



Kairu & Mccourt Advocates v Directline Assurance Company Limited (Miscellaneous Application E921 of 2020) [2024] KEHC 15856 (KLR) (At Nairobi) (13 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
AT NAIROBI
MISCELLANEOUS APPLICATION E921 OF 2020
RC RUTTO, J
DECEMBER 13, 2024**

BETWEEN

KAIRU & MCCOURT ADVOCATES APPLICANT

AND

DIRECTLINE ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. There are two applications before me for hearing and determination. The 1st application is a chamber summon by the respondent (Directline Assurance Limited) dated 13th May 2024 seeking for orders that:
 1. This reference against the decision of the Honorable Noelle Kyanga made on 29th April 2024 be and is hereby allowed;
 2. The entire ruling delivered by the taxing officer on 29th April 2024 allowing the respondent's bill of costs dated 10/3/2020 be and is hereby set aside;
 3. The Honorable Court be pleased to make a determination that the respondent's advocates did not render any services to the applicant/objector;
 4. The Honorable Court be pleased to make a determination that the applicant/objector did not instruct the respondent/advocates;
 5. In the alternative, this Honorable Court be pleased to make a determination that award of instruction fees of Kshs. 11,278,332.00 is manifestly excessive and not commensurate with amount and nature of services.



2. The application is premised on the following grounds: that the taxing officer erred in law and in fact in; making conclusive findings that the respondent's advocate (Kairu & Mccourt Advocates) rendered services to the applicant/objector; by awarding instruction fees of kshs. 11,278,332/- in this matter simply on what is stated in the Bill and without considering the applicant's evidence; and that the award of instruction fees of kshs 11,278,332/- was not based on any judicial principle on taxation. The respondent further relied on the pleadings earlier filed in opposition to the bill of costs dated 10th March 2020 that were considered by the taxing master in assessing the bill of cost. The respondent urged this court to allow the application as prayed.
3. The applicant (Kairu & Mccourt Advocates) has opposed the chamber summon application. It filed its grounds of opposition dated 20th August 2024. It urged this court to dismiss the application on the following grounds, that: the respondent failed to demonstrate that the applicant did not render legal services to it at all material times; the respondent failed to demonstrate that the applicant did not have instructions to represent its interests; the applicant has failed to demonstrate how the legal fees were excessive and not commensurate with the services rendered; and the application is an abuse of the process of the court with intent to frustrate the applicant who wishes to execute the decision. They urged the court to dismiss the Application with costs.
4. The 2nd application is a Notice of Motion dated 15th May 2024 by the applicant (Kairu & Mccourt Advocates). The applicant filed the same under the provisions of sections 1A, 1B, 3 3A and 27 of the Civil Procedure Act and section 51 (2) of the Advocates Act seeking the following reliefs, that:
 1. The Honorable Court do enter judgment in favor of the applicant as against the respondent for the sum of Kenya Shillings eleven million two hundred and seventy-eight thousand three hundred and thirty-two (Kshs. 11, 278, 332.00) being the taxed and certified costs payable to the applicant by the respondent;
 2. This Honorable Court do award interest on the aforesaid amount of Kenya Shillings eleven million two hundred and seventy-eight thousand three hundred and thirty-two (Kshs. 11, 278, 332.00) at fourteen per cent (14% p.a.) from the date of filing of the award until payment in full;
 3. A decree be issued pursuant to the judgment and order in 1 and 2 above;
 4. Costs of this application to be borne by the respondent.
5. The application is based on the following grounds: that the Applicant rendered legal services to the Respondent representing the Respondent in the purchase of parcel of land measuring six acres namely L.R. No. 10119/4 where the Respondent was the Purchaser; the Respondent failed, neglected and/or refused to pay the appropriate fees forcing the Applicant to file the Advocate/Client Bill of Costs dated 10th March 2020; the bill of costs was duly taxed by the taxing master and certificate issued; despite demand, the Respondent has neglected, refused and/or failed to pay. The Notice of Motion Application is also supported by the affidavit sworn on 11th May 2024 by Christine Kirimi, Advocate working in the nature and style of the applicant.
6. Having perused the documents presented before court the summary of, the applicant's case was that it rendered legal services to the respondent for the purchase of all that parcel of land measuring six acres namely L.R. No. 10119/4. The respondent was the purchaser. However, the respondent failed, neglected and/or refused to pay the appropriate fees compelling the applicant to file its bill of costs dated 10th March 2020. By a ruling of the taxing master dated 29th April 2024, the bill of costs was



assessed at Kshs. 11,278,332.00. The applicant extracted the certificate of costs dated 9th May 2024. That amount is yet to be settled to date.

7. The applicant urged this court to allow the application for the following reasons: it sought to have the certificate of taxation adopted as a decree of the court in order to commence enforcement proceedings; and the certificate of costs has not been set aside, stayed or challenged by way of reference.
8. The application favored no response from the respondent. When the applications were listed for hearing on 2nd October 2024, the applicant in the substantive suit was present while the respondent was absent. The matter proceeded for hearing of the two applications after the court was satisfied that the respondent was properly and duly served with the day's hearing date.
9. In submitting to the application dated 13th May 2024, the applicant (Kairu & Mccourt Advocates, respondent thereto) wholly relied on its grounds of opposition and written submissions similarly dated 20th August 2024 to submit that an advocate client relationship existed between the parties herein. The applicant was the respondent's Counsel in respect to the purchase of six acres of all that parcel of land namely L.R. No. 10119/4. It observed that this was admitted by the respondent in an affidavit sworn by the respondent's managing director. The applicant also relied on several correspondences among the parties herein, the vendor, one of the purchaser's lawyers and the head lessor's lawyers. The applicant rendered legal services and was therefore entitled to payment, it so urged. It contended that parties attempted to negotiate for payment of all outstanding fees but the same was unsuccessful. It noted that since the value of the subject was determinable from the documents, the bill of costs was properly taxed. It prayed that in the absence of the respondent, the application dated 13th May 2024 be dismissed with costs.
10. Regarding the application dated 15th May 2024, the applicant (Kairu & Mccourt Advocates), relied on the grounds espoused in its application and affidavit to persuade this court to allow the same as prayed.
11. I have considered the applications, the affidavits, the annexures thereto, the response and the law. The respondent's application dated 13th May 2024 was not argued by the author. It is uncouth that the respondent, the applicant party to the chamber summons, neither filed a supporting affidavit to its chamber summons nor filed any written submissions. It is incumbent on a party to take the necessary procedural steps and file the necessary pleadings and documents. Otherwise, on what basis is a party that invokes a court's jurisdiction want that court to determine its cause if it is not interested in prosecuting its own reference?
12. I would have otherwise dismissed the application for want of prosecution since the respondent never even bothered to appear in court when the matter was listed for hearing, despite proof of being served. Nonetheless, the interest of justice binds me to determine the application on its merits based on the documents on record.
13. The application is hinged on two grounds: whether there were no instructions to the applicant to represent the respondent as its counsel; and secondly, the award of instruction fees was grossly and manifestly excessive.
14. On the first issue, in its ruling dated 29th April 2024, the taxing master held:

“In this case, an affidavit was sworn by Ms. Terry Kiarie who confirmed that the applicant had instructions from the respondent. At paragraph 5 of her affidavit, she admits that the applicant represented the respondent in the purchase of a parcel of land measuring six acres and comprised in the property known as L.R. No. 10119/4. At the time of the instructions, she was the managing director and principal officer of the respondent company.



Further, the respondent made an offer to the vendor through a letter dated 7th August 2015 which was copied to the applicant. This clearly shows that they had instructions to act for the respondent.

In view of the above, I find that there was an existing advocate-client relationship between the applicant and the respondent which was both express and implied.”

15. The respondent does not refute that an affidavit was sworn by their then managing director. The respondent does not also dispute the contents of the affidavit. From this set of events, it clearly flows that indeed the respondent did instruct the applicant to represent its interests over the purchase of the parcel of land measuring six acres and comprised in the property known as L.R. No. 10119/4. It is this transaction that was the subject of the bill of costs dated 10th March 2020 which is captured in item 1 of the bill. It is the respondent’s own witness who admitted the instructions. The above facts were further corroborated by the letter dated 7th August 2015 whose contents are similarly not disputed.
16. I further find that the applicant substantially communicated to the respondent’s officers through email exchanges. It also wrote to the vendor’s advocates and the advocates for the lessor. The applicant paid stamp duty on behalf of the respondent and the letter dated 12th August 2020 did not dispute instructions to the applicant. All these documents are captured in the applicant’s list of documents dated 7th February 2024. Consequently, I find overwhelming evidence to conclude that the applicant rendered legal services and was therefore entitled to payment. Therefore, the reference on this ground fails and must be dismissed.
17. On whether the instruction fees in the sum of Kshs. 11,278,332.00 was grossly and manifestly excessive, I observe that the respondent is dissatisfied with the findings on instruction fees but cited the cumulative figure awarded on the taxed bill that is Kshs. 11,278,332.00. It is such a confusion that would have been easily resolved had the respondent prosecuted its application.
18. Nonetheless, the taxing master in awarding Kshs. 9,300,000.00 as instruction fees held as follows:

“Under schedule 5 part II, instruction fees can be taxed having regard to the care and labour required, the number and length of papers to be perused, nature and importance of the matter, the amount of value of the subject matter involved, interest of the parties, complexity of the matter and all other circumstances the cases may be fair and reasonable. The value of the subject matter herein is Kshs. 840,000,000.00. taking into account the above factors and the value of the subject matter, I find Kshs. 9,300,000.00 to be reasonable.”
19. I have been invited to interfere with the exercise of discretion of the taxing master but before I do that I make reference to the case of Republic vs. Competition Authority Ex Parte Ukwala Supermarket Ltd & Anor [2017] eKLR where Odunga, J. (as he then was) stated:

“The circumstances under which a Judge of the High Court interferes with the taxing officer’s exercise of discretion are now well known. These principles are:

 - (1) that the Court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;
 - (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the



relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

- (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
- (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
- (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
- (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64."

20. Taking the above principles into account, I have considered the award of the taxing master and the principles that she applied. The value of the subject matter could be determined from the documents as the purchase price of the subject property was capped at Kshs. 840,000,000.00. I find that the taxing master applied the proper principles in determining instruction fees. I therefore find no reason to interfere with those findings. I also find that the bill of costs was drawn to scale and the taxing master applied the correct guiding principles in awarding the ultimate sum of at Kshs. 11,278,332.00. Consequently, I find that the application dated 13th May 2024 lacks merit. It is hereby dismissed with costs to the applicant.

21. Turning to the application dated 15th May 2024, section 51 (2) of the *Advocates Act* provides:

“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.”

22. It is trite law that section 51 (2) of the *Advocates Act* governs the mode of recovery of taxed costs. In this case, the applicant's bill of costs dated 10th March 2020 was taxed on 29th April 2024 in the sum of Kshs. 11,278,332.00. A certificate of costs for taxation was issued on 9th May 2024. The respondent has not succeeded in challenging the taxed amount. The sum is final. Accordingly, I am persuaded to enter judgment in the sum certified totaling Kshs. 11,278,332.00. The applicant shall also be awarded costs of this application and interest therein at the rate of 14% from the date of filing the application.



It is so ordered

RHODA RUTTO

JUDGE

Delivered, Dated and Signed this 13th day of December 2024

For Appellant:

For Respondent:

Court Assistant:

