



**Maina Onsare LLP v Boston Travel Services (Commercial Appeal E185 of 2022)
[2024] KEHC 10674 (KLR) (Commercial and Tax) (13 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E185 OF 2022**

**A MABEYA, J
SEPTEMBER 13, 2024**

BETWEEN

MAINA ONSARE LLP APPELLANT

AND

BOSTON TRAVEL SERVICES RESPONDENT

JUDGMENT

1. The appellant filed suit against the respondent in Nairobi Small Claims court SCCCOMM NO. E5651 of 2022 and sought to recover advocates fees for services rendered in Nairobi ELRC Cause No E502/2020 and ELRC Cause No. 160/2018.
2. The respondent filed a preliminary objection contending that the suit violated the *Advocates Act* and provisions of the Advocates Remuneration Order and that the Small Claim's court lacked jurisdiction. Vide a ruling delivered on 9/11/2022, the trial court upheld respondents' objection and struck out the suit finding that the matter was to be determined by a Taxing officer under Section 44 of the *Advocates Act*.
3. Aggrieved by that decision, the appellant preferred this appeal on the grounds that: -
 - a. The preliminary objection was based on contested issues
 - b. The magistrate erred in finding that there was no agreement on fees.
4. The appeal was canvassed through written submissions. The appellant submitted that there existed an advocate client relationship and that the appellant had represented the respondent in ELRC Cause No. E502 of 2020 David Mwangi Wachira vs. Bunson Travels but the respondent later withdrew instructions. The appellant raised an invoice for the balance of legal fees and administrative costs



- incurred in handing over active files. That on failure to settle the invoice, the appellant filed the subject suit in that court.
5. The appellant contended that the preliminary objection did not comply with the law as set in the case of *Mukisa Biscuits Manufacturing Co Ltd vs. West End Distributors Ltd* [1969] EA 696. That the objection did not disclose the provisions of the law that were claimed to be violated. That the respondent was disputed the appellant's assertion that there was a fee agreement between them. That a determination on whether a fee agreement existed was factual evidence and that the objection was based on disputed facts.
 6. Further, that there was an agreement between the parties which could be implied from various correspondence before court. That the appellant had proposed a discounted fee of Kshs. 934,800/= which was accepted and communicated on email by the respondent and settled 50% of the amount was paid. Finally, that the Small Claims Court had jurisdiction to determine the matter which arises from a contract of parties.
 7. That respondent's case was that, legal fees is determined by the Deputy Registrar of the High Court through a bill of costs. It relied on the provisions of section 44 of the *Advocates Act* and Rule 10 of the Advocates Remuneration Order. That costs was the substratum of the claim.
 8. That the appellant failed to present any document signifying the final amount and signed by the respondent. That the emails were not reduced to an executed agreement and did not meet the threshold of a binding agreement containing offer and acceptance. The case of *Kakuta Maimai Hamisi & Anor vs. IEBC & Anor* (2017) EKLR was relied on.
 9. I have considered the record together with the submissions of the parties. The issue for determination in the appeal is whether the Small Claim's court had jurisdiction to determine the appellant's case.
 10. The duty of the first appellate court was explained in the case of *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123. In that case, it was held that: -

“... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
 11. No doubt, a court derives its jurisdiction from *the Constitution* or statute, see the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others* (2012) eKLR. In that case, the Supreme Court of Kenya held that: -

“A court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
 12. Section 12(1) of the *Small Claims Court Act* of 2016 sets out the jurisdiction of the Small Claims Court to include, inter-alia, “a contract for sale and supply of goods or services and set off and counterclaim under any contract”.
 13. In the present case, it is common ground that the claim was based on an advocate client relationship. That might have been matters contract but the issues pertaining to the business of an advocate, conduct as well as remuneration, there is a whole legal framework set out in the *Advocates Act* and the Advocates Remuneration Order.



14. In that legal regime, the procedure of raising fees, charging and recovery is very elaborate. Sections 44 and 45 of the *Advocates Act* deals with claims for legal fees and agreements between Advocates and clients.
 15. In *Mugambi & Company Advocates v John Okal Ogwayo & Another* (2013) eKLR, Waweru J held that: -

“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 court. See paragraphs 2,10,13 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 Deputy Registrar of the court.”
 16. The existence of an agreement signed by the client gives the court jurisdiction under section 45 and 48 of the *Advocates Act*. Where there is no such agreement, all disputes on fees and recovery thereof has to undergo taxation by a taxing officer. That is the law.
 17. The appellant argued that the facts of the objection were disputed and that it would require evidence do determine the matter. In the Tanzanian case of *Karat Earnest-Vs- Attorney General Civil revision 10 of 2020* (2010) TZA, cited by the High Court in *Bio systems Consultants - Vs- Nyali Links Arcade 2023 KEHC 21068 KLR*, the court held that a preliminary objection cannot be raised if any fact is to be ascertained in the course of determining it. That where a point taken is premised on issues of mixed fact and law that point does not deserve consideration through a preliminary objection. Where a court needs to investigate facts a matter cannot be raised as such .Also see the case of *Oraro -Vs- Mbaja* (2005) eKLR
 18. That may be so but here was the issue of whether, in view of the provisions of the *Advocates Act*, the Advocates Remuneration Order and the Small Claims Court, the latter court had jurisdiction to determine a dispute between and advocate and its client. I don’t think so.
 19. The view the Court takes is that all the issues raised by the parties were a preserve of a taxing officer of this Court and not the Small Claims Court.
 20. The upshot is that the appeal is bereft of merit and is dismissed with costs.
- It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF SEPTEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

