



**Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Barasa (Commercial Suit E380 of 2023) [2024] KEHC 15892 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E380 OF 2023  
JWW MONG'ARE, J  
DECEMBER 6, 2024**

**BETWEEN**

**OMWANZA OMBATI T/A NCHOGU, OMWANZA & NYASIMI  
ADVOCATES ..... PLAINTIFF**

**AND**

**HON DIDMUS WEKESA BARASA ..... RESPONDENT**

**RULING**

1. Before this court is the Plaintiff's application dated 2<sup>nd</sup> September 2024 seeking to entry summary judgment in favour of the Plaintiff against the Defendant for a sum of Kshs. 4,000,000/- together with interest as per plaint filed on 4<sup>th</sup> April 2024. In support thereof the Plaintiff filed a supporting affidavit.
2. The Defendant having been served with the application filed its opposition to the same vide a replying affidavit sworn on 18<sup>th</sup> September 2024 and a supplementary affidavit sworn on 14<sup>th</sup> October 2024.
3. The Applicant avers that on 8<sup>th</sup> September 2022 the Defendant/Respondent retained their services as lawyers for the Defendant in an Election Petition against him in Bungoma HCC EP No. 001 of 2022- *Bryan Mandila Khaemba v Didmus Wekesa Barasa Mutua & others* and the parties thereafter entered into an Advocate- Client fee agreement that was executed by both parties on 12<sup>th</sup> September 2022.
4. The Applicant further avers that pursuant to the said fee agreement the Defendant was pay to the said firm of Advocates the sum of Kshs. 5,000,000/- to cover the costs legal representation in the said petition. Indeed and as sign of good faith, the Applicant further avers that the Defendant/Respondent paid an initial fee of Kshs.1,000,000/-.
5. It was the Applicants position that the said firm of Advocates diligently and successfully defended the Defendant in the said petition and by a ruling issued on 22<sup>nd</sup> November 2022 the said petition



was dismissed with the Defendant emerging victorious in the matter. Subsequently, the Applicant has made several attempts to collect the balance of its fees of Kshs. 4,000,000/- as agreed in the Advocate-Client fee Agreement with no success. Subsequent demand notices for the payment of the outstanding fees have been ignored and or not been acted upon by the Defendant necessitating the filing of the present suit to enforce the said Advocate-Client fee agreement between the parties.

6. Upon being served with the pleadings in this matter, the Defendant filed a defence dated 18<sup>th</sup> September 2024. The Defendant also filed a Replying Affidavit sworn on 18<sup>th</sup> September 2024. In both the Defence and the said Replying affidavit, the Defendant does not deny the existence of the Advocate-Client fee agreement but argues that the same was conditional on certain milestones being met, to wit, a deposit of Kshs.1,000,000/- was to be paid upon taking of instructions and further payments were to be paid upon existence of certain conditions and milestones being met in the Election Petition.
7. The Defendant maintained that the Advocates were not deserving of the balance of Kshs. 4,000,000/- as the case was struck out in summary and the same did not proceed to full trial as envisioned. The Defendant further maintained that whether the balance therein was due and payable was a matter for a full trial and the same could not be determined by way of a summary procedure.

### **Analysis and Determination**

8. I have carefully considered the pleadings before me including the Application and the response thereto. At the writing of this ruling I note that only the Applicant had filed its written submissions pursuant to the directions of the Court, which I have carefully considered. I note however, the Defendant, despite not filing any submissions has put in a replying affidavit in addition to the Statement of Defence filed in response to the suit herein. I have therefore equally carefully considered the same.
9. From my analysis of the material before me I note that this court is called to determine whether the Application for entry of summary judgment is merited. The Application and the suit proceed from an Advocate- Client fee agreement that both parties acknowledge its existence. Section 45 of the [Advocates Act](#), Cap 16 laws of Kenya provides as follows:-
  45.
    - (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.
10. The Applicant argues that pursuant to the Advocate - Client Fee Agreement, they diligently and skillfully deployed their legal skills to defend successfully the election petition against the Defendant and that the Defendant failed to honour his part of the agreement by failing to remit the balance of the agreed legal fees of Kshs.4,000,000/-. The Applicant argued that the Defendant has not raised any



triable issues in his defence and that the same amounts to mere denials and as such the Applicant is entitled to the prayers sought for entry of summary judgment in the present application.

11. The *Advocates Act* envisions a scenario where legal fees once agreed upon between the Advocate and the client under an Advocate-Client fee agreement provided for by the law, then that fees becomes due and payable upon the Advocate's execution of its part of the agreement. I am therefore satisfied with the arguments put forward by the Advocates that their fees became due and payable once the Advocate accepted to represent the client and deployed its services as such. I find and hold that the balance of fees amounting to Kshs. 4,000,000/- is due and payable to the Advocates as per the said Advocate-Client fee agreement. It is this courts finding that the defence filed the Defendant in response to the Plaintiff is a sham and a mere denial that fails to raise any triable issues or challenge the plaint as set out. The same is hereby dismissed and this court hereby proceeds to enter summary judgment for the Plaintiff as prayed in the plaint.

### **Conclusion and Final Disposition**

12. Having considered the arguments put forth by the parties in this made in this matter I am persuaded that the Applicant's application dated 5/9/2024 has merit. The same is hereby allowed as prayed. As a consequence, therefore Judgment is entered for the Plaintiff against the Defendant in the following terms: -
- i. The sum of Kshs. 4,000,000/- together with interest at court rates from the date of filing suit herein till payment in full.
  - ii. Costs of the suit.
  - iii. Costs of this Application.
13. It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2024**

**J.W.W. MONG'ARE**

**JUDGE**

In the presence of:-

Mr. Saka holding brief for Ms. Chelangat for the Plaintiff/Applicant.

Ms. Rotich holding brief for Mr. Kiplangat for the Defendant/Respondent

Amos - Court Assistant

