



REPUBLIC OF KENYA



Gitonga Muriuki & Co Advocates v Mhasibu Sacco Society Limited (Miscellaneous Civil Application E726 of 2022) [2023] KEHC 23385 (KLR) (Civ) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E726 OF 2022**

AA VISRAM, J

OCTOBER 12, 2023

BETWEEN

GITONGA MURIUKI & CO ADVOCATES APPLICANT

AND

MHASIBU SACCO SOCIETY LIMITED RESPONDENT

RULING

1. This ruling relates to the Respondent's Preliminary Objection dated 15th February, 2023 ("the P.O") against the Applicant's application dated 14th November, 2022, seeking that the same be dismissed with costs on the grounds that: -
 - i. The application is incurably defective.
 - ii. That the said Notice of Motion is not anchored on a Plaintiff.
 - iii. That the said Notice of Motion does not contain a Certificate of Cost from the Deputy Registrar.
 - iv. That the said Application is misconceived, incompetent and bad in law.
 - v. That none of the prayers in the said Application are substantiated.
2. The Applicant's application dated 14th November, 2022, seeks the following orders: -
 - i. Spent.
 - ii. That judgment be entered for the Applicants in the sum of Kenya shillings One Hundred and Fifty Thousand (Kshs.150,000/=) only being the agreed legal fees.
 - iii. That this Honourable court be pleased to grant any further orders it deems fit.



- iv. That cost of this Application be provided for.
3. This court gave directions that the Preliminary Objection be dispensed by way of written submissions. The Respondent and the Applicant both filed their submissions dated 27th March, 2023, and 14th April, 2023, respectively.
 4. Counsel for the Respondent submitted that the parties had a retainer that was reduced in writing, constituting an Advocate-client relationship, which became strained and resulted in the Advocate filing bills to recover fees in a number of matters. After a Preliminary Objection was filed, the Applicant withdrew all of the bills and the parties agreed to pay throwaway costs in the sum of Kshs. 5,000/= per file.
 5. The Respondent contended that Section 45(6) of the *Advocates Act* did not apply because the Applicant and the Respondent had a remuneration agreement. The Advocate had been paid the agreed sums under the deed and therefore, could not tax his bills.
 6. The Respondent relied on Section 19 of the *Civil Procedure Act* Cap 21, which states that “Every suit shall be instituted in such manner as may be prescribed by Rules”. Further, Order 3 Rule (i) (ii) of the *Civil Procedure Rules* 2010 provides that “Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed”. It contended that as a general rule, a suit may only be instituted by way of Plaint, Petition or an Originating Summons.
 7. The Respondent relied on the decision of the Court of Appeal in *Geoffrey Ndungu Theuri v Law Society of Kenya* (1988) eKLR, and submitted that the relevant order specifically refers to a suit which is defined under section 2 of the *Civil Procedure Act*. In these terms, “suit” means all civil proceeding commenced in any manner prescribed under the Civil procedure Rules, and an Applicant is not entitled under Order 39 of the *Civil Procedure Rules* to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 3A of the *Civil Procedure Act* does not give the court the power to act without jurisdiction.
 8. The Respondent argued that the Applicant had failed to anchor its application in a suit, and that therefore, there was no competent suit before the court. Further, that Paragraph 11 *Advocates Act*, could only be invoked if the Advocate had filed a reference after being unhappy with the Taxation Master's decision in assessment of costs.
 9. In support of the above argument, the Respondent relied on the decision of the High Court in *Machira & Co. Advocates v Arthur K Magugu & Another* (NBI HCC Misc. App No.358 of 2001).
 10. In opposition to the Preliminary Objection, the Applicant relied on Section 89 of the *Civil Procedure Act* in the following terms:-

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.
 11. The Applicant submitted that its only interest in this matter was to recover costs, and that therefore, a miscellaneous application was the appropriate way to move the court.
 12. The Applicant contended that the retainer agreement was undisputed, and therefore, Section 45 of the *Advocates Act* was the applicable law. It relied on the decision of the High Court in *Kakuta Maimai*



Hamise v Peris Pesu, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency (2017) eKLR in the following words: -

“The issue of validity of agreements between Advocates and clients with respect to remuneration was dealt with by Ochieng, J in *Abmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* (2) [2006] 1 EA 5 in which the learned Judge held that reading of section 45(1) of the Advocates Act reveals that the agreements in respect of remuneration would be valid and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorized in that behalf. The Court proceeded to hold that an agreement that provides for fees, which was less than the fees provided for in the Remuneration Order was illegal.”

13. The Applicant argued that the present application is premised on Section 45 of the Advocates Act, which provides for the agreements between Advocates and clients for the purpose of provision of professional legal services. Specifically, Section 45(6) guides the implementation of these contracts in thus: -

45. Agreements with respect to remuneration

.....

(6) Subject to this section, 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 nor to section 48.

14. As regards the interpretation of Section 48 above, the Applicant relied on the decision of the High Court in Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited (2020) eKLR and D.M Mutinda & Co. Advocates v Kennedy Muema Musyoka (2021) eKLR, where the court stated that: -

“Similarly, in the instant case, the Applicant and Respondent entered into a contract on legal services and remuneration. The parties are bound by the terms of the retainer agreement and the appellant is estopped from seeking intervention from taxation under the Advocates remuneration order. Where there is a retainer agreement the taxing officer lacks jurisdiction to tax the Bill of Costs”

15. The Applicant contended that Section 45(6) nullifies the requirement that the costs in the agreement be taxed, and the prerequisite that the Applicant serve a bill of costs on the Respondent before approaching court to recover their costs. Further, that it is not bound by the provisions of Paragraph 11 of the Advocates Remuneration Order in assessment of costs.

16. In support of the above argument, the Applicant relied on the decision of the High Court in Corporate Insurance Company Limited v Kangethe and Mola Advocates (2021) eKLR where the held as follows: -

I find that the issue of fees was duly settled when the fee note was paid as such the Deputy Registrar does not have jurisdiction to tax the bill under section 45(6) of the Advocates Act as the settlement constitutes an agreement between the parties.



Analysis and Determination

17. I have considered the rival submissions of the parties. The issue is whether the Applicant's Notice of Motion dated 14th November, 2022, is incurably defective for the reason that the same is not anchored in a suit?
18. An objection on the ground that a suit is incompetently before the court is ordinarily a pure point of law, subject to the test in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, where the court held as follows: -

“so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

At page 701 Sir Charles Newbold, P added:-

“...A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Emphasis mine)

19. For a Preliminary Objection to succeed, the following tests ought to be satisfied; firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
20. Applying my mind to the test above, I am satisfied that the facts as set out above are not in dispute and that if successful, the Preliminary Objection will dispose of the suit. Accordingly, the issue before me, is whether or not the same ought to succeed.
21. The starting point is section 45(6) of the [Advocates Act](#) which provides as follows;
 45. Agreements with respect to remuneration
 - (6) Subject to this section, 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 nor to section 48.
22. It is clear from the aforementioned clause that where an Advocate and a client have entered into a written agreement regarding his fees, such fees are not subject to taxation.
23. In the present matter, there is no dispute that the parties had indeed entered into an agreement relating to fees. It is therefore, clear to me that the Applicant's costs ought not to be subjected to taxation pursuant to section 45 of the Act, and further, that section 48 of the [Advocates Act](#) does not apply either.
24. In the premises, and based on section 45 as set out above, it is evident that the Taxing Master does not have jurisdiction to tax the costs in the present matter. Further, the Applicant did not present a bill of costs for taxation, but rather, simply filed Notice of Motion, seeking an order that judgment be entered in its favour for the sum of the agreed legal fees.



25. Given that Section 45 does not apply, the issue before the court is whether or not the Notice of Motion, in isolation, is sufficient to enter judgment, based on what is essentially a cause of action based on breach of contract?

26. Section 19 of the *Civil Procedure Act* states: -

Every suit shall be instituted in such manner as may be prescribed by rules.

27. Order 3 of the *Civil Procedure Rules* states: -

(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

28. Order 5 specifies the actions to be taken, relating to the issue of summons and time to enter appearance. And further, Order 3 rule 2, sets out the documents to accompany a suit in the following terms: -

“Documents to accompany suit [Order 3, rule 2.]

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

- (a) the affidavit referred to under Order 4 rule 1(2);
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action: Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”

29. I am further guided by the decision of the High Court in *Proto Energy Limited v Hashi Energy Limited* (2019) eKLR at paragraph 14, where the court stated as follows: -

“Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a plaint, petition or an originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a property instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a Notice of Motion renders the entire suit defective” (emphasis mine)

30. I am further guided by the decision of the High Court in *Rajab Kosgei Magut v Nuru Jepleting Choge* (2020) eKLR, where the court stated as follows: -

“I am also of the view that an Applicant cannot use short cuts to access justice where there are laid down procedures to be followed..... Having considered the Preliminary Objection and the submissions therein, I find that the Preliminary Objection has merit and is therefore upheld. The Applicant’s application dated 19th May, 2020 is hereby struck out with costs to the 1st Respondent.”



31. Finally, in *Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others* [2018] eKLR, the Court held as follows: -

“In the end, I find that the Applicant is not properly before this court as there is no suit upon which the Notice of Motion can stand. The court cannot invoke its inherent jurisdiction to cure that defect.” (emphasis mine)

32. Based on the above rules and authorities, I am satisfied that the Applicant ought to have anchored his Notice of Motion in a suit. Without a substantive suit, the Notice of Motion is not properly before this court, and the same simply cannot stand alone.

33. Further to the above, I am satisfied that the above authorities and rules are substantive provisions that may not be wished away, rather than mere procedural technicalities which may be cured under Article 159 of the *Constitution*.

34. Based on the reasons as set out above, I find that the Applicant’s failure to anchor the application within a suit was a fatal oversight. I find that the Notice of Motion Application dated 14th November, 2022, is incompetently before this court and the same is hereby struck out with costs. I further find that the Preliminary Objection dated 15th February, 2023, is with merit, and the same is hereby upheld with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2023

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

.....for the Applicant

..... for the Respondent

