



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION**

(Coram: Monica K. Mugenyi, PJ; Fakihi A. Jundu, & Audace Ngiye, J)



TAXATION REFERENCE NO. 2 OF 2016

UHAI EASHRI APPLICANT

VERSUS

OJIAMBO & COMPANY ADVOCATES RESPONDENT

DATE: 5TH JULY, 2017

RULING OF THE COURT

A. BACKGROUND

1. In July 2014, the Applicant Company executed an agreement with one Milka Wahu Kuria, an advocate practicing in the Respondent law firm whereby the said Ms. Kuria was to file an application for the Applicant to be joined as *amicus curiae* in Reference No. 6 of 2014; identify a lead Counsel to argue the application; attend the hearing of the *amicus curiae* application, as well as the Reference with the designated lead Counsel, and file *amici* briefs on behalf of the Applicant in the event that the application was successful.
2. The agreement did also set out the fees payable for Ms. Kuria's assignment, including the instruction fee; disbursement costs of filing the application and amici briefs, service thereof on parties, as well as incidental costs such as printing and communication expenses, and the costs associated with court attendances.
3. Pursuant to the afore-mentioned agreement, Ms. Kuria appointed Messrs Aldrine Were Ojiambo and Colbert Ojiambo as lead Counsel and the Respondent law firm did prepare the pleadings and attend court proceedings in respect of the Applicant's Application for joinder as *amicus curiae*, to wit, Application No. 20 of 2014. Both Application No. 20 of 2014 and Reference No. 6 of 2014 have since been disposed of by the Court. The Application was specifically resolved against the Applicant, pursuant to which the Respondent firm filed a Bill of Costs for taxation vide Taxation Cause No. 2 of 2015 – Ojiambo & Co. Advocates vs. UHAI EASHRI.
4. Before the Bill of Costs could be taxed, however, the Applicant filed an Application for the same to be struck out on account of the existence

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of an agreement between itself and the Respondent firm governing fee payments between the two (2) parties and pursuant to which the law firm had already been paid. The said Application was formally dismissed by Her Worship, the Deputy Registrar, in a reasoned Ruling that was delivered on 26th May 2016. Dissatisfied with the Ruling of the Taxing Officer, the Applicant filed the Taxation Reference that is presently before us.

B. TAXATION REFERENCE

5. The Taxation Reference is premised on Rules 113(2) and 114 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter interchangeably referred to as 'the Court's Rules' or 'the Rules'). It essentially challenges the Taxing Officer's decision that there was no Advocate/ Client Remuneration Agreement between the Parties as envisaged under Rule 113(2) of the Court's Rules, such as would warrant the striking out of the Bill of Costs filed by the Respondent firm. The Applicant further challenges the Taxing Officer's construction of a pre-existing Advocate/ Client relationship between the Parties whereas there allegedly was no such relationship between them.

6. It is the Respondent's contention, on the other hand, that by instructing the Respondent firm to draft pleadings and argue the Application for joinder as *amicus curiae*, as well as the Reference, the Applicant's conduct was such as would impute an advocate/ client relationship between itself and the Respondent firm therefore the Taxing Officer rightly inferred the existence of such a relationship between the Parties. It was further argued for the Respondent, ^{that} having established a client/ advocate relationship between the present Parties, the alleged remuneration agreement that was relied upon by the Applicant, which

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had been executed between a one Milka Wahu Kuria and the Applicant was not a remuneration agreement as envisaged in Rule 113(2) of the Court's Rules. Consequently, it is the Respondent's contention that, in the absence of such remuneration agreement between the Parties, the Bill of Costs in issue presently was rightly filed in this Court within the precincts of the same Rule.

7. In a brief rejoinder, it was maintained for the Applicant that there was indeed an advocate/ client relationship albeit between the Applicant and Ms. Kuria and not the Respondent firm, which relationship was governed by the remuneration agreement in issue presently. In that regard, the point was made that recourse could not be made to the conduct of the Parties to impute an advocate/ client relationship when there was a document that explicitly spelt out the parties to such a relationship, as well as their interface with the Respondent.
8. Responding to questions from the Bench, learned Counsel for the Applicant did clarify that whereas the remuneration agreement between her client and Ms. Kuria was indeed governed by Kenyan law, the said agreement established an advocate/ client relationship between the said parties; outlined the remuneration terms applicable under the said relationship; details the said advocate as having been responsible for the remuneration of the Lead Counsel she appointed (who in this case were allegedly the Respondents), and had been produced in court in support of the preposition that there was no need for a Bill of Costs or the taxation thereof. Both sets of Counsel did also provide the Court with their understanding of the notion of 'lead counsel'.

C. COURT'S DETERMINATION

9. Having listened to both Counsel in submissions, it seems to us that the present matter raises two (2) distinct procedural questions that beg resolution. First is the question as to whether the matter before us is indeed a Reference on Taxation as encapsulated under Rule 114 of this Court's Rules. Relatedly, the issue of this Court's jurisdiction to interpret the remuneration agreement in issue between the Parties arose quite succinctly from the questions from the Bench with regard to a clause in the agreement that refers disputes thereunder to Courts of the Republic of Kenya. We propose to commence our determination of this Taxation Reference with a determination of the above issues.
10. We have carefully considered the pleadings and rival arguments in this matter. We have also considered the import of Rule 114 of our Rules. That Rule would appear to provide for the referral of a Taxing Officer's decision to a Bench of three (3) judges of this Division of the Court by a dissatisfied party. The question is what decision is so referred under that Rule? We find apt instruction on the nature of decisions that may be referred by way of Reference on Taxation in Rule 113 of the Rules.
11. For ease of reference, we reproduce both Rules 113 and 114 below:

Rule 113

- (1) ***The Registrar shall be a taxing officer with power to tax the costs of or arising out of any claim or reference as between the parties.***
- (2) ***The remuneration of an advocate by the client shall be by agreement between them. Where there is no such***

agreement either of the parties may refer the matter to the Registrar for taxation.

- (3) The costs shall be taxed in accordance with the rules and scale set out in the Third Schedule for the First Instance Division and Eighth Schedule for the Appellate Division.*

Rule 114

Any person who is dissatisfied with a decision of the taxing officer may within fourteen (14) days apply by way of reference on taxation for any matter to be referred to a bench of three (3) Judges whose decision shall be final.”

12. Our construction of Rule 113 is that the mandate of the Taxing Officer is restricted to the taxation of costs in accordance with the Third and Eighth Schedules to the Rules as the case may be. However, such mandate may only be exercised by the Taxing Officer where there is no advocate/ client remuneration agreement between the parties to a claim or reference. Rule 114 then provides for references on taxation where a party is dissatisfied with the Taxing Officer's decision. It is quite conceivable that the decisions that may be so referred by a dissatisfied party are restricted to the Taxing Officer's taxation of costs role as detailed in Rule 113(1) and (3). However, it seems to us that before a Taxing Officer may proceed to tax a filed Bill of costs, s/he must establish whether or not there does exist a remuneration agreement between the parties given that under Rule 113(2), the existence of such an agreement would oust the Court Registrar's mandate to tax a Bill of Costs.

13. Turning to the matter now before us, following the Respondent's submission of a Bill of Costs for taxation in June 2015, the Applicant did file a Notice of Motion in which it sought to invoke the provisions of Rule 113(2) to oust the Taxing Officer's mandate to consider the said Bill for taxation on account of a pre-existing advocate/ client remuneration agreement. In a supporting affidavit deponed by one Mukami Marete, the Applicant's Director of Operations, the point was made that the Applicant had instructed Ms. Kuria to file and represent it and 2 other parties in *amici* briefs in **Ref. No. 6 of 2014**; there was an agreement to that effect, and the Applicant had paid the full fees payable thereunder.
14. Quite clearly, therefore, the Taxing Officer in the present matter was faced with a challenge to the Bill of Costs presented to her for taxation viz a remuneration agreement that allegedly demarcated the remuneration terms as between the Parties before her in accordance with Rule 113(2) of the Rules. Logically, she had to make a determination as to whether indeed the remuneration agreement before her was in fact such agreement as was envisaged under the said Rule so as to render the Bill of Costs improperly filed. In any event, Rule 114 does not restrict the decisions in respect of which a dissatisfied party may petition this Court to only decisions to do with a taxed Bill of Costs. The Rule explicitly makes reference to 'a decision' of the Taxing Officer. A Taxing Officer faced with such interlocutory applications or preliminary points of law within a Taxation Cause might do well to consider reserving his/ her decision thereon for delivery with the actual taxation of the Bill in the interests of the prudent utilization of judicial resources, which is a tenet of efficient case management. Nonetheless, the circumstances of the present case are that the

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present Reference is properly before the Court, having been duly grounded in a decision of the Taxing Officer. We so hold.

15. We now turn to the second procedural question. We have carefully perused the agreement submitted by the Applicant as purported proof of the remuneration terms agreed upon between itself and its alleged advocate in this matter. We shall return to the merits of the foregoing suppositions later in this Ruling, but for present purposes shall address ourselves to the question of this Court's jurisdiction viz Clause 3.2 of the agreement, which prescribes the Laws of Kenya and the courts of the same country as the governing law and dispute resolution forum in respect thereof. Clause 3.2 reads:

"Governing Law:

This Agreement shall be interpreted according to and shall be governed by the Laws of Kenya. Should any dispute arise in connection with (the) Agreement, including any question in respect of the interpretation, validity, termination or non-termination of this Agreement, the parties agree to submit to the exclusive jurisdiction of the courts of Kenya."

16. The inference that we draw from the above Clause is that the law of Kenya is applicable to the interpretation of the agreement, and the courts of Kenya are the fora with jurisdiction to determine questions to do with any ***disputes that arise in connection with*** the agreement including but not limited to disputes on the interpretation, validity or termination thereof. We take the unreserved view that the matter before us is not 'a dispute arising in connection with' the agreement, but rather one in connection with a filed Bill of Costs presented for taxation. The contents of the agreement are neither in dispute nor do

they require interpretation in the present case. The agreement is merely presented as evidence that there does exist a remuneration agreement between the present Parties, an allegation that is an issue for determination on its merits herein, and to which we revert shortly. Indeed, that evidential import of the agreement for present purposes was explicitly stated by learned Counsel for the Applicant, responding to an inquiry from the Bench. We are, therefore, satisfied that this Court does have jurisdiction to entertain the present Taxation Reference. We so hold.

17. We now turn to the merits of this Taxation Reference. As stated hereinabove, the Applicant essentially challenges the Taxing Officer's decision in so far as it infers an advocate/ client relationship between the Parties; finds the Bill of Costs under review to have been properly filed, and negates the applicability of the remuneration agreement between the Applicant and Ms. Kuria for purposes of Rule 113(2) of the Court's Rules.

18. The Applicant's position in that regard has been variously restated hereinabove but, in a nutshell, is that there was an advocate/ client relationship between itself and Ms. Kuria (who, thereunder, was tasked to 'sub-contract' lead counsel); that professional relationship was governed by the remuneration agreement in issue presently and Ms. Kuria had been fully remunerated for her services thereunder, and therefore, the Bill of Costs filed by the Respondents was improperly before this Court. Conversely, the Respondent contends that the Taxing Officer rightly inferred an advocate / client relationship between the Parties from the Applicant's conduct; the alleged remuneration agreement being invoked by the Applicant was not a remuneration agreement as envisaged in Rule 113(2) of the Court's Rules, and

therefore, in the absence of such a remuneration agreement between the Parties, the Bill of Costs in issue presently was properly before this Court.

19. We shall quickly dispose of the small matter of the agreement. We understood it to be the position of both Parties that there exists no remuneration agreement whatsoever between them. That, however, is as far as the consensus goes. Whereas the Applicant maintains that their advocate/ client relationship was with Ms. Kuria who, under that relationship, was responsible for the appointment and remuneration of lead counsel; the Respondent firm asserts that it was introduced to the Applicant by Ms. Kuria and established a separate advocate/ client relationship with it (Applicant), but the Applicant has since reneged on its remuneration to it.

20. We have carefully considered the agreement in reference herein. There is no mention of Ms. Kuria as the Applicant's advocate; rather she is referred to throughout the agreement as a consultant. There is no mention, either, of the Respondent as a party to the agreement or, indeed, any reference to that firm whatsoever save as the employer of Ms. Kuria. The import of that agreement is that Ms. Kuria was retained as a consultant by the Applicant to identify lead counsel to argue an application for joinder as *amici curiae* and, in the event the application was successful (which it was not), file *amici* briefs on behalf of the Applicant in **Ref. No. 6 of 2014**. Whereas Annexure 1 to the agreement does make reference to the facilitation of the lead counsel's participation as a specific task assigned to the consultant, other documentation on the record indicate that it was, in fact, the Applicant that paid for the appointed counsel's travel and disbursements in

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respect of Application No. 20 of 2014, the application for joinder as *amicus curiae*.

21. We must therefore dispel forthwith the notion by the Applicant that there was an advocate/ client relationship between itself and Ms. Kuria, which supposedly ousted its advocate/ client relationship with the Respondent firm, or that she was responsible for the remuneration of the lead counsel she was tasked to identify. In our view, the agreement simply established a legal consultancy arrangement between Ms. Kuria and the Applicants. Might we add that the specific assignment in that regard was the identification, and not necessarily appointment, of the lead counsel. On the other hand, the documentation attached to the Affidavit in Reply clearly infers an advocate/ client relationship between the Applicant and Messrs Aldrine Were and Colbert Ojiambo. We cannot, therefore, fault the Taxing Officer for arriving at the same conclusion.

22. Having so found, the question is, was there a remuneration agreement between the present Parties as would of necessity render the impugned Bill of Costs improperly filed within the confines of Rule 113(2)? Try as we might, we are unable to find any such agreement on the Court record. It does follow then that the Bill of Costs in issue presently was properly filed for taxation. We do, therefore, uphold the Taxing Officer's decision in that regard.

23. Before we take leave of this Taxation Reference, we are constrained to observe that we have seen documentation in proof of payments effected to Ms. Kuria in accordance with the impugned agreement. In our considered view, those payments would not negate on the

obligation upon a client to recompense an advocate for advocacy services provided as is the case herein.

24. In the result, we would hereby dismiss this Taxation Reference with costs to the Respondent. It is so ordered.

Dated and delivered at Arusha this 5th day of July 2017.



Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



Hon. Justice Fakihi A. Jundu
JUDGE



Hon. Justice Audace Ngiye
JUDGE