



**PM Ndungu & Company Advocates v Njau & another (Personal representatives of Eliud Njau Kibutiri) (Miscellaneous Application E635 of 2020) [2023] KEHC 24538 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24538 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E635 OF 2020**

**MN MWANGI, J**

**MAY 26, 2023**

**IN THE MATTER OF ADVOCATES (REMUNERATION) ORDER**

**-AND-**

**IN THE TAXATION OF ADVOCATES/CLIENT BILL OF COSTS**

**BETWEEN**

**PM NDUNGU & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**DAVID KIBUTIRI NJAU ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET WAMBUI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**PERRSONAL REPRESENTATIVES OF ELIUD NJAU KIBUTIRI**

**RULING**

1. This ruling is in respect to a Notice of Motion application dated 2<sup>nd</sup> March, 2022 brought under the provisions of Section 51(2) of the *Advocates Act* (Chapter 16 Laws of Kenya), Rule 7 of the *Advocates Remuneration Order*, Section 3A of the *Civil Procedure Act* and other enabling provisions of the law. The applicant seeks the following orders –
  - i. That judgment be entered for the applicant against the respondent for ksh 829,187.00 being the Advocates taxed and certified costs and adopt as decree (sic) the certificate of costs issued on 17<sup>th</sup> June, 2021;
  - ii. That this Honourable Court be pleased to award interest at the rate of 14% per annum, from 11<sup>th</sup> July, 2020 (being the 30<sup>th</sup> day from the date on which the bill of costs was served upon



the respondent) as provided for at Part 1 paragraph 7 of the [Advocates Remuneration Order](#) and Rules; and

- iii. That costs of this application be awarded to the applicant.
2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on the same day by Patricia Muthoni Ndungu, learned Counsel for the applicant. In opposition thereto, the respondents filed grounds of opposition dated 27<sup>th</sup> July, 2022 raising the following grounds-
- i. That the respondent does not admit that he retained the applicant firm to render legal services in HCCC no 717 of 2001 (OS) (In the matter of *Eliud Njau Kiburiti v James Njoro Kibutiri*);
  - ii. That the respondent admits that the applicant prepared a bill of costs dated and filed on 3<sup>rd</sup> March, 2020, which bill of costs was served upon the respondent on 11<sup>th</sup> June, 2020 but avers that the same was totally incompetent and a violation of the [Advocates Remuneration Order](#), 2017 Schedule 6B which provides for the relevant scale and amounts to be charged when drawing an Advocate-Client bill of costs;
  - iii. That the bill of costs was drawn in bad faith and with the intention of extorting the respondent as all the items listed were grossly overcharged;
  - iv. That the respondent admits that he was represented by the firm of Koceyo & Company Advocates who filed a notice of appointment on 12<sup>th</sup> June, 2020;
  - v. That the Deputy Registrar in proceeding to consider the Advocate-Client bill of costs erred in fact and law in concluding that the respondent was entitled to taxed costs of Kenya Shillings Eight Hundred and Twenty-Nine Thousand, One Hundred and Eighty-Seven (ksh 829,187/-);
  - vi. That the decision of the Taxing Officer was based on an error of principle and amounted to wrongful exercise of discretion;
  - vii. That it would only be proper to dismiss the application immediately since it is evidently misguided, bad in law and meant to delay the course of justice;
  - viii. That the application is hence frivolous, vexatious and an abuse of the Court process and ought to be struck out with costs to the respondent;
  - ix. That accordingly, in the circumstances of this case, I verily believe that this Honourable Court ought not to exercise its discretion to grant the orders sought in the said application as the applicant has not adduced any cogent evidence to demonstrate to this Honourable Court that the applicant's suit has a high probability of success; and
  - x. That in the premises, the respondent denies that the applicant is entitled to any of the reliefs sought in the application or at all.
3. The application was canvassed by way of written submissions. The applicant's submissions and supplementary submissions were filed by the law firm of P.M. Ndungu & Company Advocates on 26<sup>th</sup> July, 2022 and 7<sup>th</sup> September, 2022 respectively, whereas the respondents' submissions were filed by the law firm of Koceyo & Company Advocates on 29<sup>th</sup> July, 2022.
4. Ms. Wanjiku, learned Counsel for the applicant relied on the provisions of Section 51(2) of the [Advocates Act](#), Cap 16 Laws of Kenya and on the case of [Lubulellah & Associates Advocates v N.K. Brothers Limited](#) [2014] eKLR and submitted that this Court has the power to enter judgment on



- taxed costs in favour of an Advocate if the certificate of taxation has not been set aside or altered by a Court. She cited the case of *Amondi & Company Advocates v County Government of Kisumu*, Kisumu Misc. Civil Application no 152 of 2020 and urged this Court to enter judgment for the applicant for ksh 829,187.00 as per the certificate of costs dated 17<sup>th</sup> June, 2021, since the certificate of taxation has neither been altered and/or varied, nor a reference challenging it filed.
5. Ms Wanjiku referred to Part 1 paragraph 7 of the Advocates Remuneration Order and stated that the Advocates bill of costs together with the notice of taxation were served upon the respondent on 11<sup>th</sup> June, 2020. She relied on the case of *Amondi & Company Advocates v County Government of Kisumu* [2021] eKLR and submitted that this Court should award interest at the rate of 14% per annum, from 11<sup>th</sup> July, 2020 being the 30<sup>th</sup> day from the date on which the bill of costs was served upon the respondents.
  6. Ms. Menchi, learned Counsel for the respondent cited the Canadian case of *Reese v Alberta* [1993] 5 A.L.R (3<sup>rd</sup>) 40 cited by the Court in *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR and submitted that, where the value of the subject matter of a suit is known or can be determined from the pleadings, judgment or settlement, the Taxing Officer has no discretion in assessing instruction fees. She stated that the Taxing Officer is expressly allowed to consider any such factors as he or she may decide to impose instruction fees, where the value of the subject matter is uncertain or cannot be determined.
  7. She relied on the case of *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] Civil Appeal 206 of 2006 as cited in *Del Monte Kenya Limited v Kenya National Chamber of Commerce and Industry (KNCCI) Murang'a Chapter & 2 others* [2021] eKLR, where it was held that failure to ascertain the correct subject matter in a suit for the purpose of taxation, and/or failure to ascribe the correct value to the subject matter, is an error of principle, and that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle.
  8. In a rejoinder, Ms. Wanjiku submitted that the allegation that the applicant firm of Advocates was not retained to render legal services in HCCC no 717 of 2001 (OS) is *res judicata* in view of the Taxing Master's ruling dated 29<sup>th</sup> April, 2021. She further submitted that the grounds of opposition herein do not contain a single statute, but contain matters of fact without supporting evidence. She relied on the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, where the Court cited with authority the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR and submitted that failure to respond to the instant application by way of a replying affidavit rendered the averments in the application uncontroverted, unchallenged and unopposed.

### **Analysis and Determination**

9. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the respondents and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether the application is properly defended; and
  - ii. If the instant application is merited.
10. In the affidavit filed by the applicant, it deposed that the respondents retained the applicant firm of Advocates to render legal services in HCCC no 717 of 2001 (OS), (In the matter of *Eliud Njau Kiburiti v James Njoro Kiburiti*) which retainer is not disputed. That thereafter, the applicant prepared a bill of costs dated 3<sup>rd</sup> March, 2020 which was filed on the same day. That the said bill of costs was served



on the respondents on 11<sup>th</sup> June, 2020. The applicant stated that the respondents were represented by the law firm of Koceyo & Company Advocates who filed a notice of appointment on 12<sup>th</sup> June, 2020.

11. The applicant averred that the bill of costs was taxed and certified at ksh 829,187.00 and a Certificate of Taxation issued on 29<sup>th</sup> April, 2021. It further averred that the said Certificate has not been set aside or altered, and that a reference has not been filed, and as such, the amount of costs therein is conclusive.

#### **Whether the application is properly defended.**

12. In opposition to the instant application, the respondents did not file a replying affidavit to challenge and/or controvert the sworn averments by the applicant. They instead only filed grounds of opposition dated 27<sup>th</sup> July, 2022. It is trite that grounds of opposition are general averments and cannot amount to proper or valid denial of allegations made on oath. In the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another (supra)*, the Court when addressing a claim where the respondent had failed to file a replying affidavit held as hereunder -

“As stated earlier the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (See *Mereka & Co Advocates v Unesco Co Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 others v Hon Attorney General* Constitution Petition no 8 of 2014 and *Eliud Nyauma Omwoyo & 2 others v Kenyatta University*). The respondents have failed to refute specifically the allegations in the petitioner’s sworn affidavit in support. Failure to file a replying affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”

13. From the above decision, it is evident that failure to file a replying affidavit means that the averments contained in the supporting affidavit filed by the applicant herein are deemed to have been admitted by the respondents. Bearing in mind that the respondents herein only filed grounds of opposition to the instant application, it is this Court’s finding that the averments contained in the affidavit in support of the application herein were not rebutted, thus the application stands unopposed.
14. The above notwithstanding, this Court still has a duty to consider the application herein on merits.

#### **If the instant application is merited.**

15. The application herein has been brought pursuant to the provisions of Section 51(2) of the *Advocates Act* which states as hereunder –

“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.”

16. The above provisions give this Court the jurisdiction to enter judgment as long as the bill of Costs has been taxed and the Taxing Master has issued a Certificate of Costs, and the retainer is not disputed. In



Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co. Ltd [2021] eKLR, the Court in allowing an application similar to this one held that –

“The procedure provided in section 51(2) of the Advocates Act aids expeditious disposal of cases relating to recovery of advocate-client costs as long as: (1) the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs; (2) the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and (3) there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate. The application may be commenced by way of a Notice of Motion which in law is potent tool for originating a suit.”

17. In the matter before this Court, it is not disputed that the applicant filed a bill of costs dated 3<sup>rd</sup> March, 2020 which was taxed at ksh 829,187.00 vide a ruling delivered on 29<sup>th</sup> April, 2021. The Deputy Registrar issued a Certificate of Costs dated 17<sup>th</sup> June, 2021 to that effect. As at the time this Court was writing this ruling, the respondents had neither filed a reference against the ruling by the Taxing Master nor had the said ruling been altered, varied and/or set aside.
18. The respondents in their grounds of opposition stated that they do not admit to having retained the applicant firm of Advocates to render legal services in HCCC no 717 of 2001 (OS) (In the matter of *Eliud Njau Kiburiti v James Njoro Kibutiri*). The applicant on the other hand submitted that the allegation that the applicant firm was not retained by the respondents is res judicata in view of the Taxing Master’s ruling dated 29<sup>th</sup> April, 2021. In view of the above, it is evident that retainer is disputed.
19. In Owino Okeyo & Company Advocates v Pelican Engineering & Construction Co. Ltd [2006] eKLR the Court in defining what a retainer is stated as follows-

“I agree with my learned brothers Ringera J as he then was and Waweru J with their definitions of what a retainer is. As cited above, Ringera J took the word to mean “employment” “engagement” or “instruction” in *Hezekiah Ogao Abunya v Kuguru Food Complex Ltd (Supra)*. Waweru J on his part in *A.N. Ndambiri & Company Advocates v Mwea Rice Growers Multi-Purpose Cooperative Limited (Supra)* defined retainer as used in Section 51(2) of the Advocates Act as “instructions to act in the matter in which the costs have been taxed.”

20. On perusal of the record, I find that the respondents did not dispute the issue of retainer before the Taxing Master, thus the allegation that the applicant was not retained by the respondents cannot be res judicata since the issue did not come up before the Taxing Master for consideration and/or determination. In their written submissions in opposition to the bill of costs dated 3<sup>rd</sup> March, 2020, the respondents submitted as hereunder-

“...the bill as drawn does not constitute any item of a complex nature neither does it constitute any complicated procedure that would warrant such instruction fees, Additionally, the fact that the applicant was not the respondents’ initial Advocates since he took up the matter after the bulk of the work had already been done renders the amount quoted unreasonable...”

21. The Taxing Master at page 1 paragraph 1 of her ruling held that the suit was instituted by way of Originating Summons by the applicant who was instructed by the respondent (sic). In light of the foregoing, and the extract reproduced above from the respondents’ submissions before the Taxing Master, it is clear that the applicant was instructed by the respondents. It is therefore apparent that the applicant was properly retained by the respondents.



22. This Court is satisfied that all the conditions set out under the provisions of Section 51(2) of the Advocates Act have been satisfied. I therefore enter judgment for the applicant as against the respondents for the sum of Kenya Shillings Eight Hundred and Twenty-Nine Thousand, One Hundred and Eighty-Seven (ksh 829,187.00).
23. On the issue of interest, Regulation 7 of the Advocates (Remuneration) Order provides as follows –
- “An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”
24. It is evident that in order for an Advocate to charge interest, a period of one month must have elapsed after the bill was delivered to the client, and the claim for interest has to be raised before the amount of the bill is paid or tendered in full. It is not disputed that the respondents were served with the bill of costs on 11<sup>th</sup> June, 2020. The claim for payment of interest at fourteen per cent (14%) per annum has been raised in the present application but the respondents are yet to pay the applicant either in part or in full, the amount taxed by the Taxing Master in her ruling delivered on 29<sup>th</sup> April, 2021. This Court therefore finds and holds that the claim of interest at fourteen percent (14%) per annum is payable.
25. In the result, the application dated 2<sup>nd</sup> March, 2022 is merited and the same is allowed in the following terms –
- i. Judgment is hereby entered for the applicant against the respondents for the sum of Kenya Shillings Eight Hundred and Twenty-Nine Thousand, One Hundred and Eighty-Seven (ksh 829,187.00) as per the Certificate of Costs dated 17<sup>th</sup> June, 2021;
  - ii. The said amount shall accrue interest at the rate of fourteen per cent (14%) per annum as from 11<sup>th</sup> July, 2020.
  - iii. Costs of the application shall be borne by the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms P.M Ndungu for the Advocate/applicant

Ms C. Nyakundi h/b for Mr. Koceyo for the clients/respondents

Ms B. Wokabi – Court Assistant.

