



**Aming'a, Opiyo, Masese & Co. Advocates v Sifa Insurance
Brokers Limited (Miscellaneous Application E1083 of 2020)
[2023] KEHC 17659 (KLR) (Commercial and Tax) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1083 OF 2020**

JWW MONG'ARE, J

MAY 26, 2023

BETWEEN

AMING'A, OPIYO, MASESE & CO. ADVOCATES ADVOCATE

AND

SIFA INSURANCE BROKERS LIMITED CLIENT

JUDGMENT

1. This is the client's notice of motion application brought under section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 51 Rule 1, 3 & 15 of the *Civil Procedure Rules 2010*.
2. The client prayed to have the ex parte order made on October 21, 2021 allowing the advocate's application dated July 6, 2021 set aside and to have it heard de novo and an order to declare that the client has paid the advocate kshs 2,750,000/- and that the client is entitled to the excess payment of kshs 1,936,723.44/-.
3. The application is premised on the grounds that the advocate filed an application dated July 6, 2021 seeking, inter alia, judgment against the client for a sum of kshs 813,276.56/- and interest at the rate of 14% per annum; the application came up for hearing on October 21, 2021 when the same was allowed ex parte.
4. The client pleaded that it was unable to oppose the advocate's application of July 6, 2021 since September 17, 2021 due to a technical hitch in the court's e-filing system which did not allow it to upload pleadings; that it was now exposed as its property could be auctioned at any time leading to irreparable loss; that it had paid the advocate a total of ksh 2,750,000/- which was more than what was claimed by the advocate.



5. Further that on October 21, 2021 when the application came up for hearing, the client's counsel was admitted to the court's virtual session at 9:14 AM just at the time when the court had ruled that the application was allowed and that even though this matter was 4th on the cause list on the said day, the application was heard before the 2nd and 3rd matters in the cause list were mentioned.
6. The client contended that it would be in the interest of fairness and justice that the orders sought herein are granted to forestall execution against it as it is not indebted to the advocate.
7. In opposition, the advocate lodged a replying affidavit sworn on February 8, 2022 by Mr Owino Opiyo.
8. The advocate averred that the applicant herein and Bell Estate Agency Limited (which two companies are owned by the same directors) retained his firm to handle their legal matters and that they had on numerous occasions represented and them; that the advocate's application dated July 6, 2021 was served upon the applicant on July 28, 2021 yet the applicant alleged that it filed grounds of opposition on October 18, 2021, which was an inordinate delay; that when the application dated July 6, 2021 came up for inter partes hearing on October 21, 2021 the court did not follow the sequence of calling the matters as listed in the causelist; that the applicant should have raised the issues of payment or overpayment of legal fees before the taxing master since this court lacks jurisdiction to tax a matter.
9. That the attached receipts by the applicant as evidence of payment of legal fees have nothing to do with the taxation in issue and they do not affect the present taxed amounts; that the applicant has only produced receipts of payments but has not indicated to court which receipt was for payment of which matter since the advocate has represented the applicant in many matters.
10. The advocate denied that the applicant paid them any fees in the matters that gave rise to the taxation and that the applicant has not satisfied the conditions for a grant of stay orders.
11. The applicant filed a supplementary affidavit sworn on March 28, 2022 by Paul Debacko Gogo, one of its directors, in response to the advocate's replying affidavit of February 8, 2022.
12. He averred that the only matter in which the Advocate represented the applicant was in HCC No 417/2017 as consolidated with HCC 439/2017, consequently, any payment which was made to the advocate can only be accounted for on the basis of representation in the two cases and not other matters as alleged by the applicant.
13. Further the respondent averred that in addition to paying the applicant a total of ksh 2,750,000/-, the applicant paid additional sums of money to the advocate therefore the total amount paid to him was kshs 3,850,000/-.
14. Having considered the pleadings and annexures filed in this matter, I find that the issue for determination is whether the ex parte order made on October 21, 2021 allowing the advocate's application dated July 6, 2021 should be set aside.
15. On October 21, 2021, the matter was mentioned virtually before Okwany J whereby only the advocate's representative appeared in court. He prayed to have the application dated July 6, 2021 which sought inter alia for judgment to be entered for the advocate for the sum of Ksh 813,276.56/- (the taxed costs). The court allowed the application as prayed.
16. The applicant now seeks to have the said court order set aside and an opportunity to have the application of July 6, 2021 heard de novo. The applicant claimed that its Advocate was not present at the time when the matter was mentioned before the court and that it had been facing challenges since September 17, 2021 in filing its grounds of opposition to the application of July 6, 2021 due to technical hitches in the Judiciary e-filing platform.



17. On the other hand, the advocate claimed that it served the Applicant with the application dated July 6, 2021 on July 28, 2021 yet the applicant only filed its grounds of opposition on October 18, 2021, which demonstrated inordinate delay.
18. The advocate did not attach an affidavit of service in its replying affidavit to confirm when he served the application. Based on the annexures in the file, it is unclear when the application of July 6, 2021 was filed and when the applicant subsequently filed its grounds of opposition.
19. Be that as it may, I have looked at the applicant's grounds of opposition annexed as "VOK 14" in the applicant's supporting affidavit. The applicant's main ground of opposition to the application was that it had already paid the advocate a total of ksh 2,750,000/- which was more than what was claimed by the Advocate in the application.
20. To my mind, in respect of matters on taxation of advocates fees, this court may only intervene once a dissatisfied party has filed a reference challenging the taxing master's final decision.
21. The Advocate's bill of costs dated September 21, 2020 was taxed on June 24, 2021 to the tune of Ksh 813,276.56/- by the Deputy Registrar. The taxation was in respect of services rendered by the advocate to the applicant in HCC No 439 of 2017. A certificate of taxation was consequently issued on June 29, 2021.
22. Paragraph 11(1) (2) (3) of the *Advocates (Remuneration) Order* states:
 - (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 of taxation 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 the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."
23. In the case of *Kagwimi Kang'ethe & Co Advocates v Nairobi Mamba Village Limited* [2017] eKLR it was held:

"In the premises, the only avenue available for a party who is aggrieved with the decision of a Taxing Officer is to approach the High Court under Paragraph 11 of the Advocates (Remuneration) Order, whether the matter is in the nature of appeal or one that involves an error on the face of the record, as is alleged herein."
24. The applicant claims that it had already paid the advocate a total of Ksh 2,750,000/- which was more than what was claimed by the Advocate. However, it has not approached this court though a reference as stipulated under paragraph 11 of the *Advocates (Remuneration) Order*, therefore this court is not in a position to interfere with the taxing master's decision. The applicant should have raised the issues of payment or overpayment of legal fees before the taxing master since this court lacks jurisdiction to tax a matter.
25. Section 51(2) of the *Advocates Act* states:

"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the



retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

26. Based on the provision above, the court had the authority to allow the application dated July 6, 2021 and enter judgement against the applicant for the sum certified to be due under the certificate of costs.
27. The upshot is that, the application dated October 22, 2021 lacks merit, the same is dismissed with costs awarded to the Advocate.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of

- 1. Ms. Msando holding brief for Prof. Tom Ojienda, SC. for the Client.**
- 2. Ms. Wambua holding brief for Mr. Opiyo for the Advocate.**
- 3. Moses- Court Assistant**

