



**Rene & Hans Advocates LLP v County Government of Nairobi (Miscellaneous Application E947 of 2023) [2024] KEHC 11979 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11979 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E947 OF 2023**

**PM MULWA, J**

**OCTOBER 3, 2024**

**BETWEEN**

**RENE & HANS ADVOCATES LLP ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... RESPONDENT**

**JUDGMENT**

1. Before the Court is the Originating Summons dated 11<sup>th</sup> October 2023, brought by the applicant under Sections 45(1) & (6) and Order 52 Rules 3(1), (5) and 10 of the *Civil Procedure Rules*. The applicant seeks orders directing the respondent to pay legal fees of Kshs. 239,347,600.00 together with interest at court rates from the filing date on account of legal services rendered in sixteen (16) concluded matters before the High Court.
2. The application is based on the grounds on its face and the supporting affidavit of Advocate Isaac Rene sworn on even date. The applicant also filed written submissions dated 8<sup>th</sup> May 2024. In brief, the grounds are that between 2021 and 2022, the respondent issued letters of instructions to the applicant to represent it and act for it in the following matters:
  - a. Nairobi HCJR Misc. Application number E109 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - b. Nairobi HCC Misc. Application number E349 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - c. Nairobi HCC Misc. Application number E348 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;



- d. Nairobi HCCOMM Misc. Application number E341 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - e. Nairobi HCCOMM Misc. Application number E342 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - f. Nairobi HCJR Misc. Application number E114 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - g. Nairobi ELC Misc. Application number E138 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - h. Nairobi HCJR Misc. Application number E107 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - i. Nairobi HCJR Misc. Application number E069 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - j. Nairobi HCCHR Misc. Application number E022 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - k. Nairobi HCJR Misc. Application number E106 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - l. Nairobi ELC Misc. Application number E091 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - m. Nairobi ELC Misc. Application number E135 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - n. Nairobi ELC Misc. Application number E134 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - o. Nairobi HCJR Misc. Application number E108 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi; and
  - p. Nairobi HCCOMM Misc Civil Application No. 620 of 2021, Musyoki Mogaka & Company Advocates v County Government of Nairobi.
3. The applicant and the respondent executed fee agreements on various dates. According to the letters of instructions, the applicant filed notices of appointment, attended Court sessions numerous, complied with Court directions in the matters until Rulings were delivered by the respective Courts and the matters were concluded. The matters involved opposing the various bills of costs filed by Prof. Tom Ojienda & Associates and Musyoki Mogaka & Company Advocates. The total sum sought by the applicants in the various bills of costs was Kshs. 1,118,897,563.00 whereas the total sums awarded through the Rulings was Kshs. 129,701,036.00. As a result of its diligence in representing the respondent, the legal fees payable was reduced by Kshs. 989,178,527.00.
  4. Despite its performance, the respondent refused to settle the applicant's legal fees as agreed between them, even after the applicant took all reasonable steps for payment. Due to non-payment, the applicant has been plunged into financial difficulties.
  5. The respondent filed a replying affidavit sworn by its Acting County Solicitor and Accounting Officer, W. S. Ogola on 12<sup>th</sup> April 2024. The deponent confirmed that the respondent instructed the



applicant to act for it in the matters outlined. He denied that the respondent entered any purported fee arrangements with the applicant.

6. It was asserted that the respondent was categorically unequivocal in its letters of instruction that the applicant's professional fees would be paid per the *Advocates Remuneration Order* (ARO). Mr Ogola deponed that the assessment and approval of the disputed fees, not in accordance with the ARO, and which led to the purported agreements by Julius Ndichu one of the respondent's litigation counsel, amounts to collusion and is illegal. He also highlighted that there was no breakdown of how the inflated figures were arrived at.
7. The deponent also pointed to the irregularities in the delivery of correspondence after the applicant received letters of instruction from the County Solicitor. All the subsequent correspondence from the applicant was received by the respondent's Legal Affairs Department. All correspondence by the applicant accepting the alleged fee assessments were sent to and received by J. Kihanya in his personal capacity.
8. The deponent further contended that he is the only officer at the respondent's office of the County Attorney with the designation and authorised to approve any fee note assessments and to enter into fee agreements with Advocates acting for the respondent. He again contended that any fee agreement entered into by Julius Ndichu on behalf of the respondent is null and void ab initio as the role has never been delegated to him at any point in time.
9. For these reasons, the respondent contended that the applicant's Summons is incompetent and devoid of merit and an abuse of the court process and should be struck out and/or dismissed with costs.

### **Analysis and Determination**

10. I have considered the Originating Summons, the grounds, the parties' respective affidavits and submissions. The issue for determination is whether the applicant has made a case for the orders sought.
11. The parties took divergent positions regarding whether the fee agreements between the applicant and respondent are valid and enforceable. According to the applicant, the fee agreements were valid and enforceable pursuant to Section 45 of the *Advocates Act*. The applicant produced copies of letters of instructions, pleadings filed and Rulings relating to the matters. It also produced letters in evidence of the fee agreements between the parties relating to the matters. The respondent disputed the validity of the fee agreements on grounds that an unauthorized person signed them.
12. Section 45 of the *Advocates Act* provides as follows:
  - “(1) 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, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee 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."

13. It is settled that an agreement under Section 45 may be constituted by exchange of correspondence, mutually setting out the actual fees payable for the specific tasks with the offer emanating from the Advocate and duly accepted by the client (See *Kakuta Maimai Hamisi and another v IEBC and another* [2017] eKLR).
14. Section 45 (2) of the *Advocates Act* allows a client to apply to set aside a fee agreement on grounds that it is harsh and unconscionable, exorbitant or unreasonable (See *Ali Mohammed Egal v Maina & Onsare Parterners Advocates* (Misc. Civil Application No. 73 of 2019) [2021] eKLR).
15. With the above in mind, I have scrutinized the exhibits produced by the applicant. The respondent claimed that the assessment and approval of the disputed fees by its litigation counsel amounted to collusion as the fees were not broken down and not as per the ARO. The position of the law is that a matter of fraud, must be specifically pleaded and strictly proved on a standard higher than a mere balance of probabilities though not as heavy as to require proof beyond reasonable doubt (See *R. G. Patel v Lalji Makanji* [1957] EA 314). The argument therefore cannot stand.
16. The respondent also claimed that all correspondence by the applicant accepting the alleged fee assessments were sent to and received by J. Kihanya in his personal capacity. I note from a search on the LSK search engine that on 30<sup>th</sup> September 2024 Mr. Ndichu Julius Kihanya's workplace is the City County of Nairobi, the respondent herein. I also note that the respondent does not dispute that Mr. Ndichu is its employee. Therefore, I am not persuaded that the said letters that were exchanged were either only issued or accepted by him in his personal capacity.
17. What is more, whereas the respondent alluded to lack of authority of its litigation counsel to negotiate and accept the fees proposed by the applicant, it neither indicated nor demonstrated that it had sought to impeach the terms in the letters under reference. As such, it is bound by the agreements and the Court cannot interfere.
18. In *National Bank of Kenya Ltd v Pipeplastic Samkolit Ltd Another* (Civil Appeal No 95 of 1999) [2001] eKLR, the Court of Appeal observed as follows:

"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."
19. The conclusion I make therefore is that the correspondences exchanged were made on behalf of the respondent and that they constitute an agreement in terms of the provisions of Section 45(1) as read with Section 45(6) of the *Advocates Act*.
20. Accordingly, the application dated 11<sup>th</sup> October 2023 is allowed in the following terms:-
  1. Judgment be and is hereby entered for the applicant against the respondent in the sum of Kshs. 239,347,600.00 only being the agreed legal fees in favour of the Applicant, on account of legal services rendered in the following matters:-
    - a. Nairobi HCJR Misc. Application number E109 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;



- b. Nairobi HCC Misc. Application number E349 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - c. Nairobi HCC Misc. Application number E348 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - d. Nairobi HCCOMM Misc. Application number E341 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - e. Nairobi HCCOMM Misc. Application number E342 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - f. Nairobi HCJR Misc. Application number E114 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - g. Nairobi ELC Misc. Application number E138 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - h. Nairobi HCJR Misc. Application number E107 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - i. Nairobi HCJR Misc. Application number E069 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - j. Nairobi HCCHR Misc. Application number E022 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - k. Nairobi HCJR Misc. Application number E106 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
  - l. Nairobi ELC Misc. Application number E091 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi;
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  - o. Nairobi HCJR Misc. Application number E108 of 2021 Prof Tom Ojienda & Associates v County Government of Nairobi; and
  - p. Nairobi HCCOMM Misc Civil Application No. 620 of 2021, Musyoki Mogaka & Company Advocates v County Government of Nairobi.
2. Interest on (1) at Court rates from the filing date until payment in full.
  3. Costs of the originating summons with interest thereon from the judgment date until payment in full.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

**P. MULWA**

**JUDGE**

In the presence of:



Mr. Hans Oichoe for applicant

Mr. Omondi for respondent

Court Assistant: Carlos

