



**Masaka v Stephen Musalia Mwenesi t/a Musalia Mwenesi Advocates (Miscellaneous Civil Suit E354 of 2021) [2022] KEHC 14309 (KLR) (Civ) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14309 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL SUIT E354 OF 2021**

**JN NJAGI, J**

**OCTOBER 27, 2022**

**BETWEEN**

**BERNARD SHINALI MASAKA ..... CLIENT**

**AND**

**STEPHEN MUSALIA MWENESI T/A MUSALIA MWENESI  
ADVOCATES ..... RESPONDENT**

**RULING**

1. The applicant has filed an application dated July 22, 2022 seeking that the court issues an order that the respondent herein pays the applicant the sum of Ksh 6,372,935.32/= together with interest thereon at 14% from May 15, 2012 being the party and party costs paid through the respondent advocates by the then Independent Elections Body Commission in Nairobi Election Petition No 30 of 2008.
2. The application is based on grounds on the face of the application and supported by the affidavit of the applicant sworn on July 22, 2022. The applicant avers that sometimes in the year 2008 he instructed the respondent firm of advocates to represent him in in an election petition vide Kakamega Election Petition No 2 of 2008 (Originally Nairobi Election Petition No 30 of 2008 – *Bernard Shinali Masaka v Dr Boni Khalwale & 2 others*). That the respondent successfully concluded the petition whose outcome resulted in an award of costs against the 2<sup>nd</sup> respondent therein, the Independent Electoral and Boundaries Commission wherein the applicant filed party and party bill of costs which was taxed on January 16, 2012 at Ksh 6,372,935.32 as per the annexed Certificate of Taxation, marked BSM 1. That on May 14, 2012, the IEBC remitted the said sum to the respondent as evidenced by annexed payment voucher, payment notification letter and letter from IEBC to the respondent, marked BSM-1. That the respondent thereupon refused and/or failed to remit the money to the applicant.
3. The application was opposed by the respondent vide the replying affidavit of Stephen Musalia Mwenesi wherein he admits that his firm represented the applicant in the said petition. He however denied that



there was a defendant in the petition by name of Electoral & Boundaries Commission or that such a body remitted the stated sum to his firm. He averred that there was no money had and received strictly for the applicant. That he believed that in any party and party costs situation a large proportion of the costs are costs or fees for professional services rendered in the course of the litigation. That the law as a consequence provides for assessment and payment of costs on advocate/client basis and in this regard the party and party costs are the basis where the fee is marked up by 50%.

4. Mr. Mwenesi further contended that his firm filed advocate/client bill of costs dated 14/6/2014 in relation to the said matter which was taxed by Hon RN Akee at Ksh 6,613,763/= vide a ruling delivered on 28/4/2021. That the taxation took into account the sum of Ksh 1,115,000/= paid up by the applicant to the respondent thereby reducing the amount due from the applicant to the respondent to Ksh 5,498,763/=. That he believes that the bill took into account the party and party costs on the matter. He annexed a copy of the ruling and certificate of taxation. He disputed that the respondent owes the applicant the amount claimed.
5. The applicant backed up his claim with submissions from his advocates, Majanja Luseno & Co Advocates, who submitted that the party and party costs deposited with the respondent were held in trust for the client, the applicant. That the advocate having failed to remit the money to the applicant has contravened section 80 of the Advocates Act which provides that:

80. Betrayal of trust

Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:

Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the attorney-general by the tribunal under subsection (3) of section 61.

6. The applicant further submitted that the respondent while drafting the advocate/client bill of costs did not take into account the taxed party and party costs. Neither did the taxing officer do so when taxing the bill.
7. It was submitted that at the time of filing suit no judgment had been entered against the applicant in favour of the respondent. Therefore, that to allow the respondent to continue to hold the money paid in 2012 would be an injustice to him. That the Advocates Act provides for mechanisms on how an advocate can recover his taxed costs. That the advocate can move under order 52 rule 4 (3) of the Civil Procedure Rules which provides that:

“If an advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and protection of the advocate’s lien, if any, as the court deems fit.”

8. The applicant finally submitted that he presented evidence as proof that IEBC remitted the money to the respondent. That the respondent has not availed any evidence before this court including a statement of account as evidence in support of his rebuttal.
9. The applicant submitted that he was entitled to party and party Costs. He relied on the case of *KANU National Elections Board & 2 others v Salah Yakub Farah* (2018) eKLR where Mativo J (as he then was) observed that:



Generally, the objective of taxation is to award “the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded. The taxing master is required to allow all such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same. [24]

10. The respondent did not file any submissions.
11. I have considered the grounds in support of the application, the grounds raised in opposition to the application and the submissions by the advocate for the applicant. The issues for determination are:
  1. Whether the electoral commission remitted party and party costs to the respondent.
  2. Whether the applicant is entitled to party and party costs to the exclusion of the respondent.
12. On the first issue, the applicant produced documents from the Independent Electoral & Boundaries Commission showing that the respondent received the sum of Ksh 6,372,943.32 from the said commission in payment of Election Petition N0 2 of 2008 between the applicant herein, Dr Bonny Khalwale and the RO, Ikhholomani. The payment notification produced by the applicant indicated that the money was paid through Barclays Bank. The respondent did not produce any document from the said bank to show that he did not receive the money yet the evidential burden had shifted to him to counter the strong evidence produced by the applicant. In my view Mr. Mwenesi merely denied that he received the money. There was no iota of truth in that denial. I therefore find that the respondent received the money.
13. As regards the second issue, a client to an advocate is entitled to the payment of party and party costs while the advocate is entitled to the advocate/client costs. The party and party costs are provided under schedule vi part a of the advocates remuneration order while the advocate/client costs are provided under schedule vi part b of the same order. The position of the law is that the party and party costs belong to the client while the advocate/client costs belong to the advocate. In *Republic v Lucas M Maittha Chairman, Betting Control and Licensing Board & 4 others ex -parte: Interactive Gaming and Lotteries Limited*, Odunga J (as he then was) held as follows:

Ordinarily, it is the client instructing the advocate that is under a legal obligation to pay the client. That, in my view, is the clear explanation of the provision for only two types of bills costs – client and advocate bill and party and party bill of costs. There is no advocate and party bill of costs. So that even in situations where costs are awarded to a party, those costs belong to the party and not to the advocate but the advocate is entitled to retain the same by way of a lien pending the determination and payment of his costs.
14. In *Samuel Omondi Adera v Lore and Co Advocates* [2022] eKLR, Radido J. held that:

... there is a distinction between a party and party bill of costs and an advocate and client bill of costs. Monies taxed in a party to party bill of costs belong to the successful client, and the advocate is generally under an obligation to pay over the same to the successful client.....However, when an advocate files an advocate/client bill of costs, he or she is seeking payment of legal fees for professional services rendered.
15. As noted by Justice Odunga in the case quoted above an advocate has a lien over money in his possession that belongs to his client. In *Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates* [2014] eKLR, the lat Onguto J explained that position of the law as follows:



A review of case law in the context of an advocate – client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.

16. In *Bill Baba Owour v National Bank of Kenya* [2022] eKLR Abuodha J cited the case of *Gavin Edmonson Solicitors ltd v Haven Insurance Co Ltd* [2008] UKSC as quoted with approval in the case of *Kenneth Njindo Matiba v AG, John Mbau Muru t/a J.M Mburu & Company Advocates & 3 others* [2020] eKLR where it was stated:

“In the ordinary cause of traditional litigation, with solicitors acting on both sides, the amount due under a judgment, award or settlement agreement would be paid by the defendant’s solicitors to the claimant’s solicitor or the claimant’s solicitor might recover the sum due to his client by processes of execution. In either case the equitable lien would entitle the solicitor not merely to hold on the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor’s equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor’s charges again, direct to the solicitor, leaving the payer to such a remedy as he might have against the claimant. This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced in personam against anyone whose conscience is affected by having notice of them, or by holding him to account if he does.”

17. In *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo* (2013) eKLR and *Beatrice N Karanja v Njeri Kariuki*, the courts held that advocates costs become due after taxation by the court.
18. In the instant case the respondent has had his advocate/client bill of costs taxed which shows that the applicant owes them money. The applicant has not challenged the taxed bill of costs in court. The costs are therefore due to the respondent. The respondent has a power of lien over the money that they received from IEBC on behalf of the applicant. The respondent is not in breach of trust for withholding the money pending taxation of its Bill of Costs and after the taxation. I therefore do not believe that the applicant is entitled to payment of the whole of the taxed party and party costs when he has not paid in full what he owes the respondent. The applicant should have demanded for the respondent to give an account instead of claiming the whole of the money.
19. In light of the above, I do not find any merit in the application dated July 22, 2022. The application is consequently dismissed with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**J. NYAGA NJAGI**

**JUDGE**

**In the presence of:**

Miss Musau for applicant



No appearance for respondent

Court Assistant: Mumo

30 days R/A

