



**Sheikh & Company Advocates v Chonga & another trading as  
Aquascapes Consulting (Miscellaneous Application E774 of 2021)  
[2023] KEHC 2455 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2455 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E774 OF 2021  
FG MUGAMBI, J  
MARCH 17, 2023**

**BETWEEN**

**SHEIKH & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**OLIVER CHAPA CHONGA & KENNEDY MWASAHA MWONGOZDA  
TRADING AS AQUASCAPES CONSULTING ..... CLIENT**

**RULING**

1. This ruling determines two applications. The application dated 10<sup>th</sup> June 2022 filed by the client seeking leave to file a reference out of time and a review of the decision of the taxing master and the application dated 28<sup>th</sup> April 2022 filed by the advocate seeking an adoption of the decision of the taxing master. Both applications arise out of the decision of the Hon. Wanyama dated 31<sup>st</sup> March 2022

**The Client's application dated 10<sup>th</sup> June 2022**

2. The client filed the reference herein dated 10<sup>th</sup> June 2022 pursuant to Paragraph 11(2) and (4) of the [Advocates Remuneration Order](#), Article 159(2)(d) of the [Constitution](#) and all enabling provisions of the law.
3. The orders sought in the reference were as follows;
  - i. That the respondent/objector be granted an enlargement of time within which to file the Chamber summons application herein and the same be admitted out of time



- ii. That the decision of the taxing officer dated 3<sup>rd</sup> February 2022 and reviewed on 31<sup>st</sup> March 2022 on the bill of costs herein dated 12.10.2021 be set aside and the bill be placed before a different taxing officer for fresh taxation
  - iii. That in the alternative, the decision of the taxing Officer dated 3.02.2022 and reviewed on 31<sup>st</sup> March 2022 on the bill of costs herein dated 12.10.2021 be set aside and the said bill be taxed at such amount as this Honourable Court may deem appropriate.
  - iv. That the costs of this application be provided for.
4. In support of the application the client filed a supporting affidavit sworn by Oliver Chapa. It was the client's contention that on 3/2/2022 the taxing master delivered a ruling where the bill of costs was taxed at Kshs 839,348/=. That the said ruling was reviewed by the taxing master and a final ruling was delivered on 31<sup>st</sup> March 2022 wherein the costs were taxed at Kshs 900,678/=.
5. The client contends in his submissions that the delay in filing the reference was not inordinate and was occasioned by the fact that after the delivery of the ruling, the file was held in the office of the Deputy Registrar. It was also submitted that eventually the said ruling was forwarded to the client's advocate on 27<sup>th</sup> April 2022 but his advocates were unable to contact him immediately. The client stated that the respondent would not suffer any prejudice by the enlargement of time prayed.
6. The client faulted the taxing officer for allowing the instruction fees on a higher scale despite the arbitration having not been concluded and despite there being an agreement on fees between the parties.
7. The advocate filed a response to the client's reference vide a replying affidavit dated 24<sup>th</sup> August 2022 sworn by Evans Ochieng. He stated that the taxation ruling was issued by the taxing master on 3<sup>rd</sup> February 2022 where the bill was allowed at Kshs 665,929. The taxing master upon consideration of the client's notice of objection and the advocate's letter showing arithmetic errors delivered the final ruling where the final taxed amount was Kshs 900,678. It was stated that a certificate of taxation was issued on 25<sup>th</sup> April 2022.
8. It was the advocate's contention that the client did not produce any evidence to show that it had made an effort to access the court file to assess the ruling and thus there was no credible reason for the delay. Further, the advocate averred that the client did not show an error in the taxing master's decision and that the court did not have jurisdiction to review the decision and neither could it conduct an itemized taxation.

#### **The advocate's application dated 28<sup>th</sup> April 2022**

9. The Advocate's application was brought pursuant to section 51(2) of the [Advocates Act](#) and rule 7 of the [Advocates remuneration orders](#). The application sought orders;
  - i. That judgment be entered for advocates against the respondent for Kshs 900,678/- being the taxed and certified costs.
  - ii. That the advocate be awarded interest at 14% per annum from the 3<sup>rd</sup> February 2022, when the costs were certified by the taxing master until payment in full.
  - iii. That the client do pay the costs of this application.



10. The application was premised on the grounds on the face of the application and the supporting affidavit sworn by the advocate Evans Ochieng. It was contended that on 3<sup>rd</sup> February the advocates bill of costs dated 21<sup>st</sup> October 2021 was taxed at Kshs 900.678/- and no reference had been filed against it.
11. The client on the other hand opposed the application by a replying affidavit dated 4th October 2022 sworn by Oliver Chapa Chonga on grounds that the ruling of the taxing master had been challenged by the application dated 10th June 2022 and the application should await the determination of the reference.
12. Both applications were canvassed by written submissions which I have considered.
13. The advocate submitted that the reference was time barred and the client failed to explain the delay. It was submitted that the client filed the reference 54 days after the taxation ruling which was after the prescribed 14day limitation and therefore undeserving of the discretionary orders for enlargement of time.
14. It was the advocates submissions that the client did not lay down any factual or legal basis of challenging the taxing master's decision. Counsel submitted that there were no errors of principle or computation errors that would justify interfering with the taxing master's decision. It was further submitted that the court's jurisdiction stemmed from section 51(2) of the *Advocates Act* to enter judgment for the taxed costs.
15. The client's rival submissions were primarily grounded on the fact that the taxing master erred in finding that there was no agreement on legal fees while the client did produce a letter of instruction where legal fees were discussed.

### **Analysis**

16. I have considered both applications, the responses and the written submissions by both parties. In my view, there are three key issues for consideration.
17. The first issue is whether the client has met the conditions for enlargement of the time within which to file the reference. Paragraph 11 of the *Advocates (Remuneration) Order* provides 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.
18. From the aforementioned provision, the time limit for filing a reference is 14 days from the date of the ruling. It is not disputed that the client filed the reference outside the limitation period. The clients reason for the delay was that the court file was at the taxing master's chambers and it took time to access the same. Further the client contended that after its advocates received the ruling, they had a difficult time tracing him as he had travelled upcountry.



19. On enlargement of time, the Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu and 8 Others* [2017] eKLR held thus:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

20. I have considered the reasons given by the client for his application for enlargement of time. My view is that the client did not demonstrate evidently how time was lost or how he actively pursued the matter after the ruling was delivered. I however find that the delay was not inordinate as it was less than two months. My view is that the advocate would not be highly prejudiced if the court enlarges time for filing of the reference. This court is mindful of the applicant’s right to have an opportunity to canvass its claim and for that reason, the court admits the reference for determination.

21. The second issue is whether the client has laid out sufficient grounds for interfering with the taxing master’s decision. I refer to the case of *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others* [2006]eKLR where Ojwang, J (as he then was) expressed himself as follows;

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.”



22. The court's jurisdiction in interfering with the taxing officer's decision is limited to instances where there is an error of principle in the taxation of the bill of costs. The client's contention was that with regard to item 2 and 3 of the bill of costs, the taxing officer applied a higher scale and that the taxing officer erred in failing to hold that there was an agreement on fees.
23. Items 2 and 3 were the instruction fees and getting up fees respectively. The taxing officer in her ruling disregarded the letter dated 19<sup>th</sup> March 2018 which purported to give instructions on legal fees on the basis that there was no proof that the advocate received the letter.
24. I have perused the rulings of the Deputy Registrar and the record. I find that the registrar applied the correct schedule in taxing the bill of costs. The issue of the letter does not arise as the same did not amount to a retainer.
25. In *Omulele & Tollo Advocates v Mount Holdings Ltd* C.A.75 of 2015 the court held 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...
- As the Section [45 of Advocates Act] indicates, under such agreement, the parties fix or put a cap on the advocates instruction fees....both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer Agreement....It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent. It is erroneous as submitted by Counsel for the Respondent that retainer and retainer agreement mean one and the same thing.”
26. From the foregoing, for the court to enforce a retainer agreement there should have been an agreement signed by both parties. My view is that there should be a meeting of minds where parties agree to be bound by the same. The letter dated 19<sup>th</sup> March 2018 is one sided and there is no proof that the advocate had agreed to the terms thereon. In the premises, I find that the taxing master applied her mind correctly with respect to this issue. In the premises I find no error of principle to warrant this courts interference. I find no merit in the application.
27. With regard to the advocates application dated 28<sup>th</sup> April 2022, the third issue is whether judgment should be entered for the advocate against the client for Kshs 900,678 together with interest.
28. Section 51(2) of the *Advocates Act* which stipulates as follows: -
- “ The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
29. Section 51(2) of the *Advocates Act* gives this Court power to enter judgment in the Advocates' favour on the taxed costs, while Rule 7 of the *Advocates Remuneration Order* provides for the interest on the said costs at 14 % until payment in full. In this case the retainer is not disputed and since the court has dismissed the reference, there is no reason why judgment should not be entered as prayed.
30. In the upshot, I order as follows;



- a. The application dated 10<sup>th</sup> June 2022 is not merited and the same is dismissed with costs to the advocate.
- b. The notice of motion dated 28<sup>th</sup> April 2022 is granted and judgment is hereby entered in favour of Sheikh & Company Advocates for the sum of Kshs 900,678/- with interest at 14% per annum
- c. The advocate is equally awarded costs of the Notice of Motion dated 28<sup>th</sup> April 2022 from the date of this ruling until payment in full.

**SIGNED, DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17<sup>TH</sup> DAY OF MARCH 2023**

**F. MUGAMBI**

**JUDGE**

