



C. Obiero & Associates Advocates v Okeno & Sons Bulding Contractors & another (Miscellaneous Civil Application E008 of 2024) [2024] KEHC 9970 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E008 OF 2024
RE ABURILI, J
AUGUST 8, 2024
IN THE MATTER OF THE PURPORTED TAXATION
OF COSTS BETWEEN ADVOCATE AND CLIENT**

BETWEEN

C. OBIERO & ASSOCIATES ADVOCATES APPLICANT

AND

OKENO & SONS BULDING CONTRACTORS 1ST RESPONDENT

PAUL OTIENO OKENO 2ND RESPONDENT

RULING

1. This matter is closely related to HCC Misc. Application Nos. E006 of 2024 and HCC Misc. Application No. E007 of 2024. The parties are the same. The dispute is over the advocate/client of Bills of Costs dated 2nd January 2024 filed in each of the three files and which had not been taxed by the Deputy Registrar of this court.
2. I therefore shall, for purposes of this ruling, and in view of the nature of prayers sought in the three matters, consolidate them to avoid duplication.
3. As soon as the advocate served upon the Respondent/Client the Bill of Costs for taxation purposes, the client's counsel filed Notice of appointment of Advocates and a Notice of Motion dated 3rd April 2024 seeking to stay the advocate/Client Bill of Costs dated 2nd January 2024, striking out of the said bill of costs and the cots to be borne by the advocate/applicant.
4. The grounds upon which the application is predicated upon and supported by the affidavit sworn by Paul Otieno Okeno and are that the said bill of costs is fatally defective for want of compliance with Rules 13 and 70 of the Advocates Remuneration Order; that the 1st Respondent is a stranger to the unfiled claim against Kisumu Water and Sanitation Company Limited and has never instructed the



- said law firm to act for it in such a matter; that C. Obiero & Associates is not an advocate capable of taxing or lodging the advocate/client bill of costs under the [Advocates Act](#) and [Advocates Remuneration Order](#); that the bill of costs is an extortion of money from the 1st Respondent in clear breach of Section 51 of the [Advocates Act](#) and that the filing of the bill of costs is intended to harass the 1st Respondent and to unlawfully bear pressure on it to illegally cause it to drop its claim for Kshs.10 million received on his behalf by the person of Clifford Obiero Advocate who is unlawfully and unjustly withholding the said money and converting it for his private use; that the bill is contrary to Section 32, 40, 48 and 51 of the [Advocates Act](#); that the bill of costs is scandalous, frivolous and vexatious and an abuse of court process.
5. In the supporting affidavit of Paul Otieno Okeno who is the 2nd Respondent, he concedes instructing the advocate to take over the conduct of an application for recognition and enforcement of arbitral proceedings between the 1st Respondent and the Ministry of Agriculture, Livestock, Fisheries and Blue Economy which case was Homabay HCC No. E08 of 2022 – unopposed and the resultant Homabay JR No. E010 of 2022 seeking for Mandamus to compel payment of the decretal sum thereof and that on 23rd November 2023, the Ministry paid Kshs.10,000,000 into the Advocates KCB account which the advocate has callously converted to personal use and declined to release even a penny to the Respondent/Client.
 6. That instead, the advocate has filed several unmerited bills of costs against the Respondent in the hope of applying the said money to his private use, despite his fees being assessed in the said matters and which the client has not refused to settle; that only an advocate can file and tax an advocate/client bill of coats of which the applicant herein is not and was not instructed to act in any matter involving KIWASCO.
 7. In the Replying affidavit sworn by Clifford Otieno Obiero advocate on 16th April 2024, it is deposed that the application dated 3rd April 2024 is incompetent, scandalous and vexatious for referring to him as a fraudster without proof yet the Kshs.10 million allegedly converted by the advocate for his personal use is held in lien on account of unpaid legal fees in a Homabay High Court matter; that the language used to describe the advocate is unlawyerly and inflammatory; derogatory and scandalous; that he was properly instructed to represent the Respondent/Client; that grounds for striking out the bill of costs are missing and that the application is made of insults purposes as shown by the tone of the drafting; that the client has had poor relations with his previous 5 advocates in the Winam Civil Case No. 43 of 2017 which is relevant to this matter and that the client herein extorts advocate’s services while seeking to avoid his obligation as a client, calling the advocate as a stranger in proceedings where he allowed the advocate to examine him in open court.
 8. The advocate annexed copy of a letter informing the client that he was holding lien over Kshs.10,000,000 to cover his fees in various matters including unfiled cases and not for proprietary purposes subject to taxation and raising concerns over what he called insults and threats by the client over the Kshs.10,000,000 received by the advocate in the Homabay High Court matters.
 9. He also annexed his certificate of registration of his business name for the law firm of C. Obiero & Associates Advocates and a letter of no objection dated 6th January 2022 from the Law Society of Kenya; instructions letter dated 29th May 2022 to defend the client in a matter against KIWASCO; notices of change of Advocates; proceedings in Winam SPMCC No. 40 of 2017 where the 2nd Respondent was led by Mr. C. Obiero Advocate in evidence as he testified as PW 1; proceedings in Winam SPMCC No. 43 of 2017 where the client is the Plaintiff against Platinum Credit Limited where Mr. C. Obiero was on record for the Client/Respondent in the impugned bill of costs.
 10. The advocate filed a Supplementary affidavit sworn on 19th April 2024 and on 6th May 2024, the client swore an affidavit in response to the Supplementary affidavit.



11. However, there is no leave of court sought and obtained to file supplementary or other affidavits, noting that the Advocate could only file an affidavit after the Respondent/Client had filed a further affidavit.
12. Parties filed written submissions. In the submissions by the Applicant, it was contended that the court ought to stay the taxation of the bill of costs because a serious issue of whether there were instructions to act for the client existed.
13. On the question of whether the bill of costs was competently filed, it was submitted that C. Obiero & Associates Advocates was not an advocate or entity capable of filing a bill of costs in terms of Section 51 of the Advocates Act and Rule 70 of the Advocates Remuneration Order.
14. That C. Obiero & Associates Advocates lacks the capacity to file and have any bill of costs be taxed against the client within the mandatory terms of the aforesaid Section and Rule and therefore cannot purport to tax Advocate – Client Bill of Costs.
15. The other submissions reiterate the assertions and depositions in the application, grounds and affidavit in support.
16. In the Advocate/Applicant’s submissions, it was submitted that the client instructed the advocate to represent the client in Winam SPMCC No. 40 of 2017 hence the advocate is entitled to recover his costs, as was held in Christine James Kioko vs J. A Makau & Company Advocates [2021] eKLR.
17. On whether the impugned bill of costs is short of statutory requirements, it was submitted that the advocate was not required to file a suit to recover his costs as was held in the above case of Christine James Kioko; and that therefore Section 48 (3) of the Advocates Act was inapplicable.
18. On reliance on Section 40 of the Advocates Act, it was submitted that the Section refers to unqualified persons who cannot recover fees, unlike in the instant case where C. Obiero Advocate is qualified to practice law and his firm name C. Obiero & Associates Advocates is duly registered as shown by the annexed certificate of Registration of the business name.
19. On alleged extortion by the advocate of the client’s funds in the former’s possession, the advocate denied such allegation contending that he only held lien not proprietary right over the funds as explained in letter annexed as CO-10.
20. The advocate termed the allegations of extortion to be scandalous, speculative and unsubstantiated.
21. On stay of taxation, it was submitted that no grounds or reasons had been advanced to warrant such stay of taxation; urging this court to dismiss the application with costs.

Determination

22. I have considered the application herein by the client/respondent/applicant against the advocate/applicant/respondent, the grounds, supporting and replying affidavits together with the annexures thereto and the parties’ respective submissions as filed.
23. The issues for determination are:-
 1. Whether the bill of costs as filed is incompetent and therefore amenable for striking out in limine.
 2. Whether there was retainer to warrant the filing of the bill of costs.
 3. Whether there should be stay of taxation.



4. What orders should this court make.
5. Who should bear costs of the application.
24. On whether the bill of costs offends the cited statutory provisions and therefore amenable for striking out, I observe that the applicant invoked the provisions of the law that refer to an advocate and not a firm of advocates or Advocate's firm name by which the bill of costs was drawn and filed being C. Obiero & Associates Advocates and goes ahead to submit that the firm has no capacity to file a bill of costs as is the case herein; as the firm is not an advocate. Further, that therefore the Advocate is unqualified to file and seek taxation of costs between advocate and client as the cited provisions refer to advocate and not a firm of advocates, in whose name the bill is brought.
25. The advocate Mr. Clifford Otieno Obiero in his replying affidavit and submissions contends that the bill of costs is competent as he did not file suit for recovery of costs and that he is not an unqualified person. Further, that his firm is dully registered under the *Business Names Act*.
26. Section 51 of the *Advocates Act* provided for general provisions as to taxation as follows:
 1. Every application for an order of taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
27. Under Rule 70 of the *Advocates Remuneration Order*; on filing of bills of taxation, every bill of costs shall be lodged with the registrar and shall be endorsed with the name and address of the advocate by whom it is lodged and also the name and address of the advocate (if any) for whom he is agent, and the name and address of any advocate or other person entitled to receive notice of the taxation. Every such bill shall be accompanied by one carbon or other true copy thereof for each name endorsed thereon of any advocate or other person entitled to receive such notice.
28. It is on the basis of the above provision that the Client/Respondent asserts that C. Obiero & Associates Advocates is not an advocate and therefore lacks capacity to tax the filed advocate/client Bill of Costs.
29. Order 30 of the *Civil Procedure Rules*, 2010, makes provisions for suits by or against firms and persons carrying on business in names other than their own. Rule 1 allows any two or more persons claiming or being liable as partners to sue or to be sued in the name of the firm. Rule 2 clarifies that if the suit is filed by partners in the name of their firm, the plaintiff or their advocate shall on demand in writing by or on behalf of the defendant declare in writing within 7 days, the names and place of residence of all names constituting the partnership.
30. Under Rule 5, where persons are sued as partners in the name of the firm, they are to appear individually in their own names but all the subsequent proceeding are to continue in the name of the firm sued. Finally, Rule 9 provides that: "Any person carrying on business in a name other than his own name may be sued in such name or style as if it were a firm and so far as the nature of the case will permit, the rules under this order shall apply."
31. The above Rule allows any person carrying on business to be sued in the name or style in which he carries the business as if it were a firm. This Court's understanding and appreciation of Rule 9 above is that the proceedings suit should target the proprietor essentially but using his business name. In this case however, it appears that the respondent deliberately used the firm name of C.Obiero & Associates Advocates as a body corporate as opposed to using his own name as the proprietor.
32. All that this court is agreeing with the client is that even if the client instructed the law firm to represent him in the matters stated herein, it is trite that a business name is not a legal person for purposes of



instituting legal proceedings and therefore it is expected that the person carrying out the business files proceedings in his own name trading as.....In this case, C.Obiero Advocate should have filed the bill in his own name trading in the name and style of C. Obiero & Associates Advocates. Failure to do so renders the pleadings incompetent and amenable for striking out so that competent proceedings can be initiated.

33. On the question of retainer, from the annexures to the affidavit of C.Obiero Advocate opposing the application, I am satisfied that his firm was instructed to represent the client in Winam SPMCC No. 40 of 2017 where the 2nd Respondent was led by Mr. C. Obiero Advocate in evidence as he testified as PW 1; proceedings in Winam SPMCC No. 43 of 2017 where the client is the Plaintiff against Platinum Credit Limited where Mr. C. Obiero was on record for the Client/Respondent in the impugned bill of costs. It is therefore not correct to rubbish Mr Obiero Advocate as a stranger in those proceedings filed or unfiled simply because of a disagreement.
34. I find that there are sufficient instructions to act for the client in those matters.
35. In the KIWASCO case where the client is stated to be the plaintiff in an abandoned matter which was not filed, for example, how did the advocate procure the witness statement dated 7th October, 2022 duly signed by the client herein, if at all the advocate is a stranger to the applicant herein? How did the advocate's firm get the letter of instructions dated 29th May 2022 to file suit against KIWASCO and claim for Kshs 1,507,000 from the firm of Odumbe Ayieda(sic) & Company Advocates in Winam CC 40 & 43 of 2017? All these are evidence of instructions and therefore no strong words can take away the retainer.
36. Off course, the advocate will have to prove that he is entitled to the fees sought.
37. On the allegations that the advocate is unlawfully withholding the client's funds received in respect of matters before Homa Bay High Court and that his costs were assessed in those cases and the client has not refused to pay hence no justification for withholding the said money, with utmost respect, advocates legal fees is never assessed or taxed in the client's cause. Only party and party costs are. It cannot therefore be true that by filing his bills of costs, C. Obiero is extorting and vexing his client.
38. I hasten to add that the strong language used in this case by the client through his advocate with the use of words such as- extortionist vilifies the advocate unnecessarily and the better if such language is avoided at all costs on advise by his advocate, an officer of the Court. This is because there are avenues for ventilating such serious claims without scandalising the advocate in proceedings of this nature. This Court would not hesitate to strike out pleadings and depositions which are calumnious and scurrilous.
39. Having established that there was retainer of the firm of C.Obiero Associates Advocates by the client, and now that there is a dispute as to whether legal fees for the legal representation was settled, it follows that the only way the dispute can be settled, over what Mr. Obiero is admittedly holding as lien over the client's money received in the Homabay cases, for his alleged unpaid fees is to file bills of costs for taxation so that the advocate gets his just dues and the balance is refunded to the client. There are no two ways about it.
40. Thus, law firms are just like societies which have capacity to sue and be sued only in the name of its officials and not in the societies' names.
41. In *Juliana Akinyi Owino v Kiarie Shoe Stores* [2014] eKLR, the High Court held that a mere name registered under the *Business Names Act* Cap 499 does not clothe it with the requisite juristic personality in the absence of the owners. The court concluded that the drafters of the Order 30 of



the Civil Procedure Rules intended that the Business name cannot sue or be sued in the absence of the proprietors.

42. With reference to the provision of Article 258, the same cannot come to the aid of the applicant advocates' law firm, since it does not fit into the category in Article 22(2)(a) as a person or persons" acting on behalf of another person who cannot act in their own name" for the reason that C.Obiero can act in his own name trading as C.Obiero & Associates Advocates as a business name and short of that, the firm name lacks locus to sue and be sued.
43. For the above reasons, albeit the firm of C.Obiero & Associates Advocates has no capacity to sue in that name, and therefore the bill of costs filed in the name of the firm is hereby struck out, the advocate does not lose his right to bring fresh bills of costs for consideration on their merits.
44. In the end, I allow the application by the client on the ground that the firm of C.Obiero & Associates Advocates has no legal capacity to bring a claim against the client in that name unless the name of the advocate is used and suing as or trading as C.Obiero & Associates Advocates and therefore the bill of costs dated 2nd January, 2024 is struck out. The advocate is at liberty to file fresh bills of costs for taxation on their merit.
45. As earlier stated, this ruling and order shall apply mutatis mutandis to HCC Misc E007 and Misc E006 of 2024 with necessary modifications as regards the specific matters wherein instructions to act were given by the applicant/ client herein to the Advocate. However, for purposes of closing each of the three files from the case Tracking System, this ruling as applied to the two other matters will be replicated and the specific case numbers assigned.
46. Each party shall bear their own costs of the applications dated March 15, 2024 and the struck out bills of costs in each of the three above-named series files.
47. This file and the above two files are accordingly closed.
48. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

