



**Gatundu & Co Advocates v Penelly Construction & Engineering Limited  
(Miscellaneous Application E819 of 2021) [2024] KEHC 14716 (KLR)  
(Commercial and Tax) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E819 OF 2021  
FG MUGAMBI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**GATUNDU & CO ADVOCATES ..... PLAINTIFF**

**AND**

**PENELLY CONSTRUCTION & ENGINEERING LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed the Originating Summons (OS) dated 22<sup>nd</sup> September 2021 seeking judgment for legal fees to the tune of Kshs. 39,311,456.68/- plus costs and interest from 3<sup>rd</sup> March 2021 when their services were terminated by the defendant, until payment in full. The OS is supported by the affidavit sworn by Advocate Alex Gatundu on 22<sup>nd</sup> September 2021 and written submissions dated 22<sup>nd</sup> July 2024.
2. The plaintiff's case is that through written instructions of 22<sup>nd</sup> December 2020, the defendant instructed the plaintiff to represent it in an arbitration matter for a claim of Kshs. 373,503,583/- against Rural Electrification Authority (REA). It was agreed that the plaintiff would be entitled to facilitation fees of Kshs. 75,000/- and 8% of the total arbitral award after the hearing and determination of the arbitration.
3. The plaintiff came on record for the defendant on 22<sup>nd</sup> December 2020 through a notice of change of advocates of the same date. It went on to represent the defendant in the claim for Kshs. 373,503,583/- and against REA's counterclaim for Kshs. 50,112,232/-. The plaintiff contends that they prepared extensively and intensively for the matter since the documentation was very voluminous, attended the hearings before the arbitrator severally in the company of the defendant's director and witness, Moses Chelugui.



4. On 3<sup>rd</sup> March 2021, the defendant changed their advocates to Messrs Okundi & Co. Advocates through a notice of change of the same date.
5. From this background, the plaintiff seeks payment of legal fees of Kshs. 39,311,456.68/- being 8% of the total award of Kshs. 34,661,131.64/- inclusive of 16% VAT and Kshs. 4,650,415.04/- being 8% of the amount counterclaimed by REA of Kshs. 50,112,232/- as particularized in its fee note of 4<sup>th</sup> March 2021.
6. The OS is opposed by the defendant through a replying affidavit sworn by its director, Moses Chelugui on 15<sup>th</sup> November 2023 and written submissions dated 23<sup>rd</sup> July 2024. The defendant contends that other than filing its notice of change of advocates and reply to amended defence and counterclaim, the plaintiff did not represent the defendant at the arbitration.
7. The defendant states that they changed representation from the plaintiff to Okundi and Company Advocates because of the plaintiff's persistent unavailability, lack of preparedness and attention towards the defendant. The defendant also denied that the plaintiff prepared the pleadings since the documentation was prepared by Okundi and Company Advocates.
8. It was deposed that the plaintiff attended only one mention before the arbitrator after coming on record, after the firm of Wairimu Mugo ceased acting.
9. The defendant contended that the sum of Kshs. 39,311,456.68/- claimed in the OS is not legally founded and is contrary to public policy; that the claim constitutes unjust enrichment and that the amount claimed is based on the quantum of an award that was yet to be determined by the arbitrator at the time of filing the OS.
10. The defendant denied the claim that it is not in a financial position to pay the fees, citing that it is a going concern with business engagements with other parties and pursuing a claim of Kshs. 373,503,583/-. It also contended that the alleged fee agreement does not amount to an agreement to pay any definite quantifiable sums of money as it amounted to a contract without consideration, nudum pactum, which is unenforceable in any event.

### **Analysis and Determination**

11. I have considered the OS, the supporting and replying affidavit as well as the parties' respective submissions and authorities. The issue for determination is whether the plaintiff has proven its claim and whether it is entitled to the orders sought.
12. In order to support its claim, the plaintiff produced the notice of change of advocates dated 22<sup>nd</sup> December 2020, confirming that they indeed came on record for the defendants. This fact is not contested. There is also evidence of the work done by the plaintiff on behalf of the defendant before they ceased acting. The plaintiff also produced the legal fees agreement of 22<sup>nd</sup> December 2020. The defendant does not dispute that it entered the said agreement.
13. From the said agreement it was agreed between the parties:
  - “(b) That Penelly Construction and Engineering Company shall pay the sum of Kshs. 75,000/- to facilitate the arbitration.
  - (c) That Penelly Construction and Engineering Company Limited shall after the hearing and determination of the arbitration pay 8% of the total Award to the Firm of Advocates.”



14. It is not disputed that the defendant paid the facilitation fees of Kshs. 75,000/-. What is in dispute is whether the plaintiff is entitled to the fees as claimed. The plaintiff relied on the Court of Appeal decision in *Peter Muthoka & Another V Ochieng' & 3 Others*, [2019] eKLR to argue that it was entitled to the amount claimed calculated at 8% of the value of the subject matter because the defendant terminated its services midstream.
15. On the other hand, the defendant argued that as per the fee agreement, the plaintiff was only entitled to 8% of the award as agreed and that it was entitled to payment after the hearing and determination of the award.
16. It is well established that it is not the business of courts to rewrite contracts between parties. Parties are bound by their contracts based on their freedom to negotiate and execute the terms, unless fraud or undue influence are pleaded and proved. See: *Pius Kimaiyo Langat V Co-operative Bank of Kenya Limited*, [2017] KECA 152 (KLR).
17. Section 45(1) of the *Advocates Act* recognizes the enforceability of legal agreements on fees made between clients and advocates. It provides as follows:

“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.”
18. The fee agreement produced by the plaintiff is executed by both parties. This is evidence that there was a meeting of minds as was stated in the Court of Appeal decision in *Makhecha & Company Advocates V Central Bank of Kenya*, [2017] KECA 122 (KLR). It is equally a well crystalized principle that where there exists a valid agreement between advocate and client on fees, the jurisdiction of the taxing officer is ousted as was held in *Majanja Luseno & Co. Advocates V Leo Investments Ltd & Another*, [2017] eKLR.
19. According to the OS and the submissions filed by the plaintiff, the plaintiff appears to peg its claim on the arbitral award and partly on the value of the subject matter in the claim and counterclaim. This is not what parties agreed to.
20. In my view, there is no ambiguity on the agreement for fees. As earlier reproduced, the agreement confirms on the face of it that the plaintiff’s fee would be 8% of the award to be paid after the hearing and determination of the arbitration. The parties did not produce a copy of the award in the OS. The



award dated 8<sup>th</sup> March 2022 was however attached to the plaintiff's application of 20<sup>th</sup> April 2023 and is a Court record. The final orders of the arbitrator read as follows:

- “ 1. The Claimant is awarded the sum of Kshs 70,150,000 with interest at 14% from the date of this award until payment in full.
2. The Respondent is awarded the sum of Kshs 5,421,840,00 with interest at 14% from the date of this award until payment in full.
3. The sums awarded to the Respondent in (2) above shall be deducted and/or set off from the sums awarded to the Claimant in (1) above, and therefore, the amount payable to the Claimant by the Respondent shall be the sum of Kshs 64,728,160.00.” (emphasis added)

### **Disposition**

21. Accordingly, and for the reasons explained, judgment is hereby entered in favour of the plaintiff for the amount of Kshs. 5,178,252.80 (being 8% of the arbitral award of Kshs. 64,728,160/=) plus interest from 3<sup>rd</sup> March 2021 until payment in full. The plaintiff shall also have the costs of the OS.
22. The monies attached in court by dint of the Ruling of 7<sup>th</sup> June 2024 and reviewed on 22<sup>nd</sup> November 2024 shall be released to the defendant/client less the amount awarded to the plaintiff/advocate as stated above.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

