



Conrad Law Advocates LLP v Kiwipay Kenya Limited & another (Commercial Case E005 of 2023) [2024] KEHC 11182 (KLR) (Commercial and Tax) (16 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E005 OF 2023
JWW MONG'ARE, J
SEPTEMBER 16, 2024**

BETWEEN

CONRAD LAW ADVOCATES LLP PLAINTIFF

AND

KIWIPAY KENYA LIMITED 1ST DEFENDANT

ECO BANK KENYA LIMITED 2ND DEFENDANT

RULING

1. On 10th January 2023, the Plaintiff (“the Advocates”) filed this suit by way of a plaint claiming that they had been retained and instructed by the 1st Defendant (“Kiwipay”) to render expert Professional Legal Services at Kiwipay’s request and instructions. That on or about 31st May 2022, the Advocates entered into a written agreement with Kiwi pay, the premise of which the Advocates rendered to Kiwipay at its request and instruction, expert professional legal services by way of; preparation of an extensional and in-depth legal opinion on the matter filed by the Assets Recovery Agency in, Miscellaneous Criminal Application *No. E039 of 2022*; engaging the Director of the Assets Recovery Agency by way of correspondence for purposes of assisting in and cooperating with the investigations commenced against Kiwipay with a view to resolving the arising issues; attending multiple consultative meetings with the Assets Recovery Agency for purposes of assisting in and cooperating with the investigations commenced against Kiwipay with a view to resolving the arising issues and; Preparing an application in Miscellaneous Criminal Application *No. E039 of 2022* seeking partial access to Account No. 66859 at the 2nd Defendant (“the Bank”) for purpose of withdrawing therefrom USD. 900,000.00 for purposes of settling outstanding bills and sustaining business
2. The Advocates contended that for the aforementioned professional and legal services, Kiwipay was to pay them an agreed fee of USD. 527,094.68 and that following the recovery of USD. 150,000.00



- after the successful legal representation of Kiwipay in the Magistrates' Court, a payment of USD. 40,000.00 was paid up in part settlement of the Advocates' invoice after Kiwipay obtained partial access to its accounts. That upon conclusion of the reference before the Magistrate's Court in Miscellaneous Criminal Application [*No. E039 of 2022*](#) Kiwipay's Director instructed the Advocates to Enter Appearance on its behalf in the High Court of Kenya, Anti – Corruption and Economic Crimes Division, Miscellaneous Criminal Application [*No. E028 of 2022*](#) where the Assets Recovery Agency filed a forfeiture application against Kiwipay's accounts.
3. Following the withdrawal of the aforementioned suit by the Assets Recovery Agency, the Advocates proceeded to file its Bill of Costs in the High Court Anti – Corruption and Economic Crimes Division, Miscellaneous Criminal Application [*No. E051 of 2022*](#) to which the Deputy Registrar proceeded to tax and allow the Bill of Costs which amount the Advocates claim is yet to be disbursed. The Advocates claim that Kiwipay has refused, failed and/or totally ignored to pay them the amount of USD. 487,094.68 which is inclusive of the fees taxed and allowed by the Deputy Registrar above. They accuse Kiwipay of breach of contract and pay for the said sum of USD. 487,094.68.
 4. Together with the plaint, the Advocates have also filed the Notice of Motion dated 10th January 2023 made under section 3A of the [*Civil Procedure Act*](#)(Chapter 21 of the Laws of Kenya), Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and section 45 of the [*Advocates Act*](#)(Chapter 16 of the Laws of Kenya) where they seek to be allowed to hold as lien for their unpaid legal fees, Kiwipay's money in the sum of USD. 487,094.68 in the custody of the Bank in Accounts No. 66859 and 66878 pending the determination of this suit. The application is supported by the grounds on its face and the supporting affidavit of Pascal Musyoki, an advocate practicing in Advocates' firm, sworn on 10th January 2023. It is opposed by Kiwipay through the Notice of Preliminary Objection dated 2nd March 2023.
 5. On 12th January 2023, the court (Mabeya J.,) partly allowed the application by allowing the Advocates to hold as lien Kiwipay's money in the said sum of USD. 487,094.68 in the custody of the Bank in Accounts No.s 66859 and 66878 pending the determination of this application. This has prompted Kiwipay to file the Notice of Motion dated 23rd December 2023 under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the [*Civil Procedure Act*](#) and Article 22 (3)(d), Article 50 (1) and Article 159 (2)(d)(e) of [*the Constitution*](#) seeking to stay, review and set aside this order. The application is supported by the grounds on its face and the supporting affidavit sworn on 23rd December 2023 by its director and officer, Gregory Schmidt. It is opposed by the Advocates through the Grounds of Opposition dated 15th January 2024.
 6. The Advocates have also filed another application by way of the Notice of Motion dated 30th January 2023 seeking the Bank to produce Statements of Account for the foretasted Kiwipay Bank Accounts; 66859 and 66878 domiciled at the Bank for the period beginning 30th October 2022 to 30th January 2023.
 7. This application is grounded on the supporting affidavit of Conrad Maloba, the Advocates' Managing Partner sworn on 30th January 2023. It is opposed by the Bank through the replying affidavit sworn on 8th March 2023 by its Senior Legal Officer, John Wambugu. In addition to their pleadings, the parties also rely on the written and oral submissions by their respective counsel.

The Advocates' Application dated 10th January 2023

8. In addition to the Advocates' averments highlighted above, they further state that Kiwipay directors are foreigners and flight risks more so now that the foreign directors have recently and irregularly removed all Kenyan shareholders and directors from the company's shareholding. That the said directors are



foreigners with no known address within the jurisdiction of the Court therefore the Advocates are apprehensive that if the orders sought are not granted, the directors of Kiwipay will remove themselves and the known assets of Kiwipay from the Court's jurisdiction to the detriment of the Advocates. That Kiwipay has no other known business or assets within the jurisdiction of the Court that may be attached in satisfaction of the Advocates' suit.

Kiwi Pay's Response

9. Kiwipay contends that the application is res judicata and an abuse of the court's process as the Advocates' fees have already been taxed and determined by the taxing master in Miscellaneous Criminal Application *No. E051 of 2022*. Thus, it avers that the application is frivolous, vexatious and procedurally incompetent and ought to be struck out.

Kiwipay's Application dated 23rd December 2023

10. Kiwipay depones that the court's orders of 12th January 2023 were prejudicially granted ex-parte without according Kiwipay the opportunity to be heard in line with the principles of natural justice, and have the effect of unjustifiably freezing the inordinately high amount of USD. 487,094.68 in its accounts. That the impugned orders were further obtained on the strength of material non-disclosure of pertinent facts and concealment, being that the Advocates had been fairly remunerated for the services provided to it. Kiwipay does not deny that it paid the Advocates a sum of USD. 40,000 as payment for their services but that the Advocates were aggrieved and filed a bill of costs which was taxed at Kshs.612,700.00/= in addition to the USD. 40,000, constituting the entirety of the fees owed to the Advocates on account of services rendered. It states that parties are bound by their pleadings and herein the Advocates plead that the amount claimed is on account of legal fees whereas the taxing master already assessed the fees due to them. That no appeal has been proffered from the said taxation and the same has also not been set aside and that the instant suit by the Advocates on the question of legal fees due clearly therefore offends the doctrine of res judicata.
11. Kiwipay states that nevertheless, on 19th December 2023, the Court in HCCOMM 484/2022 lifted the preservation orders freezing Kiwipay accounts meaning that the Kiwipay could recommence operations. The said court further determined that Kiwipay is merely the custodian of the funds in its accounts which funds belong to third parties.
12. Thus, Kiwipay reiterates that the ex-parte orders granted by the court are extremely detrimental to its operations as they have the effect of preserving funds belonging to third parties. That Kiwipay is consequently exposed to an inability to meet its financial obligations and ballooning interest rates on account of the impugned orders of the Court. That the Advocates will suffer no prejudice if this application is allowed, as it has no tangible claim against Kiwipay and that in any case, Kiwipay is a going concern and the Advocates have not demonstrated the flight risk alleged. That on the other hand, Kiwipay continues to struggle to cope in terms of its financial obligations on account of the numerous unjustified orders freezing its funds.

The Advocates' Response

13. The Advocates state that Kiwipay's application is a guised response to their application of 10th January 2023. That Kiwipay has failed to demonstrate instances of material non-disclosure on the Advocates' part to warrant the grant of the said application. They contend that their suit has been brought before the Court for recovery of costs due to an advocate pursuant to section 48 (2) of the *Advocates Act* and as such the suit is not res judicata and that the taxation of their Bill of Costs as claimed is therefore not a restriction to filing an action for recovery of costs under section 48(3) of the *Advocates Act*.



14. The Advocates assert that the directors of Kiwipay are foreigners with no known local residential address and staying the orders of the Court prior to the suit being heard and determined on merit shall prejudice the Advocates. As such, the Advocates state that the only issue for the court's determination is whether their suit is res judicata. They further claim that the filing of Kiwi Pay's application one month after the date set for the expeditious disposal of the main suit before Visram J., on merit is a clear sign of a party that is not keen on proceeding with a hearing and is bent on delaying the Court in its bid to achieve an expeditious disposal of the suit.

The Advocates' application dated 30th January 2023

15. The Advocates proffer that after the court allowed it hold as lien, Kiwipay's funds domiciled at the Bank, the Bank informed them that Kiwipay did not have enough funds in their accounts to satisfy compliance of the said orders. However, the Advocates contend that they are aware that Kiwipay has enough funds held in the subject accounts at the Bank to sufficiently and wholly satisfy compliance with the orders issued herein.

The Bank's Reply

16. In response to the Advocates' application for Kiwipay's statements of accounts, the Bank avers that it is bound by its duty of confidentiality to maintain Kiwipay's information securely such as the transactions undertaken and/or stated in the respective bank accounts. That Kiwipay and the Bank in their relationship have one of the implied terms of their contract which is that the Bank would abstain from disclosing information as to the affairs of the customer without the customer's consent. It is for that reason that the Bank is opposed to the Advocates' application for the Bank contends that it offends the very fabric that holds together the banker - customer relationship between them and that the information sought by the Advocates is information that is privileged and can only be released with the consent of Kiwipay.
17. The Bank avers that it is aware that Kiwipay has had legal issues leading to numerous court actions and orders, including a suit and a preservation order in favour of the Assets Recovery Agency, among other suits. That the Bank has always acted responsibly whenever served with any court action or order in respect to the said customer bank accounts, and where an order requires the Bank to preserve any money in the accounts the Bank has always honoured the order. It urges the court to take cognizance of various listed matters while issuing orders and/or directions on the same bank accounts as sought by the Advocates and that the management of Kiwipay and operation of its Bank Accounts held with the Bank have been the subject of several ongoing and concluded court cases most of which have given rise to varied court orders. That the Bank prominently features at the epicenter of all the ongoing court cases and is the primary target of all orders emanating from the respective proceedings particularly for the reason that Kiwipay's Bank Account Nos. 66858, 66859 and 66878 are held and maintained at its Muthangari Branch.
18. The Bank further stated that for avoidance of doubt, the preservation orders issued to date far outweigh the proceeds of Kiwipay's Accounts therefore, any further preservation order cannot be enforced in the absence of available funds. The Bank further advances that it is reputable Bank that observes and maintains legal and regulatory compliance keenly and to this end, the Bank has taken all steps towards compliance with the court orders served upon it. For these reasons, the Bank urges that the prayers sought in the Advocates' application cannot be granted and ought to be struck out and equally strike out the Bank from the suit for no reasonable cause of action has been established against it.



Analysis and Determination

19. I have carefully considered the applications as filed herein, the responses and submissions of counsel. I propose to first deal with the objection raised by Kiwipay on the argument that the present application is *res judicata* as the Advocates' fees have already been taxed in Miscellaneous Criminal Application [No. E051 of 2022](#). The Advocates do not deny the same but they claim that the parties had a legal fee agreement and as such they rely on sections 45(6) of the [Advocates Act](#) which provides that "Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48". They also rely on section 48 which provides as follows:-

48. Action for recovery of costs

- (1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.
- (2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.
- (3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.

20. I note that Kiwipay submits that having subjected its fees to taxation, the Advocates essentially derided the validity of the agreement they now seek to enforce herein and that section 45(6) above creates an obligation on the advocate to present to the court or the taxing master sufficient evidence to demonstrate existence of a binding retainer/contract/agreement, to which the taxing master would be shorn of jurisdiction by dint of the aforesaid section. That in the ruling delivered in Miscellaneous Criminal Application [No. E051 of 2022](#), the Deputy Registrar indeed dealt with the issue of whether the court had jurisdiction to determine the existence of an Advocate client relationship/retainer and that the Advocates were obligated at this point to guide the court to the conclusion that it had an agreement for fees, and as such the matter was improperly before the Deputy Registrar. Kiwipay submits that it filed a preliminary objection on the grounds that there was an agreement for fees, which was opposed by the Advocates and as such, Kiwipay urges that the Advocates acquiesced to the jurisdiction of the Deputy Registrar to proceed with the taxation in full knowledge of the purported agreement which they now seek to enforce against Kiwipay.

21. On their part, the Advocates submitted that as per section 45(6), the jurisdiction of the Taxing Officer is accordingly restricted where there exists a Contract between an Advocate and a Client under section 45 of the [Advocates Act](#) and that the Taxation of their Bill of Costs as claimed is therefore not a restriction to filing an action for recovery of costs under section 48 (3) of the Act.



22. I have gone through the ruling and reasons for taxation of taxing master in Miscellaneous Criminal Application *No. E051 of 2022* annexed in Kiwipay’s deposition annexed and marked GS-2. It is indeed correct that the Deputy Registrar determined the issue of the retainer between the parties and took into account the fact that Kiwipay had already paid a sum of USD. 40,000. I am therefore in agreement with Kiwipay that the issue of the parties’ retainer including any such agreement has already been determined or ought to be have been determined by the Deputy Registrar.
23. Thus, I am persuaded that therefore that this issue has already been determined by a court of competent jurisdiction and it involved the same parties and that the same issue is now being brought to the court in this suit as a new cause of action, I agree that this court cannot seek to reopen the same under the doctrine of definitely res judicata (See The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, NRB CA Civil Appeal No. 105 of 2017* ([2017] eKLR). Whereas it is correct for the Advocates to argue that they are entitled to recover their costs under section 48 above, it is my considered view that they cannot exercise this option after filing a bill of costs and the said bill has been taxed. My position is reinforced by the decision in *Lubulellah & Associates Advocates v N K Brothers Limited HC Comm Misc. App. 52 of 2012* [2014] eKLR where this court held that an “advocate has either the option of filing a Bill of Costs for taxation whereupon a Certificate of Costs is issued pursuant to Section 51 (2) of the *Advocates Act* or to file suit under section 48 (1) of the Act. Both roads lead to the advocate’s pursuit of their fees and costs. By the Advocates choosing to pursue the Bill of Costs route, they automatically excluded themselves from the realm of section 48 as they were impliedly stating that there was no agreement under section 45.” If indeed the agreement existed and they intended to pursue the same, then section 45(6) which they now rely on, would have come into play and they could have filed a suit as opposed to a bill of costs.
24. I therefore agree with Kiwipay that the Advocates had a chance to inform the Deputy Registrar of the impugned agreement and thus divest him of the jurisdiction to deal with the Bill of Costs as demanded by section 45(6) of the Act. By proceeding and insisting before the Deputy Registrar that there was no retainer agreement between the parties, the Advocates acquiesced to the Deputy Registrar’s jurisdiction to tax the bill of costs. I am inclined to further agree with Kiwipay’s submission that this suit by the advocates is a disguised appeal or reference against the taxation of the Deputy Registrar who already determined with finality the fees payable to the Advocates after taking into account the USD. 40,000 payment and retainer of the parties. It is therefore improper for the Advocates to raise the issue of the legal fee agreement now when they could have raised the same during taxation as this action goes against Explanation 4 of section 7 of the *Civil Procedure Act* which provides that “Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”. Why the Advocates would not pursue the issue of the legal fee agreement at the taxation proceedings is a fault of their own making. What is clear is that they cannot raise it now after their bill of costs was taxed and it leads the court to presume that they are seeking the metaphoric “second bite of the cherry” hoping that it would be sweeter this time as opposed to when their bill of costs was taxed. I therefore find that the suit herein is res judicata and fatally defective.
25. In any event, if I was to assume that the suit is not res judicata, it is my finding that the invoice which the Advocates seek to rely on does not pass the muster of a binding agreement under section 45 of the *Advocates Act* as contended by the Advocates. The said section provides in part that such an agreement “...shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.” This court, in *Kakuta Maimai Hamise v Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency*



NRB HC Pet. No. 5 of 2013 [2017] eKLR held as follows in respect of agreements under section 45 of the Advocates Act :-

“ [30] To constitute a valid and binding agreement for the purpose of section 45 of the Advocates Act, it expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case, both the two letters are not signed by the client. Whereas an agreement may be formed by a series of correspondences, the client not exhibited any document by which he signaled his acceptance of the proposed fees by the advocate. In my view, for a document to be said to constitute a valid and binding agreement for purposes of section 45 of the Advocates Act, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the client. This was the position adopted by Tanui J, in *Raini K Somaia v Cannon Assurance (K) Ltd Kisumu HCMA No 289 of 2003*”

26. A perusal of the said invoice relied upon by the Advocates reveals that the same has no signature of Kiwipay. Whereas I agree that such an agreement need not be in one document and can be in series of documents or correspondences, the email of 16th August 2022 relied on by the Advocates indicate that Kiwipay did not either also accept the terms of the said invoice presented to it as contended by the Advocates. Further, I note that there was also no other document signed by Kiwipay accepting any terms of the invoice. Even if the said invoice was accepted without contest, it should not be lost that an invoice is simply a demand for payment on terms agreed (see *Great Lakes Transport Co. (U) Ltd V Kenya Revenue Authority MSA CA Civil Appeal No. 106 of 2006 [2009] eKLR*). Therefore, there has to have been a preceding agreement that had been consummated by an offer and acceptance and what remained was payment of the price agreed as consideration. I find therefore that there is no evidence of a written agreement signed by both parties having entered into any contract for the payment of the invoiced USD. 527,094.68 which makes the said invoice a one-sided and unilateral offer that was not accepted by Kiwipay. In order for such an invoice to be effective, there had to be a meeting of minds which is an essential component for the formation of an enforceable contract (See *Toyota Kenya Limited v Vehicle & Equipment Leasing Limited HCCCComm Case No. 126 of 2019 [2021] eKLR*).
27. For the above reasons, it is my finding that the Advocates cannot seek to rely on the said invoice as having been an agreement contemplated under section 45 of the Advocates Act as it was not signed by Kiwipay. As I have stated, I find that there was no other agreement put forward by the Advocates and signed by Kiwipay as evidence of their acceptance to the terms of the Advocates as indicated in their invoice.
28. Having found merit in Kiwipay’s objection, it follows therefore that both applications filed by the Advocates automatically collapse. I find that Kiwipay’s application is merited and as such there is no valid reason for the court’s orders of 12th January 2023 to remain in force. The same are hereby vacated forthwith.

Conclusion and Disposition

29. In conclusion the court makes the following final orders:-
1. The Plaintiff’s (Advocates) applications dated 10th January 2023 and 30th January 2023 are dismissed forthwith.
 2. The 1st Defendant’s application dated 23rd December 2023 is allowed and the orders of the court dated 12th January 2023 are hereby vacated and set aside.
 3. This entire suit by the Advocates is dismissed for being res judicata



4. Costs of this suit and the applications are awarded to the Defendants.

30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. N/A for the Plaintiff (Advocates).
2. N/A for the 1st Defendants/Respondent.
3. Mr. Gichangi for the 2nd Defendant/Respondent-(Ecobank).
4. Amos - Court Assistant

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