



REPUBLIC OF KENYA



KENYA LAW

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Mugambi Imanyara & Co Advocates v W'Njuguna & 1153 others (Civil Miscellaneous Application E374 of 2021) [2024] KEHC 8777 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL MISCELLANEOUS APPLICATION E374 OF 2021**

AN ONGERI, J

JULY 4, 2024

BETWEEN

MUGAMBI IMANYARA & CO ADVOCATES APPLICANT

AND

**SAMUEL MUCIRI W'NJUGUNA & 1153 OTHERS & 1153
OTHERS RESPONDENT**

RULING

1. The application coming for consideration is the reference dated 21/9/2023 brought under paragraph 11 of the Advocates (Remuneration) Order, 2009 seeking the following prayers;
 - (i) That this honourable court be pleased to set aside the decision of the taxing master delivered on 7th September 2023 with respect to the advocate-client bill of costs dated 4th August, 2021.
 - (ii) That the bill of costs dated 4th August 2021 be referred back to taxation before a different taxing officer with appropriate directions.
 - (iii) That this honourable court be pleased to grant any other relief that may be just to meet the ends of justice in this case.
 - (iv) That the costs of this application be provided for.
2. The application is based on the following grounds;
 - i. The Taxing Officer erred in principle and law by finding that the applicant had failed to demonstrate the existence of an advocate-client relationship.
 - ii. The Taxing Officer erred in principle and law by failing to properly appreciate and apply the principle that “instructions need not be in writing but can be inferred from the conduct of the parties”.



- iii. The Taxing Officer erred in principle and law by failing to properly analyze the evidence submitted in support of the existence of an advocate-client relationship.
 - iv. The Taxing Officer erred in failing to properly consider the ruling by the Court of Appeal which allowed an application by the applicant herein to cease from acting; and which by implication is a determination of the existence of an advocate/client relationship from 16th June 2015 when the applicant took over the conduct of the matter from the firm of Agina & Associates Advocates.
 - v. The Taxing Officer erred in fact by stating that the applicant did not provide any correspondence showing instructions to act for the respondent himself expressly admitted to the advocate/applicant having instructions to act in the matter in the letter to the Deputy Registrar – Court of Appeal dated 16th November 2020.
 - vi. The Taxing Officer erred when she dismissed the bill of costs dated 4th August 2021 purely on the basis that the respondent’s conduct did not imply an advocate-client relationship when the respondent fully adopted the pleadings prepared by the advocate/applicant and even physically participated in court proceedings.
 - vii. The Taxing Officer’s errors cumulatively constitute unfair and unjust exploitation and misuse of the applicant’s endeavours in conducting its obligations to the respondents.
 - viii. The Taxing Officer having properly applied the law and facts, would have reached the inevitable conclusion that there existed implicit instructions to act and represent the respondents in the subsequent proceedings from the respondent.
 - ix. That it is just and proper to allow the orders sought herein.
3. The application is supported by the affidavit of MUGAMBI IMANYARA sworn on 21/9/2023 in which he deposed as follows;
- “(i) That I am an Advocate of the High Court of Kenya practising as such in the firm name and style of Mugambi Imanyara & Co. Advocates.
 - (ii) That I have been in conduct of this matter on behalf of the Applicant and I am well versed with the facts of this matter hence my competence to swear this Affidavit.
 - (iii) That on 7th September 2023, the Taxing Officer Hon. L. Mbacho erroneously dismissed the advocate and Client Bill of Costs dated 14th August 2023 filed by the advocate/applicant.
 - (iv) That sometime in June 2015, the Respondents herein through their representative Mr. Samuel Muciri W’Njuguna approached the Applicant herein to take over the conduct of the matter after the firm of Agina & Associates Advocates, who were on record at the time, wrote to the said Respondents herein informing them of their intention to cease acting effective 1st June 2015 via a letter dated 28th May 2015.
 - (v) That pursuant to those instructions, and the matter being at a post-judgment stage, the Applicant herein filed a formal Application to take over the conduct of the matter from the firm of Agina & Associates Advocates. The said Application dated 16th June 2015 was served upon the former Advocates, the



firm of Agina & Associates Advocates as well as the firm of Waruhiu K'Owade & Nganga Advocates who were representing the Defendants in the matter.

- (vi) That the said Application was unopposed and the court duly ordered that the Notice of Change of Advocates dated 16th June 2015 be deemed as duly filed.
- (vii) The Applicant herein then went on to represent the Respondents in the matter up to the Court of Appeal. At the High Court, the Applicant herein prepared written submissions and prosecuted the Notice of Motion Application dated 28th April 2015 which was determined by the court through a ruling dated 22nd April 2016.
- (viii) That the Respondents herein being dissatisfied with the said ruling of the court aforesaid, instructed the Applicant to appeal the same. The Applicant accordingly filed and served a Notice of Appeal dated 6th May 2016.
- (ix) That it is clear and distinct that the Taxing Officer erred in principle and law by failing to find that there already existed an Advocate/Client relationship by virtue of the Applicant having been in conduct of the matter through the Notice of Change of Advocates dated 16th June 2015.
- (x) That it is imperative to note that in one of the correspondences at the Court of Appeal, the Respondents herein through their representative Mr. Samuel Muchiri W'Njuguna wrote to the Deputy Registrar on 16th November 2020.
- (xi) In the said letter, the Respondents acknowledge that the firm of Mugambi Imanyara & Co. Advocates, the Applicant herein has been acting for them in the matter. (xii) They further confirm that they had no objection to the Applicant ceasing to act for them and that they require additional time to seek alternative legal representation.
- (xiii) That the Taxing Officer erred in failing to consider the fact that vide a Ruling dated 23rd April 2021, the Court of Appeal allowed an Application by the Applicant herein dated 25th June 2020 to cease acting for the Respondents herein which could only have been possible where there was already established an Advocate/Client relationship.
- (xiv) That the Taxing Officer erred in failing to consider the fact that the Applicant herein acted for the Respondents from the High Court all through to the Court of Appeal. The instruction period was from 16th June 2015 to 23rd April 2021. The Court of Appeal decision is instructive on the contention of whether the Advocate was instructed by the clients.
- (xv) That it is clear that the Taxing Officer erred when she disregarded the submissions and supporting documentation filed by the Applicant herein, especially on taking into consideration that the Respondents' conduct did not imply an Advocate-Client relationship when the Respondent fully adopted the pleadings prepared by the Applicant and even physically participated in Court proceedings.



(xvi) That it is only fair and just that the Ruling dated 7th September 2023 dismissing the Applicant's Bill of Costs be set aside in its entirety and the Bill of Costs be referred back for taxation on proper principles.”

4. The respondent opposed the reference and filed a replying affidavit dated 11/10/2023. In it he deponed that this court already pronounced itself on this matter through the ruling dated 7/9/2023 delivered by the Hon. Deputy Registrar L Mbacho and wherein the applicants advocate/client bill of costs dated 4/8/2021 was dismissed entirely without costs.
5. That at no stage did the applicant have conduct of the matter at the high court or court of appeal and therefore bear no basis to claim any amounts under an advocate/client bill of costs.
6. He deponed that the court in finding that no advocate-client relationship existed between the applicant/advocate and client/respondent renders any prayer for reference to a different taxing master nugatory.
7. That the irresolvable issues stated at grounds for notice of motion have to do with his complaint that the applicant advocate had misused the custody of the file to act on the file without specific instructions to do so.
8. That his complaint against the applicant/advocate is contained in his letter to the deputy registrar dated 19/9/2022 and which was referred to in the ruling by the DR in her ruling. The letter explains the circumstances in which the applicant advocate came into custody of the file, which custody did not entail any instructions to proceed with any action on the file.
9. He deponed further that he wrote a letter to the applicant/advocate as early as 9/3/2020 demanding the release of the file and all documents as no instructions had been given to the applicant/advocate.
10. The applicant/advocate responded on the same day saying that they would return the original file within 24 hours of that day. However, to date they have not returned the original file.
11. He indicated that applicant/advocate has not produced any invoice requesting for any payments during the alleged period indicating they were supposed to be paid.
12. That the notice of change of advocates dated 16/6/2015 does not indicate whether the firm of Agina & Associates Advocates were duly served and further there is no proof of receipt of change of advocate.
13. That the applicant has thus failed to establish the existence of advocate/client relationship between him and the respondent and therefore any remuneration sought from the purported existence of the same should be dismissed.
14. The parties filed written submissions as follows; the advocate/applicant submitted that Taxing Master failed to consider the undisputed fact that the issue of instructions and whether or not the Advocate was properly on record representing the Clients is one that was determined by the Court of Appeal.
15. That after the Clients refused to pay a deposit on the legal fees, despite numerous correspondence to that effect, the Advocate herein filed a formal Application to cease acting for the Clients at the Court of Appeal.
16. That it is imperative to note that in one of the correspondences at the Court of Appeal, the Clients through their representative Mr. Samuel Muchiri W'njuguna wrote to the Deputy Registrar on 16/11/2020. In the said letter, the Clients acknowledge that the firm of Mugambi Imanyara & Co. Advocates has been acting for them in the matter.



17. They further confirm that they had no objection to the Advocate ceasing to act for them save that they be allowed sufficient time to seek alternative representation.
18. Further, that the court of appeal in its ruling dated 23/4/2021 allowed the advocate to cease acting for clients in this matter.
19. That by implication of the said ruling, it was the court of appeal's affirmative position that the advocate herein was properly on record at the court of appeal and that is why their application to cease acting was allowed.
20. That the clients should therefore not be allowed to abrogate and reprobate on the issue of instruction to avoid paying legal fees yet services were rendered by the advocate.
21. The advocate/applicants argued that the contention that the Advocate was only instructed to be custodian of the client files received from the firm of Agina & Associates Advocates is misplaced and an afterthought. The Clients have adopted the pleadings filed by the Advocate at the post-judgment stage and appellate stage.
22. That the matter is currently at the Court of Appeal whose proceedings were triggered by the ruling delivered on 22/4/2016 and instituted by the Notice of Appeal filed by the Advocate herein on 6/5/2016. The Clients have never disowned the post-judgment proceedings or the appellate proceedings and the pleadings filed by the Advocate.
23. It is not in dispute that the Advocate finally on record in this matter is the firm of Mugambi Imanyara & Company Advocates, and accordingly is entitled to draw a single bill for the whole of the matter.
24. The import of the said Order is that the Advocate finally on record in the matter will file a Bill of Costs as if he was the only one acting in the matter from inception to conclusion.
25. That fees are earned the moment an Advocate acts on instructions from his client notwithstanding the stage of the matter. That further the advocates are entitled to the full instruction fees even though they joined the suit post-judgement.
26. The respondent submitted that contrary to what the applicant/advocate avers they did not represent the respondents at all in High Court Civil case No. 119 of 2003 as consolidated with high court civil case No. 26 of 2004 or in the court of appeal.
27. That the conduct of the matter was undertaken initially by Cerere Mwangi & Co Advocates, then by M/S Kagiri & Associates and then finally by Agina & Associates Advocates, who prosecuted the matter until judgement was finally given in favour of the Respondents by Odunga J (as he then was) on 9/2/2015.
28. The respondent submitted that the letter by Mr Ojwang Agina dated 28/5/2015 is addressed to the Respondents' representative, Mr. Samuel W' Njuguna, and not to the Applicant firm.
29. That the letter also does not in any way instruct the Applicant law firm to act for the Respondents. The Respondents further submit that the letter of complaint by the Respondent's representative Mr. Samuel Muciri W'Njugunaa to the Deputy Registrar dated 19/9/2022 paragraphs 5 to 7, explains how the file came into the custody of the Applicant law and how the Applicant law firm began to deal with it unauthorized and illegally.
30. The respondent submitted that Notice of Motion Application for change of advocate dated 16/6/2015 has no stamp indicating that the firm of Agina & Associates' was duly served. There is also no proof of receipt of the change of advocate by the firm of Agina & Associates, nor is there any proof



- of correspondence from the Applicant firm to the Respondents that a change of advocate had been effected.
31. That furthermore, the submissions by the Applicant Law firm marked M14 and the Notice of Appeal marked M16 were prepared and filed without the knowledge and instructions of the Respondents.
 32. That there is no evidence of correspondence between the Applicant law firm and the Respondents on the preparation and filing of submissions and the notice of Appeal.
 33. The respondent argued that the advocate-client relationship precedes taxation. If there is no relationship, then changing taxing officers is a waste of the courts time.
 34. That the respondents entered into a fee agreement with the firm of Agina & Associates Advocates, which fee was paid and duly received by Agina & Associates Advocates.
 35. That it is trite law that where there is an agreement to charge fees, the costs for an advocate cannot be the subject of Taxation. This is pursuant to section 45 of the *Advocates Act*, which requires that agreements for remuneration be in writing and signed by the client or his agent duly authorized to do so.
 36. Since there was already a Fee agreement between the Respondent and the firm of Agina & Associates Advocates, the firm of Mugambi Imanyara & Advocates have no basis on which to claim any amount they have claimed in their Bill of Costs for work not done and for instructions not given to do any work.
 37. The issues for determination in this reference are as follows;
 - i. Whether the Taxing Officer had the jurisdiction to determine the existence of a client/advocate relationship.
 - ii. Whether there was a client/advocate relationship between the applicant and the respondent herein.
 38. On the issue as to whether the Taxing Officer had the jurisdiction to determine the existence of a client/advocate relationship, I find that the Taxing Officer ought to have referred matter to the High Court for determination.
 39. In the case of Mugambi & Co Advocates –vs- John Okal Ogwayo & another [2013] eKLR, the court stated as follows;

“The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2, 10 and 13 of the remuneration order.

Where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court. “Court” is defined in section 2 of the *Advocates Act*, Cap 16 as the High Court. “Court” is thus not the taxing officer or a deputy registrar of the court.

The court in the case came to that conclusion that where an issue is raised as regards to retainer, that issue ought to be determined by a court as defined in Section 2 of the *Advocates Act*. In that definition, a taxing officer/master or a deputy registrar is not a court”.
 40. I find that the Taxing Officer had no jurisdiction to determine the existence of a client/advocate relationship between the applicant and the respondent.



41. However, the Taxing Master said the file was referred to the judge and returned to her for determination.
42. On the issue as to whether there was a client/advocate relationship between the applicant and the respondent herein, I find that the respondent submitted that the conduct of the matter was undertaken initially by Cerere Mwangi & Co Advocates, then by M/S Kagiri & Associates and then finally by Agina & Associates Advocates, who prosecuted the matter until judgement was finally given in favour of the Respondents on 9/2/2015.
43. The respondent wrote a letter stating that the applicant law firm began to deal with their file in an unauthorized manner and illegally.
44. The applicant did not controvert the averments by the respondent that the Respondent that the firm of Agina & Associates Advocates had an agreement on the payment of fees which the respondent had paid and therefore the applicant had no basis for seeking costs from the respondent for work not done and for instructions not given to do any work.
45. The applicant stated that the matter was at post-judgment stage when the Applicant herein filed a formal Application to take over the conduct of the matter from the firm of Agina & Associates Advocates.
46. The applicant submitted that the Advocate finally on record in this matter was the firm of Mugambi Imanyara & Company Advocates, and accordingly is entitled to draw a single bill for the whole of the matter.
47. Further, that the import of the said Order is that the Advocate finally on record in the matter will file a Bill of Costs as if he was the only one acting in the matter from inception to conclusion.
48. The applicant also submitted that fees are earned the moment an Advocate acts on instructions from his client notwithstanding the stage of the matter. That further the advocates are entitled to the full instruction fees even though they joined the suit post-judgement.
49. The applicant also stated in the affidavit in support of the reference that the Taxing Officer erred in failing to consider the fact that vide a Ruling dated 23rd April 2021, the Court of Appeal allowed an Application by the Applicant herein dated 25th June 2020 to cease acting for the Respondents herein which could only have been possible where there was already established an Advocate/Client relationship.
50. However, the Taxing Officer found that the only correspondence between the Advocate and the respondent was a letter dated 5/6/2015 in which the respondent gave the condition that he had no objection to the applicant having conduct of the matter so long as M/S Agina & Associates remained on record.
51. There is no indication that the said condition was complied with and I find that the applicant did not establish the existence of a client/advocate relationship in the circumstances of this case.
52. In the case of Ochieng Onyango Kibet and Ohaga Advocates vs. Akiba Bank Ltd [2007] eKLR, the court stated as follows;

“The act of authorizing an advocate to act on behalf of a client constitutes the advocate’s retainer by the client. It is not the law that an advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is



no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive; it may be wide. And nevertheless, it can be implied from the conduct of the client/advocate relationship.”

53. In the current case there is an indication that the advocate took over the matter contrary to the instructions by the respondent that there was a condition for the retainer.
54. The onus reposed on the applicant to prove the existence of an advocate/client relationship has not been discharged in the circumstances and the grant of the application to cease acting for the respondent in the Court of Appeal is not evidence that there was a retainer since the advocate acted contrary to the express instructions of the client.
55. I find that no fees is payable since the Advocate did not establish that there was a client/advocate relationship.
56. The reference dated 21/9/2023 is dismissed with costs to the respondent.
57. The order to abide in Misc. E373/2021.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF JULY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

NAIROBI HIGH COURT CIVIL MISC. APPL. NO. E374 OF 2021	0
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