



**PI Samba & Company Advocates v Bundotich (Miscellaneous  
Application E413, E414 & 427 of 2021 (Consolidated))  
[2023] KEHC 19891 (KLR) (Commercial and Tax) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E413, E414 & 427 OF 2021 (CONSOLIDATED)**

**PN GICHOHI, J**

**JULY 6, 2023**

**BETWEEN**

**PI SAMBA & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**ZEDEKIAH BUZEKI KIPROP BUNDOTICH ..... CLIENT**

**RULING**

1. The background of this ruling is that the Advocate/ applicant filed three Bills of Costs before the Taxing Master and dated May 30, 2021 as against the client respondent and in three Miscellaneous Applications. Each was duly taxed vide Ruling delivered on December 23, 2021 and a Certificate of Taxation issued on each of them on February 15, 2022 as follows: Certificate of Taxation in Misc. Application No. E 413 of 2021 for Kshs. 487,200/=, Certificate of Taxation in Misc. Application No. E 414 of 2021 at Kshs. 348,000/=, Certificate of Taxation in Misc. Application No. E 427 of 2021 at Kshs. 152,559/=.
2. The advocate / applicant moved this Court by a Notice of Motion dated April 7, 2022 under section 51(2) of the *Advocates Act*, Paragraph 7 of the Advocates (Remuneration) Order, order 51 rule 1 of the *Civil Procedure Rules* 2010 and sec. 1 A, 1B, and 3A of the *Civil Procedure Act* seeking orders that:
  1. Judgment be entered for P.I. Samba & Company Advocates in terms of the Certificate of Taxation dated February 15, 2022.
  2. Interest at the rate of 14% be deemed to have accrued from the date of service of the Bills of Costs until payment in full.
  3. A Decree be extracted and drawn in terms of the taxed costs and interest.



4. Costs be awarded to the Advocate/applicant.
3. On the other hand, the client/ respondent filed application dated March 14, 2022 through the firm of Kisilu, Wandati & Co. Advocates seeking orders for:
  - i. Stay of execution of the Ruling dated December 23, 2021 and the Certificate of Taxation dated 15<sup>th</sup> February 202.
  - ii. Leave to file reference out of time to challenge the Taxing Master's decision vide ruling dated December 23, 2021.
  - iii. Any other or further order that the court may deem fit and just to grant.
4. The grounds on the face of the Advocate/Applicant's Application dated April 7, 2022 are replicated in the affidavits sworn by Pennynah Samba on April 7, 2022. She depones that that the Bills of Costs dated 30<sup>th</sup> May 2021 were served on June 7, 2021 and the court delivered its ruling on taxation on December 23, 2021. Thereafter, a Certificate of Taxation dated February 15, 2022 issued. However, despite demands made to the Respondent to make payment, he has not settled or paid any amount of the taxed costs at all. The applicant therefore states that it is only fair and proper that the Applicant be allowed to initiate execution proceedings in terms of the orders sought herein.
5. In response, the Client/ Respondent filed a replying affidavit sworn by Zedekiah Kiprop Bundotich on November 17, 2022. He states that sometimes in 2014, the parties entered into an Advocate -client relationship vide an oral retainer that the Advocate would handle for the Client both contentious and non- contentious matters on behalf of the client and of all of its associate or related companies and companies' Directors. That the mutual agreement was that the Advocate would raise a fee of Kshs. 150,000/= each month together with separate invoice for transport disbursements for payment by the Client.
6. While annexing documents including some of the monthly invoices, the Taxing Master's Ruling, and a spread sheet, he states that since the commencement of that retainer, the Advocate diligently sent invoices each month clearly indicating the retainer of the respective months and the Client duly settled the same. On that basis, he depones that the Advocate was not entitled to tax the Bills of Costs but nevertheless, the Bills taxed vide ruling delivered on December 23, 2021 and a Certificate of Taxation dated February 15, 2022 issued. He states that the Advocate failed to disclose that there was an agreement.
7. He further states that after he was served with the Bills of Costs, he had instructed his current advocate but due strenuous financial constraints, there were delays in proper communication between him and his advocates. Nevertheless, he states that this court has discretion to stay hearing and determination of the Advocate's application seeking judgment and also to stay execution of any decree for reasons that he has filed an application seeking to file a reference out of time challenging the ruling of the Taxing Master. He states that the delay in filing that application is not inordinate and that unless an order for stay is granted, he will have no chance of challenging the judgment and decree arising from the Advocates Application dated April 7, 2022.
8. The Advocate /applicant filed a further affidavit sworn by Pennynah Samba reiterating the affidavit she swore November 7, 2022 in support of the Advocate's application dated 7<sup>th</sup> April 2022 and states that the replying affidavit by Zedekiah Buzeki Kiprop Bundotich sworn on 17<sup>th</sup> November has no bearing to the application for enforcement of the subject Certificate of Taxation. That the application before the court is based on grounds touching the jurisdiction of the Taxing Master to tax the Bill of Costs dated May 30, 2021 on the allegation that there existed an agreement of fees vide an oral retainer agreement



between the Firm and the Client but despite being served, the allegations were not ventilated before the Taxing Master.

9. She however states that there has never been any agreement between the parties in regard to fees payable between the Advocate's firm and the Client on this matter and that is the reason they filed the Bills of Costs. While denying the alleged non-disclosure, she depones that the invoices were raised by the Firm at the disposal of the Client to offer room for payment terms of fees which would arise from individual briefs from time to time. While annexing some invoices and communication between the Advocate and the Client, she depones that in addition to the monthly invoices raised by the Firm, the Firm also raised invoices for the individual matters from time to time for settlement by the Client and depones that this meant that payments due were not limited to the monthly retainer as alleged at all.
10. Arguing that the documents in the taxation are on record and which were duly served, the Advocate depones that the Respondent had a whole seven (7) months to make the claims he is trying to raise now as grounds of the anticipated reference. She further depones that the client was all along aware of the taxation that had been set for 8<sup>th</sup> July 2021 and was never at any time denied an opportunity to ventilate his claim. She therefore accuses the client for deliberately misleading the court and urges the court to allow the Advocate's application as prayed and dismiss the Client's Application dated March 14, 2022 terming it unmerited and an abuse of court process.
11. These arguments are duplicated in the client/ applicant's application dated March 14, 2022 which need not be reproduced here.

#### **Advocate's Submissions**

12. The advocate/applicant reiterates the contents of the Affidavits and while relying on the provisions of rule 7 of the Advocates (Remuneration) Order and Section 51 (2) of the Advocates Act and submits that the Client was served but failed to file any objections or submissions in opposition to the Bills of Costs dated May 30, 2021. That there was no representation made on behalf of the Client before the Taxing Master for a period of 7 months. That the issues raised in the Client's replying affidavit are therefore non- suited as they ought to have been raised before the taxing master.
13. He further submits that retainer in this matter is not disputed. That the existence of the instructions issued to the Advocate to act in the matter the subject hereof is uncontested by both the Advocate and the Client. That the objection to the taxation is the retainer monthly payment Ksh. 150,000/= to the Advocate and which the Advocate submits does not constitute the professional fees to be paid in the matter. That there has never been non-disclosure of any or material facts on the part of the Advocate as alleged in the rival pleadings and that there has never been an agreement on fees payable in this matter.
14. In this regard, the Advocate submits that for purposes of Section 45 of the Advocates Act, there can be no agreement for fees in respect to a non-contentious matter and none can be imputed in the circumstances herein. Arguing that what was between the Advocate and the client was a retainer and not an agreement on fees, the Advocate relies on the case of Omutele & Tollo Advocates v Mount Holdings Limited [2020] eKLR where the Court of Appeal held

“There was therefore no retainer agreement as envisaged by section 45 of the Advocates Act but simply a retainer. It is also common that the appellant had been duly instructed to act for the respondent and in so doing, used to be paid monthly fees as remuneration, as evidenced by invoices adduced in evidence detailing those monthly payments. The trial court appreciated as much and went on to hold that and rightly so in our view that despite the change of firm name, those instructions continued to subsist up and until when the



respondent changed advocates. The monthly payments were in pursuance of the retainer agreement. The judge was therefore erred in holding that the monthly payments evidenced by invoices and payments thereof created a retainer agreement.”

15. The Advocate therefore submits the Advocate is entitled to the fees sought. She urges the court to allow the Advocates’s application dated April 7, 2022 with costs and interest.
16. The Advocate therefore urges the court to dismiss the Client’s application dated March 14, 2022 with costs to the Advocate for reasons that it lacks merit arguing that it was only filed to avoid execution. On enlargement of time, the Advocate submits that there is no reason to give the Client more time to continue to delay justice in this matter and that the Client has not demonstrated that he will suffer substantial loss or loss of any kind.
17. The Advocate however submits that if the court is minded of any stay sought by the Client, then the same should be on terms and provision of suitable security for due performance. On this issue, the Advocate relies on the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR where the court granted the applicant leave to file out of time a reference from certificate of taxation of costs and further granted conditional stay of execution of certificate of costs. The Advocate also submits that the Client should be condemned to pay the costs under section 27 of the *Advocates Act*.

#### **Client’s Submissions**

18. Counsel for the Client reiterates the contents of the affidavits and while relying on the case of *D.M. Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR and *Owino Okeyo & Company Advocate v Feule Kenya Limited* [2005] eKLR, he submits that there existed an oral monthly retainer between the Advocate and the Client for Kshs. 150,000/= which the Client paid in full and for that reason, the Advocate is barred from taxing the Bills of Costs. Counsel relies on section 45 of the *Advocates Act* in support of the Client’s argument that the issue of a retainer agreement would only arise in relation to a contentious matter.
19. Counsel argues that the word “retainer” encompasses the instructions given to an advocate as well as the fees payable thereunder and further, that a retainer need not be in writing. That it can also be inferred from the conduct of parties. That had the Advocate/Applicant disclosed the existence of a retainer between the Advocate and the Client, then the Taxing Master would have been well advised before taxing the Bills of Costs.
20. He submits that even if the Advocate/Applicant’s view is that what she was paid was insufficient or contrary to the provisions for the Advocates Remuneration Order, she cannot revert to tax her bill after already accepting payment offered by the Client.
21. He therefore submits that the Advocate should not be allowed to tax the Bills as any legal fees had been paid in full. Lastly, he submits that the Client should be allowed to file reference in regard to the Bills dated 30<sup>th</sup> May 2-0221 out of time.

#### **Determination**

22. I have considered the material before Court in regard to the two rival applications herein and the submissions thereto. The broad issues for determination are:
  1. Whether the Advocate has made a case for this Court to allow her application dated 7<sup>th</sup> April 2022.



2. Whether the Client should nevertheless be allowed to file the reference out of time as prayed in the Application dated March 14, 2022.
23. It is not in dispute that the Advocate did file the three Bills of Costs dated May 30, 2021 as enumerated above. There is also no dispute that the same were served on the Client on June 7, 2021. The Client did not attend court for the taxation and did not file any response thereto to challenge the same.
24. The reason given for failure to file response is that the Client was financially constrained to hire his advocate is not sound. It did not require an advocate for the Client to appear before the taxing Master on scheduled date for taxation. Had he appeared then, he would have addressed the Taxing Master the best way he knew how or sought time to get an advocate. Keeping off for over seven months when the Bills were pending in court was indolence on his part.
25. The challenge now being raised by the Client in the replying affidavit ought to have been raised before the Taxing Master at the time of taxing the said Bills of Costs. Failure to challenge the bills before her led to the ruling dated 23<sup>rd</sup> December 2021 and issuance of the Certificates of Costs dated February 15, 2022. Section 51 (2) of the *Advocates Act* provides that:

“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 covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.” [emphasis added]
26. To that extent, the taxing Master was justified to tax the Bills in the absence of the Client as she did and to issue the Certificates herein. Consequently, the Advocate was justified in filing for the entry of judgment in a bid to execute.
27. Despite the Client’s indolence that made him fail to challenge the Bills during taxation, the issue that comes up is whether the Advocate should have filed the Bills in the first place. That issue is around an oral retainer agreement entered into by the Advocate and the Client many years ago, a fact that is not in dispute.
28. A perusal of these three files shows that:
  1. In Misc. App. E 413 of 2021, the Bill arose from receiving instructions to incorporate seven (7) limited liability companies being Straight World Limited, Cowtech Global Limited, Kiland Properties Limited, Evaki Limited, Denayub Company Limited, Wilzed Limited and Shompere Company Limited.
  2. In Misc. App. No. E 414 of 2021, the Bill arose from receiving instructions to incorporate five (5) limited liability companies being BZK Farm Limited, Buzeki Systems Limited, World Pole Limited, Evaki Limited, Buzeki Mining Limited and Buzeki Security Limited.
  3. In Misc. App. No. E 427 of 2021, the Bill arose from receiving instructions draw Share Purchase Agreement between Peter Njoroge & Elizabeth Mumbi Wachira and Zedekiah Buzeki Kiprop Bundotich & Dianah Jepchumba Bundotich for Kshs. 1.5 million.
29. The Taxing Master’s ruling dated December 23, 2022 on each of the three Bills of Costs does show any mention in regard a retainer that existed between the parties. However, there is no dispute between these two parties that there was a retainer agreement.



30. The issue is whether the Client had paid same was fully by virtue of the retainer for payment of Kshs. 150,000/= by the Client to the Advocate as claimed by the Client. The Advocate says that there was no agreement in regard to the matters the subject of the bills that culminated in the Certificate of Costs. That there can be no agreement for fees in respect to a non-contentious matter and none can be imputed in the circumstances herein.

31. The argument by the Client is on the other hand hinged around section 45 of the Advocates Act which provides that:

“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 or after or in the course of any contentious business in a civil court make an agreement fixing the amount of the advocate’s instruction fees 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.”

32. In the circumstances of this case where the Bills were in respect of non- contentious matters, this section does not aid the Client and neither does the finding of the Court of Appeal in the case of D. Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR as the circumstances were different from the circumstances in this case. In that case, there was a letter which was purported to be an agreement between the appellant and the respondent. The letter contained terms and conditions which the Appellant had accepted and signed for but which he later termed as an illegality and a violation of section 45 and 46 of the Advocates Act in that it provided for payment of an amount less than what is provided for under the AdvocatesAct. The terms of the letter were that:

“(i) Advocate client fees for non-contentious work – 30% of scale fees subject to a limit of Kshs.200.000=00. The balance may be recovered directly from the Bank’s customer.

(ii) Advocate client fees for contentious work – 30% of scale fees subject to a limit of Kshs.200.000=00. The balance may be recovered directly from the Bank’s customer.”

“Advocates may at their discretion opt to request for a further fee of 30% directly from the Bank in contentious matters whenever full recovery is made.”

33. While dismissing the appeal, the Court of Appeal held;

“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."

34. In the matter before this court, the retainer was oral unlike in *D. Njogu & Company Advocates* (supra) and there is no way of interpreting the intent, purport and extent of that retainer. Whereas I am mindful that what is before this court is not a reference, the annexures by both parties do not show that the invoices were payment in regard to the instructions on non-contentious matters stated in the Bills the subject of the Certificates herein. The invoices cannot be taken to be pursuant to a retainer agreement.

35. The Court of Appeal in the case of *Omutele & Tollo Advocates v Mount Holdings Limited* [2020] eKLR determined the distinction between a retainer and a retainer agreement in reference to section 45 of the *Advocates Act* and held:

"An agreement entered into pursuant to the above section is what can be termed as a 'retainer agreement.' As the section indicates, under such agreement, the parties 'fix' or put a cap on the advocate's instruction fee, meaning that 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. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent. It is therefore erroneous as submitted by counsel for the respondent that retainer and retainer agreement mean one and the same thing. The learned Judge also seem to have fallen in the same error in equating a retainer with a retainer agreement when she held that there was a retainer agreement in this case in line with Section 45 of the Act."

36. The court then went on to hold in regard to the invoice relied on therein:

"There was therefore no retainer agreement as envisaged by section 45 of the *Advocates Act* but simply a retainer. It is also common that the appellant had been duly instructed to act for the respondent and in so doing, used to be paid monthly fees as remuneration, as evidenced by invoices adduced in evidence detailing those monthly payments. The trial court appreciated as much and went on to hold that and rightly so in our view that despite the change of firm name, those instructions continued to subsist up and until when the respondent changed advocates. The monthly payments were in pursuance of the retainer agreement. The judge was therefore erred in holding that the monthly payments evidenced by invoices and payments thereof created a retainer agreement."

37. I am therefore persuaded by the above and further persuaded that even though this court has discretion to enlarge time for filing a reference as was done in the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR the circumstances herein do not favor the client herein. The client has failed to demonstrate that he is entitled to the orders sought in the Application dated March 14, 2022.



38. Conversely, there is no reason as to why the Advocate should not get the orders sought in the Application dated March 7, 2022. In regard to interest on costs, Paragraph 7 of the *Advocates (Remuneration) Order* provides that:

“An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

39. In the circumstances the court make the following orders:

1. The client’s application dated March 14, 2022 be and is hereby dismissed with costs.
2. The Advocate’s application dated 7<sup>th</sup> April 2022 is allowed in that judgment be and is hereby entered for P.I. Samba & Company Advocates as against the Client (Respondent) in terms of the three Certificates of Taxation herein dated February 15, 2022 being:
  - i. Certificate of Taxation in Misc. Application No. E 413 of 2021 for Kshs. 487,200/=.
  - ii. Certificate of Taxation in Misc. Application No. E 414 of 2021 at Kshs. 348,000/=.
  - iii. Certificate of Taxation in Misc. Application No. E 427 of 2021 at Kshs.152,559/=.
3. Interest is awarded at the rate of 14% from the date of service of the Bills of Costs until payment in full.
4. A Decree be extracted and drawn in terms of the taxed costs and interest.
5. Costs of the application are awarded to the Advocate/applicant

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 6<sup>TH</sup> DAY OF JULY ,2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

N/A for Advocate/Applicant

Ms Mwaniki for the Client/Respondent

Kevin Isindu, Court Assistant

