Muri Mwaniki & Wamiti Advocates v Caritas Mariana Holy Family Children's Home (Miscellaneous Application 74 of 2017) [2025] KEELC 4240 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4240 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS APPLICATION 74 OF 2017

JA MOGENI, J

MAY 29, 2025

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES ..... APPLICANT

AND

CARITAS MARIANA HOLY FAMILY CHILDREN'S HOME ..... RESPONDENT

RULING

1. By way of Chamber Summons dated 12/8/2021 expressed under Paragraph *11*(1) & (2) of the Advocates Remuneration Order, the Applicant/Advocate seeks Orders that;

    1. This Hon Court be pleased to set aside the ruling of the Deputy Registrar Hon V Kachuodho delivered on 7/03/2019 and any resultant Certificate of Taxation to the extent that it relates to the reasoning and determination pertaining to taxation of the whole of the Advocate/Client Bill of Costs dated 13/10/2017

    2. This Honorable Court be pleased to tax the Bill of Costs dated 13/10/2017

    3. In the alternative to Prayer 2 above, this Hon Court do remit the whole of the Bill of costs to another Taxing Officer for taxation with direction on taxation.

    4. The Advocate/Applicant be awarded costs of this Application.

2. The Application is based on the grounds that the Taxing Officer erred in law and in principle and misdirected her discretion by wholly dismissing the Applicant's Bill of Costs; the Taxing Officer failed to consider and find that Section 2 of the *Advocates Act*, the definition of 'Client' includes any person who is or may be liable to pay an Advocate any costs; the Taxing Officer failed to consider Para 31 of the *Advocates Remuneration Order* which provides that the borrower is responsible for payment of the costs of investigating title and perfecting the security; the Taxing Officer erred in law and in principle and misdirected himself in failing to consider and find that the Respondent is liable to pay the costs in

respect of instructions to perfect security for the benefit of the Respondent; the Taxing Officer erred in law and misdirected himself in principle in failing to consider and find that in relation to the Bill of Costs for worn undertaken as the request of the borrower in the perfection of security through an implied retainer, the Respondent was liable for payment of the Advocate/Applicant's fees; and that the Taxing Officer erred in law and misdirected himself in principle in finding that there was no evidence of work on instruction from the Respondent yet the Applicant had placed on record their list and bundle of documents in support of the work done and charged for in the Bill of Costs..

3. The Application is supported by the Affidavit of even date of Martin G. Mwaniki Advocate on behalf of the Applicant. Rehashing the above grounds, copies of the Bill of Costs dated 13/10/2017 and 10/11/2017, the impugned Taxing Officer Ruling and reasoning dated 3/03/2021, a Letter of Offer dated 18/05/2011.

4. I have checked the records and noted that there is no Replying Affidavit on record. I will therefore assume that the Application is not opposed.

5. On 04/03/2025 directions were issued for parties to prosecute the Application by way of written submissions. The firm of Muri, Mwaniki Thige & Kageni LLP filed the Applicant's submissions dated 17/3/2025. For the Respondent, Dr Christopher Kenyariri filed their submissions dated 21/03/2025.

6. The Applicant has submitted that Section 2 of the *Advocates Act* (Cap 16 of the Laws of Kenya) defines a Client as:-

> "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."

7. The Applicant has also relied on the Court of Appeal case of *Omulele & Tollo Advocates -Versus- Mount Holdings Limited* (Civil Appeal 75 of 2015) (2016) KECA 523 (KLR) where the Court found that a retainer need not be in writing and can be oral, or deduced from the documents and conduct of the parties. That in the above cited case, the learned Judges of the Court of Appeal pronounced themselves in the following manner:

> "From the above definition, 'retainer' covers a broad spectrum. It encompasses the instructions given to an Advocate as well as the fees payable thereunder. A retainer need not be written. It can be oral and can even be inferred from the conduct of the parties."

8. At the same time the Applicant submitted that the above position was reiterated in the case of *Mereka & Co. Advocates vs. Zakhem Construction (Kenya) Ltd* [20141 eKLR, where the Court stated that instructions need not be in writing but can be inferred from the conduct of the parties.

9. It is the Applicant's contention that the Applicant/Advocate received instructions from Ecobank to draw and register a Legal Charge over Title No. Thika Municipality Block 23/1107 registered in the name of the Respondent/Client. The Charge was to secure a loan of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000) advanced to the Respondent/Client.

10. That the Applicant/Advocate, in line with the instructions received, proceeded to prepare the requisite security documents under the Loan facility transaction to enable Ecobank secure the loan and advance the said facility to the Respondent/Client.

11. It is the contention of the Applicant that during the entire securitization process, the Respondent/ Client did not deny the existence of an Advocate Client relationship as between it and the Applicant/ Advocate.

    Further, that during the taxation proceedings before the Deputy Registrar, the Respondent/Client did not deny or challenge the fact that the Applicant/Advocate executed the instructions and prepared the Charge which allowed it to receive the loan of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000).

12. Therefore it is the submission of the Applicant that from the foregoing, and in line with the above cited decisions, the Respondent's actions draw an inference of a retainer relationship giving rise to an Advocate/Client relationship and therefore, the Respondent's claim that the Applicant was not acting on its behalf does not hold. That given the circumstances the Applicant submits that the Taxing Officer erred in holding that there was no evidence to indicate that the Applicant received instructions from the Respondent, whereas a Retainer giving rise to Advocate/Client relationship could be proved from the conduct of the Respondent.

13. It is the position of the Applicant paragraph 31 of the *Advocates Remuneration Order 2009* provides that:-

    > " The costs of a mortgage for the investigation of title and the preparation, completion and registration of his security or of any discharge or assignment thereof made at the request of the borrower, whether or not the transaction is completed shall be payable by the borrower, but any commission due to the mortgagee's Advocate for negotiating the loan shall be payable by the mortgagee."

14. Thus since there is no dispute that the Respondent is a borrower within the meaning of the aforementioned paragraph, and as per the Letter of Offer dated 18th May 2011. Then the above provision makes it clear that the fees for the preparation and registration of a security made at the request of the borrower shall be payable by the borrower.

15. That the Respondent/Client signed the Letter of Ooffer dated 18th May 2011 (annexed as "MGM 4" in the Supporting Affidavit) for the loan facility. Clause 1 under the subheading, General Terms and Conditions, provides that:-

    > " All legal charges including Advocates fees, valuation, stamp duties or other fees, costs and expenses incurred by the Bank in connection with administration of the facility, perfection of securities with respect to the facility herein and any proceedings for recovery shall be borne by the Borrower."

16. The Applicant placed reliance on the case of *Andrew Mukite Musangi t/a Multite Musangi and Co Advocates v Naomi Wangui Maina & 2 Others* [2021] eKLR, where the Respondents filed a Notice of Motion Application seeking to strike out the Applicant's Advocate/Client Bill of Costs on the basis that they never instructed the Applicant/Advocates to act for them in preparing any charges over certain parcels of land. Hon. Lady Justice Rachael Ng'etich, dismissed the Application, holding that:

    > " ... The bank was to instruct an Advocate to prepare the charge instrument and the borrower to meet the Advocate's expenses being or as captured in paragraph 5 above. The bank instructed the Applicant herein to facilitate processing of the Respondent's loan which required charging of security, and under clause 18, the paying party is the borrower. In my

view, it is in order for the Applicant to tax the Respondent's expenses resulting from securing the loan borrowed. I see no merit in the Application herein."

17. Further the Applicant referred to Section 2 of the *Advocates Act* and stated that it defines a Client as any person who is or may be liable to pay to an Advocate any costs, the Respondent, being liable to pay legal fees to the Applicant herein as borrower in view of Paragraph 31 of the Advocates Remuneration Order, qualifies him as the Applicant's Client. Therefore, that the Respondent/Client, having expressly undertaken to pay Advocates fees, valuation, stamp duties or other fees, costs and expenses, is therefore liable to pay to the Applicant/Advocate its Legal Fees and Costs arising out of the Loan Facility Transaction in line with paragraph 31 of the *Advocates Remuneration Order 2009* as well as per the said Letter of Offer.

18. This being the case then the Respondent cannot then, after enjoying the Advocate's legal services, turn around and allege that he is not liable for the fees whereas there were legal fees and other expenses whose incurrence was necessary in the negotiation, preparation and perfection of the security. Thus it is the submission of the Applicant that the Taxing Officer was in error when he failed to consider the provisions of paragraph 31 of the *Advocates Remuneration Order, 2009* and found that the Respondent was borrower and mortgagor in the subject transaction and was liable to pay the Applicant/Advocate's legal fees for the transaction and that the said Bill of Costs was, therefore, properly drawn and raised against the Respondent.

19. Further that the Taxing Officer was in error when he failed to find that in view of Section 2 of the *Advocates Act*, the definition of 'Client' includes any person who is or may be liable to pay an Advocate any costs.

20. Additionally the Applicant submits that in dismissing the Applicant's Advocate/Client Bill of Costs dated 12/08/2021, the Learned Taxing Officer ruled that there was no evidence of work done by the Applicant/Advocate on behalf of the Respondent/Client. That whereas under Paragraph 13A of the Advocates Remuneration Order 2009 the Taxing Officer had power and authority to summon and examine witnesses, to administer oaths and direct for production of books, papers and documents the Learned Taxing Officer erred in law and principle in failing to exercise power and authority to call for documents pursuant to Paragraph 13A of the Advocates Remuneration Order, 2009. That despite the Bill of Costs being rightly drawn to reflect the work done the Taxing Master further erred in principle by striking out the Advocate's Bill of Costs in its entirety.

21. Thus the Applicant submits and prays that the Ruling delivered on 7th March 2019 be set aside and this Honourable Court be pleased to tax the Bill of Costs dated 18th October 2017, or in the alternative, this Honourable Court remits the Bill of Costs to another Taxing Officer for Taxation.

22. On his part the Respondent though not having filed a Replying Affidavit filed Submissions and stated that there are many Court decisions that require of the Court to judicial notice that unless a Taxing Master has erred on the principles that govern taxation of Bills of Costs, the discretion of the Taxing Officer should always be upheld. That the Taxing Officer found, items 1 and 4 of the Bill of Costs annexed to the reference as 'MGMI' clearly indicates that the Applicants were instructed by a bank which was not disclosed. That the Respondent being a Children's Home and not a bank then the title of the Bill of Costs as Advocates-Client is mischievous because at no time did an Advocate Client relationship arise between the Applicant and Respondent.

23. That Letter of Offer annexed by the Applicants dated 8.5.2011 and marked as MGM4, at page 3 of the said Letter of Offer under the general terms and conditions, number 1 clearly states that before

disbursement of the loan the bank had to debt the legal fees from the account of the Respondent/ borrower. This being the case, then the Respondent has no legal obligation towards the Applicants.

24. It is the submission of the Respondent that ordinarily, if a lender wants the borrower to pay the legal fees directly to the Lawyers acting for it, the borrower will be required to sign an undertaking to pay the Lawyer after the transaction is completed. That no such an undertaking was produced by the Applicant before the Taxing Officer. Thus the Respondent submits that there is no privity of contract between the Applicant and the Respondent to warrant filing of a Bill of Costs against the Respondent.

25. Additionally that under paragraph 11(1) of the *Advocates Remuneration Order*, objection to the Taxing Officer's decision should be made within fourteen (14) days of the date of the decision. This is a mandatory requirement done by writing to the Taxing Officer citing the items objected to.

26. According to the Respondent, the Applicant notified the Taxing Officer through their letter dated 21/3/2019 and objected to the Taxing Officer's decision from items 1-59 and requested for reasons. In their notice objecting the Taxing Officer's decisions on the items, they clearly referred to paragraph 1 of the Ruling of Taxation delivered on 7th March 2019 whose content they had knowledge of, otherwise then they could not be complaining if they were not aware of it. Suffice it to say, that the reasons that they were seeking for were contained in the Ruling itself.

27. The Respondent observes that the Applicant did not receive any communication from the Taxing Officer and in the year 2021, they decided to file a Reference, and knowing that they were out of time to file a Reference without leave, they quickly attended the Registrar to have the Ruling certified on 29/7/2021 to operate as reasons from the Taxing Officer to try and beat the fourteen (14) days requirement which had lapsed, and assist them to argue that the time will start running from 29/7/2021 to validate the reference they filed out of time on 12/8/2021.

28. Therefore, the Reference should have been filed not later than 21/3/2019, fourteen (14) days after the reasons given in the Ruling delivered on 7/3/2019. There is no other new document on record from the Deputy Registrar other than the Ruling delivered on 7/3/2019 to satisfy the requirement of paragraph 11 (2) of *Advocates Remuneration Order*. That the Reference is time-barred.

29. That Paragraph 11(4) of the *Advocates Remuneration Order* requires that after a party has run out of time like in the instant case, the party must, by a Chamber Summons Application apply to the High Court for enlargement of time. It is mandatory. The Applicant has not made such an Application nor included a prayer for enlargement of time in the instant Application. There is no life that can be breathed into the current Reference which should be dismissed with costs to the Respondent because it is time-barred.

30. The Respondent submits that the finding of the Taxing Officer, on the Bill of Costs dated 13th October 2019 was proper and since it had no legs to stand on and the discretion was properly exercised. Thus he prays that the Applicant's Reference dated 12th August 2021 be dismissed with cost to the Respondent.

31. The single-most issue that stands out for determination is whether the Application is merited.

32. The Application before Court invokes the appellate jurisdiction of this Court vide a Reference as provided for under Para. 11 (1) & (2) of the *Advocates Remuneration Order* which provides;

> " 11. Objection to decision on taxation and appeal to Court of Appeal

(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."

33. Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper Application of the correct principles of law.

34. In *First American Bank of Kenya v Shah and Others*(2002) E.A.L.R 64 the Court held that;

> " First, I find that on the authorities, this Court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fees awarded was so manifestly excessive as to justify an inference that it was based on an error of principle."

35. Indeed these principles are well crystalized. In making such reference, a party is required to show that its case meets the principles set in jurisprudence for interference with the exercise of discretion by the Taxing Master.

36. The Applicant seeks to set aside the Ruling of Hon. V. Kachuodho Deputy Registrar dated 7/3/2019 dismissing the Applicant's Bill of Costs on the grounds interalia that there was lack of evidence of retainer between the Respondent and the Applicant. That the Respondent did not issue instructions to the Applicant to so act to warrant the Bill of Cost raised against him. In assailing this finding, the Applicant faults the Taxing Officer for failing to consider the provisions of Para. 31 Advocates Remuneration Order.

37. It is trite, that the existence of an Advocate-Client relationship is central as it gives jurisdiction to the Taxing Master to entertain a Bill of Costs. In *Wilfred N. Konosi T/A Konosi & Co. Advocates v Flamco Limited* [2017] eKLR, the Court of Appeal stated as follows:

> " The issue whether an Advocate-Client relationship exists in taxation of a Bill of Costs between an Advocate and his/her Client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the *Advocates Act* and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in Taparn v Roitei [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The *Advocates Act* and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between Advocates and their Clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered.

The nexus between the Advocate and his or her Client is the Advocate/Client relationship which springs from instructions by the Client to the Advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.As a Judicial Officer sitting to tax a bill of costs between an Advocate and his or her Client, a Taxing Officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of Advocate/ Client relationship is raised. An allegation that the Advocate/Client relationship does not obtain in taxation of an Advocate/Client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question." (Emphasis mine)

38. Para. 31 of the *Advocates Remuneration Order* is to the effect that;

> " 31. Costs of mortgage to be paid by borrower. The costs of a mortgagee for the investigation of title and the preparation, completion and registration of his security or of any discharge or assignment thereof made at the request of the borrower, whether or not the transaction is completed, shall be payable to the borrower, but any commission due to the mortgagee's Advocate for negotiating the loan shall be payable by the mortgagee."

39. My reading of Item 1 of the Applicant's Bill of Cost dated 13/10/2017 expressly refers to receiving instructions from Bank to prepare, register and perfect a charge of Kshs. 1,500,000/= over Title Number Thika Municipality/Block 23/1107. The Taxing Officer reasoned that the instructions to act were issued by the aforesaid unnamed Bank but from the filed documents, it emerged that the name of the Bank was Ecobank. That accordingly, the instructing Client was Ecobank as opposed to the Respondent herein. That in the absence of any evidence of instructions from the Respondent to the Applicant, there was no basis to assess the Bill of Cost filed before the Taxing Officer hence the dismissal with no orders at to costs.

40. Para. 24 (b) *Advocates Remuneration Order* states that a mortgage of charge is prepared by the Advocate of mortgagee or charge who in the circumstances is Ecobank. Faced by similar scenario of demand for Advocate fees from the borrower the Court in *Njuguna Matiri & Company Advocates v National Bank of Kenya* [2015] eKLR in dismissing the bank's objection to the Bill of Cost by the Applicant, the Court emphasized that;

> " Section 31 of the Advocates Remuneration Order 2014 – quoted above, rightly states that the fees for the preparation and registration of a security made at the request of the borrower shall be payable by the borrower. In my view, the above provision clearly indicates that the request made by the borrower – can only mean, a request to the bank, not to the Advocates, meaning, the bank ought to debit the borrowers account to the order of the Advocates fees when it becomes payable and or demanded. This is informed by the fact that there exists no privity of contract between a borrower and an Advocate for the bank. It is the borrower who enters into a contract with the bank for advancement of finances against securities that the Bank commissions its lawyers, as its agents to prepare and perfect. In such scenario, the Bank then enters into another contract between itself and the Advocate for payment of its fees, upon completion, or on whatever terms of payment of legal fees, but not with the borrowers who at this point are strangers to the Advocates ..."

41. The Court also in the case of *National Bank of Kenya Limited v Kangethe George T/A Kangethe & Company Advocates* Misc. Application No. 718 of 2014 (2012) KLR, in very similar circumstances, the Court held that there can be no privity of contract between a borrower and an Advocate instructed

by the bank. The Client was held to be the instructing bank and ordered that an Advocate-Client Bill of Costs be filed.

42. Section 45 of the *Advocates Act* provides as follows with respect to retainer agreements:

> " Subject to Section 46 and whether or not an order is in force under Section 44, an Advocate and his Client may—
>
> a. before, after or in the course of any contentious business, make an agreement fixing the amount of the Advocate's remuneration in respect thereof;
>
> b. before, after or in the course of any contentious business in a civil Court, make an agreement fixing the amount of the Advocate's instruction fee in respect thereof or his fees for appearing in Court or both;
>
> c. before, after or in the course of any proceedings in a criminal Court or a Court martial, make an agreement fixing the amount of the Advocate's fee for the conduct thereof; and such agreement shall be valid and binding on the parties provided it is in writing and signed by the Client or his agent duly authorized in that behalf." (Emphasis added)

43. The Court has pronounced itself on the threshold required to prove the existence of a retainer agreement under Section 45 of the Act. The Court of Appeal was faced with an almost similar situation in a case of an unwritten agreement between a firm of Advocates and its Client in the case of *Omulele & Tollo Advocates v Mount Holdings Limited*, [2016] eKLR. In dismissing the claim of an oral retainer agreement, the Court held that for the retainer agreement to exist, the terms of the agreement must have been reduced into writing, which was not the case.

44. It is trite that he who alleges must prove. The Applicant sought to recover Advocate/Client Bill of Cost and was obliged to prove existence of such a relationship to give rise to the retainer. The Applicant failed to do so. Instead the Applicant argues that there was an implied retainer arising from the works undertaken to perfect the surety for the Respondent's benefit. I have perused the Clause on legal charges as contained at page 3 in the Letter of Offer and paragraph 1 of the General Terms and Conditions which states:-

> " All legal charges, including Advocates fees, valuation, stamp duties or other fees, costs and expenses incurred .... shall be rendered by the bank's approved service providers and the fees shall be recovered by debiting the Borrower's Account"(Emphasis added)

45. It therefore follows that from the above Clause that such legal fees such as instruction fees in this case, are incurred by the Lender in this case Ecobank and recovered from the borrower's (Respondent) account on demand. I say so because the said Letter of Offer is exclusively between Ecobank Bank and the Respondent. The Clause does not provide for the Advocate to recover directly from the Borrower. If that was to be the case, nothing would be easier than the Clause to expressly state so.

46. The Applicant sought to rely on the definition of a Client as provided under Section 2 of the *Advocates Act*. It provides:-

> " Client" includes 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."

47. The above definition aptly describes the instance of an Advocate/Client relations in this case in two aspects; the first is the undisputed relationship between the Applicant and Ecobank as confirmed in the issuance of instructions described in the Bill of Costs. The second scenario is the one contemplated by the Applicant with the Respondent in this case as a potential Client liable to pay Advocates costs. Again, the import of the Letter of Offer is that the legal fees are recoverable on demand by the lender from the borrower.

48. The upshot of the forgoing is that I find no misdirection on the Taxing Officer's Ruling and final orders.

49. The reference is bereft of merit and it is dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

MOGENI J

JUDGE

In the presence of:

Mr. Waweru for the Applicant/Advocate

Dr. Kenyariri for the Respondent

Mr. Melita – Court Assistant