



REPUBLIC OF KENYA



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Muciimi Mbaka & Co. Advocates v Columba Developers (K) Limited (Miscellaneous Civil Application 246 of 2011) [2024] KEHC 1516 (KLR) (Civ) (15 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1516 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 246 OF 2011
JN MULWA, J
FEBRUARY 15, 2024

BETWEEN

MUCIIMI MBAKA & CO. ADVOCATES ADVOCATE

AND

COLUMBA DEVELOPERS (K) LIMITED RESPONDENT

RULING

1. The Motion dated 27/04/2023 was brought by Columbia Developers (K) Limited hereinafter called the Applicant against the Advocates Muciimi Mbaka Co. Advocate/ Respondent under Rule 11 of the [Advocates Remuneration Order](#) seeking orders: -
 1. Spent
 2. That the decision of the taxing officer dated 13/04/2023 allowing the Respondent's Advocate-client bill of costs dated 31/05/2011 in the sum of Kshs. 293,665.60/= be set aside and taxed afresh by this Honourable court.
 3. That in the alternative, this court be pleased to order the Respondent's Bill of Costs dated 31/05/2011 be taxed afresh by a different taxing master.
 4. That costs of this reference be provided for.
2. The grounds for the Application are stated at its face and at the Supporting Affidavit sworn by John Gatobu Kirimania the Applicant's Managing Director on 27/04/2023 citing what it states to be grave errors of principle justifying a fresh taxation.
3. Among the alleged grave errors of principle are stated as-



- a. A non-existent value of a subject matter in awarding instruction fees in the sum of Kshs. 200,000/= on item No. 1
- b. Failing to consider that there was no valid agreement between the Advocate/Respondent and the Client/Applicant warranting assessment of instructions fees;
- c. Failing to hear and/or consider the Applicant's arguments concerning opposition to item No. 1
- d. Failing to consider what was crucial in determining the instructions fees;
- e. Applying an ambiguous and unsupported theory on attendances and/or telephone conversations
- f. Failing to consider arguments presented by the Applicant in support of the objection to the bill of costs.

4. I have considered the taxing master's ruling and reasons for taxation on the Advocate-client bill of costs dated 31/05/2011 and; the Respondent's Replying Affidavit sworn on 31/07/2023 by Muciimi Mbaka Advocate for the Respondent/ Advocate.

5. In defense of the Certificate of Taxation, the Advocates attached and referred to the certified interim payment Certificate dated 11/02/2011 with a value of the profit at Kshs. 234,685,757.28/= which the Advocate applied as the basis of instructions fees together with the detailed summary of the project that the Advocate construed to be the retainer agreement which is not denied by the Applicant.

Additionally, the Advocates depose that the Applicant has not demonstrated what error of principle the taxing officer committed to warrant disturbance of the Certificate of Taxation.

6. Submissions by the Applicant are dated 23/10/2023 upon compliance with the procedure under Rule 11 of the *Advocates Remuneration Order* on whether the Application dated 27/04/2023 is merited. It is submitted that the principles of setting aside decisions of the Taxing Master are well established in the case of *DelMonte Kenya Limited V. Kenya National Chamber of Commerce and Industry & Another Murang'a Chapter & Another & 2 Others* [2021] eKLR: that

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the awards

7. On the error of principle, the Applicant cites the case *Republic vs Ministry of Agriculture & 2 others, ex-parte Muchiri Wnjuguna & 6 others* (supra) wherein Ojwang J (as he then was) supported the principle enumerated in the Delmonte case (supra) and added that it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors to include the nature and importance of the matter, the amount or value of the subject matter, interest of the parties and general conduct of the proceedings.

The Supreme Court Judge further continued to state that it is open to the taxing officer to consider only such factors as may exist in a particular given case.

8. In this regard, it is submitted that the Taxing Master omitted to consider relevant factors as the nature of the case, failure to consider relevant factors like failure by the Applicant to give instructions to the



Advocate in respect to the contract between the Applicant and Chuka University, and failure by the Taxing Master to consider the Affidavit in Objection to the bill sworn on 13/10/2011 only focusing on the itemization in the bill being the value of the subject matter of the contract; as well as the value of work done, if at all any work was done as the Advocate failed to provide to the court documentation as proof of work done to generate the Advocate-client bill of costs.

9. Additionally the Applicant submits that the Advocate having not done any work or received any instruction to file suit for breach of contract ought not have been awarded instructions fees by the Taxing Officer, there having been no substantiation of the subject matter and non-existent of value of subject matter which only was pleaded in the Bill of Costs. He further submits that he ought to be awarded costs of the Application.
10. The Respondent's submissions are dated 6/12/2023 and focuses on whether the Taxing Master's ruling dated 13/04/2023 should be set aside which it submits ought to be done if the Court finds that it is based on an error of principle or the fee awarded is manifestly excessive or low as to justify interference.
11. To support the above, it cites *Republic vs. Kenyatta University & Another ex-parte Wellington Kihato Wambugu* [2018] eKLR wherein the court held that: -

“The Taxing Master discretion will not be interfered with unless it is found that he has not exercised his discretion properly as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him or her to consider, or for him or her to consider, or acted upon wrong principle or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given”

The Respondent submits that the Applicant has failed to show that the Taxing Officer failed in any of the above requirements.

12. On the matter of retainer, the Respondent submits that The Taxing Master was right in dismissing the objection because it did not hold any truth as the Applicant did instruct the Applicant in relation to a breach of contract in respect of the construction contract between the Applicant (client) and Chuka University which contract was terminated by the Respondent before the instructions were given to the Advocates.
13. Additionally, the Respondent produced a letter of instructions detailing the nature of legal services in respect of the breach of contract and cited the case *Hamilton Harrison & Mathews v. Mumbi Ngegi* [2020] eKLR where with approval cited *Abmednasir Abdikadir & Co. Advocates V. National Bank of Kenya Ltd* [2007] eKLR in which the court observed that:

“.....The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus the giving of a retainer is equivalent to the making of a contract for solicitor's employment... Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case...”
14. In response to the matter of instructions fees, the Respondent cites the case *Joreth Limited V. Kigano & Associates* [2002] eKLR for the proposition that where the value of the subject matter in a suit could not be determined from the pleadings judgment or settlement a Taxing Officer is entitled to use his discretion in assessing the instruction fee.



15. The court added that the Taxing Officer ought to be guided by a number of factors such as nature and importance of the cause interest of the parties and the general conduct of proceedings and urges that the complaint by the Applicant has no basis as no attempt has been made to establish any foundation, but however the certificate of interim payment dated 11/02/2011 annexed to the Bill of Costs established the value as Kshs. 234,685,757.28/=
16. For the above, the Respondent urges the court to dismiss the Application with costs.

Analysis And Determination

17. Two issues have been flagged for determination by both parties:
 - a. Whether the Application dated 27/04/2023 is merited; and if so, whether the taxing master's ruling dated 13/04/2023 should be set aside.
 - b. Who bears the costs of the Application.
18. The impugned Advocate-Client Bill of costs dated 31/5/2011 was taxed upon inter-partes hearing before the taxing master. Both the client/Applicant and the Advocates/Respondent filed written submissions on the Bill of Costs.
19. The primary issue for consideration, in my view, is whether there was a retainer issued by the client to the Advocates in respect of this matter at item number 1 of the Bill of Costs in the matter of Chuka University and breach of contract and whether this issue was addressed before the taxing officer.
20. I have seen and perused an Affidavit of Objection to the Bill of Costs by the client sworn on 13/10/2011 whereof the client averred that it never gave instructions to the Advocates to pursue the dispute over a breach of contract, and therefore denied there having been a retainer, but admitted that the Advocates were handling another matter for the client. Other than several telephone calls, the client denies any instructions or services having been undertaken on its behalf.
21. That being the case the question that begs an answer is whether the Advocates moved to court or filed any application on behalf of the client without any instructions on the matter of the alleged termination of contract as to charge a sum of Kshs. 200,000/= on instruction fees? The Advocates have not exhibited the particulars of services they rendered to the client other than several telephone calls for which the taxing officer allowed as drawn.
22. In response to the objection mounted by the client in its submissions dated 2/06/2022 before the Taxing Master as well as at its Replying Affidavit it is evident that the client prepared a letter addressed to the Advocates giving detailed summary of the project and the dispute as well as giving them a box file containing correspondences with Chuka University relating to the contract.
23. The letter marked "MMI" is dated 27/04/2011 and is addressed to the Advocates by the client as Ref. Proposed Chuka University College School Business School Complex Reasons for Injunction – summary (details are attached). I have read the letter. The prayers sought by the client are tabulated in great length and numerous annexures to the letter as Appendixes running to over 36 pages. What was the reason for the detailed letter, even suggesting to the Advocates the prayers they ought to seek if not for purposes of a case to be filed in court?

Referring to the case *Hamilton Harrison & Mathews V. Mumbi Ngegi* (Supra) cited by the Advocates, (see para. 17 above), I am persuaded that by the letter dated 24/04/2011 the client indeed instructed the Advocates to move to court to obtain an injunction on its behalf among other prayers stated in the said letter.



24. As stated above the act of authorizing an advocate to act on its behalf could be by letter or by implication derived from the correspondence forwarded to the Advocates and documents running upto over 36 folios. That in my understanding constitutes a retainer and the court may imply the existence of a retainer.
25. This is so because in the submissions on the Application before me the Applicant (client) steered away from making any submission on the matter of retainer. I therefore find and hold that the Applicant/client duly instructed the Advocates to undertake the services stated in the letter dated 27/04/2011 and by the documents annexed thereto, the subject matter was well stated as the termination of contract whose value could be deduced from the documents send to the Advocates.
26. Further the court in *Rachuonyo & Rachuonyo Advocates V. National Bank of Kenya*, [2020] eKLR, rendered that: -

“A retainer means the instructions, 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.....”

By the above there is no doubt that there was a client/Advocate retainer relationship.

Is the Application dated 27/04/2023 merited?

27. For the court to set aside the decision of the taxing master it must be demonstrated that there was an error of principle by taking into account irrelevant factors or omissions to consider relevant factors like nature and importance of the matter and amount of value of the subject matter – *Delmonte case* (supra), as presented to the taxing master by the parties.
28. I have already made a finding that there indeed existed a retainer relationship between the client and the Advocate’s and found no plausible reasons to persuade me to find otherwise. The Taxing Officer is empowered to exercise his discretion to determine the value of a subject matter in the absence of clear value that cannot be determined from the pleadings documentation or settlement. The nature of the brief, the parties interest and importance are matters for consideration by the taxing officer in determining the value of the subject matter. In this case the certificate of interim payment dated 11/02/2011 clearly stated the value of Kshs. 234,685,757.28/=.
29. The principles were well stated in the *Jareth Limited v. Kigaro & Associates* (supra).
Though the Taxing Master did not put these principles in writing while making his decision it can be implied and rightfully so, in my view that indeed they were considered and were in the back of his mind as he determined the value of the subject matter.
30. The Applicant submitted that the award by the Taxing Officer was manifestly excessive. I have considered its submissions on this complaint. Other than stating that the Taxing Officer’s award was excessive it did not state what it deemed to be a fair and just award of costs. It failed to show how the taxed costs were so high as to constitute access by the court to the wealthy, nor how the same was not consistent with other awards as rendered in the *Delmonte Kenya Ltd case* (supra) cited by the Applicant.
31. On the value of work done by the Advocates, the Applicant faulted the Taxing Officer as it had submitted that no work was done by the Advocates. I agree with the Advocates that the matter never found its way to court, but filing a matter in court in my opinion is not the only demonstration of



work done by an Advocate. Perusal of documents, meetings, round table negotiations, telephone calls negotiations, legal opinions and advice constitute work by an Advocate. Absence of documentation of such work does not invalidate instructions given to the Advocates.

32. However, in my considered opinion despite the value of the subject matter as implied in the documents provide to the Advocates of Kshs. 234,685,757.28/= I am afraid that nothing much was done save as stated as perusal of the documents, telephone calls and a few meetings if any, no pleadings of whatever nature were done. No opinions were demonstrated to have been prepared for the client nor pleadings filed in court.
33. The Advocates ought not have based their instructions fees only on the value as implied in the documentation supplied by the client, but also upon what work it undertook pursuant to the instructions. I have stated above that what was demonstrated was several telephone calls and perusal of the documents which were allowed as drawn.
34. In my considered view, the amount allowed by the Taxing Officer as instructions fees was not a demonstration of the work done. I find and hold that the same was not only excessive but also not a fair representation of the work done. I therefore in exercise of my inherent discretion as held in R. Vs. Kenyatta University (supra) and proceed to tax that item No. 1 afresh as appears herebelow.
35. Consequently, upon consideration of the Application, and submissions by the rival parties, I am persuaded to find that the Application has merit, and proceed to allow the same partially in terms of prayer No. 2 and for the reasons stated at the body of the ruling I set aside the decision of the Taxing Master dated 13/04/2023 allowing the Advocate-client Bill of costs in the sum of Kshs. 293,665.60 / = and tax the same afresh as herebelow: -
- a. Item No. 1- Instructions fee- it is taxed afresh and reduced to Kshs. 100,000/=
 - b. Item no. 2, 3, 4, 7, 8 and 9- I disallow the same, for lack of proof.
 - c. Item no. 5 – the sum of Kshs. 41,900/= is upheld.
 - d. Item no. 6 – the taxed amount of Kshs. 10,000/- is reduced to Kshs. 5,000/=
- Amount taxed off = Kshs. 146,900/=
- Balance to Advocates = Kshs. 146,900/=
36. The Bill of costs dated 31/05/2011 is taxed afresh at Kshs. 146,900.60/= with each party bearing their own costs on the Application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

J. N. MULWA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

