



**Gikeria & Vadgama Advocates v Okali (Environment and Land Miscellaneous Application 166 of 2019) [2023] KEELC 18248 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18248 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 166 OF 2019**  
**OA ANGOTE, J**  
**JUNE 22, 2023**  
**IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT**  
**BILL OF COSTS**

**BETWEEN**

**GIKERIA & VADGAMA ADVOCATES ..... ADVOCATE**

**AND**

**AGWU UKIWE OKALI ..... CLIENT**

**RULING**

1. The Advocate herein filed an Advocate-Client Bill of Costs dated September 23, 2019 as against the Client to the tune of Kshs 13,009, 112.70. In response, the Client filed an application on March 6, 2020 seeking to have the aforesaid bill struck out. On June 10, 2021, the Deputy Registrar made a determination wherein she dismissed the Clients' Application and taxed the Advocates bill at Kshs 965,281.51.
2. The Client filed a Reference before this Court on June 22, 2021 asking that the Deputy Registrars' decision of June 10, 2019 be set aside and the application dated March 6, 2020 be determined. The application was allowed with the Court directing that the application of March 6, 2020 be determined by this court first.
3. Vide the application of March 6, 2020, brought pursuant to the provisions of Section 3A of the Civil Procedure Act, Order 51 Rule 1(1) of the Civil Procedure Rules and Rule 61 of the Advocates (Remuneration) Order, the Client/Applicant seeks the following reliefs;
  - i. That the Court be pleased to strike out the Advocate/Client Bill of Costs dated September 23, 2019.



- ii. That the costs of the Application be provided for.
4. The application is premised on the grounds on the face of the Motion and supported by the Affidavit of the Client of an even date. The Client deponed that the Bill of Costs dated September 23, 2019 is not only baseless but unreasonable and unjustifiable and that the Advocates' instructions were simply to obtain an injunction restraining the 1<sup>st</sup> and 4<sup>th</sup> Defendants from carrying on construction along the boundary fence of his property, LR 214/573 within Nairobi City in violation of statutory and other stipulations regulating such construction.
5. The Client deposed that despite paying a substantial amount as deposit on fees, the Advocate failed to obtain an injunction against the 1<sup>st</sup> and 4<sup>th</sup> Defendants as instructed and that being an Advocate, the Applicant knows of his own knowledge that this was an ordinary claim for injunction and no complexity, difficulty or novelty has been demonstrated to warrant the amount sought by the Respondent.
6. According to the Client, the Advocate is further not entitled to the amount sought on account of poor legal representation that forced him to hire a different Counsel to have his case re-opened.
7. According to the deponent, the Advocate failed to undertake prosecution of his case diligently as evinced by the fact that the Advocate conducted a search that failed to detect alienation of the suit property leading to an ineffectual injunction against the wrong party; that upon discovery of the mistake, the Advocate decided not to seek an injunction against the actual owner and that the Advocate did not call any witnesses other than the Applicant to buttress any aspects of the case.
8. It was deposed by the Client that when he personally obtained a highly relevant expert report from a reputable company, the Applicant showed no interest in bringing the report to the attention of the Court; that during the hearing, he deliberately jettisoned their long prepared cross-examination strategy and that the Advocate failed to adduce evidence to show the Court why two of the parties, NCC and NEMA had been joined as Defendants in the case.
9. The client deposed that he has paid more than Kshs 600,000 to the advocate which has not been reflected in the Bill; that the Court should consider the fact that the substantive matter is still in the preliminary stages and that it is only the Plaintiffs case that has been finalized, which will have to be re-opened. It is the Client's case that the conduct of the Advocate in the prosecution of the matter denies him a right to any fees.
10. In response to the application, the Advocate filed Grounds of Opposition in which he averred that he was not on record for the Client before the appointment of the current firm of Advocates; that the right to lodge the Bill of Costs accrued at the time the Client engaged the current firm of advocates *vide* the notice dated August 16, 2019 and that it is improper for the current firm of Advocates to take over conduct of the matter without having affirmed that the Client had satisfied its financial obligations pertaining to the former Counsel.
11. According to the Advocate, the Client has not paid the prorated fees for the work done which includes getting up fees and that the application is an abuse of process and ought to be dismissed.

## Submissions

12. The Client's counsel submitted that the Advocate owed the Applicant a duty of care in processing his case, which he failed to adhere to as evinced by the averments in the Supporting Affidavit; that as a consequence thereof, the Applicant changed Advocates whilst the case was ongoing and that it will be prejudicial and premature to tax the Advocates Bill.



13. It was submitted that having raised a serious challenge on the conduct of the Respondent, this Court should be guided by the provisions of Rule 61 of the Advocates Remuneration Order and ask the Advocate to show cause why they should be entitled to the fees sought in the Bill and that should the Advocate proceed to tax his Bill before determination of the case, the Applicant will suffer irreparably as he will have lost the right to challenge the Respondents right to tax.
14. In any event, it was submitted, the Respondent was paid Kshs 600,000 by the Applicant and as such, there are no further costs due to them; that the Bill of Costs dated September 23, 2019 should be struck out and that in the alternative, the taxation of the Bill if at all to await the outcome of the main suit.
15. The Advocate submitted that it was not disputed that there existed an Advocate-Client relationship between the Respondent and the Applicant and that the Advocate was retained by the Client to act for him in in ELC 410 of 2011 where the Client sought a declaratory order that the constructions by the 1<sup>st</sup> and 4<sup>th</sup> Defendants violated his right to security and integrity of his property, amongst other orders.
16. It was submitted that the Advocate diligently rendered his duties until the Applicant engaged new Counsel to come on record; that as held by the Court of Appeal in the case of *Machira & Co Advocates v Arthur K Magugu* [2012] eKLR, an advocate whose services have been terminated is entitled to immediate payment for the services he has rendered and that if upon demand the Client refuses to pay, the Advocate is entitled to file his bill and have it immediately taxed.

### **Analysis and Determination**

17. Having considered the Motion and submissions, the only issue for determination is whether the Advocate is entitled to any fees.
18. The Client asserts, and strongly so, that the Advocate is not entitled to any fees and as such the Bill of Costs filed by the Advocate should be struck out. According to him, the Advocate did not competently carry out the instructions given to him and that as a result thereof, he engaged another Counsel to take over the matter which is still ongoing; that in any event, the Kshs 600,000 already paid to the Advocate is sufficient.
19. On its part, the Advocate maintains that he carried out his duties diligently and professionally and is entitled to raise a bill for the work done before the Client engages new Counsel.
20. To begin with, the existence of an Advocate Client relationship between the parties is not disputed. The Applicant engaged the Respondent to represent him in ELC 410 of 2011 in which he sought to protect his property, LR 214/573. As with all relationships, an Advocate Client relationship can be terminated.
21. It is a general principle of law that an Advocate is entitled to fees for work done and when his services are terminated, he is entitled to fees for the work done up to the point of termination. This rationale was affirmed by the Court of Appeal in the case of *Machira & Co Advocates v Arthur K Magugu & another* [2012] eKLR where the learned Judges stated as follows:

“An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed.”



22. What the Client herein is stating is that the Advocate herein was incompetent and his incompetence thereof disentitles him to any fees. The Applicant relies on Section 61 of the [Advocates Remuneration Order, 2009](#) which provides as follows;

- “(1) (1) If any case it appears to the Court that costs have been incurred improperly or without reasonable cause, or that by reason of any undue delay in proceedings under any judgement or order, of any misconduct or default of the advocate, any costs properly incurred have proved fruitless to the party on whose behalf the same were incurred, the Court may call on the advocate by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the advocate and his client, and also (if the circumstances of the case shall require) why the advocate should not repay to his client any costs which his client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require.
- (2) The Court may in any case refer the matter to a taxing officer for inquiry and report and direct the advocate in the place to show cause before such taxing officer.”

23. Having carefully considered the above section, it is apparent that it deals with situations where costs have been incurred improperly or without reasonable cause or where there is a delay in proceedings of any judgement or order causing the Client to incur costs; or where costs incurred have proved fruitless to the person to whom costs were incurred.

24. The above section of the law further provides that the Court may disallow the costs as between the Advocate and his Client upon a notice to show cause being issued to the Advocate or order the Advocate to repay costs incurred by the Client and which the Client has been ordered to pay any other person.

25. In the present case, the Clients’ claim is based on negligence by the Advocate which he asserts disentitles the Advocate from any fees. What amounts to professional negligence was discussed by the Court of Appeal in *Champion Motor Spares v Phadke* [1969] EA 42 where it was stated as follows:

“The extent of an advocate’s liability to his client for negligence has been considered at various times by this Court. I would refer to the case of *Stephens & Co v Allen* [1918], 7 EALR 197. This case went to the Privy Council [1921], 8 EALR 211. The following extract from the judgment of the Privy Council is of some assistance: ‘The question of negligence with regard to the performance of a solicitor’s duty must to some extent be affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal’.



Russell, J., in his judgment on appeal considered this question very fully and with respect has, in my view, correctly set out the degree of care required by an advocate practicing in Uganda. He quoted from the following passage from the judgment of Lord Denning, in the recent English decision of *Rondel v Worsley*, [1967] 3 All ER 993.

‘Finally it must be remembered that counsel is not liable in negligence merely because he expresses an opinion which ultimately turns out to be wrong nor merely because he overlooks one of a number of relevant authorities. Further, in spite of the expression of Lyneskey, J., in *Pentecost v. London District Auditor*, [1951] 2 All ER 330 that so far as civil proceedings are concerned gross negligence is not known to the English Common Law, I remain of the opinion that counsel will only be guilty of *crassa negligentia* or gross negligence by some really elementary blunder, see *Purves v Landell* [1845], 12 Cl & Fin. 91’.

I agree with Russell, J., that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not be an error of judgment on some complicated point or one of doubtful construction. Each case must depend on its own particular facts, and as Scrutton, LJ, said in *Fletcher & Son v Jubbo Booth & Helliwell*, [1920] 1 KB 275 at p 280:

‘And moreover I accept the opinion of Tindal, CJ, in *Godefroy v Dalton*, 6 Bing 460, that it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed.’

26. In *National Bank of Kenya Ltd v E Muriu Kamau & Njoroge Nani Mungai & T/A Muriu Mungai & Company Advocates* HCC 539 of 2004 (Nairobi) Warsame J (as he then was) held as follows:

“...In deciding whether the defendant committed an act which constitutes negligence, it is important to address the degree and circumstances surrounding the whole issue. The starting point is there is no specific provision in the *Advocates Act* setting out the standard of duty required by an advocate in the discharge of his professional duties but generally the law recognizes that an advocate may be liable to his client for negligence. The extent of an advocate’s liability to his client for negligence has been a mute point for judicial consideration. In my view, it is not enough to prove that the advocate had made an error of judgment or ignorance of some particular point of law. But the error must be one that ordinarily a competent and skilled advocate exercising due care would not have made or shown it. It would be extremely difficult to define exact limit by which the skill and diligence which an advocate undertakes to furnish in conduct of a case is founded. It is also difficult to define precisely the dividing line between what is reasonable skill and diligence which appears to satisfy his undertaking for which he is undoubtedly responsible.

It is well known that litigation is always hazardous, therefore, an advocate must always realize that most questions have more than one aspect or interpretation. It is not possible to lie down any hard and fast rule that an advocate would be required to follow in the discharge of his duties/mandate. It suffices to say, that the variety of matters with which an advocate has to have some familiarity increases by the day due to the emerging trend of litigation which involves a lot of special skill, sophistication and modern ingenuity. I must add that the conduct of litigation is preeminently an art, which requires exceptional ingenuity or



foresight to avoid ordinary perils to a client. In such circumstances an advocate is required to display reasonable skill and care to avoid perils to his client. He must show that he fully and properly performed his instructions and that he faithfully carries out the client's instructions to the letter.”

27. It is clear from the foregoing that what constitutes negligence is a matter of fact dependent on the circumstances of the case. An Advocate-Client relationship is a contractual one, and where an Advocate acts negligently in performing the said contract, he can be held liable for professional negligence for breach of duty, which is a tort. A claim for this lies by way of a suit as against the Advocate.
28. Similarly, a Client who alleges negligence against an Advocate has recourse under the [Advocates Act](#), which under Section 53 establishes the Advocates Complaints Commission. Section 53 (4) of the [Advocates Act](#), provides as follows:
  - “ 4. It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee, thereof....”
21. In the circumstances, the Court is of the view that it cannot strike out a Bill of Costs on account of claims of negligence by the Client. Although the Client states that the matter was not complex and that the fees already paid to the Advocate is sufficient, this court is of the view that that issue can only be considered by the Taxing Master during taxation of the Bill.
22. In the result, it is the Courts finding that the Application dated March 6, 2020 lacks merit. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND JUNE, 2023**

**O. A. ANGOTE**

**Judge**

**In the presence of;**

**Mr. Kioko for Client/Applicant**

**Ms Opondo for Aluoch for Respondent/Advocate**

**Court Assistant – Tracy**

