



**Gazemba Wekesa & Co Advocates v J&K Investment Kenya  
Limited (Miscellaneous Commercial Application E377 of 2023)  
[2023] KEHC 24178 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS COMMERCIAL APPLICATION E377 OF 2023**

**DAS MAJANJA, J  
OCTOBER 27, 2023**

**BETWEEN**

**GAZEMBA WEKESA & CO ADVOCATES ..... APPLICANT**

**AND**

**J&K INVESTMENT KENYA LIMITED ..... RESPONDENT**

**RULING**

**Introduction and Background**

1. On June 28, 2022 the parties entered into a Remuneration Agreement where the Client agreed to pay the Advocates legal fees amounting to Kshs. 42,000,000.00 in respect of the Advocates representing the Client in an arbitration matter between the Client and the National Water Harvesting & Storage Authority (NWHSA) (“the Remuneration Agreement”). Under the Remuneration Agreement, the Client was to pay Kshs. 8,000,000.00 upon publishing of the award and the balance of Kshs. 34,000,000.00 upon payment by NWHSA. The arbitral tribunal published the award dated August 25, 2022 where it awarded the Client Kshs. 394,440,203.93. On August 24, 2022, the Client paid the Advocates Kshs. 6,500,000.00 being part of the legal fees due to them.
2. The advocates have filed the notice of motion dated 15.05.2023 under section 45(1) of the *Advocates Act* (Chapter 16 of the Laws of Kenya) seeking judgment against the Client for Kshs. 35,500,000.00 being the balance of the legal fees arising from the Remuneration Agreement together with interest at 14% from the date of judgment until payment in full. The application is grounded on the supporting and further affidavits sworn on May 15, 2023 and June 7, 2023 respectively by their advocate, Janet Nasimiyu Wekesa. It is opposed by the Client through the replying affidavit of its Managing Director, Li Shunkang, sworn on May 29, 2023.



3. The Client has also filed the Chamber Summons dated May 29, 2023 made under section 45(2) and (2A) of the *Advocates Act* and seeks to set aside the Remuneration Agreement. The application is supported by the grounds on its face and the supporting affidavit of Li Shunkang sworn on May 29, 2023. It is opposed by the Advocates through the Grounds of Opposition dated June 12, 2023 and the replying affidavit of Janet Nasimiyu Wekesa sworn on June 13, 2023.

#### **The Advocates' application for judgment**

4. The Advocates seek judgment based on the Remuneration Agreement which they stated is clear, unequivocal and has not been set aside. That despite receiving a demand for payment, the Respondent has failed to pay their fees hence they are entitled to judgment for Kshs. 35,500,000.00 which is the outstanding balance from the principal under the retainer.

#### **The Client's Reply and application to set aside the Remuneration Agreement**

5. The Client opposes the Advocates' application on the ground that the Advocates' application is based on misrepresentation of relevant facts and/or concealment of material facts. That there exists a contract between the parties which addressed, inter alia, the services to be rendered by the Advocates, the quantum of fees and the time for settlement.
6. According to the Client, prior to institution of the claim before the arbitral tribunal, it had appointed a consortium of consultants under the stewardship of Kensetsu Kaihatsu Consulting Engineers Limited ("KKCEL") an architectural and engineering consulting firm in accordance with a consultancy agreement dated January 18, 2021 ("the Agreement"). Under the Agreement, KKCEL was to put together a team to represent the Client at the arbitration proceedings and it is on this basis that KKCEL deputed Eng. Sirmoi Wekesa as claims consultant and Mr. Frank Walukwe, an advocate working for the Advocates' firm, as the Lead Counsel.
7. The Client states that it held a meeting on December 24, 2021 with KKCEL and thereafter executed Addendum No. 2 dated April 5, 2022 ("the Addendum") and that at Clause 4 therein, the relevant services listed include legal representation and provision of legal services in the claim against NWHSA. Under Addendum, the list of specialists includes a Contract Law Expert and a Common Law Expert. The Client's deponent states that he signed the Agreement and Addendum on behalf of the Client whilst Eng. Dr. John Ngaya Mukabi, KKCEL Chief Executive Officer, signed on behalf of KKCEL. That under the agreements, KKCEL would deal with the technical aspects whereas the Advocates would deal with the legal matters.
8. The Client avers that the Advocates' application has been brought to circumvent the express provisions of the Agreement which they acknowledged and benefited from. That all the communications regarding the arbitration were sent to the Client by Eng. Sirmoi Wekesa including communication from the Advocates. The Client contends that there should be no dispute that the Advocates' services were subsumed in the list of services in Agreement and the Addendum hence the total fee payable to all the consultants, including the Advocates through KKCEL was in the sum computed at 5% of the Award. Further, that there at all material times it is the Advocates who provided legal service to the Client under the Agreement and Addendum. The Client further contends that the legal fees due to the Advocates were part of payment envisaged at Clause 2 of the Agreement. Thus the total fees payable to the consulting team including the Advocates would be computed at 5% of the Award amount of Kshs. 397,440,203.93 being Kshs. 19,872,010.20 less all and/or any payments that would have been made to the consulting team.



9. The Client avers that the Remuneration Agreement is invalid, non-binding and unenforceable and was procured by coercion, undue influence and threats issued to Li Shunkang to execute it. Li Shunkang Li states that he did not look at the contents of the Remuneration Agreement and verily believed that he was signing a different letter presented to him by Eng. Sirmoi and that Eng. Sirmoi represented to him that if he did not sign the same, the Advocates would withdraw its services and the arbitration process would drag on for long.
10. The Client rejects the Remuneration Agreement as the basis of the Advocates' as the total legal fees to be paid had changed from Kshs. 30 million to Kshs. 42 million, that the amount in figures is Kshs. 42,000,000.00 and that in words is Kenya Shillings Thirty Million, that the balance to paid upon payment by the Client in the letter changed from Kshs.22 million to Kshs.34 million and the Client noted that the amount in figures is the sum of Kshs. 34,000,000.00 while the amount in words is Kenya Shillings Twenty-Two Million Only same as the amount contained in a previous letter he received from Eng. Sirmoi by WhatsApp. In any case, the Client depones that the amount sought in the sum of Kshs.35 million is too high, unconscionable and not supported by the provisions of the *Advocates (Remuneration) Order*.
11. The Client argues that the court lacks jurisdiction on the ground that Clause 10 of the Agreement provides that all disputes in connection with the Agreement would be referred to arbitration. It further states that the Advocates are non-suited against the Client and/or at the very least the dispute ought to have been brought by KKCEL.
12. The Client claims that the Advocates have taken issue with the Client changing advocates to represent it at the High Court in proceedings where NWHSA has sought to set aside the Award and that KKCEL have actually stated as much in their letter dated 05.05.2023 addressed to the Client. That even as the Advocates have filed the current application seeking Kshs.35 million, another law firm, related with the Advocates known as J.W. Franks Advocates LLP has issued a Letter of Demand seeking payments of legal fees on account of the same subject matter notwithstanding that the Client has never at any point instructed that firm.
13. The Client urges the court to dismiss the application and find in its favour as it is a victim of a maze of facts that require a full hearing in a different forum where the Advocates and/or its principal KKCEL may seek redress to enforce the Agreement and the Addendum. It urges the court to interrogate, investigate and determine the propriety of the Remuneration Agreement and find that it has demonstrated that the Remuneration Agreement was procured fraudulently and ought to be set aside ex debito justitiae.

### **The Advocates' Response**

14. The Advocates oppose the application seeking to set aside the Remuneration Agreement. As regards representation they state that with effect from 01.01.2023, the firms of Gazemba Wekesa & Co., Advocates and Ochieng' Walukwe & Associates Advocates merged to form a new entity, J.W & Frank Advocates, LLP. That as a result of the merger, the new entity was entitled to demand the debts on behalf of its previous respective firms.
15. The Advocates assert that the Remuneration Agreement is the only agreement for legal fees and was reached after meetings between the parties in that regard. That thereafter the Client drafted a fee note for Kshs. 30,000,000.00 but an amendment was effected thereafter as a result of a further meeting. The Advocates deny that the agreed fee is too high or unconscionable considering the subject value of the claim was in excess of Kshs. 1.4 billion. The Advocates state that the existence of an error on the part of



the Client's letter dated 28.06.2022, specifically on the amount in words does not in any way invalidate the legal fees as communicated in their fee note dated 24.06.2022.

16. The Advocates claim they are not aware of any agreement between the Client and KKCEL and are not party to it. That KKCEL could not purport to contract on its behalf. They point out that the parties entered into the Remuneration Agreement during the arbitration proceedings and way before the Client appointed its new advocates on record. The Advocates further state that as at January 18, 2021, when KKCEL and the Client entered into the Agreement, a dispute had not arisen to the point of invoking the arbitration proceedings and the Advocates at that time had not been given instructions hence the discussions on legal fees could not have arisen.
17. The Advocates affirm that the Client issued instructions to them on December 9, 2021 hence it cannot argue that KKCEL engaged them as it would have been the one to issue instructions and not the Client. That in any case, the communications of the arbitral proceedings were directly addressed to the Client as it was the instructing client and that at no point did the Advocates ever address a non-party as urged by the Client.
18. The Advocates state that the Client has not denied the fact of settlement of the partial fees following its commitment in Remuneration Agreement. That any claim and/or dispute envisaged in the Agreement can only be dealt with in another forum between the parties thereto and cannot be for consideration before this court as the Advocates were parties to the Agreement.
19. According to the Advocates, the Client's application to set aside the Remuneration Agreement is an afterthought prompted by the application for judgment. They reiterate that KKCEL, being an engineering firm, lacked the mandate enter into a remuneration agreement on behalf of the Advocates. The Advocates maintain that the Client instructed them through its letter dated 09.12.2021 executed by its Managing Director committing to pay the legal fees enumerated therein. Further, that there was part performance by way of payment of Kshs. 6,500,000.00 thus the Remuneration Agreement was valid and binding as it met the threshold required under the applicable law.
20. The Advocates state that the fraud has been alleged to be performed by a person who is not a party to this suit and not associated with the Advocates and that in any case, all the correspondence with respect to the arbitral proceedings were directly addressed to the Client by virtue of it being the instructing party and therefore at no point was a non-party addressed as purported.
21. The Advocates reject the allegation that the Remuneration Agreement is harsh, unconscionable, exorbitant and unreasonable as it is not supported by any evidence. They state that in a meeting regarding legal fees held between the parties in June, 2022 or thereabouts, it was agreed that the legal fees be drawn with consideration of future eventualities, part payment of fees was made emanating from the said meeting and subsequent communication that the Advocates' fee is Kshs. 42,000,000.00, the fees chargeable was in consideration of the subject value of the claim which was in excess of Kshs. 1.4 billion and that in addition to the award of Kshs. 397,440,203.93, the Advocates dully prosecuted an application for an additional award, which additional award is pending collection.
22. In view of the foregoing, it is the Advocates' averment that the Client has not met the requirements for setting aside the Remuneration Agreement as provided under section 45(2) the *Advocates Act*. They urge the court to dismiss the application for being an abuse of the court process.

### **Analysis and Determination**

23. From the parties' arguments outline above, the court is called upon to determine whether to set aside or enforce the Remuneration Agreement. I propose to first deal with the Client's application seeking to



set aside the Remuneration Agreement as this will determine whether same Remuneration Agreement will be enforced.

24. The Client does not deny the Remuneration Agreement. It however contends that it was entered into as a result of coercion, fraud, threats and undue influence. Having considered the grounds and evidence proffered by the Client, I am unable to agree that these allegations have been substantiated.
25. Contrary to the Client's claim, there is no evidence of the nature and circumstances of the threats alleged issued to the Client's director, Li Shunkang by Eng. Sirmoi forcing him to execute the Remuneration Agreement. In any case and as stated by the Advocates, Eng. Sirmoi is not part of these proceedings, is not an agent of the Advocates and has nothing to do with the Advocates. There is also no evidence that Eng. Sirmoi misled or hoodwinked the Li Shankang into executing the Remuneration Agreement as opposed to a different document he thought he was signing. Even if this was the case, Eng. Sirmoi is not part of the Advocates' firm and thus the Advocates could not be accused of misleading the Client. I also reject the Client's contention that it executed the Remuneration Agreement without going through its contents. The Client knew the contents of the Remuneration Agreement and this is evidenced by the fact that it made part payment without any complaint and which payment which was to be done when the Award was published despite the Remuneration Agreement providing otherwise. The Client paid the Advocates even before the Award was published. This ground by the Client thus fails.
26. The Client also urges that the Remuneration Agreement is harsh and unconscionable, exorbitant, unreasonable and contrary to provisions of the *Advocates Act* as the Kshs. 42 million fee sought on account of services rendered leading to a Final Award of Kshs. 397,440,203.93 contravenes the scale of fees set out in the *Advocates (Remuneration) Order*. As stated by the Advocates, the Client does not demonstrate how the agreed legal fees in the remuneration agreement contravenes the scale fees set out in the *Advocates (Remuneration) Order*. Further, it does not state what the appropriate or reasonable fee thereunder ought to be. In any case, I therefore find nothing harsh and unconscionable, exorbitant or unreasonable in the fee of Kshs. 42,000,000.00 when the subject matter being prosecuted in the arbitration was over Kshs. 1 billion. This ground by the Client also fails.
27. It is clear that the Client has failed to surmount its burden of proving that the court ought to set aside the Remuneration Agreement. The Remuneration Agreement meets the conditions of such an agreement as set out in section 45(1) of the *Advocates Act* as it fixed the amount of the Advocates' remuneration for the arbitration proceedings, it was in writing and was signed by the Client through its agent duly authorized agent in that behalf. I therefore find and hold that the Remuneration Agreement is valid and binding on the parties.
28. My finding above now brings me to the Advocates' application seeking to enforce the Remuneration Agreement. Since it is valid and binding on the parties, there is no reason why it should not be enforced on its own terms. The Client has already performed part of it by paying Kshs. 6,500,000.00 and what remains is that it honours the payment of the final balance which is what the Advocates now seek as a judgment. I therefore find and hold that the Advocates are entitled to the balance of the Kshs. 35,500,000.00 for which I enter judgment.

## Disposition

29. For the reasons I have set out above, I now make the following dispositive orders:
  - a. The respondent's application dated May 29, 2023 is dismissed



- b. The applicant's application dated May 15, 2023 is allowed and judgment be and is hereby entered for the Applicant against the Respondent for Kshs. 35,500,000.00 being the balance of the legal fees arising from the Remuneration Agreement dated June 28, 2022.
- c. The applicant is also awarded interest at 12% per annum on the aforementioned sum from the date of filing suit until payment in full.
- d. The respondent shall pay the applicants costs for both applications assessed at Kshs. 150,000.00 only.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2023.**

**A. MABEYA**

**JUDGE**

