



REPUBLIC OF KENYA



**Rachier & Amollo LLP v Kenya Bureau of Standards (Miscellaneous Cause E813 of 2022)
[2023] KEHC 2067 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E813 OF 2022**

**A MABEYA, J
MARCH 22, 2023**

BETWEEN

RACHIER & AMOLLO LLP APPLICANT

AND

KENYA BUREAU OF STANDARDS RESPONDENT

RULING

1. This is an application dated December 15, 2022. It was brought under section 45(6) of the *Advocates Act*, Article 159(2) (d) of the *Constitution*, Order 2 Rule 15 & Order 51 Rule 1 of the *Civil Procedure Rules*, and sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application sought to stay the taxation proceedings before Hon Elizabeth Tanui (DR) and consequential orders of December 13, 2022. The main order sought was that the applicant's Advocate-Client Bill of Costs dated October 25, 2022 for Kshs 105,309,720.01 be struck out.
3. The client also filed Grounds of Objection dated December 15, 2022 to the aforementioned Bill of Costs.
4. The grounds for the application were set out on the face of the Motion and in the supporting affidavit of Miriam Kahiro sworn on December 15, 2022. It was the applicant's case that by virtue of Section 45(1) (a) and (b) of the *Advocates Act* Cap 16 ('the Act'), the taxing master was precluded from proceeding with taxation where there was a Retainer Agreement between the advocate and client on legal fees. That under Section 45(6) of The Act, where an advocate had raised a fee note which was duly paid, the fee note amounted to a Retainer Agreement between the parties thus no taxation could ensue thereafter.



5. It was averred that the parties had a Retainer Agreement dated December 21, 2020 where legal fees was agreed upon. That the advocate raised a fee note dated July 13, 2021 of Kshs 14 5million which was paid on June 27, 2022. That the advocate could not now turn around and seek taxation under the Advocates Remuneration Order (ARO) and was not entitled to any further fees as claimed in the Bill of Costs. That the Deputy Registrar had no power to tax the bill and that instruction fees were only chargeable once yet the advocate had filed several Bills of Costs arising from one matter claiming multiple instruction fees.
6. It was also contended that the advocate had also incorporated legal fees by Paul Muite SC who's services the client had retained to lead in the application for review filed in the Supreme Court. That though the client paid the advocate's fees of Kshs 14.5 million as raised in the fee note, Paul Muite's fees of Kshs 17.4 million was not approved by the Attorney General due to lack of sufficient evidence of the work done leading to the issuance of the fee note.
7. That previously, the client had paid legal fees of Kshs 237,867,421.68 to the advocate to defend the client in the High Court, Court of Appeal and Supreme Court and there was no outstanding fees payable to the advocate.
8. That it was therefore in the interest of justice that the Bill of Costs be struck out.
9. The advocate opposed the application vide the replying affidavit sworn by Dr Jotham Okome Arwa sworn on December 21, 2022 as well as Grounds of Opposition of even date. Among the grounds of opposition was that the application was res judicata as the issues therein had been previously raised in the client's previous application dated August 4, 2022 resulting in a consent order recorded on October 5, 2022. That in the consent order, the client conceded that the advocate had a right to tax the Bill of Costs before a different taxing master, and that the application was a hidden attempt to set aside the consent order.
10. It was also contended that the application was anchored on falsehoods including the claim that the advocate had been paid Kshs 233,367,421.68/= and Kshs 14.5 million, and the allegation that there was a Retainer Agreement between the parties.
11. It was averred that the advocate as well as SC Muite were retained by the client to represent it in all proceedings against it consequent to the Supreme Court's judgment of December 18, 2020 and signed a Retainer Agreement dated December 21, 2020.
12. That the retainer did not however tax the remuneration payable to the advocate and SC Muite but instead provided that the fees payable would either be agreed discounted fees or as per the ARO. That in circumstances, where the advocate and client did not agree on fees, the only mechanism in law to determine payable fees was through taxation. That the agreement thus provided that fees payable in case of disagreement between the advocates and client would be through taxation.
13. That ten independent proceedings were then instituted as particularized at paragraph 23 of the supporting affidavit giving rise to separate instruction fees. That but for the suits in 23 (a), (f) and (g), all other suits emanated from HCCC No 405 of 2016, all the other suits related to garnishee proceedings. That the value of all the matters was Kshs 2.0 billion.
14. That the proceedings in 23 (a), (f) and (g) were the subject matter of the amended Bill of Costs in Misc. E813 of 2022, Misc 240 of 2022 and Misc E241 and the instructions fees and other costs were payable as per paragraph 1 of schedule 6 of the ARO. That for the other garnishee proceedings, paragraph 14 Schedule 16 of the ARO was applicable. That the instruction fees for the matters in 23 b, c, d, e and j were governed by paragraph 14 of the ARO.



15. It was therefore contended that it was not true that instruction fees were not payable in respect to such matters on the basis that they were not original suits, as instructions to institute, defend or oppose garnishee proceedings are expressly provided for under paragraph 14 of the ARO. That garnishee proceedings were fresh suits between judgment creditors and garnishees.
16. The advocate further contended that the invoice annexed to the client's affidavit as MK-5 of Kshs 17.4 million purportedly signed by SC Muite did not emanate from the advocate's firm. That SC Muite had no authority to sign any documents on behalf of the advocate's firm. That no such invoice had ever been sent by the advocate and the genuine invoice was the one sent by the advocate on July 13, 2021 for Kshs 31.9 million which was raised after a joint meeting between the advocate and the client.
17. That the client declined to settle the invoice despite that the advocate and SC Muite continued representing the client in negotiations of payment of Kshs 2.0 billion owed by the client to Geo-Chem whereby the advocate continued to incur facilitation costs during meetings. That the advocate eventually withdrew the invoice on November 19, 2021 and proceeded with taxation of costs. That the parties entered into negotiations and agreed that client would settle the pending bills at half the amount claimed on each of them.
18. That the advocate informed the client that it would withdraw the Bill of Costs pending at the Supreme Court in Misc App E001 of 2022 if the client paid at least Kshs 15 million from the half pending amount. The client paid Kshs 13,625,000/= and the advocate declined to withdraw the Bill of Costs due to breach of the promise. That Kshs 13,625,000/= had been credited to the amount being claimed with respect to the application for review before the Supreme Court.
19. The advocate denied ever receiving payment of Kshs 14.5 million as claimed. It was further contended that Section 45(6) of The Act was inapplicable as no agreement was ever reached. That the allegation that the amounts claimed were lofty was false as the amount quoted was the same amount agreed on in the agreement between the client and SC Fred Ngatia who was then representing the client in the same proceedings and the same was adopted as an order of the court. That one matter could not have different party and party costs and the applicant had simply applied the same party and party costs.
20. The parties were directed to dispose of the application by way of submissions. I have considered the record. There are two issues that arise for determination. These are; whether there was an agreement on fees between the advocate and client and relatedly, whether those fees were paid by the client such as to warrant striking out of the Bill of Costs dated October 25, 2022.
21. The applicable law on agreement on fees between an advocate and client is Section 45 of the *Advocates Act* which provides: -
 - (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.'



22. Under section 45(6) of the Act, the costs of an advocate in any case where an agreement on legal fees has been entered into shall not be subject to taxation, nor to Section 48 which provides for actions for recovery of costs. The section provides that: -
- ' 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'
23. The form that a legal fee agreement ought to take is addressed in Section 45(1) of the Act, and includes three critical requirements which are; the agreement must be in writing, signed by the client or his agent and must fix the amount payable.
24. As explained in [Halsbury's Laws of England, Fourth Edition Reissue, Volume 44\(1\)](#) at paragraph 180:
- ' A solicitor is entitled by statute to make a written agreement (called a Contentious business agreement) with his client, as to his remuneration in respect of any contentious business done or to be done by him, providing that he shall be remunerated by a gross sum, or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.
- To bind the client the agreement must be signed by him. It may be contained in a letter or any other document provided that all the terms of the agreement which relate to the remuneration appear in it and are sufficiently specific and the intention of the parties is clearly shown.'
25. In the present case, the advocate claimed that no such agreement as to legal fees existed, while the client alleged that there was a binding Retainer Agreement dated December 21, 2020 which provided that the advocate's legal fees would be charged as negotiated and agreed upon by parties.
26. This Court has seen the Retainer Agreement dated December 21, 2020. The agreement is in writing and is signed by both the advocate and the client. Under Legal Fees, the agreement provided that: -
- ' The fees chargeable by the Advocate shall be per the Advocates Remuneration Order or such other discounted fees as shall be agreed upon by the parties'
27. Not only does the agreement meet the requirements of Section 45(1) of The Act, it also identifies the payable fees or the manner by which the fees are ascertainable, either as per the ARO, or as per the discounted fees agreed upon by the parties.
28. In [Kakuta Maimai Mabise vs Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency \[2017\] eKLR](#), when examining the nature of a legal agreement, the court observed that: -
- ' In my view for a document to be said to constitute a valid and binding agreement for the 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 *Rajni K Somaia vs Cannon Assurance (K) Ltd Kisumu HCMA No 289 of 2003*'
29. Having met the requisite conditions, the legal agreement between the parties was valid, bringing into play the applicability of Sections 45 (1) & 46 of The Act. It then follows that under Section 45 (6) of The Act, the advocate's costs were not subject to taxation.



30. I say this because even in the advocates own pleadings at paragraphs 30-33 of the replying affidavit dated December 21, 2022, it was pleaded that the advocate initially raised a fee note of Kshs 110 million in April 2021 leading to negotiations that saw the fees drop down to Kshs 55 million. That the client called another negotiation meeting on May 4, 2021 and the advocate agreed to reduce the fees to an amount not exceeding Kshs 32 million.
31. That on July 13, 2021, the advocate raised an invoice of Kshs 31,900,000/=. To this Court, this was the final fees agreed upon as envisioned under the Retainer Agreement dated December 21, 2020 which provided that legal fees would either be as per the ARO, or as per other discounted fees agreed on by the parties. In this case, the discounted fees were finally agreed to be any amount not exceeding Kshs 32 million.
32. Having finally agreed on an amount not exceeding Kshs 32 million and the advocate having raised a fee note of Kshs 31.9 million to give effect to that agreement, the Retainer Agreement became effectual and binding between the parties and the advocate cannot attempt to wriggle itself out of the agreement by filing his Bill of Costs.
33. In *Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR*, the Court of Appeal firmly held that: -
- ' In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate's Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention. We find no merit in this appeal as the appellant's bill of costs was properly struck out. Accordingly, the appeal is dismissed with costs.'
34. The Court of Appeal in that matter affirmed the High Court's finding in *DN Njogu & Co Advocates V National Bank Of Kenya Limited [2007] eKLR* wherein the court in upholding the taxing master's decision not to tax the bill of costs held that: -
- ' If two parties willingly agree to conceive an idea and the same is put into writing, signed, accepted and executed by the parties, then the court can only be called to intervene in distinct situations. The parties herein entered into an agreement under Section 45 of Cap 16 as read with Rule 3 of the Advocates Remuneration Order. It is provided under Section 45 (6) of Cap 16 that where there is an agreement, the costs of an Advocate shall not be taxed, unless there is fraud, illegality and/or coercion in the agreement.'
35. Going by the above, the only logical finding to be reached by this Court is that the parties were bound by their retainer agreement and that therefore the advocate's costs were not subject to taxation but as negotiated and settled by the client. It then follows that the taxing master lacks jurisdiction to tax the Bill of Costs dated October 25, 2022.
36. It was however the advocate's case that the fee note was not settled and vide letter dated November 19, 2021, the advocate gave notice that if the same remained unsettled within five days thereof, the fee note would stand withdrawn and the advocate would proceed with taxation of its bills with respect to each matter.



37. The client on the other hand maintained that the invoice of July 13, 2021 was raised on behalf of the advocate's legal fees and those of SC Muite. That being a state agency, the client had to first seek authorization from the Attorney General (AG) before making any payments for legal fees for any services rendered by external counsel. That the AG found that the advocate's costs of Kshs 14.5 million had been proven and authorized payment of the advocate's fees.
38. However, as for SC Muite's costs, the AG called for more documentary evidence to show the work done by him leading to his legal fees of Kshs 17.4million, thus the payment was not approved. That the advocate's fees of Kshs 14.5 million were paid but SC Muite was yet to justify his legal fees and the same remained pending.
39. This Court has seen documents supporting the position taken by the client. There is the invoice dated July 13, 2021. It was for Kshs 31.9 million. It clearly indicated that out of that amount, Kshs 17.4 million was for SC Muite's fees. The invoice was for 6 matters including the review and stay application before the Supreme Court in SC App 33 of 2020 and HC Misc 455 of 2016 for garnishee proceedings.
40. This Court has also seen the letter dated February 25, 2022 from the client addressed to the AG requesting for approval to pay legal fees to the advocate and SC Muite. The client urged for authorization to settle the advocates invoice and avoid taxation which was for an amount over and above the demanded fees of Kshs 31.9 million. Vide letter dated March 3, 2022 ('MK-7'), the AG responded to the client and authorized payment of Kshs 14.5 million.
41. However, for SC Muite's fees of Kshs 17.4 million, was declined. As a result, it cannot be said that the Advocates fees had been agreed and paid. The fee note was one which included both the fees for the Advocate and Muite Sc.
42. In my view, where an advocate and client enter into an agreement such as the one before Court which state that the fees will be in accordance with the ARO or as shall be negotiated, once an advocate raises his fee note and demands settlement thereof and the same is settled, he cannot then go back on the same and seek to tax the bill under the ARO. The advocate can only resort to the ARO and tax the bill if the client fails to pay the feenote raised. In this case, the client fails to settle the fee note that was raised. The fees was therefore not negotiated and settled. It has to be in accordance with the ARO.
43. Further, the advocate contended that by entering into a consent to have the bills of costs taxed by a different taxing master, the client had acceded to have the bills taxed. The Court agrees with that contention, the client cannot on one hand agree to have the Advocate withdraw his reference on the belief that the bills will be taxed then turn around and raise an alleged Retainer Agreement. By entering into the said consent the client led the Advocate to act to his prejudice. The client is bound by the said consent.
44. In this regard, the Court finds that the client's application dated December 15, 2022 has no merit. The Bill of Costs dated October 25, 2022 for Kshs 105,309,720.01 is to proceed to taxation.
45. The Advocate shall have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

