



**Joe N. Mwanthi & Co. Advocates v Waweru (Miscellaneous Application
808 of 2014) [2022] KEHC 15608 (KLR) (Civ) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15608 (KLR)

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

MISCELLANEOUS APPLICATION 808 OF 2014

JN NJAGI, J

NOVEMBER 23, 2022

BETWEEN

JOE N. MWANTHI & CO. ADVOCATES APPLICANT

AND

DAVID KIHONO WAWERU RESPONDENT

RULING

1. The applicant has filed a Client/Advocate Bill of costs dated November 19, 2014 at Kshs 73,235/= against the respondent. The same was taxed by the Deputy Registrar of this court at the stated amount. The Respondent thereafter filed grounds of opposition to the bill dated December 1, 2021 opposing the bill on the grounds that there was no client/advocate relationship between him and the respondent.
2. The case for the applicant is that he is an advocate of the High Court of Kenya. That he was retained and instructed by the respondent to act for him sometimes in 2014 in a conveyancing transaction in which the respondent together with one Peter Kabugu Gicheru were selling land title Nos Kajiado/ Kaputei North/69488 and 69489 to one Morris Kirimi Nyamu (herein referred to as the purchaser).
That he was also approached by the purchaser to act for him in the matter. That the purchase price was partially financed by Rafiki Microfinance Bank Limited which gave him the brief to charge the property to secure a loan of Kshs 1.2 million. That when he completed the transaction he raised a fee note to the purchaser who paid him his legal fees of Kshs 83,000/-. He raised a fee not to the respondent made up as follows:
 - (a) Scale fees on sale of land No 69488 with Consideration being Kshs 600,000/= Kshs 35,000/=
 - (b) Scale fees on sale of land No 69489 With consideration being Kshs 600,000/= Kshs 35,000/=Total amount due Kshs 70,000/=



3. The respondent refused to settle the same. The applicant thereupon filed a Client/Advocate Bill of costs dated November 19, 2014 at Kshs 73,235/= that is the subject of this ruling.
4. The respondent opposed the Bill of Costs on the grounds that there never existed any advocate/client relationship between him and his co-owner of the land with the applicant as they never gave any instructions to the advocate. That no services were rendered to them by the advocate.
Further that the applicant has opted to tax the bill of costs against the respondent solely whereas the vendors were two parties.
5. Moreover, that the advocate gave a professional undertaking to the respondent to hold the titles and to safeguard the completion document on behalf of the sellers. He consequently argued that an advocate cannot give a professional undertaking to his client, and hence the advocate/applicant cannot now purport to have been acting for the respondent. The respondent contended that the Bill of Costs is made in bad faith and is intended to unjustly enrich the advocate who never had instructions to act for the respondent having acted for the seller and the financing bank in the same transaction.

Applicant's submissions -

6. The application was canvassed by way of written submissions of the applicant advocates and those of the advocates for the respondent, Kang'oli & Co Advocates. The applicants submitted that there existed an oral retainer or otherwise a retainer that is implied or deciphered from the acts and conduct of the parties. That in the first place it is the applicant who witnessed the execution of the sale agreement by the respondent and his co-vendor. That clause 6 of the sale agreement provided that it was the obligation of the respondent to procure and handover to the purchaser's advocates the original executed transfer. That the transfers in the transaction were drawn by the applicant.
7. That the respondent has not explained how his obligation to procure and handover the duly executed transfer were discharged by an advocate who was not acting on his instructions. It was submitted that the fact that the applicant drew the transfer and that the respondent appeared before the applicant to execute the same can only imply that the applicant was acting for and out of instructions by the respondent. Therefore, that the applicant was acting for both the purchaser and the respondent and was thus entitled to legal fees from the respondent and the purchaser as regards the conveyance calculated under Schedule 1, First Scale of the *Advocates Remuneration Order, 2014*, and also from the purchaser as regards the charge calculated under Schedule 1, Second Scale of the said Order. That the fact that the purchaser paid the fees due from him did not exonerate the respondent from payment of the fees due from him.
8. The applicant submitted that there is no law that bars an advocate acting for several parties from issuing a professional undertaking to any of the parties. That the undertaking in this case ensured that the interests of the three parties in the transaction were covered.
9. The applicant referred to an email of October 17, 2014 where the respondent was instructing him to witness the respondent's acknowledgement of the part payment made. He wondered in what capacity the respondent would ask him to witness an acknowledgment by the respondent if not in his capacity as his advocate.
10. It was submitted that the instructions in this case were given by the respondent and at no time was the respondent instructed by the respondent's co-vendor who was at the time based in Doha, Qatar. That the respondent wrote the applicant an email, annexed by the respondent as 'DKW2', instructing the applicant to get in touch with his co-vendor for purposes of agreeing on the modalities of executing the necessary documents. Counsel submitted that the email speaks volumes on the issue of instructions



that prior to then the applicant did not have contact of the co-vendor and was dealing exclusively with the respondent. That in the premises it was in order for the applicant to file the Bill of Costs solely as against the respondent.

Respondent's submissions –

11. The respondent submitted that the issue in dispute is whether there was an advocate/client relationship and or whether instructions were given to the applicant. Counsel for the respondent referred to the case of *Wilfred N Konosi t/a Konosi & Co Advocates v Flamco Limited (20170 eKLR)* where the court held that:

“The relationship between an advocate and his client springs from instructions by the client to the advocate. Absence of such relationship the taxing officer would be bereft of jurisdiction to tax a bill.”

12. Consequently, it was submitted that the applicant has not placed any documents before the court to show that he was retained by the respondent to act for him in the transaction. That the document that the respondent placed before the court indicated that they were instructed by the purchaser's financier, Ms Rafiki Microfinance (K) Limited.

13. It was submitted as regards the respondent that the applicant only did the execution of the sale agreement between the vendors and the purchaser. That it is standard procedure that where the instructions given to an advocate involves several independent briefs the bill of costs must be separated and taxed appropriately depending on the work done at each individual stage of the brief which has not been done in the Bill of Costs before the court. That as the advocate did not draw the agreement he is not entitled to full fees but to a third of the same as provided by the proviso to Section 18 (a) of the *Advocates Remuneration Order* which reads as follows:

“Provided that where the advocate acting for a vendor does not prepare a letter of agreement, heads of agreement or agreement for sale, the scale fee is reduced by one-third.”

14. The respondent submitted that there was no professional undertaking between him and the applicant. He relied on the definition of that term in the case of *Equip Agencies Limited v Credit Bank Limited (2007) eKLR* where Warsame J(as he then was) held that :

“The question for me to determine is whether there is a professional undertaking capable of being enforced against the Respondent. In my understanding an undertaking is usually given to ease and smoothen the path of transactions carried out by Advocates. It is a convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another.

In my humble view an undertaking is a promise to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under. “

15. It was contended that an undertaking can only be honoured only as between the giver of it and the recipient. That in this case the respondent could not have been the recipient as he was not a client for the



applicant. That there was no privity of contract between him and the applicant and hence cannot have received any professional undertaking from him. The respondent relied on the case of *Nelson Andayi Havi t/a Havi & Co Advocates v Jane Muthuoni Njage t/a J M Njage & Co Advocates (2015)eKLR* where it was held that:

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16. It was submitted that it is not the practice that an advocate can give an undertaking to his own client and therefore that it cannot have been the case in this matter.
17. It was further submitted that the applicant was wrong in lodging the Bill against only one of the vendors while excluding the other vendor. That the fees, if any, ought to be have been shared between the clients and apportioned appropriately in accordance with Section 41 of the *Advocates (Remuneration) Order*.

Response by the Applicant –

18. The applicant, in the final end, conceded that they did not prepare the agreement for sale but only witnessed the same hence by dint of Rule 18(a) of the *Advocates (Remuneration) Order*, the cumulative scale fee of Kshs 70,000/= for both conveyances should be reduced by a third to Kshs 46,666.66/=.

Analysis and determination –

19. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective advocates for the parties.

The issues for determination are –

1. Whether there was Advocate/Client relationship between the two parties
2. Whether there were any services rendered by the applicant to the respondent.
20. The question on the first issue is whether the respondent had given instructions, or rather retained, the applicant to represent him in the matter. In the case of *Obaga & Company Advocates v Kipkebe Limited [2009] eKLR*, Musinga J (as he then was considered what a retainer is and held as follows:

Black's Law Dictionary, 6th Edition, 1990 defines “retainer” as follows:

“In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. This act of employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses, and related matters.”

A retainer can be oral or in writing. When it is not in written form, existence of the same can be challenged by a client. This leads me to the definition of a “client.” Section 2 of the *Advocates Act* defines



a client to include “any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.”

21. In *Mereka & Company Advocates v Zakhem Construction (Kenya) [2014] eKLR*, it was held that:

“It is trite law that a retainer need not only be in writing but can be implied from the parties conduct on this am guided by the case of *Ohaga v Akiba Bank Limited* [2008] 1 EA 300, where it was held that, “a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order.”

22. Arising from these authorities, it is clear that instructions to an advocate can be both in writing or orally. I find that in this matter there were oral instructions by the respondent to the applicant for the applicant to act for them in the matter. There is no law that bars an advocate from acting for several parties over the same matter. The applicant has adduced evidence that shows that he acted for the respondent in the matter. The respondent and his co-vendor appeared before the advocate to sign the transfer documents. It is clear from the evidence that the applicant only dealt with the respondent and not the other vendor. The privity of contract was only between the applicant and the respondent. The applicant was therefore correct in demanding payment from the respondent alone.

23. The applicant argued that the respondent had vide a letter dated July 28, 2014 given him a professional undertaking that they (the advocates) will hold the completion documents and that they will not release them to any persons whatsoever. That if 60 days were to elapse after receipt of the original titles and other completion documents drawn by them and the outstanding sum of Kshs 1,200,000/- would not have been received by the appellant, they were to return the documents to the applicant.

24. The applicant argued that an advocate cannot give a professional undertaking to his client. That the fact that the respondent was giving him a professional undertaking meant that he was not a client.

25. A professional undertaking as demonstrated in the authorities quoted above is done between advocates. The undertaking the respondent gave to the applicant was strictly not a professional undertaking as it was not between two professionals. It was simply a promise to the applicant. Though the advocates termed it as a professional undertaking, its purport was that the respondent was not to release the documents to any person contrary to the instructions by the applicant. In my view this was necessary as the advocates were acting for the two parties in the transaction. The respondent gave the promise in his capacity as an advocate to the applicant. It may not have been a professional undertaking but it was for all purposes a binding agreement between the two. The applicant should therefore not make a mountain out of it.

26. The applicant has conceded that since he did not prepare the agreement for sale but only witnessed the same his fees should have been reduced by a third by dint of Rule 18(a) of the *Advocates (Remuneration) Order*, thereby leaving his legal fees at Ksh 46,667. I find that this is what the applicant was entitled to in Advocate/Client fees between him and the respondent.

27. In light of the above, I enter judgment for the applicant to the sum of Ksh 46,667/= with interest at court rates. Since the objection has partially succeeded I order each party to meet its own costs to the application.



DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2022.

J NYAGA NJAGI

JUDGE

In the presence of:

No Appearance for Applicant

Miss Luchereli holding brief Mr. Omondi for Respondent

Court Assistant: Ubah

30 days R/A

