



Thandi v Githinji t/a Onesmus Githinji and Company Advocates (Commercial Case E183 of 2022) [2023] KEHC 3251 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E183 OF 2022**

DAS MAJANJA, J

APRIL 20, 2023

BETWEEN

OLIVER NJIHIA THANDI APPLICANT

AND

**ONESMUS G GITHINJI T/A ONESMUS GITHINJI AND COMPANY
ADVOCATES RESPONDENT**

RULING

1. In the Originating Summons dated March 29, 2022 made, *inter alia*, under Order 52 Rule 4(1)(a) and (b) and 2 of the [Civil Procedure Rules](#), the Applicant is seeking orders that:
 - (1) The respondent to pay the applicant a sum of Kshs. 10,578,956.62 being sums owed as per the ruling in Disciplinary Tribunal Case No. 151 of 2014, sums taxed in Miscellaneous Application No. E046 of 2018 and judgment in Misc. Civil Case No. 444 of 2018.
 - (2) Costs be awarded to the applicant.
2. The application is supported by the Applicant's affidavit sworn on March 29, 2022. It is opposed by the Respondent through his replying affidavit sworn on October 7, 2022 and the Notice of Preliminary Objection of the same date. Both parties filed written submissions in support of their respective positions.
3. The Applicant's case is principally based on the proceedings set out in its prayers. The Applicant states that it instructed the Respondent to take over and act for him in a suit; HCCC No. 2 of 1998 which involved his properties; LR Nos. 9265/3, 4 and 5 situate in Molo ("suit properties"). When the suit was completed he sold the properties to a company for Kshs. 59,471,000.00. He complains that the



Respondent kept him the dark about the transaction whereupon he lodged a complaint against him at the Advocates Disciplinary Tribunal; Tribunal Case No. 151 of 2014 seeking an account of all the monies received. By the judgment delivered on 18th June 2018, Tribunal ordered the Respondent to pay the Applicant Kshs. 1,340,000.00 within 60 days. The Tribunal noted that it did not have jurisdiction to set aside an alleged agreement for fees as only the High Court had jurisdiction under section 45(2) of the *Advocates Act* (Chapter 16 of the Laws of Kenya).

4. The Applicant thereafter filed HC Misc. Application No. 444 of 2018, Oliver Njihia Thandi v Onesmus G. Githinji t/a Onesmus Githinji and Company Advocates in which he sought an order that the time for filing the application under section 45(2) of the *Advocates Act* be extended and the application be deemed as properly filed and the Remuneration Agreement dated June 6, 2014 (“the Remuneration Agreement”) be set aside and that the court do order taxation of the bills of costs to certify the amount payable to the Respondent in respect of the sale and purchase of the suit properties and any other work done in the impugned agreement. After considering the matter, the court rendered its ruling dated 7th March 2019 dismissing the application on the ground that the Remuneration Agreement was not in fact a remuneration agreement as contemplated in the *Advocates Act* hence there was nothing to set aside. It also held that the issue of taxation was within the parties’ discretion. The court did not make any order as to costs.
5. The Applicant thereafter filed his bill of costs for taxation; HC Misc. Application No. E046 of 2018, Oliver Njihia Thandi v Onesmus G. Githinji t/a Onesmus Githinji and Company Advocates against the Respondent for acting for him in respect of the sale of the suit properties. The court considered the Bill of Costs and certified the amount due to the Applicant on a party and party basis as Kshs. 755,887.50 in accordance with the Certificate of Taxation dated September 19, 2019.
6. The Applicant therefore seeks judgment for Kshs 10,578,956.62 made up of the amount certified in HC Misc. No. 444 of 2018 being Kshs. 755,887.50 being party and party costs increased by ½ in accordance with Schedule 6B(a) of the *Advocates Remuneration Order* and 16% VAT making a total of Kshs. 1,315,243.38 deducted from Kshs. 11,894,200.00 which the Respondent unilaterally withheld from him on account of the Remuneration Agreement.
7. In response to the application and in his Notice of preliminary objection, the respondent attacks the application on the ground that the matters raised do not fall within the ambit of Order 37(1) of the *Civil Procedure Rules*. It contends that there is no order or decree for the sum of Kshs. 10,578,956.62. Further that the application is bad in law in that it seeks to raise issues that have been determined in three distinct proceedings before competent courts. The Respondent points out that the application is statute barred under section 45(2A) of the *Advocates Act* as it is brought to challenge a remuneration agreement after a period of 8 years.
8. The Respondent does not dispute the substance of the proceedings against him. He states the Tribunal Case No. 151 of 2014 had nothing to do with the High Court Case at Nakuru or remittance of the purchase price but it was about failure to account for which he was found liable. As regards HC Misc. No. 444 of 2018, he states that court dismissed the case against him and that Misc. Application No. E046 of 2018 was in respect of the sale of the suit properties which were not part of the Remuneration Agreement. He therefore urges that this suit is an attempt to re-open matters that have been determined and for which there is a remuneration agreement between him and the Applicant.
9. I do not propose to belabor the procedural issues raised for in my view what the Applicant seeks to do is to enforce the results of the determinations made in his favour in three separate proceedings. I will therefore consider whether the Applicant may do so and thereafter consider whether the Applicant is entitled to judgment for Kshs. 10,578,956.62 by looking at each case.



10. In the Tribunal Case No. 151 of 2014, the Applicant filed a complaint against the Respondent for, “withholding and/or failing to account for funds belonging to the Complainant and for acting without the client’s instructions in the purchase of a property in Kinoo.” In the final analysis, the Tribunal concluded that the Respondent should pay the Applicant Kshs. 1,340,000.00 within 60 days. In his written submissions, the Applicant concedes that the Respondent has paid this sum and he therefore abandoned the claim based on this decision.
11. In HC Misc. No. 444 of 2018, the court merely dismissed the application seeking to set aside the Remuneration Agreement with no order as to costs. The court did not order the Respondent to pay any amount but it observed that the Remuneration Agreement was not in fact remuneration agreement within the confines of the Advocates Act and left the issue to the discretion of the parties on how to proceed. I therefore hold that no liability arises from that application in so far as the court did not make any enforceable orders thereon.
12. The proceedings in HC Misc. No. E046 of 2018 resulted in a Certificate of Taxation against the Respondent. Although the Applicant states that the Bill of Costs was specifically for the sale of the suit properties, the actual bill was not produced before the court. Moreover, the Certificate of Taxation refers to party and party bill of costs as opposed to the Advocate Client Bill of Costs. What is clear though is that in any event, the Applicant ought to be given credit for this amount from the total amount withheld by the Respondent.
13. The final issue is whether the Applicant is entitled to Kshs. 10,578,956.00. As I understand, the gravamen of the Applicant’s case is that Respondent wrongfully withheld the sum of Kshs. 11,984,200.00 on the basis of the Remuneration Agreement. The Respondent contends that the issue of the Remuneration Agreement was settled in HC Misc. No. 444 of 2018 when the court observed that:
 - (16) In the premises, I am of the considered view that the purported agreement as it stands is a one sided document and cannot therefore be termed as giving rise to an agreement between the parties. The said document is not legally binding and cannot be enforced by either of the parties. Consequently, this court cannot set aside a contract that was not in existence in the first place.
14. Thus, although the court dismissed the application to set aside the Remuneration Agreement, it did so on the basis that the agreement was not in fact a remuneration agreement within the law. That is why the court proceeded to hold that the issue of taxation was within the discretion of the parties. Following the ruling of the court, the Respondent is now estopped from relying on the agreement to charge his fees and resist an application to account for the monies he has withheld on account of an invalid agreement. Further, since the issue of validity of the agreement has been determined, the objection raised on account of section 45(2A) of the Advocates Act is not valid as the court has already settled the issue of the validity of the agreement by concluding that it is not valid.
15. The Respondent contends that the application is incompetent on the ground that it does not fall within the purview of Order 37 of the Civil Procedure Rules that deals generally with matters that ought to be resolved through an Originating Summons. I disagree, Order 52 of the Civil Procedure Rules provides the framework within which issues between Advocates and Clients are resolved hence Order 37 is not applicable to such matters. More particularly rule 4 thereof provides as follows:

[Orders 52, rule 4.] Power to order advocate to deliver accounts and documents.



4 (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 deems fit.

16. In substance the Applicant seeks an account of the sum of Kshs. 10,578,956.62. The Respondent does not deny that he withheld the said sums but avers that this is on the basis of the Remuneration Agreement covering services rendered not only for the purchase of the suit properties but also other matters including Nakuru Misc. No. 70 of 2009, Nakuru HCCC No. 2 of 1998, Succession Cause No. 77 of 2007, Purchase of Kinoo Market Plot No. 2 and extra legal services provided in connection thereto. Since the Respondent asserts his claim for fees, then the only option for the court under Order 54 rule 4(3) is to direct the respondent to file his bill of costs in the matter he was instructed.
17. Even though the court held that the Remuneration Agreement was not a remuneration agreement as contemplated by the *Advocates Act*, it does not mean the Respondent is not entitled to fees for work done. It only means that the fees due, in the absence of an agreement, must now be ascertained by way of taxation. Once the amount is certified, the Respondent shall give the Applicant credit for the certified fees against the amount withheld and pay the Applicant the balance. In the meantime, I decline to issue judgment for the amount claimed in the Summons.
18. For the reasons I have stated, I allow the Originating Summons dated March 29, 2022 on the following terms:
- a. The Respondent is directed to file his bills of costs against Applicant for the services rendered to the Applicant including Nakuru Misc. No. 70 of 2009, Nakuru HCCC No. 2 of 1998, Succession Cause No. 77 of 2007, Purchase of Kinoo Market Plot No. 2 and extra legal services provided in connection thereto within the next 30 days.
 - b. Upon taxation of the bill of costs, the amount so certified including the amount certified in HC Misc. E046 of 2018 shall be deducted from the sum of the Kshs. 11,894,200.00 held under the Agreement dated 6th June 2014 and the balance paid over to the Applicant.
 - c. The parties shall be at liberty to apply for further orders.
 - d. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

D. S. MAJANJA



JUDGE

Court of Assistant: Mr M. Onyango

Ms Maina instructed by Muturi S. K. and Company Advocates for the Applicant.

Ms Kalaine instructed by Onesmus Githinji and Company Advocates for the Defendant.

