



Guandaru Thuita & Company Advocates v Kinuthia & another (Anti-corruption and Economic Crimes Miscellaneous E040 of 2024) [2025] KEHC 4114 (KLR) (Anti-Corruption and Economic Crimes) (2 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4114 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES MISCELLANEOUS E040 OF 2024
LM NJUGUNA, J
APRIL 2, 2025
IN THE MATTER OF AN ADVOCATE – CLIENT BILL
OF COSTS ARISING FROM HCACECS 5 OF 2018

BETWEEN

GUANDARU THUITA & COMPANY ADVOCATES APPLICANT

AND

DESMOND IRUNGU KINUTHIA 1ST RESPONDENT

NELSON KARANJA KINUTHIA 2ND RESPONDENT

RULING

1. The Applicant has approached this court by way of the Notice of Motion dated the 15th October, 2024 in which he has sought the following orders: -
 - a. That the Honourable court be pleased to strike out the Bill of Costs dated 22/8/2024.
 - b. That such orders and/or directives that the Honourable court may deem just and appropriate in the circumstances of this case.
 - c. That costs of this application be awarded to the Respondents.
2. The application is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 1 Rule (1), order 2 Rule 15(1) (a) (b), (c) and (d), Order 51 Rule (1) of the *Civil Procedure Rules* and Section 45 of the *Advocates Act*, Cap 16 Laws of Kenya. It is premised on the grounds on its face, and its supported by the affidavit sworn by Desmond Irungu Kinuthia, sworn on 15th October, 2024.



3. Through the application, the respondents/applicants aver that despite their having been a fee agreement between their father and the applicant/respondent over the conduct of Milimani High Court Anti-Corruption case number 5/2018 and Milimani Anti-Corruption Criminal Case No. 28 of 2019 (*Republic v Stephen Ndung'u Kinuthia & 19 others*, the applicant/Respondent has proceeded to file a Bill of Costs in blatant violation of the [Advocates Act](#).
4. The respondents/applicants state that, as a result, any question regarding matters hereof can only be tried in an ordinary suit since the court does not have jurisdiction to tax the Bill of Costs. That the Advocate has been paid legal fees but has not declared the same in the Bill of costs, which is highly prejudicial to the respondents/applicants and which would amount to unjust enrichment were the Bill of Costs be allowed as prayed.
5. The respondents/applicants have contended that the Bill of Costs is ex-facie incompetent, fatally defective and is inadmissible, and that if the orders sought herein are not granted, the respondents/applicants will suffer irreparable harm.
6. The application is opposed by way of a preliminary objection and a replying affidavit sworn by one Fredrick Guandaru Thuita, on the 30th January, 2025.
7. The gist of the preliminary objection is that the taxing master has no jurisdiction to hear an application to strike out a Bill of Costs. That the taxing master can only consider an opposition to a Bill of Costs either by way of a Replying Affidavit or submissions but cannot determine it vide an application for striking out.
8. In the replying affidavit, the applicant/respondent depones that, there was no fee agreement between the respondents/applicants and himself and hence the assessment of the amount payable must be done by a taxing master. That the letter dated 19th July 2024 is obviously not an agreement but a mere letter addressed to a third party rather than to any of the respondents/applicants, and hence cannot form the basis of an application under Section 45 of the [Advocates Act](#).
9. That notwithstanding that the letter had been addressed to a stranger to these proceedings, it states that the agreed fees was not in writing and further that the deposit for the 2 cases would be in the sum of Kshs.2,000,000. That the letter referred to two (2) cases namely:- Milimani Magistrate's Court ACC No. 28/2019 and Milimani HCACECS No. 5 of 2018 and there was no demarcation of what amount of deposit was to go to each.
10. That out of a deposit of Kshs.2,000,000 requested for both cases, only a paltry Kshs.400,0000 was paid and the entire amount was posted to the account of Magistrate's court Anti-Corruption case being the first ever received from the Applicant and which is not the subject of the Bil of costs herein.
11. The application was disposed of by way of written submissions and both parties complied with the directions on filing of submissions.

Applicant's/respondents' Submissions

12. The applicant/respondent distilled two (2) issues for determination as follows: -
 - a. Whether the Taxing Master has jurisdiction to hear and determine an application to strike out a Bill of Costs.
 - b. Whether there was an agreement on legal fees.



13. On the issue of jurisdiction, it was submitted that a taxing master's primary power is to tax bills and not to hear issues arising as disputes on retainer or an application to strike out a Bill of Costs. That they can only consider an opposition to a Bill of Costs either by a Replying Affidavit or submissions but not to strike out.
14. On the issue of whether there was an agreement on legal fees, the respondent/applicant contended that there was no agreement on fees and relied on the case of *Kakuta Maimai Hamise v Peris Pesi Tobiko* on what constitutes a valid and binding agreement for purposes of Section 45 of the *Advocates Act*.
15. On the part of the respondents/applicants it was their submission that there was an agreement on legal fees and by the time the Advocate stopped handling the matter, he had been paid Kshs.400,000/-. The Respondents/applicants distilled only one issue for determination as follows:-

a. Whether there was a valid fee agreement.

16. They submitted that the taxing master had no jurisdiction to tax the Bill of Costs under Section 45(6) of the *Advocates' Act*. That the Advocate having been paid his legal fees, the respondents will be prejudiced if the Advocate is allowed to tax his Bill of Costs as that would amount to unjust enrichment as he will have been paid twice for the same work.
17. The respondents/applicants contended that a fee agreement does not have a prescribed format so long as the requirements of Section 45(1) are met. Reliance was placed on the case of *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR in which a letter was upheld as forming a fee agreement and the case of *Shira Enterprises v Mwangi Njenga & Co. Advocates* in which the court held that a fee agreement must not be in one document "titled" "agreement for payment of legal fees".
18. The respondents/applicants thus argued that there is immense evidence to show a fee agreement capable of ousting the jurisdiction of the Taxing Master.

Analysis and Determination

19. The court has considered the application, supporting affidavit, the preliminary objection, replying affidavit and the submissions and in my considered view, the only issue for determination is whether there was an agreement on legal fees.
20. Section 45 of the *Advocates' Act* under which the application is premised provides:-

“.....subject to this section the costs of an Advocate in any case where an agreement has been made by virtue of this Section shall not be subject to taxation nor to Section 48.”
21. The respondents/ applicants herein have contended that there was a fee agreement between the advocate and their father, one Stephen Ndungu Kinuthia, on the two matters that the Advocate was instructed to handle being case No. HCACECS No. 5/2018 and ACC No. 28/2019. That the agreed fees was Kshs.1,000,000 for the two matters. In support of their contention, the respondents/applicants have annexed a letter dated the 19th July 2024 from the Respondent which mentions agreed fees but which was not reduced into writing.
22. The letter goes on to state that; however, there was a consensus that the deposit for the two cases would be in the sum of Kshs.2,000,000, out of which the respondent acknowledged receipt of Kshs.400,000 leaving a balance of Kshs.1,600,000/-.
23. The respondents/applicants contend that the *Advocates Act* does not prescribe the format of a fee agreement so long as the requirements of Section 45(1) of the *Act* are met and this court fully agrees



with them to that extent. However, looking at the letter dated the 19th July 2024, it is just what it is; a mere letter and not an agreement. In that letter, though the applicant/respondent has made an admission that there was fees agreement which was not in writing, a casual reading of it reveals the following:-

- a. There was agreed fees that was not put in writing.
- b. There was a consensus that the deposit for the two (2) cases would be Kshs.2,000,000/-
- c. The amount of the agreed fees is not stated therein and this court cannot ascertain how much it was.
- d. The document that is in the form of a letter is not signed by both parties.

24. In the case of *Kakuta Maimai Hamise v Peris Pesi Tobiko* (*supra*), the learned Judge had this to say on agreements envisaged under Section 45 of the *Advocates Act*.

“To constitute a valid and binding agreement for the purposes of section 45 of the *Advocates Act*, it expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case both the two letters are not signed by the Client. Whereas an agreement may be formed by a series of correspondences, the Client has not exhibited any document by which he signalled his acceptance of the proposed fees by the Advocate. In my view, for a document to be said to constitute a valid and binding agreement for the purposes of section 45 of the *Advocates Act*, the same must not only be unequivocal that it signifies what the precise final amount is, but must be signed by the person to be charged who in this case is the Client. This was the position adopted by Tanui, J in *Rajni. K. Somaia v. Cannon Assurance (K) Ltd* Kisumu HCMA No. 289 of 2003

25. Going by that legal position which I fully support, it therefore follows that there was no fee agreement as alleged by the respondents/applicants.

26. Section 45(6) is very clear that subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this Section, shall not be subject to taxation nor to Section 48. It then follows that where there is an agreement on fees, costs cannot be subject to taxation and but virtue of that provision, the jurisdiction of the Taxing Master to tax such a Bill of Costs which has been filed in contravention of that section is outrightly ousted and he or she cannot even strike out such a Bill of costs.

27. In the end, I find that there was no fees agreement and therefore, the taxation of the Bill of Costs shall proceed before the Taxing Master.

28. Consequently, the application is hereby dismissed with no orders as to costs

29. It is ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 2ND DAY OF APRIL, 2025.

L.M. NJUGUNA

JUDGE

In the presence of:-

No appearance for the Applicant

Mr. Midenga for the Respondents



Court assistant – Adan

