



REPUBLIC OF KENYA



**Odie v Vitalis (Civil Case E002 of 2020)
[2023] KEHC 1038 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E002 OF 2020
RE ABURILI, J
FEBRUARY 13, 2023**

BETWEEN

JOHN OCHIENG ODIE PLAINTIFF

AND

JUMA JOSEPH VITALIS DEFENDANT

JUDGMENT

1. The defendant herein was the advocate representing the plaintiff before the Employment and Labour Relations Court at Nairobi. By an amended plaint filed in court on 5/1/2021, the plaintiff herein John Ochieng Odie seeks the following 24 reliefs as against the defendant Juma Joseph Vitalis advocate:
 - a. A declaration that there existed a valid oral fee agreement fully executed by the plaintiff and ratified by the defendant through receipts he signed and issued personally that constituted valid, written binding and signed agreement.
 - b. A declaratory order that the defendant had been paid his full fees in advance and that there is no outstanding amounts due to the defendant.
 - c. A declaration that by his conduct, the defendant is in breach of the contract between him and the plaintiff.
 - d. A declaration that the defendant's actions are disgraceful, dishonorable and inconsistent with constitutional and statutory provisions and principles of the rule of law and tainted with illegality, irrationality and procedural impropriety and therefore unfit person to practice as an advocate of the high court of Kenya.
 - e. A declaration that the defendant has violated the plaintiff's fundamental rights and freedom to human dignity and to fair administrative action contrary to Articles 10(2), 19(2) & (3), 28 and 47(1) of the [Constitution of Kenya, 2010](#) read together with Article 3(1).



- f. A declaration that the defendant by his conduct is in breach of his duties of care and reasonable skill under law of contract, equity and tort.
- g. A declaration that the defendant's statement of account rendered on January 24, 2017 is invalid, fraudulent misleading, null and void ab initio.
- h. An order of certiorari bringing into the honourable court for purposes of quashing the defendant's statement of account dated January 24, 2017.
- i. A declaration that the continued withholding of Kshs 522,358/- belonging to the plaintiff by the defendant is unlawful and unjustified.
- j. An order directing the defendant to pay the plaintiff Kshs 522,358/- he is unlawfully withholding within 14 days of judgement.
- k. Special damages of Kshs 150,000/- lost for failure to present receipts of fees he was paid by the plaintiff.
- l. General damages of Kshs 379,273/- for fraudulent misrepresentation, induction and deceit being the deference of what he is unlawfully withholding and what he proposed to be due and payable to the plaintiff in the disputed statement of account.
- m. General damages breach of statutory duties.
- n. General damages for breach of trust and responsibilities.
- o. General damages for breach of fiduciary duties.
- p. General damages for gross negligence particularized in paragraphs 18 and 20 of the plaint.
- q. A global sum/lump sum amount of Kshs 20,000,000/- for violating plaintiff's fundamental rights and freedoms under the provisions of the Constitution 2010 and bill of rights particularly under.
 - i. The rule of law
 - ii. Human dignity
 - iii. Human rights
 - iv. Good governance
 - v. Integrity
 - vi. Transparency
 - vii. Accountability
 - viii. Responsiveness
 - ix. Sensitivity
 - x. Equal protection and benefit of the law
 - xi. Equity, trust and fiduciary benefits entrenched in Article 10(2).
 - xii. Covenant of good faith and fair dealing.



- xiii. Substantive and procedural justice-natural justice and due process of law by dint of the preamble, Articles 1(1) & (2)(c), 2(1)& (4), 3(1), 4(2), 10 (2), 19(2) & (3), 20(1), 21(1), 27(1), 28 and 47(1) & (2) of the Constitution.
 - r. General damages for conversion and unlawful appropriation of money received on behalf of the plaintiff.
 - s. General damages for unjust enrichment.
 - t. General damages for undue influence and abuse of power/position.
 - u. Exemplary damages for the defendant's conduct calculated to make a profit for himself that may well exceed the compensation payable to the claimant.
 - v. Interest at 18% from June 24, 2016 or from filing suit.
 - w. Reasonable, fair and just costs comprising disbursements and other expenses excluding instructions fees as the court would determine or order to be taxed.
 - x. 12% interest on costs in (w) above.
2. In a nutshell, at the core of the instant dispute is the provision of legal services by the defendant advocate and officer of this Court. According to the plaintiff, he retained the defendant's services to represent him before the Employment and Labour Relations Court vide Cause No 772 (N) of 2009 at what the plaintiff claims to have been an agreed legal fee of Kshs 150,000/- which he duly paid to the defendant advocate in installments. The plaintiff asserts that by such payment, the defendant was under both constitutional and statutory duty to the plaintiff which duty he allegedly, subsequently breached.
 3. Pursuant to the said legal representation, the plaintiff was successful in the sum of Kshs 1,430,000/- was awarded in his favour in damages. The respondent in that matter, Kenya National Examinations Council (KNEC), remitted Kshs 1,272, 358/- inclusive of party and party costs of the suit after statutory deductions out of which it is pleaded that the defendant unlawfully and unjustifiably withheld Kshs 522,358/- remitting only Kshs 750,000/-.
 4. The plaintiff avers that the fee came about after the defendant had filed party and party bill of costs which was taxed at Kshs 266, 452/-. He accuses the defendant of failing to produce certain documents in that matter that would have ensured that a higher figure was given by the taxing officer.
 5. The plaintiff further asserts that upon inquiring from the defendant of his entitlement, the defendant tendered a statement of account which he considers to be fraudulent. He further claims that he approached the Advocates Complaints Commission which recommended that he approaches a competent court. That in all these, the suit raises issues of statutory contract, equity, tort and constitutional questions.
 6. The defendant filed his amended statement of defence denying the claim and contended inter alia that if any money was paid in the form of legal fees, the same was part-payment. He denies any negligence attributed to him in the manner that he handled the matter up to taxation of the bill of costs.
 7. On the allegation of unlawfully withholding the plaintiff's funds, the defendant contends that he rendered a true and just account of the money he received from KNEC for and on behalf of the plaintiff.



8. The matter proceeded to hearing, the plaintiff testified as PW-1 adopting his statement dated May 21, 2021 which is largely a reiteration of the averments in the plaint. Briefly, he instructed the defendant to represent him in a matter which was determined in his favour. The advocate thereafter filed party and party bill of costs. The defendant in that matter paid the decretal sum and costs. That upon the funds being remitted to the defendant, he withheld the sums as earlier sated thus the suit.
9. In cross examination, he confirmed the representation save that he had paid the entire legal fees as agreed with the defendant. He stated that his advocate would travel from Kisumu to Nairobi for hearing of the suit. After the determination of the matter, he approached the advocates complaints commission which advised him to proceed to court.
10. On his part, the defendant testified as DW-1 adopting his statement dated July 21, 2021. Briefly, he stated that he received instructions to defend the plaintiff in the suit before the employment and Labour Relations Court at Nairobi wherein they agreed that the plaintiff was to pay a deposit of Kshs 150,000/-. That the defendant successfully prosecuted the suit culminating in an award of sums in his favour. He thereafter filed party and party bill of costs which was assessed at Kshs 266,452/-.
11. On the claim that he withheld the plaintiff's money, the defendant contended that out of Kshs 1,005,906/- received from KNEC, he retained Kshs 255,906/ pending his taxation of costs. He thus denied the plaintiff's claim.
12. On cross examination, the defendant stated that he was entitled to the fees by virtue of his legal representation of the plaintiff. He stated that he never issued a fee note.
13. DW-2, Joel Omino Onyango adopted his witness statement dated July 2, 2021 which was to the effect that he is the one who introduced the plaintiff to the defendant.
14. On cross-examination, he confirmed introducing the two contestants to each other but was not aware of the payment of legal fees.
15. At the close of the oral hearing, parties filed and exchanged written submissions. The plaintiff filed rather very lengthy submissions dated November 21, 2022. Even so, the same have been taken into consideration.
16. According to the plaintiff, none of his assertions and evidence was discredited and shaken during cross-examination as the main focus was on receipts. That the defence is not plausible for want of a certificate of costs determining the fees payable to the defendant. That similarly, there was no certificate of costs showing the fees were increased by half as was held in *Nyagito & Co Advocates v Doinyo Lessos Cremeries Ltd* [2014] eKLR, *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR, *Central Bank of Kenya v Makecha & Company Advocates* [2019] eKLR, *Makumi, Mwangi & Company v Invesco Insurance Company Limited* [2017] eKLR, *Kinyua Muyaa & Company Advocates v Kenya Ports Authority Pension Scheme & 8 others* and *Rachuonyo & Rachuonyo Advocates v Kenya National Capital Corporation Limited* (2022) eKLR.
17. The plaintiff submitted that the defendant is not entitled to the fees claimed for legal representation as the same cannot be his before the same is taxed by the taxing officer as was held in *Philiph Muchiri Mugo v Mbeu Kithakwa* (2016) eKLR and *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (2016) eKLR.
18. He further submitted that the recommendations by the Advocates Complaints Commission is not binding on him since the commission misconstrued the issue before it as it sought to limit the cause of action to taxation or taking of cash account which is not the case presented before this Court. Further, that the commission did not have the benefit of interrogating the documents as presented before this



- court. He relied on the authority in *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2017] eKLR and *Wambugu, Motende & Co. Advocates v Attorney General of Kenya* [2013] eKLR.
19. On the issue of jurisdiction, it was submitted that the suit is based on the defendant's violation of provisions of Articles 10, 28, 35 and 47 of the *Constitution* and statute in his conduct and decisions while representing the plaintiff as variously interpreted in *Omulele & Tollo Advocates v Magnum Properties Limited* [2016]eKLR, *Owino Okeyo & Company Advocates v Fuelex Kenya Limited* [2005]eKLR, *Minister of Safety & Security v Luiters* (2007) 28 ILJ133 (CC), *Fredricks & others v MEC for Education Training, Eastern Cape & others* (2002)23 ILJ 81 (CC) and *S v Boesak* (2001) (1) SA 912 (CC)..
 20. The defendant further submitted that matters of fact and law are within the jurisdiction of this Court by dint of Article 165 (3) (a) & (b) of the *Constitution of Kenya, 2010*, enabling statutes and judicial precedents of Superior Courts as stated in the *High Court (Organization and Administration) Act, 2015* and the case of *Sally Njambi Mabihu & another v Mwangaza Kia Deche & another* [2017] eKLR and a host of other authorities stated therein.
 21. He further submits that the Duties and responsibilities of an Advocate are governed by a retainer; express or implied as was held in *Ochieng, Onyango & Kibet & Ohanga Advocates v Akiba Bank Limited* [2008]eKLR and *Patrick S. K. Kimiti v John Ngugi Gachau* [2015]eKLR. That pursuant thereto, a contracted Advocate should exercise reasonable care and skill and to protect the Client's interest by acting diligently and carefully. This was the observation made in *Kinluc Holdings Ltd v Mint Holdings Ltd & another* (1998) eKLR. It was submitted that therefore when an advocate breaches his contract by way of carelessness and causes damages to his client, he becomes liable under a contract, tort or trust.
 22. Further submission was that in the instant case, the defendant being an officer of this Court, his conduct has a potential of preserving or tarnishing the integrity of the Judiciary on every occasion because, according to the plaintiff, the defendant breached his obligations under Section 80 of the *Advocates Act*.
 23. The defendant submitted that this court lacks the jurisdiction to hear and entertain the matter since the dispute herein relates to fees due to an advocate governed by the *Advocates Act* and the *Advocates Remuneration Order* and that the proper forum is the Deputy Registrar sitting as a Taxing Officer. This contention was supported by the holding in the case of *Corporate Insurance Company Limited v Kang'ethe and Mola Advocates* (2021) eKLR and *Masore Nyang'au & Company Advocates v Kensalt Limited* (2019) eKLR.
 24. It was submitted by the defendant that even if this court has jurisdiction, there was no evidence adduced by the plaintiff of receipts allegedly issued in full payment of legal fees. That by the plaintiff's admission that the Defendant successfully prosecuted the services for which he had been procured confers on the defendant as the advocate, the right to claim advocate fees from the plaintiff/client under Schedule 6 Part B of the *Advocates (Remuneration) (Amendment) Order*.
 25. It was further submitted that the court in Nairobi awarded him Kshs 266,452/- in a matter that was handled out of his station and therefore incurred incidental expenses like hotel accommodation and air tickets which were admitted by the plaintiff as having not been catered for.
 26. It was further submitted that the defendant rebutted the plaintiff's case in his defence since the fees was deducible from the decretal sum and the evidence of DW-2 who testified that the sum of Kshs 150,000/- did not constitute the entire legal fees due to the defendant.



Analysis and determination

27. I have carefully reviewed the parties' respective cases and evidence adduced as well as the written submissions. Before I frame the issues for determination, it is important to highlight that submissions are not evidence and that they remain legal arguments not fresh evidence to support a party's case. It follows that however well written submissions do not substitute evidence. The court in determining the merits of the case will rely on the pleading as and the evidence in support or as controverted.
28. The main issues for determination are whether this court is possessed of jurisdiction to entertain the plaintiff's claim against the defendant and secondly, if the court has jurisdiction, whether the plaintiff has proved his case against the defendant on a balance of probabilities.
29. I shall first deal with the issue of jurisdiction since without it, the court must down its tools and take no further step in the matter. More so, both parties filed their lists of issues and the issue of jurisdiction played out in both instances even though the rest of the issues were at variance. My decision to first deal with the issue is in keeping with the *locus classicus* case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989) eKLR where it was held that:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
30. As correctly submitted, the jurisdiction of the court flows from both the *Constitution* and statutes. It cannot be conferred on the court by judicial craft or by the parties' pleadings. This court is a creature of Article 165 of the *Constitution* and is conferred with unlimited original jurisdiction in criminal and civil matters.
31. The dispute herein no doubt arises from the defendant's legal representation of the plaintiff in a labour dispute before the Employment and Labour Relations Court at Nairobi which case was determined in the plaintiff's favour and he was awarded damages. Subsequently, the defendant advocate filed the party and party Bill of Costs which was then taxed by the Deputy Registrar of the court and a sum of money awarded after a period of time which the plaintiff deems was occasioned by a lapse on the defendant's part.
32. Nonetheless, the money was paid to the defendant advocate who then remitted to the plaintiff and retained what he contends was rightfully his. The plaintiff therefore seeks the court's intervention and to find the defendant to be in breach of his duty as an advocate duly appointed. He also claims that the advocate violated his constitutional rights, the law and subsidiary legislation.
33. From the pleadings, I discern that the central issue in the matter is that of determination of what was rightfully due to the client by the advocate. The fact that the defendant represented the plaintiff in court is not disputed.
34. It is also undisputed that the plaintiff had initially approached the Advocates Complaints Commission complaining about the defendant's conduct complained of in this suit. The advice and recommendations by the Commission vide their letter dated November 22, 2018 are that:
 - a. the advocate had had rendered a statement of account dated January 24, 2014 which the plaintiff contested. Here, the Commission advised the plaintiff herein to make an application



under section 45 of the [Advocates Act](#) Cap 1 Laws of Kenya to challenge the Advocate's fee. The Commission also gave him the alternative of proceeding under Order 52 Rule 4 of the [Civil Procedure Rules](#) to ask for the delivery of a cash account.

- b. The Commission also advised the plaintiff that on the basis of the court award, the advocate was entitled to retain the party and party costs and also Kshs 399,678 as advocate client costs. He would also be entitled to reimbursement of travelling and accommodation expenses. It noted that the case was filed in Nairobi while the Advocate that he instructed was based in Busia.
35. However, the plaintiff asserts that those recommendations or pieces of advice are not binding on him as the Commission misconstrued the issue before it. This brings the question; what is the procedure after the determination of a complaint by the Commission.
36. The Advocates Complaints Commission is a public body established under Section 53 of the [Advocates Act](#), Cap 16 Laws of Kenya to inquire into complaints against advocates, law firms and their employees. The Act further provides that if a serious complaint is found, the complainant is advised to file a formal complaint with the Advocates Disciplinary Tribunal.
37. In the instant case, there is evidence that the plaintiff indeed lodged a complaint with the Commission over the defendant's conduct in allegedly withholding his money and failure to render an account of the money received by him on the plaintiff's behalf.
38. After interrogating the matter, the commission by letter dated November 22, 2018 made various observations and recommendations regarding the complaint including advising the plaintiff to move court under Section 45 of the [Advocates Act](#) to challenge the fees payable to the defendant.
39. Up to this point, there is no evidence that the plaintiff took any step in the direction given by the Advocates Complaints Commission.
40. Under section 45 of the [Advocates Act](#), the procedure to be adopted is set out under Order 52 Rule 3 of the [Civil Procedure Rules](#).
41. The section provides that:

“45. Agreements with respect to remuneration

- (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
 - (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
 - (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
 - (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof; and such 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.
- (2) A client may apply by chamber summons to the 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 the 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.

(2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.

(3) An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof:

Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.

(4) Where any agreement made by virtue of this section is made by the client as the guardian or committee of, or trustee under deed or will for, any person whose property will be chargeable with the whole or any part of the amount payable under the agreement, the advocate shall, before payment thereunder is accepted or demanded and in any event within six months after its due date, apply by chamber summons to the Court for approval of such agreement, and every such application shall be dealt with in accordance with subsection (2).

(5) If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of



the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.

- (6) 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.”

42. From the above provisions, the plaintiff could have applied to court for enforcement of the agreement that he claims was reached between him and his advocate the defendant herein. Nonetheless, an agreement that would lead to an undercutting by the advocate is not enforceable in law and on this, the plaintiff was well advised by the Advocates Complaints Commission that the advocate was entitled to the fees charged plus travel expenses from Busia to Nairobi. The Commission also advised him and correctly so that if he was dissatisfied with their advise which he says was not binding on him, he could have applied to court in the manner prescribed by law, for the advocate to render or deliver a cash account. No such application was made.

43. Order 52 Rule 3 of the Civil Procedure Rules implements section 45 of the Advocates Act as reproduced above and it provides that:

“Applications with respect to remuneration

- (1) Any application under section 45 of the Act shall be instituted in the matter of the Act and shall be supported by affidavit.
- (2) An application under section 45(2) of the Act shall be served on the advocate.
- (3) An application under section 45(4) of the Act shall be served on the guardian, committee or trustee as the case may be.
- (4) An application under section 45(5) of the Act shall be served on the party and on the advocate or the advocate’s legal personal representatives as the case may be.
- (5) Any person served with an application under this rule may file an affidavit in reply but no further affidavit may be filed without leave.”

44. On the other hand, under Order 52 Rule 4 of the Civil Procedure Rules, it is stipulated:

Power to order advocate to deliver accounts and documents

- (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—
 - (a) the delivery by the advocate of a cash account;
 - (b) the payment or delivery up by the advocate of money or securities;
 - (c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;
 - (d) the payment into or lodging in court of any such money or securities;
 - (e) the delivery up of papers and documents to which the client is entitled.
- (2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.



- (3) If the advocate alleges that he has a claim for costs, the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deem fit.”
45. From the above provisions of the law, I am persuaded that the gist of the suit herein relates to fees paid to an advocate in form of legal fees, the alleged mismanagement of the case on party and party costs by counsel and finally the purported withholding of money allegedly received by counsel on behalf of the client. That being the case, the law as reproduced above and the plaintiff as advised by the Advocates Complaints Commission, has a stipulated remedy in law but that the plaintiff herein failed to avail himself of that remedy.
46. As a consequence, I find and hold that this court is bereft of the jurisdiction to entertain his claim other than in the manner proposed by the Advocates Complaints Commission.
47. Additionally, the plaintiff raises issues of violation of constitutionally protected rights as well as breach of duty by the defendant in the handling of the matter.
48. It is common ground that remuneration of an advocate is governed by part IX of *Cap 16*. Section 44 provides that the Chief Justice may make orders prescribing remuneration of an advocate. Section 45 thereof provides for the mode of agreements between an advocate and client on the mode of remuneration.
49. Pursuant to the provisions of Section 44 of the *Act*, there is now in force the *Advocates (Remuneration) Order 1962* which regulates the remuneration of advocates. Section 2 thereof provides that:
- This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap. 301) and in a Tribunal established under the *Rent Restriction Act* (Cap. 296).
50. The section is clear that all matters of remuneration of an advocate fall under that section. The issue herein is that the plaintiff alleges to have paid the defendant all his fees for representation. He also accuses the defendant of mishandling the taxation cause before the employment court such that the court awarded less than should have been given had the defendant been diligent.
51. The *Advocates (Remuneration) Order* provides mode of proceedings when one is dissatisfied with the finding of the court on the issue of costs. There are also elaborate procedures or steps to be taken by the client if he objects to the amount claimed by the advocate as party and party costs or the award by the taxing officer. Under Paragraph 11 of the *Advocates Remuneration order*, it is provided that:
1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.



52. In *Machira and Company Advocates v Magugu* (2002) 2 EA 248, Ringera J (as he then was) held that:
- “Secondly as I understood the practice relating to taxation of bills of costs, any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Rules.”
53. Further, in *Donholm Rabisi Stores (Firm) v EA Portland Cement Ltd* (2005) eKLR the court held that:
- “Taxation of costs whether those costs be between party and party or between Advocate-client is a special jurisdiction reserved to the taxing officer by the *Advocates Remuneration Order*. The court will not be drawn into arena of taxation except by way of a reference from a decision on taxation, made under rule 11 of the Advocates Remuneration Order. The present application is not a reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself.”
54. From my analysis of the matter, I find that the crux of the matter herein relates to issues of taxation of costs as awarded by the Taxing Officer pursuant to the matter in which the defendant represented the plaintiff. The law as provided above sets out an elaborate procedure to be undertaken if one of the parties is dissatisfied with the findings thereon.
55. On the other hand, in a matter of a dispute between client and advocate, the advocate can file an advocate-client bill of costs for taxation by the taxing master. The plaintiff has the option of applying to enforce an agreement if one existed between him and his advocate or apply that the advocate renders accounts or deliver a cash account. None of the available legal options have been taken by the plaintiff against the defendant.
56. My finding on the matter is that the suit herein is neither an appeal nor an application for setting aside of the taxing officer’s findings and clearly therefore, the court lacks the requisite jurisdiction to entertain the matter. In addition, the claim that the advocate mishandled the plaintiff’s case on costs is not proved to the standard required, on a balance of probabilities.
57. On the alleged violations of rights under the *Constitution* to wit Articles 3(1), 10(2), 19(2) & (3), 28 and 47(1) by the defendant through the relationship of advocate-client, the court’s jurisdiction in determining matters of constitutional violations are donated by Article 165 of the *Constitution*. The operative statute and or regulations are the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which contemplates that the mode of instituting such an action is by way of a petition. None of these provisions have been invoked in the body of the pleadings.
58. Even if the Articles were cited, that would not be sufficient. There must be proof of violation or threatened violation. Of great significance in matters of violation of individual rights is the pronouncement in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, where the test was stated as follows:
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that



of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

59. Furthermore, it is common ground that issues of constitutional violations have to be instituted by way of petition as provided by Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.
60. In the instant case, the proceedings have been initiated by plaintiff contrary to the Rules. Even if want of form is not fatal to one's case, having considered the plaintiff's pleadings, evidence tendered and the written submissions, I am unable to find instances where the defendant violated the plaintiff's rights, if any as none of the alleged violations was established to the satisfaction of the court.
61. The law as set out above provides an elaborate system of handling such grievances which procedure ought to be followed to the letter. In the instant case, I find that the *Advocates (Remuneration) Order* is the operative law and no justification was advanced for by-passing the said clear procedure.
62. In the circumstances, I find that this court lacks the requisite jurisdiction to hear and determine the matter herein. Consequently, on the 24 prayers sought by the plaintiff against the defendant, this court makes the following orders:
- a) on the prayer for a declaration that there existed a valid oral fee agreement fully executed by the plaintiff and ratified by the defendant through receipts he signed and issued personally that constituted valid, written binding and signed agreement, I find this prayer not proved on a balance of probabilities. The same is declined and dismissed.
 - b) on the prayer for a declaratory order that the defendant had been paid his full fees in advance and that there are no outstanding amounts due to the defendant, I find this prayer not proved on a balance of probabilities. The Advocates Complaints Commission had already found in favour of the advocate defendant herein. The prayer is declined and dismissed.
 - c) on the prayer for a declaration that by his conduct, the defendant is in breach of the contract between him and the plaintiff, I find the relief not proved on a balance of probabilities. The same is hereby declined and dismissed.
 - d) on the prayer for a declaration that the defendant's actions are disgraceful, dishonourable and inconsistent with constitutional and statutory provisions and principles of the rule of law and tainted with illegality, irrationality and procedural impropriety and therefore unfit person to practice as an advocate of the High Court of Kenya, I find this prayer to be devoid of any merit as no evidence was adduced to the required standard to enable this court arrive at such a declaration. It is hereby dismissed.
 - e) on the prayer for a declaration that the defendant has violated the plaintiff's fundamental rights and freedom to human dignity and to fair administrative action contrary to Articles 10(2), 19(2) & (3), 28 and 47(1) of the *Constitution* 2010 read together with Article 3(1), I find this prayer not supported at all. The same is hereby declined and dismissed.
 - f) on the prayer for a declaration that the defendant by his conduct is in breach of his duties of care and reasonable skill under law of contract, equity and tort, I find the relief not proved on a balance of probabilities. The same is hereby declined and dismissed.
 - g) on the prayer for a declaration that the defendant's statement of account rendered on January 24, 2017 is invalid, fraudulent misleading, null and void ab initio, I find this prayer devoid of any substance as the plaintiff was advised to approach the court under section 45 of the



Advocates Act or in the alternative, under Order 52 of the Civil Procedure Rules which he has not done to date. The prayer is dismissed.

- h) on the prayer for an order of certiorari bringing into the honourable court for purposes of quashing the defendant's statement of account dated January 24, 2017, I find that prayer misplaced as judicial review proceedings are initiated in proceedings which are not the type herein and the Advocates Complaints Commission having found that the advocate had rendered accounts which were true, there is no basis upon which this court would quash the accounts in the absence of judicial review proceedings against the recommendations or decision of the Commission. The prayer is therefore dismissed.
- i) on the prayer for a declaration that the continued withholding of Kshs 522,358/- belonging to the plaintiff by the defendant is unlawful and unjustified, I find no evidence adduced to support the assertion that the defendant was withholding the plaintiff's money and or illegally. This prayer is hereby dismissed.
- j) on the prayer for an order directing the defendant to pay the plaintiff Kshs 522,358/- he is unlawfully withholding within 14 days of judgement, I find no evidence to support that assertion of the defendant illegally withholding the plaintiff's money. The prayer is declined and dismissed.
- k) on the prayer for Special damages of Kshs 150,000/- lost for failure to present receipts of fees he was paid by the plaintiff, there was no dispute that this money was paid to the advocate as part of his legal fees hence no loss was occasioned to the plaintiff as the advocate conceded even in his response to the complaint lodged against him by the plaintiff before the Advocates Complaints Commission. This prayer is therefore devoid of any basis and is hereby declined and dismissed.
- l) on the prayer for General damages of Kshs 379,273/- for fraudulent misrepresentation, induction and deceit being the deference of what he is unlawfully withholding and what he proposed to be due and payable to the plaintiff in the disputed statement of account, I find this prayer far-fetched and unsupported. It is hereby dismissed.
- m) on the prayers for General damages for breach of statutory duties; (n) General damages for breach of trust and responsibilities; (o) General damages for breach of fiduciary duties; and (p) General damages for gross negligence particularized in paragraphs 18 and 20 of the plaint, I find all these prayers to be vexatious and frivolous and devoid of any substance. They are all dismissed.
- q) on the prayer for a global sum/lump sum amount of Kshs 20,000,000/- for violating plaintiff's fundamental rights and freedoms under the provisions of the Constitution 2010 and bill of rights particularly under, I find this prayer not supported by any facts presented before this court. It is hereby declined and dismissed.
 - i. The rule of law
 - ii. Human dignity
 - iii. Human rights
 - iv. Good governance
 - v. Integrity



- vi. Transparency
 - vii. Accountability
 - viii. Responsiveness
 - ix. Sensitivity
 - x. Equal protection and benefit of the law
 - xi. Equity, trust and fiduciary benefits entrenched in Article 10(2).
 - xii. Covenant of good faith and fair dealing.
 - xiii. Substantive and procedural justice-natural justice and due process of law by dint of the preamble, Articles 1(1) & (2)(c), 2(1) & (4), 3(1), 4(2), 10 (2), 19(2) & (3), 20(1), 21(1), 27(1), 28 and 47(1) & (2) of the Constitution.
- r) on the prayer for General damages for conversion and unlawful appropriation of money received on behalf of the plaintiff, I find this prayer not supported by any evidence. It is declined and dismissed.
 - s) on the prayer for General damages for unjust enrichment, I find this to be frivolous and vexatious prayer. It is hereby dismissed.
 - t) on the prayer for General damages for undue influence and abuse of power/position, I find this prayer devoid of any substance. It is hereby dismissed.
 - u) on the prayer for Exemplary damages for the defendant's conduct calculated to make a profit for himself that may well exceed the compensation payable to the claimant, I find this prayer to be repetitive and devoid of any merit
 - v) on the prayer for Interest at 18% from 24th June, 2016 or from filing suit, as there is no award given on any of the monetary prayers sought, this prayer is spent.
 - w) on the prayer for Reasonable, fair and just costs comprising disbursements and other expenses excluding instructions fees as the court would determine or order to be taxed, the plaintiff is acting pro se and would not be entitled to instructions fees which is only available to practicing advocates who act for litigants. It is therefore devoid of merit. It is dismissed.
 - x) on the prayer for 12% interest on costs in (w) above, this prayer is not available as no awards have been made in favour of the plaintiff. It is declined and dismissed.
63. On the whole, this suit is found to be devoid of any merit and is hereby dismissed with an order that each party bear their own costs on the basis that although costs follow the event and to the successful party, the plaintiff pro se litigant is a lay person whose knowledge of the law was extremely limited if not diminished and although he stubbornly refused to heed the advisory given by the Advocates Complaints Commission and filed this suit which I find to be frivolous and vexatious, I find that this is a good case where the extremely ignorant party should be forgiven on the issue of costs. The plaintiff is advised that in future, let him seek legal advice even if, from the National Legal Aid Service at no fee before engaging in litigation of this nature.
64. I so order. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY, OF FEBRUARY, 2023



R.E. ABURILI
JUDGE

