



P. I Samba & Company Advocates v Buzeki Enterprises Limited (Miscellaneous Application E1056 of 2020) [2022] KEHC 12487 (KLR) (Commercial and Tax) (4 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12487 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1056 OF 2020
DO CHEPKWONY, J
AUGUST 4, 2022
IN THE MATTER OF THE ADVOCATES ACT
AND
IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014
(SCHEDULE 5)
AND
IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT
BETWEEN
P. I SAMBA & COMPANY ADVOCATES ADVOCATE
AND
BUZEKI ENTERPRISES LIMITED CLIENT

RULING

1. Before this court are two applications coming up for ruling simultaneously. The first application is by way of a Notice of Motion application dated 12th August, 2021 seeking a Judgment to be entered in favour of the Applicant/Advocate in terms of the Certificate of Taxation dated 6th August, 2021. The application is expressed under Section 51(2) *Advocates Act*, Paragraph 7 of the *Advocates Remuneration Order*, Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and Sections 1A, 1B & 3A all of the *Civil Procedure Act* and it is couched in the following terms;
 - a. Judgement be entered for P. I Samba & Company Advocates in terms of the Certification of Taxation dated 6th August, 2021.



- b. Interest at the rate of 14% be deemed to have accrued from the date of service of the Bill of Costs until payment in full.
 - c. A Decree be extracted and drawn in terms of the taxed costs and interest.
 - d. Costs of the Application.
2. The application is premised on the grounds on the face of it and supported by the annexed affidavit sworn by Pennynah Samba sworn on 13th August, 2021.
3. The Client/Respondent (herein after referred to as “Client”) in objection to the application dated 12th August, 2021 filed a Replying Affidavit sworn by Zedekiah Kiprop Bundotich on 21st December, 2021.
4. In his affidavit, the Client deposed that in 2014 parties entered into an advocate-client relationship *vide* an oral retainer in which they agreed that the advocate would handle both contentious and non-contentious matters on behalf of the client and the advocate would raise a fee note of Kshs.150,000/= each month together with a separate invoice for transport and disbursement.
5. The Client avers that since the commencement of the retainer the advocate raised invoices each month and the client duly honoured the same as raised, and on that basis, the advocate was not entitled to tax her bill of costs given that she had already been paid for the services rendered.
6. The Client deposed that upon being served with the bill of costs he instructed the advocates on record to defend his interests but due to strenuous financial challenges which he was facing, there was a huge turnover of staff which in turn resulted in significant delays in proper communication between it and the advocate including furnishing the advocates with sufficient documentation to defend the bill of costs.
7. The Client avers that the fact that there existed a retainer between the parties to the effect that the advocate would be raising monthly invoices of Kshs.150,000/= for work done is confirmed by the fact that the advocate never raised a specific invoice to be paid for the work she did in preparation of the Joint Venture Agreement.
8. The Client deposed that unless it is given the opportunity to challenge the Taxing Masters Ruling, it stands to suffer since the advocate will proceed to obtain Judgment against the client as per the Certificate of Taxation dated 6th August, 2021.
9. It is deposed that the delay in filing the application is not inordinate and neither was it out of indolence on the Client’s part.
10. That unless there be an order staying the hearing and determination of the application dated 12th August, 2021, the Client stands to suffer irreparable loss since the advocate will proceed to obtain Judgment against the client as per the Certificate of Taxation which certifies that the advocate is entitled to Kshs. 50,375,325/=.
11. The Advocate/Applicant filed a Further Affidavit sworn by Pennynah Samba on 1st February, 2022.
12. The second application was filed by the Client brought by way of Chamber Summons brought under Paragraph 11 (5) of the *Advocates Remuneration Order*, 2009 and Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Article 50 & Article 159 of the *Constitution*. The application seeks for the following orders;
 - a. Spent;



- b. Spent;
 - c. That the Honourable Court be pleased to grant an order of stay of execution of the Taxing Master's ruling dated 27th July 2021 and the ensuing Certificate of costs dated 6th August 2021;
 - d. That the Honourable Court be pleased to grant the Client leave to file a Reference out of time to challenge the taxing master's Ruling dated 27th July 2021;
 - e. That the Honourable Court be pleased to grant any other or further orders which it may deem fit and just to grant in the circumstances;
 - f. That each party to bear its own costs of this application.
13. The application is grounded on the reasons stated on its face and supported by the sworn affidavit of Zedekiah Kiprop Bundotich dated 3rd September, 2021.
 14. In response to the application, the Advocate filed a Replying Affidavit by Pennynah Samba sworn on 15th September, 2021 detailing the reasons for objecting to the application.
 15. In summary, the advocate has deposed that the application before court is based on grounds touching on the jurisdiction of the Taxing Masters in taxing the amended bill of costs dated 17th February, 2021 on allegations that there existed an agreement of fees *vide* an oral retainer.
 16. The Advocate avers that the allegation disentitling the firm from taxing the bill was dealt with in the Notice of Preliminary Objection dated 21st April, 2021 when the objection was dismissed *vide* a ruling delivered on 28th June, 2021.
 17. The Client deposed that the instant application and the grounds advanced thereby offend the provisions of the law for being *res judicata*.
 18. The parties canvassed the two applications by way of written submissions, which they duly filed.
 19. This matter came up for highlighting of submissions on 17th May, 2022 and both parties highlighted their respective submissions which this Court has put into consideration.

Analysis and Determination

20. Having considered the Advocate's Notice of Motion application dated 12th August, 2021 and the Client's Chamber summons application dated 3rd September, 2021, the affidavits and the written submissions alongside the oral submissions presented by the parties during the hearing together with the cited authorities. The issues arising for determination before this Honourable Court are;
 - a. Whether there was a retainer between the parties.
 - b. Whether the Client has made out a case to warrant grant of the leave sought.
 - c. Whether this matter is *res judicata*.
 - d. Whether the Client has met the threshold for grant of stay of execution.



21. In determining these issues, this Court is guided by the provisions of the *Advocates Remuneration Order* under Paragraph 11(1) and (2) which states that;
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.
22. The Advocate/Applicant being dissatisfied by the ruling of the Taxing Master delivered on 27th July, 2021 preferred this reference for determination before this Honourable Court.
23. On the first issue with regard to the question of retainer, Section 45 of the *Advocates Act* provides guidance for this court in determining the issue. The said section 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."

.....
24. In the case of *Omulele & Tollo Advocates v Mount Holdings Limited* (2016) eKLR, the Court of Appeal held;
- "Retainer encompasses the instructions given to an advocate as well as the fees payable, it can be written, it can be oral and can even be inferred from the conduct of the parties."
25. The same definition was reiterated in the case of *Stephen Aluoch K'opot t/a K'opot & Company, Advocates v Cornel Rasanga Amoth* [2017] eKLR, where the High Court said that;
- "A retainer is the basis of a relationship between the advocate and client. Such a relationship may be oral or in writing, express or implied. It is not necessary that retainer be in writing. The purpose of section 45(1) of the *Advocates Act* is to regulate remuneration agreements



between advocates and clients. It does not limit the nature of agreement that may be entered into between advocate and client for the provision of legal services.”

26. In the above mentioned authority, the Court distinguished the terms retainer and retainer agreement and stated that;

“From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding; the same must have been put in writing and signed by the client or his agent. It is therefore erroneous as submitted by counsel for the respondent that retainer and retainer agreement mean one and the same thing.”

27. Now turning to the instant case before Court there is no dispute that there indeed existed a relationship between the parties but the only issue that needs to be determined by this Court is whether a retainer and retainer agreement refer to one and the same thing in order to oust the jurisdiction of the Taxing Master.

28. From the cited authorities, the Court clearly distinguished the two terms, retainer and retainer agreement, thus in the absence of a retainer agreement, the Advocate/Applicant was entitled to institute a bill of costs before the Taxing Officer for determination so as to recover her legal fees in the matter.

29. The next question for determination is whether the Advocate/Applicant represented the Client/Respondent in the transaction. The Respondent submitted that the Applicant’s role in regard to the transaction was only limited to following up on disbursement of funds sought to be borrowed and did not involve prequalification brief, providing the borrower necessary proposal to back the funds, drafting the facility documents and advising the client as alleged by the Advocate/Applicant.

30. Upon perusal of the Court record, I note that there are several documents in the bundle of documents by the Advocate/ Applicant and several letters regarding the transaction.

31. This Court’s attention has been brought to letters dated 5th January, 2021, a demand letter by the Advocate/Applicant dated 7th February, 2018, a letter dated 26th February, 2018 and one dated 13th December, 2017 addressed to the Kenya Revenue Authority, which clearly prove that the Advocate/Applicant acted for the Client/Respondent in the transaction in question.

32. This position is also confirmed from the several email correspondences between the Advocate/Applicant, the Client/ Respondent and the Firm of M/S Kisilu & Company Advocates. It is clear from the emails that the Advocate/ Applicant was heavily involved in the transaction and did not only involve disbursement of funds as alleged by the Client/ Respondent.

33. In regard to the issue of leave to file a Reference out of time, this court is guided by the provisions of Paragraph 11 of the *Advocates (Remuneration) Order* which states as follows:

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.

3.
4. The High court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

34. In light of Paragraph 11(4) of the [Advocates Remuneration Order](#) above, this court has the discretion to enlarge time under Paragraph (1) and (2) of the [Advocates Remuneration Order](#) once the party seeking extension of time satisfies the court that indeed he/she/it deserves such discretion.
35. In the instant case, the Taxing Master's ruling was delivered on 27th July, 2021 and the instant proceedings were commenced on 3rd December, 2021, which is approximately 4 months after the delivery of the said ruling.
36. The principles that guide courts in exercise of their discretion in an application to enlarge time were clearly set out by the Supreme court in the case of [Salat v Independent Electoral & Boundaries Commission & 7 others](#) (2014) eKLR, where the Court stated that:

“Discretion to extend time is indeed unfettered but it's incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
- iii. Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.
- iv. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.
- v. Whether there would be any prejudice suffered, the respondent if the extension was granted.
- vi. Whether, the application had been brought without undue delay and
- vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

37. What I gather from the above authority is that extension of time is not a right of a party and is only available to a deserving party upon providing evidence for the delay in bringing the application within the timelines as set out in Paragraph 11 (1) and (2) of the [Advocates Remuneration Order](#).
38. The Applicant has alluded to the fact that the bill of costs was filed at a time when the Client/Applicant was encountering severe financial challenges due to the impact of the Corona Virus Pandemic on its



business. As a result of this, there was huge turn over of staff which caused delays in the advocates being furnished with relevant documents to defend the bills of costs and also challenges in giving proper instructions to the advocates.

39. It should be noted that the timelines set out under Paragraph 11 (1) and (2) of the *Advocates Remuneration Order* are very strict and this court will only exercise its discretion on proper and tangent reasons being advanced. The Client was prompted to filing the current application upon the advocate having filed the application dated 12th August, 2021 seeking to have the Certificate of Taxation dated 6th August, 2021, entered as a judgment of this Court. This was four(4) months after the ruling on taxation had been delivered. The Client/Applicant has only stated that the delay is not inordinate but nor explained the same. What has been explained is the failure to defend the bill before the Taxing Officer. This application has come after the Respondent has instituted an application to have the Judgment entered against the Applicant. I find it an afterthought.
40. On the question of delay, Mohamed J (as he then was) in the case of *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014]eKLR, stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exerciseable”.

41. In my mind, the Client/Applicant has not met the threshold as set out in the Supreme Court decision in *Salat v Independent Electoral & Boundaries Commission & 7 others (supra)* for this court to exercise its discretion under paragraph 11(4) of the *Advocates Remuneration Order*. The Client/Applicant has not made any explanation let alone, a satisfactory and plausible one, which is crucial in imploring exercise of discretion of a court where there has been inordinate delay in bringing such application. The Applicant has poked holes in the Taxing Master’s decision on a bill it did not defend or give evidence, so that the same was based on what the Taxing Master had, and cannot be faulted at this stage. In view of this, the Applicant is not deserving exercise of discretion of this court in its favour.
42. Therefore, the Client/Applicant’s application for leave to extend time is not merited. Having found so, there is no reason for delving and determining the rest of the issues.
43. In the circumstances, and based on the foregoing reasons, the application dated 3rd December, 2021 is hereby dismissed with costs and the Advocates application dated 12th August, 2021 is allowed as prayed.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS...4TH .. DAY OF... AUGUST..., 2022.

D. O. CHEPKWONY
JUDGE

In the presence of:

M/S Samba counsel for Applicant

M/S Mwaniki counsel for Respondent

Court Assistant - Sakina

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