



REPUBLIC OF KENYA



KENYA LAW
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Kamundi & another v PMM Estates (2001) Limited (Miscellaneous Application E320 of 2023) [2025] KEHC 1682 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION E320 OF 2023

JK NG'ARNG'AR, J

FEBRUARY 4, 2025

**IN THE MATTER OF: AN ADVOCATE/CLIENT BILL OF COSTS UNDER
THE ADVOCATES ACT AND THE ADVOCATES**

(REMUNERATION) (AMENDMENT ORDER 2014);

IN THE MATTER OF: RULE 116(3) OF THE COURT OF APPEAL RULES,

2022

AND

**IN THE MATTER OF: COURT OF APPEAL CIVIL APPEAL NO. E124 OF
2022 BY THE OWNERS OF MOTOR VESSEL**

'MIREMBE JUDITH' V JADE INTERNATIONAL

SHIPPING LINE DMCC

(BEING AN APPEAL FROM THE WHOLE OF THE RULING AND

ORDER OF THE HIGH COURT AT MOMBASA (HONOURABLE

LADY JUSTICE NJOKI MWANGI) DATED AND DELIVERED ON

28.10.2022) IN

ADMIRALTY CLAIM NO. M001 OF 2022

THE OWNERS OF MOTOR VESSEL 'MIREMBE

JUDITH'

VERSUS

JADE INTERNATIONAL SHIPPING LINE DMCC

AND IN THE MATTER OF

BETWEEN



F KINYUA KAMUNDI 1ST RESPONDENT
DT MUYAA (PRACTICING AS KINYUA MUYAA & COMPANY
ADVOCATES 2ND RESPONDENT

AND

PMM ESTATES (2001) LIMITED CLIENT

RULING

1. The Client/Applicant filed a Notice of Motion application dated 31st May 2024 pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law.
2. The Applicant seeks for orders that the Bill of Costs dated 16th November 2023 between the Advocate and the Client be stayed pending determination of HCCC E061 OF 2023, F. Kinyua Kamundi & Another v PMM Estates (2001) Limited, that the Bill of Costs dated 16th November 2023 between the Advocate and the Client be stayed pending the determination of the Bill of Costs in Mombasa Court of Appeal *CA No. E124 of 2022*, the Owners of Motor Vessel ‘Mirembe Judith’ v Jade International Shipping Line, and that the court be pleased to make such other order as may be expedient in the matter.
3. The application is premised on grounds on its face and the affidavit of Kelvin Mogeni sworn on 31st May 2024 that the advocate has filed a suit before the High Court seeking orders on the Bill of Costs before the Court of Appeal. That the client has raised the issue of fees which was agreed and paid by the client to the advocate raising the question as to whether the Bill of Costs is necessary. That the advocate had filed a Bill of Costs before the Court of Appeal and the Deputy Registrar made a ruling to the effect that he had jurisdiction to hear and determine the application. That the Bill of Costs before the Court of Appeal has not been withdrawn and no order has been made by the Court of Appeal or the taxing master of that court marking the Bill of Costs as withdrawn. That the Court of Appeal has made a ruling that all costs and consequential costs be met by the Respondent in that appeal, and that the Bill of Costs before this court is an abuse of the court process.
4. The Advocates/Respondents filed a Replying Affidavit sworn by D. Muyaa on 6th June 2024 made reference to the Defence and Replying Affidavit and sworn by Dr. Wilson Mukama in HCCC No. E061 of 2023 alleging that there was a fee agreement in the sum of US\$ 5,000.00, that an earlier Bill of Costs had not been determined, that the Court of Appeal had delivered a ruling on 10.8.2023, and that the High Court has no jurisdiction to determine the matter. The Advocates/Respondents further stated that in paragraph 7 of the Defence, the Client/Aapplicant pleaded that the Bill of Costs then pending in the Court of Appeal was immature as no Party and Party Bill of Costs had been taxed. That the Client/Applicant wished to rely upon the Defence in seeking stay of execution of the present bill purporting that the advocates could not file the Party and Party Bill after the Client/Applicant failed to pay their fees and instructed another counsel.
5. The Advocates/Respondents aver that in the suit for security for their fees, the Client/Applicant disputes jurisdiction of the High Court. That in the earlier bill that was withdrawn, the Client disputed jurisdiction of the Deputy Registrar of the Court of Appeal to tax the bill. That the Client now seeks to obtain a stay of taxation of the bill filed at the High Court. The Advocates state that they do not have a fee agreement with the client as under Section 45 (1) of the *Advocates Act*, a fee agreement must



be in writing and signed by a Client or its agent duly authorized on that behalf. That the firm could not have accepted or agreed to the fees of US\$ 5,000.00 when the fees under the Advocates' Remuneration order is US\$ 519,129.00. The Advocates further state that in a ruling and orders made on 1.9.2023 in Civil Appeal No. E0124 of 2022, the Court of Appeal clarified its judgment delivered on 14.4.2024 by a further order that apart from the costs of the proceedings, the Respondent in that appeal should pay port charges. That the fees claimed by the Advocates herein are not payable by the Respondent, Jade International Shipping Line, in that appeal. That the Advocates fees are payable by the client and not the opposing party in proceedings in which legal services were provided.

6. The Advocates pointed out that the previous Bill of Costs dated 18.7.2023 filed in the Court of Appeal in Civil Appeal No. 124 of 2022 was withdrawn by Notice of Withdrawal dated 27.10.2023 and they notified the Deputy Registrar, Court of Appeal by a letter. That both the client and its advocates were served with the notice and letter. That the client had objected jurisdiction of the Deputy Registrar of the Court of Appeal to tax Advocate/Client Bills of Costs and it is on this basis that the Bill was withdrawn. That the present Bill is pending taxation in the High Court and that there is no need for an order that the Bill had been withdrawn.
7. The application was canvassed by way of written submissions. The Client/Applicant filed submissions dated 24th October 2024 and argued that they made an application to the Court of Appeal seeking clarification on who is to bear all costs, charges and consequential charges on detention of the Motor Vessel Mirembe Judith. That having found the action of arresting its vessel unwarranted, it could not be the intention of the same court to punish the Client with costs. That the term all consequential costs and charges includes the advocates costs herein. The Client further submitted that the Advocates had filed a Bill of Costs before at the Court of Appeal and that upon an application challenging the Bill, the Deputy Registrar made a ruling that he indeed had jurisdiction to hear and tax the Bill. That no evidence has been shown that the Bill was withdrawn or an order of the Court of Appeal withdrawing the same. That the Bill of Costs dated 18th July 2023 is alive and nothing stops the advocates from proceeding with taxation.
8. The Advocates/Respondents in their submissions dated 11th November 2024 in opposition to the Client's application responded to the grounds raised in the motion. On the first ground that there is a suit pending in the High Court, the Advocates argued that the suit was for security pending filing and taxation of an advocate-client Bill of Costs. That on paragraph 7 of the annexed Client's Defence, the Client challenged the suit on grounds that the Bill of Costs had not been taxed and that the Client now seeks to prevent taxation of the Bill. That the Client filed a Preliminary Objection demanding that a Bill be taxed first at the same time intimating to court that they were keen to discuss fees. That the matter was adjourned when it came up for interpartes hearing, that the vessel sailed, fees were not settled, and that the Client has not prosecuted the Notice of Preliminary Objection. That under Section 48 of the [Advocates Act](#), taxation of the Bill of Costs precedes a suit for recovery of costs, and seeking security for costs and taxing costs are two processes that can proceed concurrently.
9. The Advocates submitted on the second ground that there was no agreement on fees and that Section 45 of the [Advocates Act](#) comes into play only when there is a written agreement signed by the Client and the Advocate. That if an alleged fee agreement is not in writing and is not signed, it is not binding, and that in any event, they would not have accepted US\$5,000.00 in full payment of fees amounting to US \$519,129.00. That the Client should have produced the alleged fee agreement it relied upon. On the third ground, the Advocates argued that the Client objected to jurisdiction of the Deputy Registrar of the Court of Appeal to tax the Bill, that they conceded to the objection and withdrew the Bill then wrote to the Deputy Registrar of the Court of Appeal before objections were determined to notify him of withdrawal of the Bill. The Advocates submitted on the fourth ground that they did not provide



- legal services to the Respondent in Civil Appeal No. 124 of 2022 and that the client is confusing Party & Party Bill of Costs with Advocate/Client Bill of Costs.
10. I have considered the Notice of Motion application dated 31st May 2024, Replying Affidavit sworn on 6th June 2024 and submissions by the parties. The issue for determination is whether there should be stay of taxation of the Advocate/Client Bill of Costs dated 16th November 2023.
 11. The Client/Applicant on the one hand argue that the Advocate/Respondents filed a Bill of Costs in the Court of Appeal and the Deputy Registrar made a ruling made a ruling that he had jurisdiction to tax it. That no evidence has been shown that the Bill of Costs was withdrawn and no order has been made by the court to that effect. That the Court of Appeal further made orders that all costs and consequential costs be met by the Respondent and that the issue of fees was agreed and paid, and therefore the Bill of Costs before this court is an abuse of the court process.
 12. The Advocates/Respondents on the other hand stated that in the suit for security for their fees, the Client/Applicant disputed jurisdiction of the High Court while in the earlier bill at the Court of Appeal that was withdrawn, the Client disputed jurisdiction of the Deputy Registrar of the Court of Appeal to tax the bill. That the client now seeks for stay of execution of the bill filed in the High Court. That the Advocates do not have a fee agreement with the Client, that the firm could not have accepted or agreed to the fee of US\$5,000 when the fees under the Advocates Remuneration Order is US\$519,129.00. That the fees claimed by the Advocates herein are not payable by the Respondent, Jade International Shipping Line, in that appeal.
 13. The record bears a letter dated 27th October 2023 addressed to the Deputy Registrar, Court of Appeal stating that they had filed a Notice of Withdrawal withdrawing the Bill of Costs dated 18th July 2023 in its entirety. The Advocates attached a Notice of Withdrawal dated 27th October 2023. The letter and the notice were attached to the Bill of Costs dated 16th November 2023 which was served upon the Client through email and an Affidavit of Service sworn on 22nd March 2024 by Muthuri Kinyua filed to that effect.
 14. The court in *George Gikubu Mbutia v Housing Finance Company of Kenya Limited & 2 Others* (2018) eKLR held that: -

“In the administration of justice, there is a concept known as “sanctity of the record.” This means that the court record is prima facie proof of the correctness of the record of proceedings and entries in the court file. The concept of sanctity of record means that what is endorsed in the court record is sacrosanct. This encompasses the principle of infallibility of court records.”
 15. Further, in the case of Kirimi & another *v Standard Digital & another (Civil Case 9 of 2019)* [2023] KEHC 25070 (KLR) (3 November 2023) (Ruling)

“By analogy of a suit, which includes a Bill of Costs within the meaning of the word suit under section 2 of the Civil Procedure Rules, once a suit or application has been withdrawn, it ceases to exist and the Court cannot properly purport to proceed to hear and determine a withdrawn suit.”
 16. In consideration to the positions above, it therefore means that the Bill of Costs at the Court of Appeal was withdrawn and the one dated 16th November 2023 is properly before this court with jurisdiction to tax it.



17. The issue of payment of fees has also been raised. While the Client/Applicant states that fees were agreed on and paid to the Advocate raising the question as to whether the Bill of Costs is necessary, the Advocates state that they do not have a fee agreement with the client as a fee agreement must be in writing and signed by a Client or its agent duly authorized on that behalf. That the firm could also not have agreed to the fees of US\$ 5,000.00 when fees under the Advocates' Remuneration order is US\$ 519,129.00.
18. The court in *Omulele & Tollo Advocates v Mount Holdings Ltd*, C.A.75 of 2015 held as follows: -
- “ A retainer means the instruction, employment or engagement of an advocate by his client ... a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable ... It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and / or his agent.”
19. There is no evidence on record of any form of agreement on payment of fees on record or evidence that that the fees were paid. The Client was required to furnish this court with such evidence as provided for under Section 109 of the *Evidence Act* as follows: -
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
20. On whether an application for costs and taxation of costs can proceed concurrently, I hold the view that the purpose of taxing the Bill of Costs is to ascertain the amount payable by the Client to the Advocate. This is the basis upon which the court determines the amount of security. This court is therefore not persuaded that taxing the Bill of Costs dated 16th November 2023 should be stayed. If at all between an application for taxation of the bill of costs and a suit for security for costs, and which of the two should precede the other, then it ought to be the taxation of the Bill of Costs.
21. Accordingly, the Notice of Motion application dated 31st May 2024 lacks merit and is dismissed with costs.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4TH DAY OF FEBRUARY, 2025.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Applicant

..... Advocate for the Respondent

Court Assistant – Shitemi

J.K. NG'ARNG'AR, J.

