



Owiti, Otieno & Ragot Advocates v Nyambati (Environment and Land Miscellaneous Application 45 of 2019) [2025] KEELC 3136 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3136 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 45 OF 2019
SO OKONG'O, J
APRIL 3, 2025

BETWEEN

OWITI, OTIENO & RAGOT ADVOCATES APPLICANT

AND

JASON M NYAMBATI RESPONDENT

RULING

1. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
2. The Applicant filed an advocate and client bill of costs dated 14th November 2019 for taxation against the Respondent in respect of the services that the Applicant is said to have rendered to the Respondent in Kisumu ELC No. 498 of 2015(formerly Kisumu HCCC No. 171 of 2011)(hereinafter referred to as “the primary suit”). The Respondent was one of the defendants in the primary suit. The Applicant’s bill of costs was taxed by the taxing officer Hon. M.Shimenga on 28th October 2021 at Kshs. 263,500.32. The Respondent appeared in person during the taxation and informed the court that he had paid a sum of Kshs. 20,000/- to the Applicant for which he was entitled to a credit from the amount claimed by the Applicant. The sum of Kshs. 263,500.32 awarded to the Applicant as costs was arrived at by the taxing officer after deducting the said sum of Kshs. 20,000/- that had been paid by the Respondent to the Applicant. The Respondent did not raise any objection to the Applicant’s Bill of Costs save for the issue of the payments that he had made. After the ruling by the taxing officer on 28th October 2021, the Respondent did not object to the taxation as provided under Paragraphs 11(1) and (2) of the *Advocates Remuneration Order* which provide 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. What is before me is the Applicant’s Notice of Motion application dated 6th September 2023 brought under Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya seeking an order that the Certificate of Taxation issued in favour of the Applicant on 11th November 2021 in the sum of Kshs, 263,500.32 be adopted as judgment of the court together with interest at 14% per annum from 13th February 2020 until payment in full. The application was supported by the affidavit of Jude Ragot Advocate in the Applicant’s firm. The Applicant averred that the Respondent instructed the Applicant to act for him in the primary suit on or about 21st November 2011. The Applicant averred that the Respondent had not disputed having retained the Applicant in the matter. The Applicant averred that the Applicant entered appearance in the primary suit and appeared in court on several occasions on behalf of the Respondent until 15th January 2019 when it was granted leave to cease acting for the Respondent.
 4. The Applicant averred that on 13th January 2020, it presented its bill to the Respondent for settlement but the Respondent failed to do so. The Applicant averred that it filed Advocate and Client Bill of Costs which was taxed on 28th October 2021 in the sum of Kshs. 263,500.32 and a certificate of taxation was issued on 11th November 2021. The Applicant averred that the said Certificate of Taxation had neither been set aside nor varied. The Applicant averred that it was entitled to interest at 14% per annum on the costs awarded from 13th February 2020 being one month from the date of presentation of its Advocate and Client Bill of costs until payment in full in accordance with Rule 7 of the Advocates Remuneration Order.
 5. The Respondent opposed the application through a Notice of Preliminary Objection dated 15th December 2024 and a replying affidavit sworn on 22nd December 2024. In his Notice of Preliminary Objection, the Respondent contended that there was no retainer between him and the Applicant, Owiti, Otieno & Ragot Advocates and as such the costs claimed by the Applicant are not payable. In his replying affidavit, the Respondent averred that the firm of Advocates which he instructed was Otieno, Ragot & Company Advocates. The Respondent averred that he never instructed the Applicant, Owiti, Otieno & Ragot Advocates to act for him in the primary suit. The Respondent averred that if the firm of Owiti, Otieno & Ragot Advocates acted for him at any stage of the proceedings in the primary suit, it did so without instructions and could only demand payment for services rendered from the date when they came on record. The Respondent averred that he had not received a bill from the firm of Otieno, Ragot & Company Advocates. The Respondent averred further that there were many defendants in the primary suit who were represented by the Applicant. The Respondent averred that it was not fair in the circumstances for the Applicant to demand from him the whole costs for defending the primary suit. The Respondent averred that the Applicant had filed separate bills of cost against the other defendants in the primary suit which should be consolidated with the bill of cost that was filed herein for taxation so that the costs can be apportioned amongst all the defendants who were represented by the Applicant to guard against unjust enrichment.
 6. The Applicant filed a supplementary affidavit also sworn by Jude Ragot on 13th February 2025 in response to the Respondent’s Notice of Preliminary Objection and replying affidavit. In the affidavit,



Mr. Ragot averred that when the Respondent instructed him to act for him in the primary suit, he was practising in the firm of Otieno, Ragot & Company Advocates. He stated that it was to that firm that the Respondent made payment of the initial legal fees. He stated that he continued to represent the Applicant under the firm of Otieno, Ragot & Company Advocates until June 2018 when his firm changed names to Owiti, Otieno & Ragot Advocates. Mr. Ragot stated that he notified the Respondent of the change of the name of the firm and of the fact that he had filed a Notice of Change of Advocates in the primary suit. He stated that he continued to act for the Respondent through the new law firm, Owiti, Otieno & Ragot Advocates and the Respondent continued to make payments of legal fees to the new law firm until when the firm obtained leave to cease acting for him. He averred that the claim by the Respondent that he had never interacted with the Applicant, Owiti, Otieno & Ragot Advocates was not true and was an attempt to avoid responsibility for the costs of the legal services rendered to him. He stated further that, the fact that the Respondent was notified of the change of the name of the original law firm, continued to receive services through the new law firm and made payments to the firm was sufficient proof of retainer.

7. The application was heard orally on 20th February 2025 when Mr. Ragot appeared for the Applicant while Mr. Nyamweya appeared for the Respondent. The Applicant submitted that the payment of legal fees by the Respondent to the new law firm meant that the Respondent accepted the change of advocates. The Applicant submitted that a retainer need not be in writing.
8. The Respondent's advocate maintained that there was no retainer between the Respondent and the firm of Owiti, Otieno & Ragot Advocates. The Respondent submitted that the receipts for the payments made by the Respondent to the firm of Owiti, Otieno & Ragot Advocates produced as evidence of retainer did not mention the primary suit. The Respondent submitted that the burden was upon the Applicant to prove retainer which it failed to do.
9. I have considered the application together with the supporting affidavit and supplementary affidavit. I have also considered the replying affidavit and Notice of Preliminary Objection filed by the Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various authorities cited in support thereof. Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya which I have reproduced earlier in the ruling provides in clear terms that unless set aside or altered by the court, the certificate of taxation issued by the taxing officer is final as to the costs so certified. The Section gives the court the discretion to enter judgment for the advocate for the sum certified by the taxing officer to be due where there is no dispute as to the retainer.
10. In *Amondi & Co Advocates v. County Government of Kisumu* [2021] eKLR, [2021]KEELC 2421(KLR), the Court stated as follows with regard to Section 51(2) of the *Advocates Act*:

Having regard to the above provision it is clear that the only instances where a court may not enter judgment on a certificate of costs is where the certificate has been set aside, varied and/or altered or the retainer is disputed. See Republic -vs- City Council of Nairobi, Ivyland Park Ltd (interested party) Ex parte Inderpal Singh & 2 others (2021) eKLR where P. Nyamweya J (as she then was) stated: -

It is an established position of law that the only reason a court of law cannot enter judgment on a certificate of costs is if the same has been set aside or altered, or where there is an issue of retainer'."



11. In *Mwema Kitulu & Co. Advocates v. Kenya Deposit Insurance Corporation*, ELC Misc. Application No. 29 of 2016, this court stated as follows:

The taxing officer has wide powers under paragraphs 10 and 13A of the Remuneration order which he can employ to determine whether or not there was an agreement between the parties on fees. Since the determination of the issue would require calling of evidence, the taxing officer is better placed to take such evidence and he has power to do so. The party who is aggrieved with the decision of the taxing officer on any issue raised before him can raise objection under paragraph 11(1) of the Remuneration Order. This I believe would bring to an end the practice which is gaining root in which parties for various reasons are raising all sorts of objections to bills of costs and seek reference of such objections to the High Court for determination. Some of these objections are raised for the purposes of delaying taxation of bills of cost. I believe that judicial time and costs to the parties would be saved if all the issues in dispute in a bill of costs are determined by the taxing officer and a single reference is brought to the High Court under paragraph 11(1) of the Remuneration order for all objections which a party may have against the decision of the taxing officer. The only exception should be where the parties agree under paragraph 13A of the Remuneration Order to refer a matter to the High Court for its opinion.

12. I have considered the decisions of my brothers, Waweru J. and Gikonyo J. in the cases of *Abincha & Co. Advocates vs. Trident Insurance Co. Ltd.* [2013]eKLR and *Kenya Orient Insurance Limited vs. Oraro & Company Advocates*[2014]eKLR which were cited by the Respondent in support of its submission that the issue as to whether or not the taxing officer had jurisdiction to tax the Applicant's bill could only be determined by this court. I beg to differ from the restrictive interpretation which my colleagues gave to the provisions of paragraphs 10 and 13A of the Remuneration Order. As I have stated above, my view is that the taxing officer has power to determine all issues factual and legal, arising out of or connected with a bill of costs before him and that this court's intervention is limited only to giving an opinion pursuant to a reference by agreement of the parties under paragraph 12 of the Remuneration Order or determining an objection under paragraph 11 of the said *Remuneration Order*. The taxing officer has no power to refer an issue to the superior court for its opinion in the absence of agreement by the parties. If the position taken in the two cases above was to hold, the question which arises is, what happens if the parties do not agree to refer an issue to the superior court for its opinion? Does the taxation come to a halt?"

13. I still hold the same view. I think that if the Respondent was serious about the issue of retainer, he should have raised it before the taxing officer where he appeared to have conceded that the Applicant acted for him. The Respondent's problem before the taxing officer was that the Applicant had not given him credit for some of the payments that he had made.

14. In *Black's Law Dictionary, Ninth Edition* a retainer is defined as:

A client's authorization for a lawyer to act in a case."

15. In *Ochieng, Onyango, Kibet & Another v. Adopt A Light Limited* [2007] eKLR the court stated as follows on retainer:

It is clear that the respondent's defence is based on the fact that no evidence of retainer is exhibited to the present application. I reckon that an Advocate/client relationship is grounded on retainer and in the absence of retainer, one can say the relationship is on shaky grounds. The burden of establishing the existence of a retainer is always and primarily on



the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service.”

15. I agree with the Applicant that a retainer need not be in writing. A retainer can be in writing or oral and may also be inferred from the conduct of the parties. See the decisions in *J Mbugua Mburu & Associates Advocates v. City Star Shuttle Ltd* [2021] eKLR and *Omulele & Tollo Advocates v. Mount Holdings Limited* [2016] eKLR. It is not disputed that the Respondent had initially instructed the firm of Otieno, Ragot & Company Advocates to act for him in the primary suit. In 2018, the firm of Otieno, Ragot & Company advocates merged with the firm of Odhiambo Owiti & Campany Advocates to form a new law firm, Owiti, Otieno & Ragot Advocates. I am satisfied from the evidence on record that the Respondent was notified of the merger of the two law firms and of the fact that the new law firm, Owiti, Otieno & Ragot Advocates, had filed a notice of change of advocates in the primary suit and would henceforth be the firm acting for him in the matter. There is evidence that the firm of Owiti, Otieno & Ragot Advocates acted for the Respondent in the primary suit for some time until it applied for leave to cease acting for the Respondent. While the firm of Owiti, Otieno & Ragot Advocates was acting for the Respondent, the Respondent made payments of legal fees to the firm on 6th June 2018, and on 6th March 2020 after it had ceased to act. The Respondent claimed that the receipts for the payments made by the Respondent that were produced by the Applicant in evidence did not refer to the primary suit. It should be noted that it was the Respondent who was the first to produce the said receipts before the taxing officer, and on account of these receipts, he obtained a reduction on the taxed costs. Secondly, if these payments were not for the legal fees for the primary suit, in which other suit was the Applicant acting for the Respondent?
16. It is my finding from the evidence before the court that the Respondent authorised the Applicant to act for it in the primary suit. This can be inferred from; his failure to raise objection when notified of the merger of the firm of Otieno, Ragot & Company advocates with the firm of Odhiambo Owiti & Campany Advocates to form a new law firm, Owiti, Otieno & Ragot Advocates and the fact that he would be represented by the new firm, making payment of legal fees to the new firm and not raising the issue of retainer before the taxing officer. I therefore find no merit in the Respondent’s objection to the Applicant’s application on account of lack of retainer. As correctly submitted by the Applicant, the other issues raised by the Respondent should have been raised before the taxing officer and in my view, are not valid grounds upon which the court can refuse to enter judgment for an advocate for the taxed and certified costs.

Conclusion

17. In conclusion, I find merit in the Notice of Motion dated 6th September 2023. Judgment is entered for the Applicant against the Respondent in the sum of Kshs. 263,500.32 being the costs taxed and certified by the taxing officer to be due to the Applicant in her Certificate of Costs dated 11th November 2021. The decretal sum shall be paid together with interest at the rate of 14% per annum from the date hereof until payment in full.

DELIVERED AND DATED AT KISUMU ON THIS 3RD DAY OF APRIL 2025

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Onyango Jael h/b for Mr. Ragot for the Applicant



N/A for the Respondent

Ms. Maureen-Court Assistant

