



**Milton Mugambi Imanyara t/a Mugambi Imanyara & Co
Advocates v Merit Development Limited (Civil Suit E372 of 2024)
[2024] KEHC 15674 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E372 OF 2024
FG MUGAMBI, J
DECEMBER 6, 2024**

BETWEEN

**MILTON MUGAMBI IMANYARA T/A MUGAMBI IMANYARA & CO
ADVOCATES PLAINTIFF**

AND

MERIT DEVELOPMENT LIMITED DEFENDANT

RULING

1. This ruling determines two applications: The plaintiff's Notice of Motion dated 11th July, 2024 and the defendant's Chamber Summons dated 19th September, 2024. Both applications arise from a previous advocate-client relationship between the parties. It is not controverted that the plaintiff was instructed by the defendant to provide legal services in ELC No. 164 of 2017, Kibera Criminal Case No. 18 of 2008 and City Court Criminal Case No. 18 of 2008.

The plaintiff's application dated 11th July 2024:

2. The application is brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks two primary reliefs; first, an injunction to restrain the defendants from disposing of or otherwise dealing with the parcel of land identified as Plot No. 1/198 Lenana Road (the suit property) and second, an order of prohibition preventing the Chief Land Registrar from endorsing or registering any transfer or other instrument in the register with respect to the suit property.
3. The application is premised on the grounds set forth in the motion and is supported by affidavits sworn by Milton Mugambi Imanyara on 11th July, 2024, and 20th September, 2024. In response, the



defendants filed a replying affidavit sworn by Divyang Kerai, a director of the defendant company, on 4th September, 2024.

4. The plaintiff contends that on 18th July 2018, the parties entered into a fee agreement, under which the defendant agreed to pay Khs. 60,000,000/= for legal services rendered by the plaintiff. The payment was to be made from the proceeds of the sale of the defendant's (the suit) property or from other sources in the event that the suit property was not sold within six months, by 18th January 2019.
5. The plaintiff contends that the defendant neither sold the property nor arranged for alternative payment. Trusting in their long-standing relationship, the plaintiff refrained from enforcing the agreement, assuming the property would eventually be sold or that other payment arrangements would be made. The plaintiff now contends that the defendant has declined reasonable offers to sell the property, raising suspicion of an attempt to evade payment of the agreed legal fees.
6. The plaintiff further suspects that the defendant may not have other financial resources to settle the fees and is concerned that the defendant may attempt to transfer or dispose of the property without notice. Such actions could prevent the plaintiff from recovering the owed fees, and potentially result in significant financial loss.
7. In response, the defendant contends that none of its directors or shareholders has ever seen the fee agreement relied upon by the plaintiff. The defendant asserts that the purported fee agreement, allegedly signed by Mr. K. V. Mavji (now deceased), is unenforceable, null, and void, as it was not properly executed. The defendants deny that any general or special meeting was convened to discuss or approve the alleged legal fees. Additionally, the defendant argues that the disputed costs should be subjected to taxation.

The defendant's application dated 19th September, 2024:

8. The application is brought pursuant to the provisions of Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 Rule 7, Order 50 Rule 6 of the Civil Procedure Rules, Section 45(2) of the [Advocates Act](#) and Article 40, 46 & 489 of the [constitution](#). The defendant seeks to set aside the interim injunction orders issued on 15th July 2024. The defendant also seeks an extension of time to file an application challenging the alleged fee agreement and an order compelling the plaintiff to file its advocate-client bill of costs in relation to the court cases referenced in the agreement.
9. The defendant argues that the fee note is unconscionable, disproportionate to the work done, and was entered into without the knowledge or consent of the other directors. Furthermore, they claim that it is not supported by a board resolution. As such, the defendant asserts that the plaintiff ought to file its bill of costs for taxation. They acknowledge that the statutory timelines for objecting to the fee agreement have lapsed, thus necessitating this application.
10. The application is opposed through affidavits sworn by Gopal Patel and Milton Mugambi Imanyara on 10th October 2024. Their grounds of opposition include the fact that the defendant does not deny the existence of fees that are due and outstanding, and that the objection to the fee agreement is time-barred under Sections 45(2) and 45(2A) of the [Advocates Act](#). The plaintiff also disputes the defendant's claim of non-receipt of the demand, and notes that the demands were sent to the same email address previously used for communication.
11. Regarding compliance with the company's internal procedures, the plaintiff relies on the Turquand rule and Section 34 of the [Companies Act](#). Additionally, the plaintiff has annexed correspondence relating to the legal matters handled by the firm on the defendant's behalf.



Analysis and determination

12. Pursuant to the directions of this court, the applications were canvassed through written submissions, accompanied by oral highlights presented by Counsels which I have carefully considered alongside the pleadings, evidence and authorities cited. Two issues arise for determination:
- i. Whether the plaintiff is deserving of the injunctive reliefs sought; and
 - ii. Whether the defendant has made out a case for expansion of time to set aside the said fee agreement.

Whether the plaintiff is deserving of the injunctive reliefs sought:

13. The conditions for grant of injunctive relief are well crystalized from the decision in *Giella V Cassman Brown & Co Ltd*, (1973) E.A 385, at page 360. The three-pronged test requires a party to prove the following;
- i. That they have a prima facie case with a probability of success;
 - ii. That they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages if the order is not granted; and
 - iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
14. On the first condition for establishing a prima facie case, I begin with an inquiry into the fee agreement. A plain reading of Section 45 of the *Advocates Act* reveals that it accords advocates and clients the discretion to agree on remuneration. In particular, Section 45(1)(c) of the *Advocates Act* states as follows with regard to agreements concerning remuneration:
- “...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.” (emphasis mine)
15. As with any other agreement, the onus of proving the existence of the retainer agreement lies with he that wishes to enforce it. This principle was affirmed by the Court of Appeal in *Omulele & Tollo Advocates V Mount Holdings Ltd*, [2016] KECA 523 (KLR). The Court of Appeal further noted, with respect to the right of an advocate to enforce a fee agreement, that:
- “Under the proviso to Section 45 (5) of the Act, an advocate who is a party to a retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. In fact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee.”
16. Based on the legal framework and judicial precedents, the plaintiff only needs to demonstrate that the retainer agreement was reduced into writing and executed by both parties in order to prove its validity.
17. In this case, the letter dated 18th July 2018, marked as Annexure MM1, serves as the basis for the agreement between the parties. The letter, drafted by Merit Development Limited and addressed to the plaintiff, specifies that the legal fees for the three lawsuits would amount to Kshs. 60 million. It is signed by both Mr. K. V. Mavji, the director of the instructing client and the advocate and it clearly outlines the sources of funds to pay the legal fees.



18. It is evident that these are the terms the parties agreed to, as demonstrated by the execution of the said agreement. Notably, the agreement is drafted on the defendant's letterhead, meaning it originated from the defendant and not the plaintiff. The defendant's argument that the letter was not properly executed according to the defendant's memorandum and articles of association lacks merit in light of the Turquand's rule, as established in *Royal British Bank V Turquand*, [1856] 6 E&B 327.
19. This principle holds that a company or corporation cannot escape liability due to its officers' non-compliance with internal management regulations or statutory provisions.
20. This rule is echoed in Sections 33 and 34 of the Kenya *Companies Act*, which provide as follows:
Section 33:

“The validity of an act or omission of a company may not be called into question on the ground of lack of capacity because of a provision in the *constitution* of the company.”

Section 34(1):

“In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is free of any limitation contained in the company's constitution.”
21. It is further a settled principle of contract law that parties to a contract are bound by the terms they have negotiated. Courts cannot rewrite contracts for the parties. In *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another*, [2001] eKLR, the Court of Appeal held:

“A court of law cannot rewrite 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.”
22. Given the clear terms outlined in the letter and the signatures of both parties, it is evident that a valid and binding agreement was formed. Consequently, the plaintiff's claim for payment of legal fees from the proceeds of the sale of the suit property, or from other sources as mutually agreed, is legally enforceable. The defendant's argument that the agreement was made unilaterally is unsupported, as it is evident that both parties executed the agreement.
23. There is no dispute that the plaintiff represented the defendant in various matters. The plaintiff's legal fees remain unpaid, prompting the plaintiff, through a letter dated 29th March 2024, to formally demand payment. It is, therefore, clear that the plaintiff has established a prima facie case with a high likelihood of success.
24. Moreover, the defendant has not presented any evidence to rebut the plaintiff's anxiety that the defendant does not have the financial means to otherwise settle the outstanding legal fees. In my view, the plaintiff would suffer greater harm if the injunction is denied, as they have already provided legal services and continue to suffer the inconvenience without compensation. On the other hand, while the defendant may face inconvenience, this is outweighed by the plaintiff's need for an immediate remedy to prevent continued harm. The balance of convenience therefore tilts in favor of granting the injunction to secure the plaintiff's interests.



Whether the defendant has made out a case for expansion of time to set aside the said fee agreement and for the plaintiff to be ordered to file a bill of costs:

25. The parameters for consideration in an application for expansion of time are as set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR. The following principles were established by the Court:
- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time;
 - viii. The degree of prejudice to the respondent if the application is granted.
26. By dint of section 45(2) of the *Advocates Act*, a client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable. The Act provides further under section 45(2A) that such an application ought to be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.
27. The defendant seeks to be allowed to file the application to set aside the fee agreement out of time. Their reason for not filing the application on time is that the defendant's directors had never had sight of the agreement and only became aware of it after the death of K.V. Mavji.
28. The defendant does not deny that the said K.V. Mavji was a former director of the defendant company. That being the case, it is a well settled principle of company law arising from the decision in *Salomon V Salomon*, [1897] AC 22 that a company is a separate legal entity from its members. Flowing from that, the company enjoys perpetual succession which means that the death of a director or shareholder does not extinguish the company's obligations or disrupt the continuity of its business. In the present case, the fee agreement, having been duly executed by a former director of the defendant company, remains binding on the company even after his death.
29. The evidence on record further demonstrates that the plaintiff sent not one but two fee demand letters dated 29th March 2024 and 10th June 2024. Both letters went unanswered by the defendant. The explanation that the defendant gives is that the email address through which the demands were sent belongs to one Kantilal Kerai, who is elderly, uninvolved in the day-to-day operations of the company and rarely checks his email.



30. This explanation fails to hold up on two grounds. First, the CR12 attached to the plaintiff's documents as annexure MMI 2 clearly identifies kantilal.kerai@gmail.com as the defendant's official email address, through which the demands were properly sent. The plaintiff, therefore, cannot be faulted for using this address. Second, the same email address was used to serve other pleadings, as evidenced by the advocate's documents. Notably, these pleadings were received, as admitted by the defendant, evidencing a clear inconsistency in their excuse.
31. Moreover, the defendant's assertion lacks credibility since Kantilal Kerai has not sworn an affidavit to support these claims or provide any justification for the failure to respond to the fee demands.
32. In my view, it is not until the defendant received the court orders of 15th July 2024 that they were jolted into action. Even then, they waited another 2 months to file this application to challenge the fee agreement. The period of inactivity between when they received the court orders of 15th July 2024 and their application which was filed on 20th September has not been sufficiently addressed.
33. I find this to be nothing more than an afterthought triggered by the commencement of this suit. The defendant's conduct further reflects a clear lack of diligence, and it is therefore my finding that no credible or satisfactory explanation has been provided for the delay in bringing the application.
34. This position aligns with the principles set out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat [supra], where the court underscored the need for an applicant seeking an extension of time to provide a reasonable and credible explanation for the delay. The court held that the extension of time is not a right but a discretionary remedy that must be exercised judiciously and only where sufficient cause is shown.
35. Since the application seeking expansion of time is not successful, the other prayers particularly seeking to have the advocate ordered to tax their bill of costs fails too. Be that as it may and for the sake of finality, I will nonetheless make the following observations.
36. Section 45(6) of the Advocates Act expressly excludes the taxation of a bill of costs where an advocate and a client have entered into a valid agreement for fees. The provision states;

“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.”
37. This principle has been affirmed in numerous judicial decisions, including Sheetal Kapila V Narriman Khan Brunlehner, [2021] KEHC 9487 (KLR) and Sifa International V Board of Trustees NSSF, [2018] eKLR. In these and similar cases, courts have consistently held that taxation is unnecessary where a valid agreement on fees exists.
38. From a public policy perspective, upholding such agreements is essential to maintaining confidence in professional relationships and ensuring certainty in agreements between advocates and their clients, provided that the agreements comply with the law. In my view, courts must be vigilant in safeguarding these agreements and should not entertain attempts to invalidate them unless compelling grounds, such as fraud or coercion, are clearly demonstrated.
39. I have already established that the fee agreement dated 18th July 2018 is valid, binding upon the parties and enforceable. Additionally, the details of the work done by the plaintiff for which the fee is demanded are annexed as MMI 1R, MMI 2R, and MMI 3R. The defendant has neither challenged the authenticity of these annexures nor disputed the details in the correspondence provided.



Disposition

40. Accordingly, and for the reasons that I have stated, the plaintiff/advocate's application dated 11th July, 2024 is allowed as prayed. The defendant/client's application dated 19th September 2024 is disallowed. The plaintiff/advocate shall have the costs of both applications.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

