



REPUBLIC OF KENYA



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A Thuo Kanai Advocates v Cannon Assurance Limited (Miscellaneous Application 126 of 2013) [2025] KEHC 2787 (KLR) (Commercial and Tax) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 126 OF 2013**

BM MUSYOKI, J

MARCH 14, 2025

BETWEEN

A THUO KANAI ADVOCATES APPLICANT

AND

CANNON ASSURANCE LIMITED RESPONDENT

RULING

1. Before me is an application by way of notice of motion dated 20th July 2021 in which the applicant is seeking the following orders;
 1. The Honourable Court be pleased to enter judgment for the sum of Kshs 282,130/= in costs as certified by the Deputy Registrar on 8th July 2021.
 2. The Honourable Court be pleased to award interest on the said sum of Kshs 282,130/= at the rate of 14% per annum from 14th February 2013 being one month after service of the fee note on the respondent/client specifying that interest will be charged on cost until payment of costs pursuant to Rule 7 of the *Advocates Remuneration Order*, 2009.
 3. The costs of the application be provided for.
2. The genesis of the application is a certificate of taxation issued by the taxing officer on 8-07-2021. The certificate was a result of a contested advocate/client's bill of costs dated 28th March 2013 which was taxed at Kshs 282,130.00. The respondent has not sought to have the certificate set aside neither has it filed any challenge to the same.
3. The respondent has sought to oppose the application herein through replying affidavit sworn by one Joan Oburu. The respondent has raised issue of retainer by arguing that the applicant was not retained by the respondent as an advocate and as such no fees was payable under the *Advocates Remuneration*



Order. It contends that the applicant was an employee of the respondent and has put reliance on judgement of Honourable Justice Okong'o in Miscellaneous application number 162 of 2015 where the Honourable Judge is said to have held that the applicant was an employee of the respondent and was not entitled to charge fees as an independent advocate.

4. The applicant has countered the above argument by stating that the ruling of the Judge was in rem and the jurisdiction of the said court is different from the jurisdiction of this court and as such, not binding on this court. The applicant has also cited ruling of Justice Maureen Odero in High Court Miscellaneous application number 263 of 2013 dated 29th November 2019. In these matters, Honourable Okong'o found that there was no advocate-advocate relationship between the applicant and the respondent while Honourable Justice Maureen Odero held that the relationship existed. I have seen the rulings being referred to and it is clear to me that the instructions in the cited cases were not the same for the current application. This application resulted from civil case number 511 of 2010 which was not the subject in the cited cases. It is my opinion that each case comes with its own instructions and independent billing in terms of advocate's fees. It has not been suggested to me that the instructions in those other cases emanated from the same series of cases or different causes of action. Without that benefit, this court finds the decisions in those other cases irrelevant to this matter as far as the issue of retainer is concerned.
5. It is always desirable that the issue of retainer once raised be resolved before an application for taxation is prosecuted. In this case, the respondent raised an objection on retainer through a replying affidavit dated 30th April 2013 and by ruling dated 1-07-2020, the taxing officer found that there was advocate-client relationship between the parties. The applicant has submitted that the respondent is relitigating a matter which has already been decided on through the said taxing officer's ruling. Whereas I acknowledge that the Deputy Registrar's finding on retainer has not been appealed, it is my considered opinion that she did it without jurisdiction and as such that ruling cannot stand. That jurisdiction belongs to the court presided over by a judge. In *JMbugua Mburu & Associates Advocates v City Star Shuttle Ltd* (2021) KEHC 1532 (KLR) Honourable Justice G.V. Odunga held as follows;

“The procedure for determining disputes relating to retainer in his country is rather blurred. That the Taxation Officer has no jurisdiction to determine issues of retainer was appreciated by Azangalala, J (as he then was) in *City Finance Bank Limited vs. Samuel Maina Karanja T/ A Maina Karanja & Co. Advocates Nairobi (Milimani) HCCC No. 132 of 2004* in which the learned Judge expressed himself as follows:

In my view the Advocates Remuneration Order is a complete code in itself if instructions are admitted to have been given where the dispute is between the client and his or her advocate. However, where it is alleged that an Advocate acted without instructions, different principles apply and the Advocates Remuneration Order is not adequate in the circumstances. The Plaintiff in the present case alleges that it never instructed the Defendant to provide certain services. If it turns out to be true then the dispute goes beyond the Advocates Remuneration Order.”

The procedure in such matters was explained by this Court in *Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited Nairobi High Court (Commercial Division) Miscellaneous Application No. 343 of 2011* in which I expressed myself as follows:

In my considered view, it would be sensible, to apply and obtain leave. It is at that stage that the issue of retainership would be disposed of so that after the taxation of the costs, judgement would thereby entered on the issuance of the certificate of costs without having to determine whether or not there is a retainer. It would save judicial time by having the



issue of the retainer determined early in the taxation proceedings instead of running the risk of having to go through the elaborate process of taxation only for the process to come to nought on the ground of lack of a retainer at the end. However, as current state of the law seems to have no quarrel with taxation without leave, I wish to say no more on the issue... In my view, where an advocates costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer. That issue, as already stated, would be appropriately dealt with if the leave was sought. However, there is no bar to the same being raised before the taxing master in which case the taxation may be adjourned pending the determination of the issue before a Judge.”

6. Paragraph 11 of the *Advocates Remuneration Order* makes provision for challenging of a decision of a taxing officer which includes taxation of bill of costs. The respondent has not expressed its desire or intention of challenging the ruling of the taxing officer dated 1-07-2020. This means that the respondent does not challenge the quantum of costs as taxed. Its only problem is that, according to it, there was no retainer or advocate/client relationship between it and the applicant.

7. Under Section 51(2) of the *Advocates Act* judgment should not be entered if there is dispute on retainer. The Section provides that;

‘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.’

8. Although the certificate of taxation has not been contested the applicant has not overcome the hurdle of retainer. In *Ochieng, Onyango, Kibet & Another v Adopt A Light Limited* (2007) KEHC (KLR), the court held as follows;

I am in agreement with the sentiments expressed by Visram J in Misc. Civil application No.651/2004 Nairobi, in Owino Okeyo & co. Advocates vs Mike Maina when he said;

‘In my view the section (read section 51(2) is applicable where there is no dispute about the retainer. In that situation, it makes it expedient and less costly for the Advocate to obtain a quick judgement. And that, I believe is the purpose of that section. That in clear cut situations where there is no dispute about the retainer and the bill of costs has been taxed, it would be highly unjust to require the Advocate to file suit for the recovery of his fees.

9 Following the above, I have come to conclusion that the application dated 20-07-2021 cannot be granted at this point. It has to wait until the issue of retainer is determined by a Judge of this court. The same is declined. In the circumstances, I direct that either party shall file an appropriate application for determination of the issue of retainer by a Judge before application for entry of judgment is considered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT .

Ruling delivered in presence of Mr. Thuo for the applicant and Mr. Gitonga for the respondent

