



**Maina & Maina Advocates v Ndungu (Miscellaneous Application 33 of 2019)
[2023] KEHC 1564 (KLR) (Constitutional and Human Rights) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION 33 OF 2019**

HI ONG'UDI, J

MARCH 9, 2023

BETWEEN

MAINA & MAINA ADVOCATES ADVOCATE

AND

BENEDICT KABUGI NDUNGU CLIENT

RULING

1. By way of a Notice of Motion dated 19th May 2020, filed under Section 51(2) of the *Advocates Act*, 1989, Paragraph 7 of the *Advocates Remuneration Order*, 2009, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Section 1A, 1B, 3A of the *Civil Procedure Act*, the advocate/applicant seeks the following orders:
 - i. That judgment be entered against the respondent for the sum of Ksh. 1,279,283.65 only being advocate/client costs as taxed on 18th December 2019 plus interest at 14% p.a. from 25th November 2019 until payment in full.
 - ii. That the costs of this application be borne by the respondent.
2. The instant matter originates from Constitutional Petition No. 247 of 2019 (Benedict Kabugi Ndungu v Safaricom PLC). The advocate/applicant filed his Advocate-Client Bill of Costs for taxation on 17th October 2019. The Taxing Master, Hon. L.A. Mumassabba issued the Notice of Taxation of the Bill of Costs on 24th October 2019 and the client/respondent was served by the advocate/applicant on 26th November 2019. The Bill of Costs was taxed at Kshs. 1,279,283/65 vide the Ruling dated 18th December 2019. A Certificate of Taxation dated 28th January 2020 was then issued. The instant application was filed following the respondent's alleged neglect or refusal to settle the taxed sum with the interest therein.



The Advocate/Applicant's case

3. The application is supported by the affidavit of Gideon Mutai, an advocate working for the applicant. It's dated 19th May 2020. He deponed that at the time of filing the application, the Certificate of Taxation had not been set aside or altered.
4. He deponed further that according to Paragraph 7 of the *Advocates Remuneration Order*, 2009 the Applicant was entitled to charge interest on its costs at the rate of 14% p.a. from the expiry of one month after delivery of the bill upon the client. He urged the Court to grant the prayers sought.

The client / Respondent's Case

5. In response to the application, the respondent filed a replying affidavit and a chamber summons dated 25th May 2021 under Articles 50 and 159(2) (d) of the *Constitution*, Sections 1A,1B, 3 and 3A, 63(e) of the *Civil Procedure Act* cap 21, Rule 11(4) of the *Advocates Remuneration Order*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. He seeks the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this application inter-parte, this honourable Court be pleased to grant orders of stay of proceedings in respect to the application dated 19th May 2020.
 - iii. That the respondent be granted leave to file an objection and a taxation reference to this honourable Court against the Ruling of the honourable Court's Taxing Officer.
 - iv. That this honourable Court be pleased to set aside and/or declare null and void, the Certificate of Taxation issued in respect of this matter for Ksh. 1,279,283.65.
 - v. That the cost of this application be in the cause.
6. The Chamber Summons was supported by the grounds on its face and his supporting affidavit of even date and documents annexed therein. The replying affidavit and supporting affidavit reiterated the averments deponed to below.
7. He averred that the advocate/Client bill of costs was taxed at Ksh. 1,279,283.65 and the applicant proceeded to extract the Certificate of Taxation. Thereafter an application for a decree in respect of the said certificate, was made. He contested the amount taxed arguing that the Taxing Master erred in law & fact in the taxation. He averred that he had entered into an agreement dated 21st June 2019 with the applicant, as provided under Section 45 of the *Advocates Act* and so the Taxing Master did not have jurisdiction to tax the applicant's Bill of Costs.
8. He deponed that his delay in filing this reference was due to the financial difficulty he had been facing and was forced to borrow money to instruct his advocates. Its his case that should the application dated 19th May 2020 proceed he will suffer prejudice as he will have been condemned unheard.

The Advocate/Applicant's Response

9. The advocate/applicant in reply filed its replying affidavit dated 26th May 2022 sworn by Ivy K. Mouti who deponed that the firm and the client/respondent had signed an instruction note at the onset of their engagement. Further that under the Clause for fees, the parties agreed that the same would either be agreed upon or taxed. Further that the respondent had undertaken to pay all the legal fees accruing, disbursements, taxes and other amounts incurred during the duration of the matter as per



the *Advocates (Remuneration)(Amendment) Order*, 2014. It was on this premise that the firm pursued its costs through taxation.

10. She deponed further that the taxation was done upon the respondent's failure to pay the legal fees, and this failure continues to prejudice the applicant for services rendered to the client. In view of this, she stated that the client/respondent's chamber summons application was frivolous and vexatious and so ought to be dismissed with costs.

Parties' Submissions

The advocate/applicant's submissions

11. The advocate/applicant filed written submissions and a list of authorities dated 20th June 2022. Counsel found the only issue for determination to be whether judgement should be entered against the client/respondent. While relying on the case of *Ndungu Gitbuka and Company Advocates v Geoffrey Moriaso Ole Mailoy* [2019] eKLR counsel submitted that according to the *Advocates Act* Section 15(2) it is clear that the certificate of costs once issued by the Taxing Master is final unless set aside or altered by the court. Similar reliance was placed on the cases of *Nyabena Alfred t/a Nyabena Nyakundi & Company Advocates v Tourism Promotion Limited t/a Serena hotel* [2018] eKLR and *Nduati & Co. Advocates v Kenya Orient Insurance Company Limited* [2021] eKLR.
12. He submitted that this position is further anchored in Section 51(2) of the *Advocates Act*, and that since the Certificate of Taxation had not been set aside and/or altered the Court should enter judgement against the client/respondent. Furthermore, that their application ought to be allowed since there was no reference filed challenging the Certificate of costs.
13. On the prayer of interest at 14% per annum, Counsel relied on Rule 7 of the *Advocates Remuneration Order*, 2009 and the case of *Kitbi and Company Advocates v Menengai Downs Limited* [2015] eKLR where it was held that once judgement is entered on a certificate of costs the decretal amount is liable to attract interest of 14% per annum from 30 days after the service of the bill and not the date of taxation.

The Client/Respondent's Submissions

14. The firm of Matheka Oketch and Company Advocates on behalf of the Client/respondent filed written submissions dated 5th July 2022. Counsel submitted that the Taxing Master had erred in law and fact in taxing the Advocate's Bill of Costs at Ksh. 1,279,283 whereas the parties had agreed on the fees payable and so there was nothing to tax due to the parties Agreement dated 21st June 2019.
15. On whether Judgement ought to be entered against the respondent for the amount of Ksh. 1,279,283.65 counsel relied on the case of *Makami Mwangi Wang'ong'u and Company Advocates v Invesco Assurance Company Limited*(2018)eKLR where it was held that the only reason in which the court would decline to enter judgment where an advocate's bill has been taxed and certificate issued is where there is a dispute as to retainer. Similar reliance was placed on the case of *V. Chokaa and Company Advocates v County Government of Mombasa as a successor of Municipal Council of Mombasa* (2017) eKLR.
16. Counsel also argued that this point was also provided for under Section 51(2) of the *Advocates Act*. As such, he urged the Court to decline entering judgement in favour of the advocate/applicant.

Analysis and Determination

17. The following determination revolves around the issues raised in the advocate/applicant's Notice of Motion dated 19th May 2020 and the client/respondent's chamber summons dated 25th May 2021. On



- one hand the advocate/applicant desires this Court to enter a judgement decree with reference to its Bill of Costs as taxed by the Taxing Master on 18th December 2019 and a Certificate of Taxation issued.
18. The client/respondent is opposed to the advocate /applicant’s application since he claims that they had entered into a retainer agreement dated 21st June 2019 which stipulated the advocate / applicant’s fees. For this reason, the client/respondent asserted that the Taxing Master had no jurisdiction to tax the Advocate - Client Bill of Costs dated 17th October 2019. He therefore seeks to have the Certificate of Taxation set aside and he be granted leave to file an objection and tax reference against the Taxing Master’s Ruling.
19. From the foregoing and upon perusal of the parties’ pleadings and submissions. I find the issues arising for determination to be as follows:
- i. Whether there was a retainer agreement for payment of fees between the parties.
 - ii. If (i) above is answered in the affirmative:
 - a. Whether this Court should grant leave to the client/respondent to file an objection and tax reference against the Taxing Master’s Ruling.
 - b. Whether the Certificate of Taxation should be set aside.
 - c. Whether this Court should stay the proceedings of the advocate/applicant application.
 - iii. Whether this Court should enter a judgement decree with reference to the Bill of Costs as taxed by the Taxing Master.

Issue No. (i). Whether there was a Retainer Agreement for Payment of Fees between the Parties.

20. The *Advocates Act* Cap.16 on Agreements with respect to remuneration under Section 45 provides as follows:
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.
21. The Court in the case of *Kakuta Maimai Hamise v Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency* [2017] eKLR reiterating this provision observed as follows:
28. The issue of validity of agreements between advocates and clients with respect to remuneration was dealt with by Ochieng, J in *Abmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* (2) [2006] 1 EA 5 in which the learned Judge held that reading of section 45(1) of the *Advocates Act* reveals that the agreements in respect of remuneration would be valid



and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorised in that behalf. The Court proceeded to hold that an agreement that provides for fees, which was less than the fees provided for in the Remuneration Order was illegal.”

22. Expounding on retainer agreements the Court in the case of *Sheetal Kapila v Narriman Khan Brunlechner* [2021] eKLR quoting the case of *Omulele & Tollo Advocates vs Mount Holdings Ltd* CA 75 of 2015 with approval restated that:

“A retainer means the instruction, employment or engagement of an advocate by his client.

On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship...”

23. It is imperative therefore for a party who seeks to rely on the ‘Agreement’ to demonstrate the existence of a valid and binding Agreement between itself and the advocate. This was appreciated by the Court in the case of *Vincent Chokaa v Local Authorities Provident Fund Board (Lapfund)* [2020] eKLR as follows:

25. The client also stated that it had entered into a retainer agreement with the Advocate which capped the Advocate’s fees at Kshs. 18 million. Section 45 (6) of the *Advocates Act* provides that where such an agreement has been made fixing an advocate’s remuneration, the costs of that advocate shall not be subject to taxation. It would be necessary for the client to establish the terms and conditions of the agreement, whether written or oral, to enable the court determine whether the agreement met the conditions of a valid agreement as provided under section 46 of the *Advocate Act....”*

24. The advocate/applicant opposed the client/respondent’s assertion, and stated that the document the client was seeking to rely on was an Instruction Note. An examination of the document which the client/respondent claims to be the retainer agreement discloses the following as extracted from the Instruction Note:

FEES:

- i. Legal Fees as Per Scale to be agreed upon or Taxed.
- ii. 60 % (Sixty Percent) of Damages and/or Settlement in respect of any of The Subject Matters and Net of All Costs Including (a) Above.

25. Before signing the fee note the client/respondent made the following undertaking:

‘to pay all legal fees accruing, disbursements, taxes and other amounts reasonably incurred during the transaction for items 1, 2, 3 and 4 above as per the *Advocates (Remuneration) (Amendment) Order 2014.*’

26. A perusal of this instruction note makes its clear that the note does not contain a specified figure to constitute agreed upon fees and neither is there an express statement that this note is an agreement for the fees to be paid by the client/respondent. The note that is herein referred to as the retainer agreement fails to state the precise fixed amount that constitutes the agreed upon fees in a retainer agreement.

27. The client/respondent is required to produce an agreement or document that would prove that he accepted the fees proposed by the advocate/applicant hence the creation of a valid retainer agreement



for the purposes of Section 45 of the *Advocates Act*. The existence of such an agreement would automatically oust the Taxing Master's jurisdiction to tax the Advocate-Client Bill of Costs. This was underscored in the case of *Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited* [2020] eKLR where the parties had a retainer agreement. The Court held that:

“...The parties are bound by the terms of the Retainer Agreement and the Appellant is estopped from seeking intervention from taxation under the Advocates Remuneration Order. Where there is a Retainer Agreement the Taxing Officer lacks jurisdiction to tax the Bill of Costs...”

28. I do find that in light of the documents adduced there was no retainer agreement between the parties as alluded to by the client/respondent. Further that the document relied upon in this claim does not meet the prerequisites set out in Section 45 of the *Advocates Act*. As a consequence, I find that the advocate/applicant rightly filed its Advocate - Client Bill of Costs before the Taxing Master, who had the duty to tax the bill of costs.
29. Considering the findings above the prayers by the client/respondent have no standing. Although the client/respondent deponed that he has been facing financial difficulties, I find this not to be a sufficient legal ground to allow filing of a tax reference.
30. Likewise, Rule 11 of the *Advocates Remuneration Order* 2009 provides that the Court has discretion to extend time for filing a reference. It states as follows:

Objection to decision on taxation and appeal to Court of Appeal.

- i. 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.
 - ii. 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.
 - iii. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - iv. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - v. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
31. Rule 11 is clear on the procedure with respect to objections to decisions on taxation. This Court's jurisdiction to hear an application for a reference is based on fulfilment of Rule 11(1) and (2) of the *Order*. There is no document submitted to show that there was any Notice issued to the Taxing



Master requesting for a reasoned decision and notifying her of the client/respondent's intention to file a reference.

32. The upshot of the foregoing and for the reasons set out above, I find that the client/respondent's chamber summons dated 25th May 2021 lacks merit and as such is dismissed. On the other hand, I find that the advocate/applicant's notice of motion dated 19th May 2020 has merit, and is allowed.

I therefore enter Judgment against the client/respondent in the sum of Kshs.1,279,283/65 plus interest at 14% p.a from 25th November 2019 as prayed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

