



**Kenindia Insurance Company Limited v Olendo t/a Ogejo,
Olendo & Company Advocates (Miscellaneous Civil Application
E009 of 2022) [2024] KEHC 12212 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E009 OF 2022
S MBUNGI, J
OCTOBER 7, 2024**

BETWEEN

KENINDIA INSURANCE COMPANY LIMITED CLIENT

AND

**RAYMOND OLENDO T/A OGEJO, OLENDO & COMPANY
ADVOCATES RESPONDENT**

RULING

1. The applicant herein, having been aggrieved by a ruling delivered on October 12, 2022, on an Advocate's Bill of Costs on HCMISC. E009 of 2022 and HCMISC 5/2022, sought leave to lodge a Notice of Objection out of time stating that the decision was made in the absence of its Counsel and without notice contrary to Order 20 Rule 1 of the [Civil Procedure Rules](#).
2. Having been granted leave to object the orders of 12.10.2022, the applicant proceeded to file chamber summons and a notice of objection dated 20.11.2023 seeking the following prayers: -
 - a. That pending the determination of this reference, there be stay of any further costs-recovery proceedings arising from the decision of the taxing officer dated October 12, 2022 and the resultant certificate of costs arising therefrom.
 - b. The decision of the Taxing Officer dated 12 October, 2022 in respect of the Bill of Costs dated January 20, 2022, as to the existence of a retainer be set aside.
 - c. The Bill of Costs dated January 20, 2022, be struck out.
 - d. In the alternative, a decision be made on the items disputed and the said bill of costs be remitted back to another Taxing Officer and the same be taxed afresh and or the court be pleased to tax afresh the items objected to and to render a decision thereon.



3. The application was rooted on the following grounds: -
- i. Items 1 and 31 which were rendered by the firm of Omwenga & Company Advocates whom the Client/Respondent had retained and not the Applicant.
 - ii. The client retained the services of J. B. Shilene and Company Advocates in this matter and not the Applicant firm Ogejo, Olendo & Company Advocates to handle the primary suit on its behalf.
 - iii. Nothing on the court records was presented by the advocate/respondent indicating that the Respondent was given instructions to handle the primary suit subject of the bill of costs giving rise to this reference.
 - iv. The letters updating the client/applicant of the progress of the matter subject herein, though addressed to the Applicant, were received by West Kenya Sugar Company, -the insured.
 - v. The Respondent without a doubt acted for the insured (West Kenya Sugar Company) and the insured was under the cover of the advocate/applicant. No direct link between the respondent and the applicant existed herein.
 - vi. Retainer was therefore disputed and the Taxing Officer ignored express evidence before her that showed that the applicant had been retained by West Kenya Sugar Company Limited and thus her decision on retainer constituted an error of principle.
 - vii. Items 2, 5, 7, 10, 12, 13 and 27 which items were claimed in relation to service of various documents but had not been specifically proved in accordance with the prescription under Rule 10 (1) of Schedule 7 of the [Advocates Remuneration \(Amendment\) Order, 2014](#).
 - viii. Items 4, 6, 8, 9, 11, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 29 and 30 relating to court attendance which were never verified from the parent file or through availed typed proceedings as require under Paragraph 13 of the [Advocates Remuneration Order](#) that requires such awards to be pegged only on actual attendances evidenced by recorded court proceedings.
 - ix. Items amount allowed on increase by one half as provided under Schedule 6B of the [Advocates Remuneration \(Amendment\) Order, 2014](#), item on VAT and the grand total of the sum allowed on the whole Bill, which items were unreasonable, unjustifiable and not drawn in line with the provisions of the [Advocates Remuneration \(Amendment\) Order, 2014](#).
4. The chamber summons was supported by an affidavit sworn on the November 20, 2023 by one Josephine Onyambu, of Kenindia Assurance Company Ltd, further supplementing the grounds on the face of the application.
5. Through a replying affidavit sworn by one Raymond Olendo, dated 19.12.2024 and filed in this court on 16.02.2024, the respondent opposed the chamber summons on the following grounds: -
- i. That the applicant duly instructed the Law Firm t/a Ogejo, Olendo & Co. Advocates through the insured to take up the matter among many other matters in a tripartite agreement and on the basis of insurer and insured contractual relationship.
 - ii. The respondent further submitted evidence in support of the contractual relationship with the applicant, including but not limited to, letters between the parties, acknowledgement receipts, communication via email and letters on the proceeds, updates and status of the case. The respondent categorically stated that on several occasions, including but not limited to the 13.12.2018, 18.05.20, the applicant made letters sending cheques to the respondent for costs.



- iii. The respondent stated that whenever a judgment was delivered in these matters, the Applicant gave general instructions to avoid execution proceeding against their clients, that whenever they delayed to pay the decretal sum, we were to file a holding appeal and seek stay of execution to buy them more time to pay, the decretal sum.
- iv. The respondent stated that further to the foregoing, whenever a judgment was delivered in these matters and the Plaintiff appealed, the Applicant gave the respondent general instructions to take the appellate to save on costs of them seeking another advocate and prevent any eventuality of an adverse order being made against them, when they delay in responding to the appeals.
- v. The respondent further averred that in honoring its part of the tripartite agreement, the Applicant has also settled the decretal awards and costs made to the various plaintiffs through the respondent. however, in this instance the suit was dismissed and there was no decretal money to be paid and the Applicant could not send any money as there was no risk on their insured's property being attached and sold in execution of decrees.
- vi. That in further honoring its part of the tripartite agreement the Applicant assisted the respondent in defending their insured and instructed investigators to investigate the claim in Butali PMCC No. 89 of 2014 and then send the same to the respondents to enable the respondents to build their defence.
- vii. That in confirmation of the existence of a policy between the Applicant and the Insured and in confirmation that the Applicant was obliged to meet our legal fees, the Applicant availed to us, the Applicant availed to us a copy of part of the policy (Annexed hereto and marked RO-33 is a copy of the Policy Document and cover by the Applicant).
- viii. That the Taxing Master duly exercised discretionary powers judiciously and within the set principles and yet the Applicant has neither proved nor substantiated any error in principle committed by the taxing master to warrant this court to interfere with his decision.

Analysis

6. I have looked at the application, grounds in support and the averments contained in the supporting affidavits of one Josephine Onyambo the Brand Manager of Kenindia Assurance Company Limited Kisumu Branch sworn on November 20, 2023.I have also looked at the replying affidavit sworn by Raymond Olendo the respondent herein.
7. I have also looked at the annextures contained in the rivalling affidavits.
8. The parties were to file submissions but I have gone through the records and I have not seen any at the time of preparing this ruling, nevertheless, I find the material placed before me enough to enable me render my determination on the issues raised.
9. From the material before me, I isolate the following issues for determination;
 1. Was there a dispute as to whether there was a client-advocate relationship between the applicant and the respondent?
 2. If there was did the Taxing Master sized with jurisdiction to proceed with the taxation of the Bill of Costs?
 3. Can a trial Magistrate tax the client-advocate Bill of Cost.



4. Did the Taxing Master misapprehend the principle applicable in taxation of client-advocate bill of costs.

Determination.

10. I have looked at the ruling, it states in part....this is a court ruling following the applicant's Bill of Costs dated January 2022. I have carefully considered the bill and the affidavits filed. The respondent denies existence of a contractual relationship with the applicant. However, in a replying affidavit sworn by Raymond Olendo on April 7, 2022 shows that there existed a contractual relationship between parties whereupon the applicant was to represent respondent's case in the primary suit."
11. The above clearly shows that there was a dispute on the issue of retainer, the *Advocates(Remuneration) Order* 2009 High Court paragraph 2, 10, and 13 require that where such a dispute arises the Taxing Officer has to refer the dispute to a judge to determine. In this case the 'Taxing Master' did not do that but proceeded to determine the issue arriving to a finding that there was a client advocate-relationship between the applicant and the respondent and proceeded to tax the bill thus abrogating jurisdiction upon herself.
12. The other issue raised by the applicant is that the Magistrate taxed the client-advocates bill as a Magistrate but not as a Registrar as provided for by Rule 9 of the *Advocates(Remuneration) Order*.
13. I have looked at the ruling, it is true that the Magistrate taxed the bill in her capacity as a Magistrate, instead as a Registrar as provided by rule 9, this makes the proceedings incompetent.
14. Having found that the Magistrate acted without jurisdiction, there is no need to delve on the how she taxed the bill of costs.
15. This being the situation, I do set aside the decision of the Magistrate dated October 12, 2022 and order that the Bill of Costs be taxed by another Taxing Officer other than Hon J.N Maragia SRM
16. The matter be mentioned before the Deputy Registrar High Court October 15, 2024 for further directions/reallocation of the file.
17. I have seen the replying affidavit by the respondent and annexures in terms of many correspondences between him and the applicant, I am satisfied that there was client- advocate relationship between the applicant and the respondent.
18. Superior courts have held that a client-advocate relationship can be discerned from correspondences between the parties as seen in the case of *Mereka & Company Advocates -v- Zakhem Construction* (Kenya) 2014 where it was held thatfrom the email correspondence between the parties, the emails acknowledges that he had gone through the proposal and further calls for financial proposal which he indicates was not provided in the said proposal....while in the later email he has indicated the extent of the intended project: from these it can be implied that the client was agreeable to the process and the steps taken by the advocate in realizing the said project. It would then be superfluous for the client to claim that no instructions had been given or any retainer obtained. It is trite law that a retainer need not only be in writing but can be implied from the parties conduct on this I am guided by the case of *Ohaga -vs- Akiba Bank Limited*(2008) 1 EA 300..where it was held that ' a retainer may be implied where (i) the client acquiesces in and adopts the proceedings: or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer: or (iii) the client by his conduct performed part of the contract: or (iv) the client has consented to a consolidation order."
19. Having found so, the Taxing Master should now proceed unhindered to tax the Bill of Costs.



20. The reference succeeds.
21. Each party to bear its costs of the reference for the mistake was on part of the court.
22. Right of appeal 30 days explained.
23. Parties to appear before the Deputy Registrar on 15.10.2024.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE.

In the presence of:

Appellant – absent

Respondents – absent Mr. Mario holding brief for Olendo for the respondent present online

Ms. Achieng for the applicant present online

Court Assistant : Elizabeth Angong'a

