



Fedha v Vivian Shibanda t/a Shibanda & Co. Advocates (Miscellaneous Civil Application E025 of 2023) [2024] KEHC 11260 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E025 OF 2023
AC MRIMA, J
SEPTEMBER 27, 2024**

BETWEEN

DORCAS ILAMWENYA FEDHA APPLICANT

AND

VIVIAN SHIBANDA T/A SHIBANDA & CO. ADVOCATES RESPONDENT

RULING

Introduction

1. The application by way of Notice of Motion subject of this Ruling was instituted by Dorcas Ilamwenya Fedha (hereinafter referred to as ‘the Applicant’).
2. It is dated 12th July 2023 and is supported by her two Affidavits deposited to on 12th July 2023 and 10th November 2023 respectively. The application arose as a result of instructions given by the Applicant to the Respondent.
4. The application was heard by way of written submissions, hence, this ruling.

The Application:

5. The application sought the following Orders: -
 - a. That this honourable Court be pleased to strike out the Respondent’s Advocates/Client Bill of Costs dated 18th June 2023 and filed in Court on 26th June 2023.
 - b. That the Respondent be condemned to pay costs of this Application to the Applicant.
6. It was the Applicant’s position that the Respondent was instructed to file an application for revocation of a grant of letters of Administration by her daughter one Janet Fedha, in Kitale High Court Probate and Administration Cause No. 190 of 2007.



7. It was further deposed that the Respondent's fees for the services was agreed at Kshs. 300,000/- (all Inclusive) and that a Fees Agreement was executed between the said Janet Fedha and the Respondent. The Agreement was dated 14th September 2020. Pursuant to the Agreement, the Respondent was paid Kshs. 200,000/- as part-payment.
8. The Applicant posited that, without any lawful justification, the Respondent unprocedural abandoned the Applicant and her daughter even before prosecuting their instructions.
9. The Applicant further stated that the Respondent then filed an Advocate/Client Bill of Costs against Janet Fedha in Kitale High Court Miscellaneous Application No. E003 of 2021 which is sub-judice pending determination of a Reference. The Respondent also filed another Bill of Costs in this matter against the Applicant.
10. The Applicant vehemently deposed that she was covered by her daughter in the instructions to the Applicant and that the Respondent could not legally render two separate bills over the same instructions.
11. It was her case that the Respondent's actions are an afterthought after Janet Fedha resisted the claim of over Kshs. 1,000,000/-.

The Submissions:

12. The Applicant filed written submissions dated 2nd February 2024. It was her case that when the Respondent ceased acting for her she filed Kitale Misc. App No. E003 of 2021 against Janet Fedha seeking to recover a sum of Kshs. 1,327,000/- less Kshs. 200,000/-.
13. The Applicant submitted that the Deputy Registrar taxed the Bill. However, Janet Fedha filed a Reference which is pending determination by this Court.
14. It is the Applicant's case that subsequently, the Respondent filed the instant suit seeking taxation in Kitale Succession Cause No. 190 of 2007.
15. From the foregoing, the Applicant contended that the instructions given were covered in the Fees Agreement of 14th September 2020 and that in the face of the Agreement, the Respondent cannot legally render a separate Bill or seek taxation of her costs.
16. It is the Applicant's position that the right cause to follow was to recover the balance of her fees and not otherwise.
17. The Applicant submitted that pursuant to Sections 45(1) and 46 of the Advocates Act, the Applicant and her daughter lawfully negotiated and entered into the Fees Agreement on Counsel's remuneration and as such, the Advocate could not again subject the issue of fees to taxation.
18. The Applicant submitted further that according to Shiva Enterprises -vs- Mwangi Njenga & Company Advocates (2020) eKLR, it was sufficient to have a memorandum in writing that reveal that they are aimed at fixing the fee payable, not necessarily an 'agreement for payment of legal fees' between an Advocate and a Client.
19. The Applicant submitted that in acting under the instructions of Janet Fedha in High Court Succession Cause No. 190 of 2007, the Advocate represented both her and her daughter.
20. It was her case that the Respondent is estopped from pursuing any other further fees other than what was agreed. The Applicant drew support from Misc. Civil Application No. 730 of 2006 Misc 165 of 2007, D.M Njogu & Co. Advocates -vs- National Bank of Kenya Ltd.



The Respondent's case:

21. The Respondent challenged the application through a Replying Affidavit deposed to by one Vivian Shibanda on 25th August 2023.
22. Counsel deposed that the Applicant instructed the firm of Messrs. V.A Shibanda & Co. Advocates to act for her in Kitale High Court Succession Cause No. 190 of 2007 wherein she was the 2nd Objector.
23. It was her case that she prepared the necessary Affidavits on different occasions to which the Applicant appended her signature but the Applicant is yet to settle legal fees from on or about September 2020.
24. It was her position that the purported agreement annexed concerns Janet Fedha and not the Applicant herein. She deposed that nowhere in the Agreement did she acknowledge that Janet Fedha was responsible for payment of her legal fees.
25. Counsel further deposed that the Affidavits in protest by the Objectors in the Succession Cause No. 190 of 2007 were sworn separately and not jointly as insinuated by the Applicant and the Court records. She urged the Court to find that there was no Fees Agreement between herself and the Applicant and as such the law allows a Bill of Cost to be drawn and presented to Court for assessment.

The Submissions:

26. In its written submissions dated 5th February 2024, the Respondent reiterated her case stating that the Applicant herein instructed her firm to act in Kitale Succession Cause No. 190 of 2007; a fact the Applicant admits and that there was no agreement in so far as legal fees were concerned.
27. The Respondent also stated that there was no agreement between the parties herein that legal fees would be paid jointly by the Applicant and Janet Fedha. It was her position that the firm of V. A. Shibanda & Co. Advocates received instructions from the Applicant as an individual and not through Janet Fedha.
28. The Respondent submitted that the Applicant lives in Kitale where the Respondent took instructions from whereas Janet Fedha resides in Canada and at no point did the two give joint instructions.
29. Based on the above arguments, the Respondent urged the Court dismiss the application with costs.

Analysis:

30. From the application, the response and the parties' submissions, the main issue for determination is whether the Respondent's Bill of Costs be struck out.
31. Preliminarily, there is no doubt that the issue raised in the application can only be dealt with by this Court and not the Taxing officer. [See *Abincha & company Advocates vs Trident Insurance Company Ltd (2013) eKLR* and *Mugambi & Company Advocates v John Okal Ogwayo & Another (2013) eKLR*].
32. There is also no doubt that whereas there was a Fees Agreement between the Respondent Counsel herein and one Janet Fedha [which Agreement was upheld by this Court], there was no such agreement between the parties in this cause.
33. The question which now begs for an answer is whether the Fees Agreement or retainer executed between Janet Fedha and Counsel included the Applicant's instructions in the Succession Cause.
34. According to the Black's Law Dictionary, 9th Edition, the word retainer is defined as follows: -



- i. A client's authorization for a lawyer to act in a case.
 - ii. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.
 - iii. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.
 - iv. An advance payment of fees for work that the lawyer will perform in the future- also termed retaining fee.
35. The Halsbury's Laws of England, 5th Edition, 2009, defines the same word at page 13 para 763 as: -
- The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment.....
36. Section 45 of the [Advocates Act](#) provides for Agreements between Advocates and Clients in the following way;
45. Agreements with respect to remuneration
1. 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. ...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.
37. It is, therefore, apparent that Fees Agreements or Retainers can be lawfully entered into between Counsel and Clients.
38. The Applicant took the position that the Respondent was instructed by her daughter one Janet Fedha, on her daughter's behalf and on her behalf as well, to act for the two in filing an application for revocation of a grant of letters of Administration Kitale High Court Probate and Administration Cause No. 190 of 2007 at an agreed legal fee of Kshs. 300,000/-.
39. On the other hand, the Respondent conceded that she was instructed by the said Janet Fedha and reduced the instructions into an Agreement, but denies that the Agreement covered the instructions by the Applicant herein to her in Kitale High Court Succession Cause No. 190 of 2007.



40. Given the centrality of the Fees Agreement in this matter, it is incumbent to reproduce the said Agreement verbatim and as follows: -

I Janet Khevali Fedha of email address telephone no.do hereby instruct the Firm of V.A Shibanda & Company Advocates to pursue this claim on my own behalf with regard to Kitale High Court Succession Cause No. 190 of 2007.

41. Before answering the eminent question in the matter, suffice to note that Kitale High Court Succession Cause No. 190 of 2007 was a Succession Cause. It seemed that the Applicant and her daughter had been left out of that cause, hence, the instructions to Counsel.

42. As a mother and daughter, each had distinct interests in the estate subject of Kitale High Court Succession Cause No. 190 of 2007. The interests sought to be pursued and protected were not the same. The Applicant rooted her case as a widow to the deceased and the said Janet Fedha's case was that she was a daughter to the deceased. In such cases, the law makes different provisions on inheritance.

43. In the instructions by Janet Fedha to Counsel, it was clearly stated that Janet Fedha was instructing the Advocate to pursue her distinct claim and not otherwise. The allegation that the instructions were joint with those of the Applicant herein can only fail on two grounds.

44. The first ground is that according to Section 62 of the *Evidence Act*, Cap. 80 of the Laws of Kenya, unless within the permissible exceptions, the contents of documents cannot be proved by oral evidence. The Applicant herein has not addressed the Court on the applicability of any of the exceptions to this case. The second ground is that the document speaks for itself in no uncertain terms. It was Janet Fedha instructing Counsel on her own behalf and not otherwise.

45. This Court, therefore, rejects the Applicant's argument that the Fees Agreement between Janet Fedha and Counsel included her instructions to Counsel. Had Janet Fedha intended to have it that way, nothing would have stopped her from making such an express provision in the Agreement.

46. It is, therefore, this Court's finding that the Fees Agreement between Janet Fedha and Counsel did not include the Applicant's herein instructions to Counsel. The Respondent was, hence, in order to file a Bill of Costs against the Applicant for services rendered.

47. In the unique circumstances of this matter, the Taxing Officer will no doubt be guided by the provisions of Rule 62 of the Advocates (Remuneration) Order which provide as follows: -

Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other proceedings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate's bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

48. Deriving from the foregoing discussion, the upshot is that the application lacks merit.

Disposition:

49. As I come to the end of this ruling, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal



investigating the conduct of a Judge in March 2024 thereby mostly being away from the station.
Apologies galore.

50. In the end, the following orders do hereby issue: -

- a. The Notice of Motion dated 12th July 2023 is hereby dismissed.
- b. The Applicant, Dorcas Ilamwenya Fedha, shall bear the costs of the application.
- c. The Bill of Costs herein shall be accordingly taxed.

51. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually and in the presence of: -

Mr. Samba, Counsel for the Original Respondent/Applicant.

Miss. Shibanda, Counsel for the Original Applicant/Respondent.

Chemosop/Duke – Court Assistants.

