



REPUBLIC OF KENYA



**Maingi Musyimi & Associates v Kamotho (Miscellaneous Application E628 of 2023)  
[2023] KEHC 26100 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E628 OF 2023  
FG MUGAMBI, J  
NOVEMBER 24, 2023**

**BETWEEN**

**MAINGI MUSYIMI & ASSOCIATES ..... ADVOCATE**

**AND**

**MARIANNE NYOKABI KAMOTHO ..... CLIENT**

**RULING**

**Background**

**The application of 3<sup>rd</sup> March 2023**

1. This ruling determines two applications. The first is dated 3<sup>rd</sup> March 2023, filed by the client. It is a reference in relation to the bill of costs dated 1<sup>st</sup> September, 2022 and seeks to set aside the ruling on taxation delivered on 23<sup>rd</sup> February 2023 by Hon. Mary N. Osoro, Deputy Registrar in Misc. App. No. E628 of 2022. The application is brought under the provisions of paragraph 11 of the Advocates Remuneration Order (ARO), sections 1A, 1B, 3A and 79(G) of the *Civil Procedure Act* and supported by the affidavit and further affidavit of Marianne Nyokabi Kamotho, the client.
2. The client states that she was not served with the documents in support of the bill of costs to enable her prepare her response in time. She takes issue with the taxation of item 1 of the advocates bill of costs for the reasons that the same was not supported by evidence and was manifestly excessive.
3. She avers that the taxing master failed to consider that the advocate had acknowledged receipt of Kshs. 80,000/= as disbursement to cater for filling of the suit which amount should have been considered. Finally, it was her case that there was a mutual agreement between the parties that the advocate was to be paid the sum of Kshs. 1,500,000/= for three files they were handling on her behalf, including CMCC No. E6834 OF 2020.



4. The application was opposed vide a replying affidavit sworn by Paul Maingi Musyimi, the advocate, on 29<sup>th</sup> March 2023. The advocate denied that there was a retainer or agreement for fees between the parties and insisted that no proof had been adduced in support of the same. He took issue with the electronic evidence produced by the client stating that the same had not been verified as contemplated in section 55 (8) and section 106 of the Evidence Act. In any case, the advocate argued that the text messages did not prove that there was a meeting of minds between the parties.
5. The advocate acknowledged having represented the client in three separate suits but affirms that the payment of Kshs. 80,000/= was paid pursuant to a legal services agreement dated 9<sup>th</sup> July 2020 between the advocate and Kenchair Holdings Limited where the client is the sole director-shareholder in Thika ELC No. 1276 of 2013 & Thika ELC 413 of 2013 (consolidated).

### **The application of 16<sup>th</sup> March 2023**

6. The second application, filed by the advocate, was brought under the provisions of section 5(2) of the Advocates Act caps 16 of the Laws of Kenya and Paragraphs 4 and 7 of the Advocates Remuneration Order 2014. It seeks an order that judgement be entered in favour of the advocate, Maingi Musyimi Associates against the client, Marianne Nyokabi Kamotho in the sum of Kshs.3,215,523/= together with interest thereon at 14% per annum from 12<sup>th</sup> October 2022 (30 days from date of service of Bill of Costs) until payment in full.
7. The application was supported by the affidavit and further affidavit sworn by the advocate. The application was also opposed vide a replying affidavit dated 4<sup>th</sup> April 2023 sworn by the client. She confirmed that the advocate represented her in CMCC NO. E6834 OF 2020. She denied not having paid legal fees and states that she was not served with a ruling notice by the advocate for the taxation of the bill of costs. The client reiterated the grounds in her application of 3<sup>rd</sup> March 2023.
8. Pursuant to the directions of this Court the parties canvassed both applications by way of consolidated written submissions. The client's submissions are dated May 26, 2023 and the advocates submissions are dated June 1, 2023.

### **Analysis**

9. I have carefully considered the pleadings, evidence and rival submissions filed by the parties before this Court. In doing so, I am well aware of the limitations of this Court in an appeal of this nature. The generally laid down principle is that this Court cannot interfere with the decision of the taxing master unless there is an error of principle, or unless it finds that the fee awarded was manifestly excessive or high to warrant such interference. (For this see: *First American Bank of Kenya v Shah & Others*, [2002] 1 E.A and *Joreth Ltd v Kigano & Associates*, Civil Appeal No.66 of 1999 [2002] 1 EA 92, [2002] eKLR amongst others).
10. That said, it is my view that the two applications raise the following issues for determination:
  - i. Whether there was proper service of the pleadings and ruling notice on the client by the advocate with respect to Misc. App. No. E628 of 2022.
  - ii. Whether there was a mutual agreement between parties on the legal fees payable?
  - iii. Whether the taxing master erred in not applying the correct value of the subject matter in taxing the bill of costs.



- iv. Whether the taxing master erred in not considering the part payment of legal fees of Kshs 80,000/=.

**Whether there was proper service of the pleadings and ruling notice on the client by the advocate with respect to Misc. App. No. E628 of 2022.**

11. The client avers that there was a breach of the provisions of order 21 rule 9A of the Civil Procedure (Amendment) Rules, in that she was not properly served with a breakdown of the costs as required. Order 21 rule 9A reads as follows:

“A party claiming costs at a Magistrates Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought.”

12. It is clear from the evidence before the court that the client was served with the Advocate & Client Bill of Costs providing the breakdown of costs sought by the advocate, via an email dated September 12, 2022. The client was also served with a hearing notice on the same date, a ruling notice on February 1, 2023 and the certificate of taxation on March 7, 2023. The email address to which all these pleadings were served was nyoxiii@gmail.com.
13. The taxing master additionally noted in her ruling that the bill of costs was duly filed and the client was absent despite the date having been taken by consent. The client does not deny service of the certificate of taxation yet the documents were all served using the same email address. I am therefore convinced that there was proper service on the client as required by law and that the averments otherwise by the client are untenable.

**Was there a mutual agreement between parties on the legal fees payable?**

14. The evidence before the court confirms that there was a Legal Services Agreement dated July 9, 2020 between Kencair Holdings Limited and the advocate over payment of legal fees of Kshs. 5,000,000/= exclusive of VAT. Clause 2 of the said agreement was very clear that the services in respect of which the agreement relates was Nairobi ELC 1276 of 2013. (Described as the primary brief). Clause 2.2. further provided that the agreement would not cover legal fees that were not ancillary to the primary brief. It goes without saying that this agreement did not govern the fees in relation to CMCC No. E6834 of 2020 from which these proceedings arise.
15. Having so found, the question then is whether there was an agreement for the legal fees as evidenced by the text message conversation between the parties. Besides concurring with the advocate that the messages are not supported by a certificate as required under the Evidence Act and that the text messages do not reflect a meeting of the minds of the parties therein, the Advocates Act is also very clear on the form of a retainer agreement.
16. Section 45 of the Advocates Act provides as follows:

- “(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) 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."

17. The Courts have also pronounced themselves on the threshold required to prove the existence of a retainer agreement under section 45 of the Act. The Court of Appeal held in the case of *Omulele & Tollo Advocates V Mount Holdings Limited*, [2016] eKLR that for the retainer agreement to exist, the terms of the agreement must have been reduced into writing, which was not the case here.
18. In the instant case, there was a text message purportedly sent proposing a figure in terms of legal fees. There is no indication that the text was agreed to. This would appear to me to be at most an offer that was not acceded to. Borrowing from the observation by the Court of Appeal, there being no written agreement regarding the retention and payment of the appellant's fees by the respondent, it follows that there was no retainer agreement as envisioned by section 45 of the *Advocates Act*.
19. It is therefore my finding that the taxing master applied her mind correctly by proceeding to tax the bill of costs as she did under the ARO.

#### **On instruction fees**

20. There is a plethora of authorities including the Court of Appeal decision in *Joreth Limited V Kigano & Associates*, [2002] eKLR and *Peter Muthoka & Another V Ochieng & 3 Others*, [2019] eKLR, both of which cement the fact that instruction fees are based on the value of the subject matter. The value of the subject matter should be ascertained from the pleadings, judgment or any settlement, depending on the stage at which the fees are being taxed.
21. The client contends that the taxing master did not apply the correct value of subject matter in taxing the bill of costs. The client avers that the instruction fees of Kshs, 3,080,000/= in *Milimani Commercial Court CMCC E6834 of 2020* based on the value of the subject matter as Kshs. 80,000,000/= was speculative as the main prayer in the plaint was that of removal of the client from their home. Further that vide a ruling delivered on and dated the 21st May, 2021, the Honourable Court proceeded to hold that 'there was no valuation report annexed as provision on the value of the property'.
22. According to the advocate the value of the subject matter is clearly discernible from the pleadings filed in *Milimani CMCC E6834 OF 2020*. The advocate relies on the valuation report procured by the client herself and annexed to her sworn replying affidavit dated 24<sup>th</sup> February 2021 where she acknowledges, supported by a valuation report, that the value of the subject matter is Kshs. 80,000,000/=.
23. While the client has provided a copy of the ruling dated 21<sup>st</sup> May 2021 whereby the Learned Magistrate states that there was no valuation report annexed to the application, the client does not deny having sworn the replying affidavit of 24<sup>th</sup> February 2021. The client further does not deny knowledge of the valuation report annexed to the affidavit. While it would seem to have been an omission on the part of the Learned Magistrate, in the absence of any other pleadings contradicting the evidence on record



in support of the submissions by the advocate, I find that the taxing master was right in basing the instruction fees on Kshs. 80,000,000/=.

**The part payment of legal fees of Kshs 80,000/=**

24. As previously stated, the client has not produced any evidence to prove payment of Kshs. 80,000/= towards settling the fees in CMCC E6834 of 2020. As such, this ground of argument fails.

**Determination**

- i. For all the reasons that I have stated, I find no reason to interfere with the decision of the taxing master with the result that the reference dated 3<sup>rd</sup> March 2023 is dismissed.
- ii. For the avoidance of doubt the application dated 16<sup>th</sup> March 2023 is allowed as prayed.
- iii. Consequently, judgment be and is hereby entered in favour of the advocate, Maingi Musyimi Associates against the client, Marianne Nyokabi Kamotho in the sum of Kshs.3,215,523/= together with interest thereon at 14% per annum from 12<sup>th</sup> October 2022 (30 days from date of service of Bill of Costs) until payment in full.
- iv. The advocate shall have the costs of the applications.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2023.**

**F. MUGAMBI**

**JUDGE**

