



REPUBLIC OF KENYA



**Samnakay v Nimaji (Miscellaneous Application E992 of 2020)  
[2021] KEHC 376 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 376 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E992 OF 2020**

**EC MWITA, J**

**DECEMBER 16, 2021**

**BETWEEN**

**MOHAMED \$ SAMNAKAY ..... APPLICANT**

**AND**

**LAILA NIMAJI ..... RESPONDENT**

**RULING**

1. The advocate /applicant filed a notice of motion dated 14<sup>th</sup> June 2021, seeking entry of judgment on the taxed cost in the Certificate of Costs dated 23<sup>rd</sup> April 2021. The application is supported by the applicants' affidavit sworn on the same day and a further affidavit sworn on 19<sup>th</sup> October 2021.
2. The applicants' case is that their advocate/client bill of costs was taxed on 11<sup>th</sup> March 2020 and allowed at Kshs.1,111, 023 and no reference was filed. Despite demand to pay the amount, the respondent has not done so.
3. According to the applicants, they acted for the respondent as an individual and not for the estate. They therefore urged the court to enter judgment in the sum in the certificate of costs dated 23<sup>rd</sup> April 2021.
4. The respondent filed a replying sworn on 4<sup>th</sup> October 2021. She deposed that she was not served with the bill of costs and that she was not aware that it had been taxed on 11<sup>th</sup> March 2021. She also denied that there was advocate client relationship between her and the applicant. She asserted that the applicant had been engaged to act for the estate of her late father Shamsudeen Nimji by her mother (Gulshan Nimji), the executrix of the estate. This fact she stated, was confirmed by numerous correspondence from the applicant who had been instructed to pursue various cases on behalf of the estate and, therefore, she could not be responsible for the applicant's fees.



5. The respondent further stated that her mother passed on in 2016 a fact that was well known to the applicant and that the applicant was paid Kshs. 150,000 to represent the estate which was not taken into account when the bill was taxed.
6. It was the respondent's further contention that the applicant did not file any suit on behalf of the estate and could not, therefore, base taxation on value of unfiled claim. She maintained that had she been served with the bill of costs; she would have raised objections to it. She stated that the Certificate of Costs is invalid as it was issued without hearing her and should be set aside.
7. According to the respondent, since retainer was disputed, summary judgment cannot be entered; that the applicant has filed a miscellaneous application rather than a suit and that the applicant has not accounted for the deposit paid which entitles her to a set off. She urged the court to decline to enter judgment in this matter.
8. The applicant filed a further affidavit responding to the respondent's contentions that they acted for the estate and not her. The deponent stated that the respondent instructed them as a beneficiary of the estate and not on behalf of the estate. He stated that the issue of fees was discussed and the respondent undertook to pay the fees personally. She paid Kshs. 20,000 by issuing a personal cheque and later paid a further Kshs. 150,000 again from her personal account. She was also the one attending their offices to give instructions. He also stated that the respondent could not have given instructions on behalf of the estate since she had no capacity, not being an executor.
9. Counsel for the Parties highlighted their written submissions to this application. The applicant's submission was that they were instructed by the respondent, a beneficiary of the estate and not by the executrix. They also argued that the respondent could not have instructed them to act for the estate because she had no capacity to do so. They again argued that it was the applicant who attended and gave instructions and that she undertook to pay their fees which was clear in the correspondence to her.
10. According to the applicant, the issue of retainer being raised now is an afterthought. It could only have been raised during taxation. It was argued that all documents pertaining to their fees were served and that the respondent's advocates were fully aware of their costs having been taxed way back in April 2021 but the respondent never filed a reference. She cannot be heard to say now that she wants to challenge the taxing officer's decision.
11. The applicants relied on [\*Hezekiah Oira t/a H. Oira Advocates v Kenya Broadcasting Corporation \(Misc. Appl. No. 35 & 36 of 2011\) \[2016\] eKLR\*](#), that where there is a law prescribed either by the Constitution or an Act of Parliament governing a procedure for redress, that procedure should be followed. (see also [\*Kimani Wanyoike v Electoral Commission of Kenya \(CA 213 / 1995\)\*](#))
12. For the respondent, it was submitted that the applicant acted for the estate and not the respondent and that the letter dated 24<sup>th</sup> February 2016 from the applicant to the respondent was clear that they were acting for the estate. According to counsel, the applicants were not retained by the respondent and, therefore, under section 51 of the [\*Advocates Act\*](#), judgment cannot be entered against her. Counsel was clear that the respondent was not disputing that the applicants are entitled to fees, but that such fees should be paid by the estate and not the respondent.
13. I have considered the application, the response and submissions made on behalf of the parties. The applicant's advocate/client bill of costs was taxed by the taxing officer and allowed at Kshs. 1,111, 023. A Certificate of taxation was issued to that effect and dated 23<sup>rd</sup> April 2021. The applicant has sought to have judgment entered in terms of that certificate of taxation which has not been set aside and there is no reference pending.



14. The respondent has opposed the application on the ground that the applicant acted for her father's estate and not her and, therefore, their fees can only be paid by the estate. According to the respondent, there was no retainer from her and she cannot pay the applicant's taxed costs. She also argued that she was not served with the notice of taxation.
15. To this response, the applicant maintained that they were instructed by the applicant as a beneficiary of the estate as she could not instruct them to act for the estate without capacity not being the administratrix of the estate. The applicant also maintained that the respondent was dully served with the notice of taxation.
16. There is no doubt that the applicant's bill of costs was taxed and allowed at Kshs. 1,111,023 and a certificate of taxation issued to that effect. That certificate of costs has not been set aside. There is no reference pending before court challenging that certificate either.
17. The respondent has argued that the applicant acted for the estate and their fees can only be paid by the estate. She has relied on the correspondence from the applicant dated 24<sup>th</sup> February 2020 to argue that the correspondence stated that the applicant they were acting for the executrix.
18. I have perused the letter and although it states that that the advocates were acting for the executrix, the letter went on to state at the end, that since the respondent had instructed them on her own behalf, she was responsible for their fees. The respondent did not respond to that letter that she would be responsible for the fees. The applicant stated that the respondent paid deposit for fees by personal cheque drawn on her personal account and later paid further deposit again from her own account by transfer, which demonstrated that she had instructed them on her own not for the estate.
19. The respondent did not show that it was the executor that instructed the applicant. She was the one who signed the attendance documents and all letters from the applicant were addressed to her, including those demanding payment for fees. She did not also challenge the contents of those letters. Even in this application, she did not deny receiving those letters, thus contents of those letters remain unchallenged. The respondent did not show that anyone else other than her instructed the applicant, or that she had capacity to give instructions on behalf of the estate. I do not therefore agree with her that the applicant acted for the estate and that the estate should pay the taxed costs.
20. It must be appreciated that there is no law requiring that instructions by a private person or entity to an advocate must be in writing. Instructions or retainer may be express or implied from the conduct of the parties in a particular case. (see *Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Ltd [2007] eKLR*.)
21. The respondent again argued that she was not served with the notice for taxation. She did not, however, say how she came to know about the taxation and the certificate of taxation. Even then, she did not do anything to challenge that certificate of taxation. I am unable to agree with her that she was not served. Even if she was not, this is not the application in which to consider such a grievance.
22. The respondent again argued that the applicant had been paid Kshs. 150,000 which was not taken into account during taxation. This again is not an issue for this court to resolve in this application. That issue could only have been raised before the taxing officer and thereafter in a reference to this court is not the case here.
23. Section 51(2) of the *Advocates Act* is clear that a certificate of costs unless set aside, is final as to the amount covered thereby.



24. Having determined that the applicant/Advocates were instructed by the respondent and she is responsible for payment of their taxed costs, I have no option but to allow the application.
25. Consequently, the application dated 14<sup>th</sup> June 2021, is hereby allowed and Judgment entered for the applicant as prayed. The applicant shall also have costs of this application.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2021**

**EC MWITA**

**JUDGE**

