



**Mwaura v CK Gitonga t/a Koome & Koome Advocates (Civil Miscellaneous Application 28 of 2024) [2024] KEHC 10348 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10348 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL MISCELLANEOUS APPLICATION 28 OF 2024**

**SM MOHOCHI, J**

**AUGUST 8, 2024**

**BETWEEN**

**JOHN KAMAU MWAURA ..... APPLICANT**

**AND**

**CK GITONGA T/A KOOME & KOOME ADVOCATES ..... RESPONDENT**

**RULING**

1. The Applicant together with four (4) victims of an accident, involving the Applicant's motor vehicle, having agreed not to institute suit in respect of the said accident approached the Respondent herein on the 8<sup>th</sup> of January, 2024 for purposes of recording an out-of-court settlement agreement for which the Respondent charged the Applicant Kshs 300,000 allegedly being the cost for such agreements.
2. The Applicant on indicating to the Respondent that he did not have the said amount, was asked to make a down-payment of Kshs 50,000 which he did and to commit through a written agreement to pay the balance of Kshs 250,000 on the 26<sup>th</sup> of January 2024 and in default to pay an additional Kshs 200,000. The Applicant being a lay person and without the benefit of optional advice or any independent legal advice on the cost of such agreements was forced to sign the fee agreement dated 8<sup>th</sup> January 2024 which he did through compulsion, misrepresentation and undue influence.
3. That, the Applicant, upon signing of the fee agreement and being of the view that the amount charged for drafting the settlement agreement was manifestly excessive, proceeded to seek independent legal advice on the costs for drafting settlement agreements and decided to engage his counsels now on record to renegotiate the terms of the fee agreement dated 8<sup>th</sup> January 2024. The said advocates wrote to Respondent who refused to change the terms whilst threatening to represent the victims of the accident involving the Applicants motor vehicle in a criminal suit as counsel watching brief via his letter dated 17<sup>th</sup> January 2024 exhibited as annexure 2.



4. That the Respondent further went ahead to institute Nakuru SCC Comm No E178 of 2024 C K Gitonga t/a Koome & Koome Advocates v John Kamau Mwaura in the small claims court for the recovery of fees on the basis of the agreement dated 8<sup>th</sup> January 2024 which was however dismissed on the 15<sup>th</sup> of March 2024 for want of jurisdiction by the small claims court.
5. While the suit for recovery for fees was still pending before the small claims court, the Applicant herein filed the instant application seeking amongst other things to set-aside the fee agreement dated 8<sup>th</sup> January 2024.

### **Applicants Case**

6. Before me is a chamber Summons Application dated 27<sup>th</sup> February 2024, filed pursuant to Section 45(2) of the [Advocates Act](#) seeking the following relief(s);
  - i. Spent
  - ii. Spent
  - iii. That, the fee agreement dated 8<sup>th</sup> January 2024 between the Applicant herein (as the Client) and the Respondent (as the Advocate) be set-aside.
  - iv. That in the alternative and without prejudice to prayer 3 above, the fee agreement dated 8<sup>th</sup> January 2024 made between the Applicant-client) and the Respondent (as the Advocate) be varied by substituting the amount of remuneration fixed therein to such amount as the Honourable court may deem just and fair.
  - v. That, further in the alternative and without prejudice to prayers 3 and above, the costs in question and represented in the fee agreement date 8<sup>th</sup> January, 2024 made between the Applicant (as the Client) and the Respondent (as the Advocate) be taxed by the Registrar of the Court.
  - vi. That, costs of this application be provided for.
7. The Application is supported by the Applicant's Sworn Affidavit dated 27<sup>th</sup> February 2024 and is premised on the following five (5) grounds:
  - i. That, the Respondent has already instituted a suit for recovery of costs based on an agreement for fees dated 8<sup>th</sup> January 2024, which the Applicant seeks to challenge herein for being exorbitantly high, unconscionable and exorbitant, in Nakuru SCC Comm No E179 of 2024 C.K Gitonga t/a Koome & Koome Advocates v John Kamau Mwaura in the small claims court.
  - ii. That, the fee agreement dated 8<sup>th</sup> January 2024 made between the Applicant and the Respondent is harsh, unconscionable, exorbitant and unreasonable in respect to the amount of Kshs 300,000/- fixed and payable to the Respondent as his professional legal fees and further the said fee agreement is stipulating a further payment of Kshs 200, 000/- for default.
  - iii. That, the amount stipulated in the fee agreement dated 8<sup>th</sup> January 2024 is manifestly excessive, for drawing an out of court settlement agreement not to file suit for an intended accident claim, and/or professional fees due to an advocate as prescribed on taxation in the [Advocates Act](#) Cap 16 had the matter proceeded to court.
  - iv. That, the Applicant did not get the benefit of optional advise from the Respondent or any independent legal advice or opinion or otherwise on the fee agreement dated 8<sup>th</sup> January 2024 and being a lay person he relied on the expertise of the Respondent who is a professional and a



party to the agreement who used compulsion, misrepresentation and undue influence to have the fee agreement executed and entered into with the Applicant.

- v. That, the Applicant together with four (4) victims of an accident involving the Applicant's motor vehicle having agreed not to institute suit in respect of the said accident approached the Respondent for purposes of recording an out of court settlement agreement for which the applicant was charged Kshs 300,000 allegedly being the cost for such matters and required to pay the sum of Kshs 50,000 as down payment and to commit in writing for the payment of the balance of Kshs 250,000 and in default to pay an additional Kshs 200,000.
  - vi. That, there has been no delay in filing of the present application by the Applicant as the suit for recovery for costs was filed in the small claims court on 8<sup>th</sup> of February 2024 by the Respondent despite the Applicant engaging his counsel now on record to renegotiate the terms of the fee agreement having been entered into through compulsion, misrepresentation and undue influence.
  - vii. That, it is only fair, just and equitable that this Honorable Court do intervene and have the fee agreement dated 8/1/2024 varied, set aside and the amount substituted to such an amount as this Honorable Court may deem fit and fair or order that the costs in question be taxed by the Registrar of this Honorable Court as by law provided.
8. The Applicant Submits that, this is an Application for setting-aside a fee agreement between an advocate and a client. Section 45(2) of the *Advocates Act* provides the following remedies for a client who has entered into a written fee agreement with his advocate and is of the view that the same is harsh or exorbitant. The said section provides therefore;
- “A client may apply by chamber summons to court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years standing appointed by the Registrar after consultation with the chairman of the society for each application and on any such application the court, whose decision shall be final, shall have power to order
- a) That the agreement be upheld; or
  - b) That the agreement be varied by substituting for the amount of remuneration fixed by the agreement such amount as the court may deem just; or
  - c) That the agreement be set aside; or
  - d) That the costs in question be taxed by the Registrar, and that the costs of the application be paid by such party as it thinks fit.”
9. That, Section 45(2) gives the High court power to set-aside and or vary a fee agreement such as the one entered into between the Applicant and the Respondent herein where the same is deemed to be harsh. In the circumstances of the instant case, the Respondent drafted an out of court settlement agreement for the Applicant for which he charged Kshs 300,000 for which Kshs 50,000 was already paid to the respondent at the execution of the fee agreement. It is the Applicant's humble submission that the amount of Kshs 300,000 for just drafting an agreement is manifestly excessive considering that the Applicant had already settled the matter as between himself and the victims of the agreement before approaching counsel for purposes of drafting the out of court settlement agreement.



10. The Applicant thus submits that, he has satisfied the requirements of Section 45[2] of the *Advocates Act* and coupled with the fact that his application remains unchallenged, he is entitled to the orders sought in his application. The Applicant further submits that, prayer 2 of the Application has however been overtaken by events as the Respondent's suit for recovery of fees was dismissed for lack of jurisdiction. He therefore prays to court for the grant of the remaining orders and thus urge the court to allow the application dated 27<sup>th</sup> February 2024 with costs to the Applicant.

### **Respondent's Case**

11. The Respondent filed a replying Affidavit dated 16<sup>th</sup> March 2024 and written submissions dated 23<sup>rd</sup> March 2024 that regurgitate the sworn Affidavit in opposition as follows;
12. That, the entirety of the issue emanates from an agreement dated 08/01/24 that had been reached by the parties herein relating to services successfully issued by the respondent herein which averted the possible loss of over 1,200,000/= and the Applicant paid a deposit of Kshs 50,000/= after which he sought to pay the negotiated amount at a later time to which he defaulted and efforts were made to negotiate the matter with a view to avoiding the penalty clauses to which similarly the Applicant defaulted.
13. That, the Respondent filed a claim in the Small Claims Court Nakuru SCCOMM E179 of 2024 under section 12 of the small claims act on account of a claim of money held or owed which is pending and that, to counter the efforts made by the Respondent, the Applicant filed the instant application being an afterthought and of course in unclean hands made an attempt to renegotiate a contract through the invitation of the judiciary into the contracting process
14. That, the amount due inclusive of the penalty clause is Kshs 450,000/- as per the agreement 08/01/24 and the Respondent would have wished to tax the matter where the figure would have been increased by 50% in view of the advocate client bill of cost, but the parties resolved then to enter into the agreement under the concept of freedom to contract as such the said application is incompetent, lacks merit and should be dismissed and/or struck out with cost assed at Kshs 100,000/=
15. That, it's instructive to note that, in the practice of law the question of fees are either determined by the parties through a written agreement and or by a court when moved appropriately in a situation where a contract is lacking and there is serious disagreement
16. That, to assert the above position and divesting of the need of the court intervention the parties herein willingly entered into an agreement dated 08/01/24 for legal services where a part consideration of Ksh 50,000/= was paid leaving a balance of Ksh 250,000/= which was to be paid on or before 26<sup>th</sup> January 2024.
17. The Respondent submits that, all along at no point has the Applicant ever raised the issue of exorbitance or unconsciouable fees when the claimant was negotiating on his behalf before the conclusion of the negotiations that saw the withdrawal of the potential cases nor has he at any given point filed a reference to any judge seeking to set aside the fee agreement and or contract
18. That, the contract as entered is binding as per the prerequisites of Section 45 (1) of the *Advocates Act* to the extent that the document was in writing and signed by the both the claimant and the respondent
19. That, the agreement presented has not been proscribed by the law more particularly what constitutes invalid agreements as is to be seen in Section 46 of the *Advocates Act*



20. That, to date the respondent has all through been acting in bad faith and with unclean hand this is despite the claimant herein negotiating him out of contracts that had pecuniary value of over 1,400,000/-.
21. That, no vitiating factors have been brought to the courts attention that can invoke the court's jurisdiction in disallowing the Applicant's efforts to pursue his legitimate fees claim.
22. That, the provisions of *Advocates Act* have not in their operation excluded the function of the small claims court or the small claims Act in pursuing fees arising from a contract entered into by the parties
23. That, the Applicant attempt in this Application is just but a avenue to deny of the Respondent his fees agreed upon after receiving effective services and the Application is just but an afterthought meant to frustrate recovery proceedings in the small claims court while denying the Respondent herein fees agreed upon after receiving effective services.
24. That, the Respondent having initially filed recovery proceedings in the small claims court prior to this miscellaneous application indeed there's a legitimate expectation of the matter having been initially to be hand to its conclusion without interference of stay orders and by the time of filing of the recovery claim in the small claims court on the 06/02/24 there was no dispute existing as is to be contemplated under Section 45 (24) of the *Advocate Act*
25. That the Respondent is alive to the fact that, parties are allowed to contract as and when, and how it pleases them for as long as the contract is not subject to vitiating factors, and the Applicant has all along had the necessary capacity and indeed accorded much thought over the issue and upon satisfaction and receipt of services issued thereto entered into the said accord and satisfaction agreement dated 08/01/24
26. The Respondent Submits that, the court has extensively in affirming the freedom to contract have held the position that, the courts should essentially not interfere with the freedom to contract and as such they have rendered themselves that they courts do not have the necessary jurisdiction to police the contract making process See the decision of *Josephat Njuguna v Highbribe Self Help Group* (2014) eKLR.
27. That the provisions of section 48 of the *Advocates Act* contemplates situations where there is no express agreement thus leading to the filing of an advocate client bill of cost which is not the case herein. Indeed a reading of section 45(6) of the *Advocates Act* thus excludes the provision of the need for taxation and the application of section 48 of the advocate act.
28. That on strength of the above it would make no sense to allow for the transmission to taxation as no bill exists or has been filed only recovery proceedings.
29. That, any decision that would allow the transmission to taxation would be in essence an attempt to unconstitutionally interfere and undermine with the small claims court functioning and jurisdiction as per section 12 of the *Small Claims Court Act* which should essentially be avoided at all costs.
30. That, the proceedings brought against the Applicant under section 12 of the *Small Claims Court Act* relates to money owed arising from contracts more particularly the agreement dated 08/01/24 and the entirety of the Applicant's efforts are thus a direct challenge of the lawful jurisdiction of a recognized court.
31. The Respondent contends that, in the absence of a declaration of unconstitutionality of section 12 of the *Small Claims Court Act* or the institution of a constitutional petition litigating the unconstitutionality of the said provision it would be unfair to interfere with the jurisdiction of the said lower court as is sought and it would thus greatly prejudice the Respondent if the application is allowed.



32. That, it would further economically malign the Respondent if the court is to allow an illegal effort of denying counsel fees having effectively addressed the problems by the Applicant and it would be a dangerous trajectory and a bad practice not accepted in law to allow the obvious disenfranchising of the respondent legal fees through a miscellaneous application which in practice is not used for determination of substantive reliefs as is sought by the Applicant.
33. That, substantive reliefs sought by the Applicant can only be granted through substantive institution of a suit via plaint in line with Order 3 rule 1 (1) of the *Civil Procedure Rules* As Read With Section 19 of The *Civil Procedure Cat* Cap 21 and accordingly the miscellaneous application should by virtue of the above be dismissed.
34. That, similarly it will be a case of unjust enrichment on the part of Applicant for him to secure services and fail to pay only resulting to underhand methods of delaying the payment of fees and that, the Applicant has been indolent and as such equity cannot come to their aid noting too well that recovery proceedings were already commenced in the small claims court prior to the institution of the miscellaneous application herein.
35. The Respondent submits that, the Applicant on the prayer of stay of proceedings is yet to achieve the grounds set as per Order 42 Rule 6 (1) that requires the existence of a review application or an appeal which is lacking.
36. That, any grant of stay orders will essentially interfere with my rights to due process as a litigant and will impede the rights to access to justice and right to be heard without any delay and overall my right to a fair trial. The Respondent thus Prays that the Application be dismissed with costs.

### **Analysis and Determination**

37. The Small Claims Court (the Court) was established by the Small Claims Act 2016, that was assented to on 1<sup>st</sup> April 2016 and later amended by the Small Claims Court (Amendment) Act, 2020 (the Act). The Court was gazetted vide Gazette Notice No 3791 of 2021 with the objective guaranteeing the right to access justice as envisioned under Article 48 of the *Constitution* of Kenya, 2010 through: timely disposal of all proceedings before the Court; using the least expensive method and reasonable court fees; equal opportunity to access judicial services; reduction of case backlog;
38. The Jurisdiction of the Small Claims Court is anchored in Section 12 of the Act specifies that the Court has jurisdiction to determine any civil claims (whose value does not exceed Kenya Shillings One million, KES 1,000,000) relating to: A contract for sale and supply of goods or services; A contract relating to money held and received; Liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property; Compensation for personal injuries; and Set-off and counterclaim under any contract.
39. Section 13 of the Act goes on to expressly exclude certain matters from the jurisdiction of the Small Claims Court. Those matters include claims which the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations. Worthy to note, no dispute pertaining to tenancy relationship shall be heard and determined by this Court.
40. The operationalization of the Small Claims Court is intended at the creation of a people centric approach to access to justice by affording the citizenry justice services that are accessible, inclusive, efficient, timely and responsive to specific access needs of particular groups likely to suffer from social and economic disadvantage. It goes without say that, hefty court fees, legal representation fees, complexity of procedures and delays in determination of cases contributes to barriers to access to justice



more so to the marginalized, vulnerable and those with complex needs. The Small Claims Court was therefore designed to contribute towards achieving equality, poverty reduction and social inclusion by ensuring that all persons have equal access to fair and timely justice.

41. Section 20A provides for Remuneration of advocates as follows;

“The Chief Justice shall, in consultation with the Council of the Law Society of Kenya established under the Law Society of Kenya Act (Cap. 18) make orders prescribing and regulating the remuneration of advocates who appear before the Court”.

42. The Substratum of the dispute herein between the Advocate/Respondent and the Applicant is the Advocate’s Remuneration in a small claims court cause and the existence of a mutually executed “retainer” agreement dated 8<sup>th</sup> January 2024 which the Applicant contends is harsh, unconscionable, exorbitant and unreasonable and the Advocate maintains the retainer agreement dated 8<sup>th</sup> January 2024 is a valid and enforceable contract protected by the Advocates Act.

43. This Court is alive to the guiding principles located in section 3 of the Small Claims Court Act that includes; timely disposal of all proceedings using the least expensive methods and that Section 20A has remained inactive owing to the lack of adoption of the Draft Remuneration (Proposed Schedule 13 Advocates Remuneration Order(2019) which provides for remuneration not exceeding Kenya Shillings Fifty Thousands (Kshs 50,000/-) on the higher scale where the value of the Subject matter exceeds Kshs 600,000 up to one million shillings, as the Advocate’s Instruction fees.

44. The "Lower Scale" shall be applied where the claim is disposed of by consent, by a decision on a preliminary question of law not dependant on fact or ex parte, that is where no defence or other denial of liability has been filed and the "Higher Scale" shall be applied in all other cases. Provided that where the lower scale applies, the fees shall be the one prescribed in (a) above reduced by 50%.

45. The Dispute here Goes to the heart of the “cost effective underlying principle, the jurisdiction of the court and if an advocate can posture and seek solace in a retainer agreement that the Applicant-client deems oppressive.

46. I am persuaded that, the enactors of the Small Claims Court Act desired to ensure access to justice is achieved in an inexpensive manner and that section 20A distinguishes the manner in which remuneration is charged to ringfence the underlying principle, the Advocate cannot argue that he is entitled to enforce his retainer even where the amount of remuneration is expressly excessive.

47. This Court is persuaded to interfere with the Retainer agreement dated 8<sup>th</sup> January 2024, set it aside and vary the same by substituting the instruction fees from Kenya Shillings Three Hundred Thousand (Kshs 300,000/-), to Kenya Shillings Fifty Thousand (Kshs 50,000/-)

It is So Ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 8<sup>TH</sup> DAY of AUGUST 2024**

**MOHOCHI S. M.**

**JUDGE**

