section 51** of the *Advocates Act* as well as **Rules 13 and 13A** of the *Advocates (Remuneration) Order*. They submitted that any application, including the Preliminary Objection, fell within the jurisdiction of the taxing officer and not the Judge. To this end, they quoted from the cases of **Donholm Rahisi Stores v East Africa Portland Cement Ltd HCCC No. 18 of 2004 (unreported)** as well as **Sharma v Uhuru Highway Development Ltd**.
5. As regards the issue as to whether the Applicant/Advocates had received instructions from the Client/Respondent, they submitted that such instructions need not be in writing, they could be express or inferred from the conduct of the matter. The Applicant/Advocates relied upon the contents of the Replying Affidavit as regards the Preliminary Objection and noted the cases in which they had acted for the client before this Court. They also referred to the case of **Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt-a-Light Misc. Appl. No. 729 of 2006**. The

submissions then went into commentary as to the shifting of the burden of proof, which normally fell upon the advocates to show that they had received instructions to act for the client, but could be upon the client to show that instructions had not been given or had been withdrawn. The Applicant/Advocates underlined that the issue was not really about instructions but whether the client should escape payment of legal fees merely because of the failure of the Applicant/Advocates to file a Notice of Change of Advocates.

6. I do not consider that it is within the purview of this Court to go into whether instructions were given or not given by the Client/ Respondent to the Applicant/Advocates herein. The matter before this Court is as regards the Preliminary Objection. The issue of whether instructions were given or not, is purely factual and a matter of evidence not a point of law. A Preliminary Objection is raised purely on a point of law or procedure. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696** Law, J.A (as he then was) held at page 700 *inter alia*:

“...so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...” (Underlining mine).

7. Further, I am bound by the Court of Appeal decision as cited by the Applicant/Advocates in the **Sharma v Uhuru Highway Development** case (supra) in which **Akiwumi JA** found:

“The application then came before him on 2nd December, 1999, which he proceeded to hear and concluded with his Ruling of 19th May, 2000. O’Kubasu J, not being seized of the taxation itself, and there being no appeal or reference to the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11 (1) and (2) and 12 of the Order, from a decision of the Taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent’s application to strike out the cause. This by itself, makes his hearing of, and his Ruling of 19th May, 2000, on the Respondent’s application, a nullity from the word go. It would have been different if the Appellant had brought a suit in the High Court by way of a plaint, for the recovery of costs due to him, under section 48 of the Advocates Act”.

I agree entirely with the holding of my learned brother **Waweru J.** in the **Donholm Rahisi** case when he stated:

“In my view the inherent jurisdiction of the court cannot properly be inferred to include the jurisdiction to intervene in the jurisdiction of another judicial officer. Such interventionist jurisdiction must be expressly conferred by law.”

What is before the Court is the taxation of the Applicant/Advocates’ Bill of Costs dated 30th July 2012. That Bill is before the Court under the provisions of the *Advocates (Remuneration) Order*. The judicial officer who has the responsibility for such taxation is the Deputy Registrar of the Court. I concur with the submissions of the Applicant/Advocates when they say that until the decision of the Deputy Registrar, as taxing officer, is delivered, this Court has no jurisdiction under the provisions of the *Advocates (Remuneration) Order*. If the Applicant/Advocates are correct in stating that the Hon. Deputy Registrar felt that a decision with regard to the Preliminary Objection raised by the Client/Respondent lay with a

Judge of the Court, then all well and good. It appears that the basis of the Client/Respondent's objection to the taxation is that he never gave instructions to the Applicant/ Advocates. That is a matter of fact which cannot be disposed of by way of Preliminary Objection and should be ruled upon by the Deputy Registrar in her capacity as taxing officer.

8. As a result, I have no hesitation in dismissing the Preliminary Objection of the Client/Respondent dated 20th February 2013 with costs to the Applicant/Advocates.

DATED and delivered at Nairobi this 20th day December, 2013.

J. B. HAVELOCK

JUDGE



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