



Brollo Kenya Limited v David Oyatta t/a Oyatta & Associates Advocates; Ketan Doshi (Third party) (Commercial Case 15 of 2013) [2024] KEHC 5680 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL CASE 15 OF 2013**

GL NZIOKA, J

MAY 6, 2024

BETWEEN

BROLLO KENYA LIMITED PLAINTIFF

AND

DAVID OYATTA T/A OYATTA & ASSOCIATES ADVOCATES DEFENDANT

AND

KETAN DOSHI THIRD PARTY

JUDGMENT

1. The matter herein was commenced vide an originating summons dated 21st January 2013, wherein the applicant was praying for the following order as verbatim reproduced: -
 - a. The respondent render cash account of the money paid by the applicant and money held on behalf of the applicant.
 - b. The respondent delivers to the applicant a list of money which the respondent has in his possession or control on behalf of the applicant.
 - c. The respondent pay the applicant any and all money held on behalf of the applicant.
 - d. Cost of this application be borne by the respondent.
2. The matter was subsequently heard inter parties wherein vide a ruling dated; 20th January 2015, the Honourable court allowed prayers (1) and (2) of the originating summons, and prayers (3) and (4) were deferred for further hearing.



3. By a further ruling dated 12th May 2015, the Honourable court ordered as follows: -
 - a. The originating summons herein dated 21st January 2013 and the affidavits herein be and are hereby deemed as the pleadings for purpose of the suit.
 - b. There shall be liberty for parties to file further or supplementary affidavits, and such other documents as may be necessary.
 - c. The accounts which have been rendered by the respondent shall form part of the pleadings.
 - d. Costs of this application shall be in the cause.
4. Pursuant to the aforesaid, the matter was fully heard. The plaintiff's case was supported by the evidence of Ketan Doshi and the defendant's case by the learned counsel David Oyatta. The parties filed their respective submissions. The plaintiff's submissions are dated 10th July 2020, while the defendant's submissions are dated 28th September 2020. The submissions were later highlighted and are considered herein.
5. The plaintiff's case as set out in the originating summons converted into a plaint is that there existed an advocate-client relationship between the parties herein. That, judgment was entered in favour of the plaintiff on 11th November 2011 vide HCCC No. 1232 of 2001 Brollo Kenya Limited vs Kenya Commercial Bank Limited and Pamela A.M. Tutui (practising under the name and style of P.M. Tutui & Company Advocates) where the defendant was acting for the plaintiff.
6. That upon hearing the parties' judgement in the matter was entered in favour of the plaintiff in the sum of Kshs 2, 609, 750 which money was received on behalf of the plaintiff by the defendant. However, the defendant has neglected, ignored and/or refused to forward the same to the plaintiff.
7. The plaintiff's case was supported by the evidence of Ketan Doshi who adopted his witness statements dated; 14th February 2018, as evidence in chief and testified that, on or about August 2008, the plaintiff instructed the defendant to take over the conduct of aforesaid suit number. That, upon receipt of the instructions from the plaintiff, the defendant forwarded a fee note for Ksh. 250,000 which was duly paid by the plaintiff and the subject suit instituted.
8. That, the case was heard and judgment was entered on 11th November 2011, in favour of the plaintiff for the sum of Ksh. 2,609,750 plus interest at court rates from the date of filing the suit to payment in full. Further, the court ordered the plaintiff's costs to be borne by the 1st defendant therein, and party to party costs were taxed at Kshs. 340,240.35.
9. However, the defendant avers that costs were taxed vide Miscellaneous Application No. 297 of 2012 at Kshs. 2,475,116, but has not placed any material before the court including the certificate of taxation to support his allegation of the taxed costs. Further, a perusal of Miscellaneous Application No. 297 of 2012 court file revealed that there are no proceedings of the alleged taxation. That, it is unfeasible that the Advocate/Client costs would be taxed at Kshs. 2,475,116 while the party to party cost were certified at Kshs. 340,240.35.
10. Be that as it may, despite demand, the defendant to date has failed, neglected and/or refused to forward the decretal sums to the plaintiff.
11. The plaintiff argues further that, it did not instruct the defendant to act in matters; HCCC No. 802 of 2002, HCCC No. 803 of 2002 and HCCC No. 804 of 2002. That it is, the third party that gave



- the instructions in his individual capacity as a son and brother to the plaintiffs in those suits. Further, the plaintiff did not expressly and/or impliedly state that it would be liable for fees in those suits.
12. Further, the defendant attempted to execute directly against the plaintiffs in HCCC No. 802 of 2002, HCCC No. 803 of 2002 and HCCC No. 804 of 2002 but he did not succeed and now seeks satisfaction from it, yet the plaintiff is not liable to satisfy the subject sums.
 13. The defendant's case is set out its case vide a replying affidavit dated 18th July 2013, further affidavits dated; 9th June 2014, 18th August 2014 and 31st August 2015, converted into a defence pleadings.
 14. The defendant pleaded that there is a nexus between the plaintiff, its directors and the parties in Miscellaneous Application No. 666 and 668 of 2012 which arose from HCCC No(s); 802, 803 and 804 of 2002. That he received instructions to represent the plaintiff in HCCC No. 1232 of 2001 and also the plaintiff through its director, the third party herein, instructed his firm to act in three (3) matters referred to.
 15. That, the third party is a son to Nilam Shah, the plaintiff in HCCC No. 802 of 2002. Furthermore, he is a brother to Ms. Sanjita Shah, the plaintiff in HCCC Nos. 803 and 804, of 2002 who resides in the United Kingdom and who authorized him and the company to take full responsibility of the cases.
 16. That pursuant to the said instructions, he took over the suits from the firm of Gichuki Kinga'ra & Co. Advocates and filed notice of change of Advocates in all the four cases simultaneously. That his firm raised an interim fee note of Kshs. 250,000 in the present suit and was paid.
 17. That, judgement in the plaintiff's suit was entered in its favour. However, the other suits were dismissed for want of prosecution after the plaintiffs therein failed to give the firm further instructions. Thereafter, the parties in the matter disagreed on the way forward necessitating the filing of bill of costs in all the matters.
 18. That the defendant filed Miscellaneous Application No. 297 of 2012 pegged on the claim and not the resultant party to party bill of costs and the bill was taxed as drawn in the sum of Kshs. 2,475,116. The defendant, in response to the claim that the subject bill of costs was never taxed, perused the court file and discovered that the ruling was missing.
 19. However, the other Advocate/Client bills were in his firm's favour as follows: -
 - a. HCCC No. 802 of 2002-----Kshs. 782,992.41
 - b. HCCC No. 803 of 2002-----Kshs. 3,411,497.32
 - c. HCCC No. 804 of 2002-----Kshs. 5,117,245.98

Total -----Kshs. 9,311,735.71
 20. That, the plaintiff and/or the third party filed references in HCCC No. 802 and 803 of 2002 and (Retired) Hon. Justice Havelock entered in the sum of Kshs. 782,989.41 and Kshs. 1,776,520.05 respectively. That no reference was preferred in HCCC No. 804 of 2002 as such the figure stands at Kshs. 5,117,245.98 plus interest at 14% per annum from 4th October 2012, bringing the total sum in the four (4) suits to Kshs. 10,151,871.43.
 21. That the plaintiff through its advocates on record by a letter dated 8th November 2013 made a payment of Kshs. 782,989.40 leaving an outstanding balance of Kshs. 9,368,882.39. The defendant argued that it is holding Kshs. 5,920,772 being the decretal sum in the present suit matters as lien leaving an outstanding balance of Kshs. 3,448,110 that it counterclaims for from the plaintiff.



22. That, the plaintiff having not satisfied the subject certificate of taxed costs and taking into account that the third party had instructed all fees would be paid by the plaintiff, the third party and/or the plaintiffs in the other suits, all the monies are being held lawfully as lien towards part satisfaction of the taxed costs and therefore, it is not true that the firm is unlawfully holding any money or failed, neglected and/or refused to forward the decretal sum as alleged.
23. The defendant further stated that, the plaintiff, the third party, and the defendant have been negotiating to settle the fees due to his firm, including fees in the other suits. That, now the references having been finalized and the statement of accounts presented before the court, the plaintiff intends to run away from its obligation in respect to the third party's sister, Sanjita Shah, who resides in the United Kingdom.
24. That, since the plaintiff is denying liability and the fact that he was instructed by the third party, the defendant seeks for judgment by way of counterclaim against the plaintiff and the third party jointly and/or severally.
25. The third party case is based on his statement of defence dated 17th June 2016 and witness statement dated 4th April 2018, wherein he denied liability to pay for the defendant's services. He reiterated the plaintiff's evidence that he instructed the defendant to take over the conduct of; HCCC No. 1232 of 2001 in his capacity as a director of the plaintiff.
26. That, judgement was entered in favour of the plaintiff for the sum of Kshs. 2,609,750 with costs to be borne by Kenya Commercial Bank, the 1st defendant therein. However, the defendant without just cause withheld the decretal amount claiming that it was offset from the legal costs in HCCC No. 802, 803 and 804 of 2002, on the basis that the third party had given the defendant instructions.
27. That Nilam Doshi and Sanjita Shah instructed the defendant to act for them in HCCC No(s). 802, 803 and No. 804 of 2002 and that he was not a party thereto. Further if he gave instructions to the defendant, he did so in his individual capacity as a brother and son of the plaintiffs in those other suits. Therefore, it is inconceivable for the defendant to retain the plaintiff's money for fees rendered in the other suits.
28. Further, he never undertook to pay defendant's costs in the subject suits and in any case, the defendant taxed the bill of costs in those suits and sought to execute against the respective clients.
29. Furthermore, other suits were dismissed and the defendant taxed his fees in HCCC No. 802, and No. 803 of 2002 as consolidated with HCCC No. 804 of 2002 which were allowed at Kshs. 782,989.41 and 5,117,245.98 respectively. That upon reference, the taxed costs were ordered at Kshs. 782,989.41 in HCCC No. 802 of 2002 and Kshs. 1,022,600 in HCCC No. 804 of 2002. Subsequently, the defendant was paid his fees in HCCC No. 802 of 2002. As such there is no valid reason for the defendant to continue holding the plaintiff's decretal amount.
30. The third party argued that, he does not owe the defendant any obligation whatsoever and therefore the third party notice served is misconceived, unfounded and an abuse of the court process and maintained that he would seek to have the suit against him dismissed with costs.
31. As aforesaid the matter was disposed of vide filing of submissions wherein the plaintiff reiterated the pleadings and its evidence save to add that the facts and issues upon which the defendant wish to have his fees from Sanjita and Nilam decreed against the plaintiff and/or third party are res judicata.
32. That under Company law, a company is a separate legal entity distinct from its directors as held in the case of; Victor Mabachi & Another v Nurnturn Bates Ltd [2013] eKLR. Thus, unless there are factors



- such as fraud or improper conduct to warrant lifting of the veil, a company cannot be held liable for commitments given by its directors.
33. That there was no evidence in the present case, that the third party intimated to the defendant that the plaintiff would bear the burden of paying the fees due to the defendant. Furthermore, the third party was always categorical that he acted as an authorized representative of Sanjita and Nilam Doshi and not at the behest of the plaintiff.
 34. Further, it is trite law that an agent can bind his principal but cannot be held responsible for the obligations of the principals as held in the case of; Anthony Francis Wareheim & 2 Others v Kenya Post Office Savings Bank Civil Application No. 5 & 48 of 2002 where the Court of Appeal unanimously held that, where the principal is disclosed the agent is not to be sued.
 35. That the defendant cannot include in his statement of account, the sums in respect of which he already has decreed against Sanjita and Nilam. Further, the defendant has not proved as per his statement of account that the sum of; Kshs. 2,475,116 in respect of; HCCC No. 1232 of 2001 is due.
 36. That, the certificate of taxation relied on has not been produced as the same does not exist nor does the file from which the court took the subject proceedings. Further, the bill of costs was served through registered post without leave of the court and that if taxed at all it was undertaken ex parte.
 37. The plaintiff submitted that the defendant having failed to prove the amount of Kshs. 2,475,116 to the required standard, the proper sum payable in respect to the subject suit is the party to party costs in the sum of Kshs. 340,240.35 increased by one half to a total of Kshs. 510,360.50. Further, the defendant billed the plaintiff a sum of Kshs. 250,000 that was paid, and having received Kshs. 340,240.25 as party and party costs, his cost in HCCC No. 1232 of 2002 had been paid in full.
 38. As such the sum of Kshs. 1,776,520.05 purportedly decreed in Miscellaneous Application No. 666 of 2012 is unsustainable as the decree is in the name of Nilam Doshi and even then the sum was reduced by Justice Havelock (retired) to Kshs. 782,989.41.
 39. Further the sum of Kshs. 782,989.41 purportedly decreed in Miscellaneous Application No. 667 of 2012 is unsustainable as there is a decree in the name of; Nilam Doshi which was reviewed by (Rtd) Justice Havelock to Kshs. 1,022,600.02. Furthermore, the sum of Kshs. 5,920,772 purportedly decreed in Miscellaneous Application No. 668 of 2012 is unsustainable as there is a decree in the name of Sanjita Shah. That, (Rtd) Justice Havelock included the said sum in the amount of Kshs. 1,022,600.02 decreed in Miscellaneous Application No. 668 of 2012.
 40. The plaintiff submitted that based on the foregoing and the fact that, the defendant omitted the Kshs. 340,240.35 received as party to party costs in HCCC No. 1232 of 2001, in its statement of account then that same is untenable.
 41. Further, a true statement of account, if any, would indicate that the defendant has received a total sum of Kshs. 6,511,012.35; that the taxed sum was Kshs. 1,805,589.43, and the balance due to the plaintiff is Kshs. 4,898,171.35.
 42. Furthermore, the sums in Miscellaneous Applications Nos. 666, 667 and 665 of 2012 are not due from the plaintiff or the third party, thus the sum of Kshs. 5,920,772 ought to be refunded to the plaintiff with interest thereon at court rates until payment in full.
 43. However, the defendant reiterated the issue of res judicata and submitted that, in determining prayer (1) and (2) of the originating summons Hon. Justice Ogola, made an express and unambiguous finding that the defendant had a right of lien and was entitled to hold the funds he had received. Therefore, the court cannot revisit the issue.



44. Further, the plea of res judicata can only hold where a party seeks to have a determination on merit of facts already adjudicated. However, the defendant obtained the funds held as lien by virtue of a client/advocate relationship.
45. The defendant then identified the following issues for determination: -
- a. Whether the third party is equally liable to pay the defendant his fees arising from the subject cases.
 - b. Whether the defendant's decrees against Nilan Doshi and Sanjita Shah are res judicata as against the plaintiff or the third party.
 - c. How much is payable, if any, to the defendant from the plaintiff and the third party jointly and/or severally.
46. The defendant submitted on the first issue, that, section 2 of the *Advocates Act* defines a client as: -
- “any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.”
47. The defendant cited the case of; Nderitu & Partners Advocates v Mamuka Valuers (Management) Ltd [2006] eKLR where (RTD) Hon Justice Waweru held that, a retainer cannot be in dispute and that it does not matter that instructions were given on behalf of someone else. That, if need be the client can get a re-imburement from his principal.
48. The case(s) of; Waiyaki Waruhiu & Co. Advocates –vs- Bongo Development Company Limited; and Thomas K’bahati & Peter Kaluma t/a Lumumba Mumma & Kaluma Advocates v Kenya Union of Commercial Food and Allied Workers [2017] eKLR were relied on where the courts cited section 2 of the *Advocates Act* and concurred with the decision in the afore case that the person who gives instruction is the client.
49. The defendant submitted that, in the present suit, it was the evidence of the plaintiff’s witness that they were the instructing party in all the suits. Further, the Hon. Justice Ogolla held vide the ruling dated; 31st January 2015 that the defendant only interacted with the third party and the plaintiff and not the plaintiffs in the other suits therefore the third party is estopped from denying responsibility and has the duty to ensure that the respondent recovers his fees.
50. Further, the only issue for determination pending is how much fees are payable to the defendant, or alternatively, how much, if any, of the money held as lien is payable to the plaintiff. That, judgement in the form of a counterclaim can be entered for the defendant against the plaintiff and/or the third party for sums over and above the amount held by the defendant.
51. The defendant argued that, the amount held as lien was to set off its legal fees. That, it has proved its entitlement to the fee of; Kshs. 3,198,110.04 by way of filing a statement of account showing the total fees payable in all four (4) matters as taxed by the court as being Kshs. 10,151,871.44 and after deducting the fees in HCCC No. 802 of 2002, the deposit in HCCC No. 1232 of 2001, and the amount detained as lien, the balance payable to himself is Kshs. 3,198,110.04.



52. At the conclusion of the arguments by the respective parties, I find several issues have arisen for determination, notably whether the decision of Hon Justice E. Ogola dated, 20th January 2015 allowed the originating summons in terms of prayers (1) and (2) to finality or the subject prayers are still live.
53. In that regard, the defendant submits that the subject issues were fully canvassed whereas the plaintiff submits that, the orders given were at an interim stage of trial and therefore the said issues were to be canvassed at the full hearing of the matter.
54. Pursuant to the afore, I have looked at the prayers (1) and (2) of the originating summons, summarized as prayer requiring the defendant to render cash account of money received on behalf of the plaintiff and deliver to the plaintiff a list of money in its possession or control held on behalf of the plaintiff.
55. I note that upon hearing the matter, the court stated and ordered as follows:
- “28. In view of the above findings, it is plain that the case herein is disputed and order 3 sought by the applicant cannot be granted. Prayers 1 and 2 of the application merely seek clarification of the accounts.
29. In the upshot, the applicant’s originating summons dated 21st January 2013 and filed in court on the same day is hereby allowed in terms of prayer 1 and 2 thereof which must be complied with within 14 days of the ruling. Costs shall be in the cause”.
56. The plain reading of the order afore clearly indicates that prayer (1) and (2) was granted in finality. As such the live prayers are (3) and (4).
57. The other issue for consideration is whether the defendant is entitled to pay the plaintiff all monies held by it. In that regard, the plaintiff submits inter alia that, the defendant’s claim in the sum of Kshs 2,475,116 allegedly payable to as legal fees in relation to HCCC No. 1232 of 2001 is not substantiated. That, there is no certificate of costs upon which the claim is premised and that the bill of costs dated 27th April 2012, produced by the defendant is not proof of alleged taxed costs.
58. That the burden of proving the taxed costs lies on the defendant and since the defendant has not produced a certificate of taxation in relation to the subject amount, it should be disregarded. Further, in view of the fact that the amount awarded in the subject suit is Kshs 5,920,772, then the costs cannot be Kshs 2,475,116.
59. However, the defendant maintains that, the bill of costs in relation to HCCC 1232 of 2001 was taxed at Kshs 2,457,116 as confirmed by evidence tendered by the defendant at paragraph 8 to 20 of its affidavit. That, the bill was taxed as drawn as the same was not opposed. Further, the certificate of taxation is not available as the court file went missing after taxation, a position not challenged by the plaintiff. That, if the plaintiff holds the view that, the bill has not been properly taxed then the plaintiff should have moved the taxing master to determine the costs. The defendant submits that it has no reason to lie to the court that the subject bill was taxed.
60. Further the argument by the plaintiff that, the costs cannot have been assessed at Kshs 2,475,116 taking into account the amount of Kshs 5,920,772 is not tenable, in view of the fact that, bill of costs are taxed based inter alia on the value of the subject matter. That the claim herein was for a sum of Kshs 9,834,342 and Kshs 2,609,750 respectively.
61. Having considered the rival arguments advanced by the parties. I find that a certificate of taxation is prima facie evidence of taxed bill of costs. However, the defendant has not produced any in relation to



- the bill of costs filed in respect of HCCC No. 1232 of 2001. Yes, the bill of costs may have been taxed as submitted by the defendant and indeed there is no reason to doubt the defendant. However, in the absence of the certificate of taxation, it is difficult to ascertain the amount taxed.
62. In my considered opinion if the file in which taxation was dealt with has gone missing the defendant should have sought for reconstruction of the file and/or issuance of a fresh certificate of taxation or sought for fresh taxation of the bill of costs. In the given circumstances it is not tenable to rely on the oral arguments by the defendant that the subject bill was taxed. I therefore hold and find that, the figure of Kshs 2,457,116 claimed as taxed costs in HCCC No. 1232 of 2001 has not been proved or substantiated. As such it is a premature claim and therefore the plaintiff is not liable to pay the same.
 63. The other sums of money in issue relates to the amount taxed in matter HCCC No(s). 802, 803 and 804 of 2002. In that regard, the defendant has produced certificate of taxations and rulings of the taxing master in relation to the subject matters. The rulings of the taxing master in those matters are dated 4th October 2012. The certificate of taxation in relation to matter HCCC 804 OF 2012 has been produced dated; 29th October 2012. The amount therein is Kshs 5,117,248.98. The ruling was delivered by the taxing master vide Miscellaneous Application No. 665 of 2012.
 64. However, I note that no certificate of taxation was produced in relation to HCCC No. 802 and 803 of 2002, but there are rulings of taxation vide Miscellaneous Application No. 666 of 2012 and Miscellaneous Application No. 667 of 2012, showing the taxed amount as 782,989,94 and Kshs 5,117,245.98 respectively. In that regard I hold and find that, there is proof of the taxed amount the taxing master the Honourable Deputy Registrar.
 65. However, by a notice of motion application dated 10th January 2013, the plaintiff sought to set aside two of the taxed bills. Upon hearing the two references, the (Retired) Justice J. B. Havelock delivered a ruling dated 3rd October 2013 in which he upheld a sum of Kshs 782,989,41 and entered judgment in respect of Miscellaneous No. 667 of 2012 in the amount of Kshs. 1,022,600.02.
 66. Pursuant to the afore order, both parties sought for review of the orders of the (Rtd) Justice Havelock on the ground inter alia that, there was miscalculation of the sum awarded in Miscellaneous Application No. 667 of 2012 which should have been Kshs 1,084,347.02 instead of Kshs 1,022,600,12 awarded. Further, the findings in relation to Miscellaneous Applications No(s). 666 and 667 of 2012 were reversed and finally the reference in relation to HCCC No. 808 of 2002 was not considered.
 67. The afore concern on the ruling of the court was raised by the plaintiffs' counsel vide a letter dated 8th November 2013, addressed to the defendant. The plaintiff indicated that, it would seek for review of that ruling of the court. In the same vein by a notice of motion application dated 3rd February 2014, the defendant sought for review or variation of the ruling of the Honourable (Retired) Justice J. B. Havelock delivered on 3rd October 2013, on the ground that, the court did not make a finding on the unchallenged items in the taxed bill, and disregarded the defendant's submissions in respect to the HCCC Miscellaneous Application No. 667 of 2012. Further the court referred to matter HCCC No. 803 of 2002, in the body of the ruling, yet it was not before the court nor formed part of the application.
 68. As can be gathered from the above, the ruling by the Honourable court dated 3rd October 2013 was deemed by both parties to have calculations errors or extraneous matters or omission of material facts. What is not clear to this court and has not been availed is evidence as to whether these issues were ever canvassed to finality. If the subject issues were not resolved, the question that arise is; how did the parties herein ascertain the sums payable in respect of all the taxed bills in HCCC No(s). 802, 803 and 804 of 2002 vide Miscellaneous Application No(s). 665, 666 and 667 of 2012.



69. Be that as it were, to narrow down on the issues, the amount of Kshs 782,989.94, taxed by the Honourable Deputy Registrar on 4th October 2012, in relation to HCCC No. 802 of 2002, and affirmed in the ruling of the High Court on 4th October 2013, has been paid, and therefore should not and does not form part of issues in dispute herein.
70. That narrows the matter to the taxed bills in respect in HCCC No(s). 803 and 804 of 2002. In that regard, the following issues need to be resolved:
- a. Whether the matter HCCC No. 803 of 2002 was a subject of reference to the High court.
 - b. Whether the same was considered by the court
 - c. Whether the amount awarded in the sum of Kshs 1,002,600.02 was correctly calculated.
 - d. Whether the afore sum of Kshs 1,002,600.02 was in relation to both matters HCCC No(s). 802 and 804 of 2002
71. In my considered opinion, these are the issues that should have been canvassed at the hearing of the review application. As it were, the learned trial judge has since retired and the matter cannot be referred back to him for consideration.
72. However, I have read through the subject ruling. I note that, the trial Judge states at paragraph 3 of the ruling that what was before the court was only taxation references in relation to HCCC No. 802 of 2002 under Miscellaneous Application No. 666 of 2012, and in relation to HCCC No.(s) 803 and 804 of 2002, under Miscellaneous Application No. 667 of 2012. That, objections were filed in relation to taxation proceedings in the three (3) High Courts files and finally, objections were based on two (2) items in both files namely the instruction fees and getting up fees.
73. Based on the aforesaid, it does appear, the court considered the two references as relating to matters HCCC No. 802 of 2002, as one reference vide Miscellaneous 666 of 2012 and matter HCCC 803 and 804 of 2002, as the other reference vide Miscellaneous Application No. 667 of 2012.
74. However, the court made an award in relation to the two references, but it is not clear whether the figure of a Kshs 1,002,600.02 was applicable to both HCCC No. 803 of 2002 and HCCC No. 804 of 2002 individually or as consolidated. The clarity thereof is crucial before the sum owing to the defendant or plaintiff can be ascertained.
75. Unfortunately, the parties have not dealt with these issues. As such this court is therefore unable to make a finding as to whether the instruction and getting up fees in HCCC No(s). 803 and 804 of 2002 is Kshs. 1,002,600.02 and whether that sum applies to each file.
76. Further, it is noteworthy that, the defendant was ordered vide the ruling of the court dated 30th January 2015 to file a statement of accounts of the sums of money held on behalf of the client. I note that, the subject statement has been filed at page 177 of the defendant's bundle of documents. A careful consideration thereof reveals the following:
- a. A sum of Kshs 2,475,116 has been included as taxed sum vide Miscellaneous 297 of 2012 in relation of HCCC 1232 of 2001. This court has ruled that the subject sum is not supported by a certificate of taxation.



- b. Further the costs in respect of Miscellaneous Application No. 666 of 2012, is indicted as Kshs 1,776,520,05 and stated to have been negotiated through consent of the parties. That consent has not been availed. The plaintiff did not confirm that there was such a consent. But even more so, that figure contradicts the ruling of the court dated 3rd October 2013 where the figure in relation to Miscellaneous application No. 666 of 2012 is different.
- c. The statement refers to High Court Miscellaneous Application No. 668 of 2012, in the sum of Kshs 5,117,245.98. First and foremost, there is no evidence of Miscellaneous Application No. 668 of 2012. The three Miscellaneous Applications as evidenced by documents produced are High court Miscellaneous Application No(s). 665, 666 and 667 of 2012. Secondly, the sum above is the subject review of the court ruling of 3rd October 2013. It is not ascertainable.

77. The upshot of the aforesaid is that, based on the finding that, the amount allegedly taxed in relation to matter HCCC No. 1232 of 2001 has not been substantiated as such, the court is not able to grant and/or allow prayer (3) of the plaint, until the application of review on the ruling of the court dated 3rd October 2013, is heard and determined.

78. In view of the fact that both parties raised the issue of review of the ruling by (Rtd) Justice Havelock and did not pursue it which cannot enable final orders herein, I make no orders as to costs in this matter. Each party to meet its own costs. In a nutshell the prayers (3) and (4) in the plaint have not been allowed as prayed.

Dated, delivered and signed this 6th day of May, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Karani H/B for Mr. Wandabwa for the plaintiff

Mr. Oyatta for the defendant

Ms. Ogutu: Court Assistant.

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