



JW & Frank Advocates LLP v J&K Investment Kenya Limited (Miscellaneous Civil Application E718 of 2023) [2025] KEHC 4996 (KLR) (Commercial and Tax) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E718 OF 2023**

AA VISRAM, J

APRIL 24, 2025

BETWEEN

JW & FRANK ADVOCATES LLP ADVOCATE

AND

J&K INVESTMENT KENYA LIMITED CLIENT

RULING

Introduction and Background

1. On 21st February, 2024, the court’s Deputy Registrar delivered a ruling (“the Ruling”) in which she dismissed the Advocates’ Bill of Costs dated 8th August, 2023 (“the Bill of Costs”) for reasons that they had no instructions from the Client to represent it in HC Comm. Misc. Civil Application No. E146 of 2023; National Water Harvesting and Storage Authority versus J & K Investment Kenya (“the Suit”).
2. The Advocates have since filed the Chamber Summons dated 5th March, 2024, made under Paragraphs 11 (1) and (2) and 79 of the Advocates Remuneration Order (“the Order”) and Section 51 (1) and (2) of the *Advocates Act* (Chapter 61 of the Laws of Kenya) seeking to review and/or set aside the Ruling; a finding that the Advocates were retained by the Client to represent it in the Suit; and that the Bill of Costs be allowed as prayed or as the court deems reasonable. The Advocates also seek judgment against the Client together with interest at 14% per annum and pray that a Decree be issued or in the alternative, that the court remits the Bill of Costs back for taxation before a different taxing officer.
3. The Application is supported by the supporting affidavit of Frank Ochieng’ Walukwe, an advocate in the firm of the Advocates, sworn on 5th March, 2024 and the further affidavit of Sirmoi Wekesa sworn on 20th May, 2024. The Application is opposed by the Client through the replying affidavit sworn by its Managing Director, Li Shunkang sworn on 24th April, 2024. The Application was canvassed by way



of written submissions which are on record, and which together with the pleadings I have considered and I will reference to in my analysis and determination below.

Analysis and Determination

4. The Advocates submit that the sole issue for the Court's determination is whether there existed an Advocate-Client relationship between the parties in respect of the Suit. In the Ruling, the Deputy Registrar stated that from her perusal of the documents availed by the parties and the Suit, the Advocates were previously known as Gazemba & co. Advocates and that they were previously on record for the Client in an arbitration dispute between the parties to the Suit. The Deputy Registrar found that the said suit arose consequent to the arbitral award as the other party sought to set aside the award.
5. The Deputy Registrar additionally found that the Client had opted to instruct another firm of advocates in addition to Applicant, and that the present Advocates did not have instructions to represent the Client in the Suit.
6. The Advocates version of events on the other hand, is that the Deputy Registrar had failed to consider a consultancy agreement between the Client and its agents, Kaihatsu Consulting Engineers Limited, which was material to establishing their instructions, which they alleged were issued through the Client's Agents.
7. In response, the Client deposed that the instructions to the Advocates were only in respect to the arbitration proceedings, and that the Advocates assumed instructions in relation to proceedings concerning the Suit, and proceeded to prepare a replying affidavit in relation to the said proceedings concerning the Suit. The Client maintained that the deponent was not authorized to swear that affidavit, and the Client expunged the same, and filed a new affidavit. The Client submitted that it instructed another firm of Advocates to represent them in the Suit and had ceased to instruct the Applicant.
8. Based on the record before, I am of the opinion that the Deputy Registrar reached a reasonable conclusion and I am not inclined to interfere with the same. I say so for a number of reasons, set out below.
9. The Applicant submitted, in short, that since the Client did not withdraw the instructions after the arbitration proceedings, then the same continued to subsist into the Suit. Further, that it had not been notified of the appointment of another firm of advocates for the Suit.
10. I have considered the contents of the consultancy agreement dated 18th January, 2021, between the Client and Kensetsu Kaihastu Consuting Engineers Limited, the third party referred to by the Applicant, and found at page 137 of the annexed documentation to its supporting affidavit. Whereas the Advocates hinge their instructions on this agreement, I am unable to find any express language appointing the Applicant as the Client's legal Counsel in relation to the proceedings in question. The Applicants name does not appear anywhere in body of the said agreement, and in any event, the Applicant is not a party to that agreement.
11. The said agreement is between only the Client and a third party. Therefore, the fact that the Advocates were served with pleadings did not automatically mean that they were instructed by the Client. This is especially so because the arbitral proceedings, in which they had been retained has since been concluded. Those proceedings are private and out of court, whereas, the proceedings relating to the Suit are both new, and in a different forum, being court related proceedings. Accordingly, the Advocates ought to have obtained new instructions from the Client in relation to the same. I say so



because in circumstances such as the present, where there is a dispute in relation to representation and instructions, a court must be cognizant of the principle that a litigant retains the right to choose the Counsel of his choice, whether that is to remain with the same Counsel, or to engage other Counsel in the new proceedings (See Tobias M. Wafubwa v Ben Butali [2017] KECA 142 (KLR)).

12. In the present circumstances, I am unable to find any express conduct on the part of the Respondent Client to show that it intended to retain or give fresh instructions to the Advocates to represent it in the court related proceedings after the conclusion of the arbitral proceedings. The record shows that the Respondent/ Client expressly appointed and instructed a different firm of Advocates before the Applicant filed its documentation in relation to the court proceedings.
13. In the circumstances described above, I find that the Deputy Registrar reached a reasonable conclusion in relation to the issue of representation, and I decline to interfere with its decision in relation to the same.

Conclusion and Disposition

14. Based on the reasons set out above, I find and hold that the Advocates’ Chamber Summons dated 5th March ,2024, lack merit and the same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF APRIL, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....Court Assistant
.....for Advocates/Applicant
.....for Client/Respondent

