



**Titus Makhanu & Associates Advocates v Southern Shield  
Holdings Limited (Miscellaneous Civil Application E147 of 2021)  
[2023] KEHC 2971 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E147 OF 2021  
DO CHEPKWONY, J  
MARCH 17, 2023**

**BETWEEN**

**TITUS MAKHANU & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**SOUTHERN SHIELD HOLDINGS LIMITED ..... RESPONDENT**

**RULING**

1. There are two rival applications before the court for determination. One is a Chamber Summons application dated November 30, 2021 by the Respondent/Client brought under Paragraph 11 of the [Advocates Remuneration Order](#) seeking the following orders: -
  - a. That this Honourable Court be pleased to set aside the decision and consequential orders of the Taxing Master, Hon S Githogori dated November 18, 2021 with Respect to instructions fees.
  - b. That the Honourable Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
  - c. That the costs of this reference be provided for.
2. The 2<sup>nd</sup> application is by the Advocate/Applicant and it is a Notice of Motion application dated 1<sup>st</sup> April, 2022 brought pursuant to Sections 1A,1B and 3A all of the [Civil Procedure Act](#), Section 51(2) of the [Advocates Act](#), Rule 7 of the [Advocates, Remuneration Order](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#). The same seeks for the following orders to issue:-



- a. That this Honourable Court be pleased to enter Judgment in favour of the Applicant against the Respondent hereto for the sum of Kshs 11,881,598.40 being the costs taxed by the Taxing Master.
  - b. That the taxed costs do attract at 14% pa from the date of filing the Bill of Costs being February 22, 2021 until payment in full.
  - c. That the costs of this application be provided for.
3. Directions were issued that the two applications be disposed of by way of written submissions simultaneously. However, I wish to first address the Client's Chamber Summons application for the obvious reason that if the Chamber Summons seeking for setting aside of the award on instruction fees succeeds, the Advocate's Application for adoption of the Certificate of Costs as the order of the court will fall.

**Client's chamber summons application dated November 30, 2021.**

4. The Chamber Summons application is premised on twelve (12) grounds as set out on its face and further supported by the affidavit of Abdulali Kurji, the Client's Director sworn on the November 30, 2021. The Client's case is that the Advocate herein represented it in HCCOMM No 249 of 2018, Mediation and Arbitration proceedings which were all geared at achieving the same cause being the enforcement of a Shareholders agreement in relation to 755,254 shares, meaning that the three causes could not run simultaneously. In that result, HCCOMM No 249 of 2018 was stayed and eventually withdrawn to allow pursuit of the Alternative Dispute Resolution Mechanisms.
5. For mediation, it is averred that the same was unsuccessful and the parties withdrew the same after which the issue of a Put Option Notice was referred for Arbitration. The Arbitration was also dismissed with costs and according to the client, there was an agreement that the advocate would waive fees with respect to HCCOMM No 249 of 2018 and the Mediation.
6. Nonetheless, the Advocate filed a bill of costs dated February 22, 2021 which was later taxed at Kshs.11,881,598.40 on the November 18, 2021 notwithstanding the Client had opposed the Bill of Costs vide affidavits dated February 22, 2021, April 7, 2021, May 4, 2021 and July 28, 2021 respectively. The client avers that the taxing master had entirely ignored and filed its case and arguments advanced in the affidavits especially the contentions that: parties had agreed on payable legal fees out of which the client paid the Advocate Kshs 1,1100,000/=; that the Client had instructed M/S Makhanu Odhiambo & Co Advocates in HCCOMM No 249 of 2018 and not the Applicant herein; that parties had agreed on waiving of fees after the payment of Kshs 1,000,000/= legal feels and lastly, failing to appreciate that the Directors of Alicate Holdings Limited who are also the client's directors had negotiated the terms conclusively.
7. The Client added that the taxing master assessed instructions fees at Kshs 6,670,050.00 arrived at by calculating the same separately for HCCOMM No 249 of 2018, the Mediation and Arbitration proceedings notwithstanding that the cause of action was the same. The impugned decision was also faulted for stating that the subject matter was ascertainable in the pleadings as Kshs 745,456,000/= thereby departing from her earlier decision made in HCC Misc No 145 of 2021, *Titus Makhanu v Alicate Holdings Ltd*, where on the same subject the taxing master held that the subject matter could not be ascertained.



### **Advocate's response**

8. In opposing the Client's application, the Advocate filed a Replying Affidavit sworn by the Advocate, Mr Titus Makhanu on June 20, 2022 and a Notice of Preliminary Objection dated February 25, 2022. In the Replying Affidavit, it is averred that whereas it is true that the Client did not instruct the M/S Titus Makhanu & Associates, the Advocate herein, per se to act for it in HCCOMM No 249 of 2018, the said firm had taken over the right and obligations of M/S Makhanu Odhiambo Advocates whom the Client herein had instructed through Deed of Assignment dated 3<sup>rd</sup> June, 2019. Consequently, the Advocate herein informed the client and continued to act for the client in HCCOMM No 249 of 2018 until sometimes on January 27, 2021. Thus, it would be unjustified for the Client to allege that it never instructed the advocate herein whereas the record shows otherwise.
9. Also, it is the Advocate's argument that the Client misdirected itself in submitting that the causes of action in the High Court case, Mediation and Arbitration Causes were not the same. That in the three forums, three different claims were filed on instruction of the Client, the first being the Complaint dated June 21, 2018 in the High Court case, a Statement of Claim dated March 6, 2019 in the Mediation Proceedings and Statement of Claim dated February 6, 2020 in the Arbitration proceedings. Further, it is averred that the High Court proceedings and the Mediation proceedings were commenced on account of a Put Option Notice dated February 28, 2018 for recovery of Kshs 676,940,982.00 while the Arbitration proceedings were commenced on account of a Put Option Notice dated May 31, 2019 for recovery of Kshs 745,456,000.00, which amount the Client believed as payable to it. The advocate maintains that there were three distinct instruction and fees should be awarded separately on each of them.
10. Whereas the Advocate admits that the decision herein conflicts the Taxing Master's earlier decision made in Misc.E145 of 2021, he submits that it is in the previous decision where the taxing master was wrong. Lastly, the advocate has averred that an agreement for waiver of fees has to be in writing pursuant to Section 45 of the *Advocates Act* and so is the agreement on payable legal fees. Thus, since no such agreements were presented, it would be misleading to urge the court to believe in such theory.
11. In the Notice of Preliminary Objection, the Advocate adduced five grounds which in summary indicate the Chamber Summons application was filed without a valid authority being issued and signed by the Client. That the firm on record for the client proceeded without a duly executed authority and so was the deponent who swore the affidavit in support of the Chamber Summons application.

### **Client's supplementary response**

12. The Client further filed an affidavit sworn by its Director, Abdulali Kurji, sworn on June 27, 2022 and Grounds of Opposition dated March 29, 2022 in response to the Notice of Preliminary Objection. In the further affidavit, the Client reiterates that it never instructed the Applicant in the High Court matter which was withdrawn on May 15, 2019. That the Notice of Change of advocates was filed sometimes in January 14, 2021 and as from that time, the Advocate never did any work. He however disputes whether the subject was discernable from the pleadings as alleged.
13. In the Grounds of Opposition which are filed in rebuttal of the Notice of Preliminary Objection, the client argued that the reference herein is a continuation of the taxation in which the Advocate has never raised the issue of authority to swear or act. The court is therefore asked to discard the Preliminary Objection as an afterthought.



## **Advocates Notice Of Motion Application dated 1<sup>st</sup> April, 2022**

14. The advocate's application is premised on grounds that the Bill of Costs was taxed at Kshs 11,881,598.40 and a Certificate of Costs to that effect issued on February 22, 2022. Thus, given that the bill of costs has never been set aside, varied or otherwise altered by the court, in the circumstances the same out to be adopted as an order of this court together with interests sought for enforcement. In the affidavit sworn in support of the application, the advocate annexed the ruling by the taxing master dated November 18, 2021 and the Certificate of Taxation dated February 22, 2022 and further added that where a Certificate of Cost has not been set aside, the same is to be deemed as final pursuant to Section 51 of the *Advocates Act*. Further, that the Rule 7 of the *Advocates Remuneration Order* entitles advocates to charge interest at the rate of 14%.

### **Client's response**

15. In response to the Advocate's application, the client filed a Replying Affidavit sworn by Abdulali Kurji on June 13, 2022. He averred that since the Client has a pending application objecting to the taxation, the advocate's application is defective, bad in law and filed prematurely.
16. Parties were thereafter directed file written submission in support of their respective cases. I have considered the record which reflects that the parties complied with the Advocate filing two sets of submissions dated July 19, 2022 and July 23, 2022 whereas the Client filed three sets of submissions dated July 18, 2022, July 22, 2022 and August 16, 2022. I have read and considered those submissions but will not reproduce the same here but analyze them in the determination.

### **Analysis and determination**

17. Having considered the record, including pleadings filed by parties, the substantive submissions made by the parties as well as the authorities relied on, I am of the view that the following issues arise for determination: -
- a. Whether the Advocate's Notice of Preliminary Objection is merited;
  - b. Whether the Client's application has met the threshold to warrant setting aside of the Taxing Master's decision;
  - c. Whether the Advocate's Certificate of Costs can be adopted.

### **Merit on the notice of preliminary objection**

18. Time and again, this court has reiterated that a Preliminary Objection should always be on a point of law which is apparent on the face of the pleadings. This implies that the facts as pleaded are correct save for the legal barrier to the sustenance of the suit. It should not be gleaned from the pleadings. It further does not require extensive analysis of facts and circumstances and if argued at a preliminary stage, it may dispose of the suit. While I am agreeable that a Preliminary Objection can be raised at any stage in litigation, it is preferable that it to be raised at the earliest possible opportunity lest parties be inferred to have acquiesced to the Jurisdiction and competency of the subject suit.
19. In the present case, although the advocate has averred that the Applicant's Chamber Summons was filed by firm not authorized to and the affidavit in support of the application sworn by a Director without the authority of the client, I am of persuasive view that the Preliminary Objection was an after thought since parties have all along participated in the taxation process without the Advocate challenging the affidavits sworn thereto. In any event, as a rule, the Directors are the persons who have



the authority to act for the Company unless the contrary is shown. In the affidavit sworn in support of the Client's Chamber Summons application, Mr. Abdulali Kurji states that he is a Director of the Client and has been authorized to swear the affidavit. In the absence of any evidence that the deponent was never authorized by the Client/Respondent Company to the Supporting Affidavit, I see no point of law for dismissing the Chamber Summons application. Similarly, I associate myself with the Court's decision in the case of *Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & Another* [2021] eKLR, wherein the court observed thus:-

“... “This court is in agreement with above pronouncements. The mere fact that the Plaintiff did not file its resolutions authorizing the swearing of the Verifying Affidavit by one of its Directors and the firm of S J Nyang and Company advocates to file the suit on its behalf cannot be a ground for invalidating the suit.”.”

20. Consequently, the Chamber Summons application herein cannot be defeated on account of failure by the Applicant to file letter(s) of Authorization by the Client. In the upshot, I find Notice of Preliminary Objection not based on a pure point of law which can dispose of the Chamber Summons application at preliminary stage and the same is without merit, hence declined.

#### **Whether the client's application has met the threshold to warrant setting aside of the taxing master's decision**

21. The client seeks the setting aside of the taxing master's decision dated November 18, 2021 on instruction fees for a number of reasons. The first being that it has never instructed the Advocate to come on record on its behalf in respect to HCCOMM No 249 of 2018. It is a common ground between the parties that the Client instructed the firm of M/S Makhanu Odhiambo & Company Advocates in the said matter but not the Applicant herein. That HCCOMM No 249 of 2018 was withdrawn on May 15, 2019 following a court order dated December 13, 2018 directing the stay of proceedings pending reference of the matter to Alternative Dispute Resolution mechanisms. That sometimes in January 14, 2021, the Advocate herein filed a Notice of Change of advocates but the client maintains that without clear and express instructions, the Advocate cannot infer instructions even by virtue of the Deed of Assignment. On the other hand, the Advocate relied on the Deed of Assignment dated June 3, 2019 which I have read through. It states that the Advocate herein (M/S Titus Makhanu & Associates, Advocates) shall take over and continue with all the rights of M/S Makhanu Odhiambo & Company Advocates including demanding payments and receipt of unpaid and or outstanding legal fees.
22. The Client has challenged, the Deed of Assignment stating that the same was introduced at submission stage hence the likelihood that it did not exist as of the date of filing the Bill of Costs and was only made up to cover the Advocate's case. However, in my view without any evidence by the client that the Deed of Assignment was an alteration by the advocate herein, I am inclined to conclude that the Advocate was justified to file the Bill of Costs on behalf of M/S Makhanu Odhiambo & Company Advocates notwithstanding that the Advocate herein had undertaken minimal works in the matter.
23. Secondly, the Client has sought the setting aside of the Taxing Master's decision on ground that the advocate was not entitled to separate instruction fees with respect to HCCOMM No 249 of 2018, the subsequent mediation and arbitration. It is the Client's case that the cause of action was the same, being the enforcement of shareholding agreement although different Put Option Notice prices were quoted for each forum. He maintains that different claims were filed on instruction of the Client, first being the Plaintiff dated June 21, 2018 in the High Court case, Statement of Claim dated March 6, 2019 in the Mediation Proceedings and Statement of Claim dated February 6, 2020 in the Arbitration proceedings and the Advocate was entitled to separate instruction fees for claim. It is however not disputed that the



Mediation proceedings arose out of HCCOMM No 249 of 2018. I am of the view that the instructions to pursue Arbitration proceedings after the Mediation proceedings turned futile were separate and not flowing from the High Court Cause. Therefore, the Advocate is entitled to instructions fees on the amount of work done over and during the arbitration proceedings besides the High Court Cause.

24. Thirdly, the Client has sought the setting aside of the Taxing Master's decision on the ground that the Taxing Master erred in assessing instruction fees and giving conflicting decisions on the same subject and wrongly assessed the subject matter. Parties have commonly submitted that for purposes of taxation of a Bill of Costs, the value of the subject matter of a suit ought to be determined from the pleadings, Judgement or settlement (if such be the case) but if the same is not so ascertainable, then the Taxing Officer is entitled to use his/her discretion to assess such instruction fees as he/she considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.
25. In this case, the Taxing Master adopted the subject matter at Kshs 676,940,982.00 on the basis that the same was easily determinable from the pleadings. The Client has averred that the figure claimed in the Plaintiff was not the actual value of the shares which it intended to enforce. The Advocate on the other hand argues that the said figure was arrived at by taking into account Clause 12.5 of the agreement. However, upon further scrutiny of the pleading filed by the parties, it became dubious as to whether the shares which the Plaintiff sought to enforce were actually valued at Kshs 676,940,982.00. It appears from the record that for the correct value of shares to be arrived at, the same had to be determined by the Client's Insurance Auditors and the amount claimed in the Plaintiff was not the actual price. The same informed the arbitral tribunal when it dismissed the Client's claim while arriving into conclusion that the claimant would not be entitled to such amounts. As a result thereof, am reluctant to endorse the value of the subject matter adopted by the Taxing Master for the reason that the value of the shareholding was not settled. By the Client, I find that the Taxing Master erred in adopting the sum of Kshs 676,940,982.00 for purposes of assessing instruction fees. The Taxing Master ought to have proceeded on basis that the value of subject matter was not ascertainable from the proceedings.
26. Lastly, the Clients assertions that there was a retainer agreement for payment of Kshs 1,100,000/= to the Advocate as its legal costs were never substantiated nor did they meet the threshold set out under Section 45 of the *Advocates Act* which requires a retainer agreement to be in writing and signed by the client or his agent.
27. Having found that the Taxing Master proceeded on the wrong principle in calculating instruction fees, it follows that the Client's Chamber Summons application dated November 30, 2021 is merited and there is therefore no basis of venturing into the application seeking for adoption of the certificate of costs.
28. Consequently the following orders do hereby issue:-
  - a. That the Bill of Costs be and is hereby remitted back for re-taxation on instruction fees before another Taxing Master other than Hon. Githogori.
  - b. Each party to bear its own costs

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**D. O. CHEPKWONY**



**JUDGE**

**In the presence of:**

Mr. Maklemo counsel for Applicant

No appearance for and by the Defendant

**Court Assistant - Sakina**

