



**Kairu & McCourt Advocates v Directline Assurance Company Limited (Miscellaneous Application E923 of 2020) [2024] KEHC 15835 (KLR) (Civ) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15835 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS APPLICATION E923 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 1<sup>st</sup> application is that of the respondent (Directline Assurance Company Limited) dated 13<sup>th</sup> May 2024. It is a reference against the ruling of the taxing master delivered on 29<sup>th</sup> April 2024. It prays for the following reliefs:
  1. This reference against the decision of the Honorable Noelle Kyanga made on 29<sup>th</sup> April 2024 be and is hereby allowed;
  2. The entire ruling delivered by the taxing officer on 29<sup>th</sup> 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. 20,776,500.00 is manifestly excessive and not commensurate with amount and nature of services.



2. The application is premised on the grounds on the face of the application, thus: that the taxing officer erred in law and in fact in; making conclusive findings that the respondents advocate rendered services to the applicant/objector; by awarding instruction fees of kshs. 20,776,500/- without considering the applicants' evidence; and that the award of instruction fees of kshs 20,776,500/-, which was viewed as excessive, was not based on any judicial principle on taxation.
3. The respondent further relied on the pleadings earlier filed in opposition to the bill of costs dated 10<sup>th</sup> 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.
4. The application is opposed. The applicant(Kairu & Mccourt Advocates) filed its grounds of opposition dated 20<sup>th</sup> August 2024. It prayed that the application be dismissed for the following reasons: the respondent failed to demonstrate that no advocate client relationship existed between the parties hence lacked instructions to represent its interests; and no reasons had been advanced to demonstrate that the amount awarded was grossly and manifestly excessive.
5. The 2<sup>nd</sup> application is that of the applicant(Kairu & Mccourt Advocates) and is dated 15<sup>th</sup> May 2024. The application is filed under the provisions of sections 1A, 1B, 3 3A and 27 of the Civil Procedure Act and section 51 (2) of the Advocates Act and seeks 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 twenty four million, one hundred thousand, seven hundred and fourty (Kshs. 24,100,740/-) 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 twenty four million, one hundred thousand, seven hundred and fourty (Kshs. 24,100,740/-) 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.
6. The application is supported by the grounds on the face of the Motion as well as the supporting affidavit sworn by Christine Kirimi, an Advocate working in the nature and style of the applicant. In summary, the applicant's case is that it rendered legal services to the respondent by offering advisory services and preparing transaction documents in a project for the rehabilitation of old housing estate within Nairobi where the respondent together with parties working as a consortium, won a tender from the Nairobi City County to rehabilitate Toi Market into a modern Market and build residential houses along Suna Road in Nairobi.
7. That, the respondent failed, neglected and/or refused to pay the appropriate fees compelling the applicant to file its bill of costs dated 10<sup>th</sup> March 2020. By a ruling of the taxing master dated 29<sup>th</sup> April 2024, the bill of costs was assessed at Kshs. 24,100,740/= The applicant extracted the certificate of costs dated 9<sup>th</sup> May 2024. That, that amount is yet to be settled despite a demand being made.
8. The applicant urged this court to allow the application for the following reasons: that 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.
9. The application favored no response from the respondent. When the applications were listed for hearing on 2<sup>nd</sup> October 2024, the applicant in the substantive suit was present while the respondent



was absent. The matter proceeded for hearing of the two application after the court was satisfied that the respondent was properly and duly served with the day's hearing date.

10. In submitting in response, to the application dated 13<sup>th</sup> May 2024, the applicant relied on its grounds of opposition and written submissions dated 20<sup>th</sup> August 2024 to submit that an advocate client relationship existed between the parties herein. It recalled that the respondent entered into a joint venture together with Sinohydro Corporation and Mentor Management and the Nairobi City County for the redevelopment of old housing estates within Nairobi. The respondent appointed the applicant as its advocates. In support of these assertions, the respondent relied on the respondent's managing director's affidavit, meetings, negotiations, proposals, preparations and several correspondences regarding the subject matter.
11. According to the applicant, a principal agency relationship existed between the respondent and Harbour Capital, the firm that appointed the applicant as their advocates. The respondent was thus estopped from denying that an advocate-client relationship existed between the two parties. That from the conduct of the parties, a retainer could be inferred as it need not to exist mandatorily in writing. The applicant submitted that it rendered legal services to the client and was therefore entitled to legal fees.
12. On whether the taxed costs were fair and reasonable, the applicant submitted that the value of the subject matter was discernible from the joint venture agreement. Consequently, the sum of Kshs. 24, 100, 740.00 was drawn to scale. The applicant urged that in light of the above reasons, coupled with the respondent's non-attendance of the hearing of its application, the respondent's application was for dismissal with costs.
13. Regarding the application dated 15<sup>th</sup> May 2024, the applicant(Kairu & Mccourt Advocates) relied on its written submissions dated 23<sup>rd</sup> August 2024. The applicant urged this court to allow the application as it was unopposed.
14. I have considered the applications, the affidavits, the annexures thereto, the response and the law. The respondent's application dated 13<sup>th</sup> May 2024 was not prosecuted by the author. It is deplorable that it neither filed a supporting affidavit nor any written submissions to its chamber summons. It is incumbent on a party to take the necessary procedural steps and file the necessary pleadings and documents. Otherwise, on what basis is the respondent invoking the jurisdiction of this court if it is not interested in prosecuting its own reference? I would have dismissed the application for want of prosecution since the respondent never even bothered to prosecute its application when the matter was listed for hearing. Nonetheless, the interest of justice binds me to determine the application on its merits based on the documents on record.
15. The application is hinged on two grounds: first, there were no instructions to the applicant to represent the respondent as its counsel and secondly, the award of instruction fees was excessive in the circumstance. On the first issue, the taxing master in its ruling dated 29<sup>th</sup> April 2024, made reference to numerous decisions and held that;

“according to the evidence by the applicant there was direct evidence of instructions by the respondents. Ms. Terry Kiarie swore an affidavit confirming that the applicant had instructions. In it, she admits that the applicant received instructions from the respondent while she was the managing director and principal officer of the respondent. She confirmed that pursuant to the instructions given to the applicant by the respondent, the applicant represented the respondent in various meetings and discussions relating to the transaction herein. Even though there is no written agreement between the parties, there is direct evidence that the respondent gave instruction to the applicant and pursuant to those



instructions, the applicant represented the respondent. In view of the above, I am satisfied that there is an advocate-client relationship between the applicant and the respondent.”

16. From the reference, the respondent indiscriminately denies that the applicant was its instructed counsel. However, no evidence rebutted the documentary evidence on record. It is on record that from the respondent’s own principal officer at the time the transaction took place, and in her sworn affidavit, that the respondent entered into a joint venture together with Sinohydro Corporation and Mentor Management and the Nairobi City County for the redevelopment of old housing estates within Nairobi. In pursuance of those instructions, the applicant acted for the respondent in various meetings and discussions relating to this particular transaction.
17. Furthermore, evidence of that relationship was evident from the bundle of documents dated 8<sup>th</sup> February 2024 as follows: correspondence regarding the transaction between the applicant and John Macharia, director of the respondent; vide a letter dated 11<sup>th</sup> May 2016, the applicant received instructions from the respondent’s advisor to incorporate Toi Redevelopments Limited. The billing was done to the respondent and by virtue of this, a principal-agency relationship existed between the respondent’s advisor Harbour Capital and the respondent. This relationship could also be determined from the email exchange from the Nairobi County Housing Director Ms. Marion Rono to Maureen Gathuu, a contact person for the respondent. I also find that the applicant prepared several documents in respect to this transaction. Finally, the applicant attended several meetings on behalf of the respondent on diverse dates including 22<sup>nd</sup> June 2016, 6<sup>th</sup> July 2016, 13<sup>th</sup> December 2017 and 20<sup>th</sup> September 2018.
18. From the above, I find that the applicant was duly instructed by the respondent to represent its interests. No rebuttals were adduced to dispute those transactions. For this reason, I find that the applicant rendered legal services and was therefore entitled to payment. An advocate client relationship existed as to justify the filing and consideration of the applicant’s bill of costs dated 10<sup>th</sup> March 2020. Therefore, the reference on this ground fails and must be dismissed.
19. On whether the instruction fees in the sum of Kshs. 20,776,500.00 was grossly and manifestly excessive. The taxing master in awarding Kshs. 20,000,000.00 as instruction fees took into account several decisions of the court and held as follows:

“In this case, the applicant prepared the pre-qualification documents in support of the tender application by Directline Assurance Company Limited, Deed of agreement between DACL and other consortium members, joint affidavits between DACL and other consortium members; power of attorney to DACL to John Gichia Macharia among other documents.

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 or 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 case may be fair and reasonable

Taking into account the above factors, I find that Kshs. 20,000,000.00 is reasonable. Accordingly, instruction fees are taxed at Kshs. 20,000,000.00”

20. 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."

21. Taking the above principles into account, I have considered the award of the taxing master and the principles that she applied. In awarding instruction fees, the taxing master had regard to the care and labour required, the number and length of papers to be perused, nature or importance of the matter, the amount of value of the subject matter involved, interest of the parties and complexity of the matter. She observed that the applicant prepared the pre-qualification documents in support of the tender application by Directline Assurance Company Limited, Deed of agreement between DACL and other consortium members, joint affidavits between DACL and other consortium members; power of attorney to DACL to John Gichia Macharia among other documents.

22. I find that the taxing master applied the proper principles in determining instruction fees and exercised her discretion. I therefore find no reason to interfere with that exercise of the discretion of the taxing officer and her 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. 24, 100, 740.00. Consequently, I find that the application dated 13<sup>th</sup> May 2024 lacks merit. It is hereby dismissed with costs to the applicant (Kairu & Mccourt Advocates, the respondent thereto).



23. Turning to the application dated 15<sup>th</sup> 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.”

24. 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 10<sup>th</sup> March 2020 was taxed on 29<sup>th</sup> April 2024 in the sum of Kshs. 24,100,740.00 A certificate of costs for taxation was issued on 9<sup>th</sup> May 2024. The respondent has not succeeded in challenging the taxed amount. The sum is final. Accordingly, I am inclined to enter judgment in the sum certified totaling Kshs. 24,100,740.00 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 13<sup>TH</sup> DAY OF DECEMBER 2024**

For Appellant:

For Respondent:

Court Assistant:

3 | Page

