



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APP. NO. 428 OF 2017

HAMILTON HARRISON & MATHEWS.....APPLICANT

-VERSUS-

MUMBI NGENGI.....RESPONDENT

RULING

This ruling relates to a Chamber Summons Application dated 11th January 2019, pursuant to **section 45 (1) and (6) of the Advocates Act, Order 52 Rule 3 of the Civil Procedure Rules, paragraph 11 (2) and (4) of the Advocates Remuneration Order, Order 50 Rule 4 of the Civil Procedure Rules, sections 1A, 1B, and 3A of the Civil procedure Act Cap 21 of the Laws of Kenya**. The Applicant is seeking orders;

1. That the court to enlarge time and deem this reference as having been filed within the prescribed time;
2. That the court makes a declaration that the Taxing officer

misdirected himself in holding that he lacked jurisdiction to tax for professional services arising from **Nairobi High Court Miscellaneous Civil Application Number 547 of 2012;**

3. That the court makes a declaration that there was a retainer between the Applicant and the Respondent with respect to professional services rendered in **Nairobi High Court Judicial Review Number 269 of 2014;**
4. That the Ruling of the taxing officer delivered on 6th November 2018 be set aside and the Applicant's bill of costs dated 19th October 2017 be taxed before another taxing officer.
5. That the costs of this application be provided for.

The application was based on the following grounds;

a. By this ruling delivered on 6th November 2018, the Taxing officer declined to tax the applicant's Bill of costs dated 19th October 2017 on the basis that:-

- i. He had no jurisdiction to tax for services arising out of **High Court Miscellaneous Civil Application Number 547 of 2012** as there was an agreement for fees under **Section 45 (1) of the Advocates Act; and**
- ii. He had no jurisdiction to tax for services arising out of **Judicial Review 269 of 2014** as there is a dispute as to the existence of a retainer.

b. By a letter dated 12th November 2018, the Applicant requested the Taxing Officer for reasons for his decision. The Taxing Officer responded to the said letter by his letter of 22nd November 2018 (received by the applicant on 8th December 2018) stating that the reasons are contained in the ruling of 6th November 2018;

c. The Applicant had to carefully review the ruling before lodging a reference which ought to have been done by 22nd December

2018. The court proceeded on vacation from 21st December 2018 and time was therefore frozen;

d. The taxing officer fell into grave error as there was **no written binding retainer in High Court Miscellaneous Civil Application Number 547 of 2012** between the parties as contemplated under **Section 45 (1) of the Advocates Act**;

e. The Respondent instructed the Applicant to act for it in **Judicial Review 269 of 2014** and the Applicant is therefore entitled to compensation for the work done;

f. Striking out the Applicant's Bill of Costs as was done by the taxing officer is a draconian measure when there was the alternative of referring the issue of jurisdiction to the court as provided under paragraph **12 of the Advocates (Remuneration) order**;

g. It is fair and just for the court to determine the question of jurisdiction on merit and avert the injustice visited upon the Applicant by the ruling of the taxing officer.

RESPONDENT'S GROUNDS OF OPPOSITION

The Respondent opposed the application on grounds that;

1. The Applicant Advocate had not complied with **paragraph 11 of the Advocates (Remuneration) Order** with respect to giving notice in writing to the taxing officer of the items of taxation to which he objects;
2. The court should decline the invite to exercise discretion to enlarge the prescribed time for filing the reference for want of procedure;
3. The Applicant Advocate received instructions and was paid a total of Ksh 2,450,000/- plus VAT and disbursements in respect of **High Court Miscellaneous Civil Application No. 547 of 2012** despite receiving payments;
4. The Advocate rendered inadequate or no legal services in respect of **High Court Miscellaneous Civil Application No. 547 of 2012**;
5. That the amount already paid to the Advocate in any case is a fair and reasonable compensation for services rendered;
6. The Advocates had no instructions to act for the Respondent with respect to **Judicial Review Application No. 269 of 2014** a matter which the Respondent was not a party to;
7. That in any case, the Applicant Advocate ought to move the right forum to recover outstanding agreed legal fee, if any; and
8. The application is incompetent for want of laid down procedure and an abuse of the court process.

APPLICANT'S SUBMISSIONS

FACTS

It was the Applicant's submissions that, by his ruling delivered on 6th November 2018, the taxing officer declined to tax the Applicant's Bill of Costs dated 19th October 2017 and instead struck it out.

That on 12th November 2018, which is 5 days after the ruling of the taxing officer, the Applicant by way of a letter requested the taxing officer to furnish it with reasons for his decision to enable it "take further action". The said letter was issued pursuant to **paragraph 11 (1) of the Advocates (Remuneration) Order**.

That by his letter of 22nd November 2018 received by the Applicant on 8th December 2018, the taxing officer indicated that the reasons for his decision are contained in the ruling.

That as a result of the foregoing, the Applicant had made this application seeking the prayers set out therein.

Whether the applicant is entitled to an order for enlargement of time to file its reference

In **Peter Julius NJoroge –vs- Fidelity Commercial Bank & Another [2018]eKLR**, the court held:-

"Any party desirous of objecting to the decision of the taxing officer may do so after giving notice in writing to the taxing officer of the items objecting to. This should be done within 14 days after the decision. Upon receiving the reasons from the taxing officer, the objector ought to file the reference within 14 days of receipt of the reasons. Sometimes parties do not keep the timelines set by sub paragraphs (1) and (2). However, by dint of the provisions of subparagraph (4), the High Court is empowered to enlarge the time fixed by subparagraphs (1) and/or (2). The rule on enlargement of time expressly pronounces that power is discretionary"

Whether in filing the reference, the Applicant complied with paragraph 11(1) of the Advocates Remuneration Order

The Applicant invites this court to examine its letter of 12th November 2018 and discern its import and true meaning. The said letter is at page 4 of the **exhibit KK2** annexed to the affidavit of **Kiragu Kimani** sworn on 11th January 2019.

The Applicant submits that contrary to the Respondent's assertion, it fully complied with the dictate of **paragraph 11(1)** of the ARO. Its letter of 12th November 2018 was issued pursuant to and was in full compliance with **paragraph 11(1)** of the ARO.

The Applicant further relies in the case of *Lubullela & Associates, Advocates –vs- Kenyatta National Hospital [2012]eKLR*, where similar objection to that made by the Respondent was made and dismissed. The Applicant in the Lubullela case had issued a letter to the taxing officer requesting for reasons just like the Applicant in this case. It did not expressly state that it was objecting to taxing officer's decision. In dismissing the Respondent's objection the court held as follows;

“...I have carefully considered Rule 11(1) of the Advocates (Remuneration) order. Whilst it requires a party objecting to the decision of the taxing master to issue a notice within 14 days, the sub rule does not specify the format of such notice. In my view, the letter of 6th January 2010 was compliant with the sub-rule”

Whether there was a retainer agreement between the parties with respect to Nairobi High Court Misc. 547 of 2012 within the meaning of section 45 (1) of the Advocates Act.

Section 45 (1) of the Advocates Act provides that a retainer 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.

The Applicant submits that there was no written agreement signed by the Respondent.

Whether there was a retainer between parties with respect to Nairobi JR Misc. No. 269 of 2014

At paragraph 11 of Kiragu Kimani's affidavit sworn on 31st August 2018, it is deposed that the Respondent instructed the Applicant to oppose the Judicial review application on her behalf. At page 29 of the exhibit **marked KK1**, it evidences communication stating that while attending court on 25th July 2014 for *High Court Miscellaneous Civil Application No. 547 of 2012*, the Applicant learnt that the statutory manager had filed a new suit challenging his removal being **Judicial review 269 of 2014**. The move was against the interests of the Respondent as a director and shareholder in Blue Shield Insurance Company Limited as she wanted to end the receivership.

The respondent instructed the Applicant to oppose the Judicial Review Application on behalf of the Blue shield Insurance Company Limited. The Respondent's mother, Ms. Beth Muigai signed the affidavit as a shareholder and director of the company. The correspondence on instructions and the replying affidavit filed in opposition to the Judicial Review proceedings were produced at **pages 28 to 41** of Kiragu Kimani's Affidavit sworn on 31st August 2018 and filed on 5th September 2018.

In *Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Ltd (2007)eKLR*, Osiemo J. (as he then was), observed that:-

“Justice L. Njagi pointed out as follows in HCCC No. 416 of 2004, Nyakundi & Company Advocates- vs- Kenyatta National Hospital Board (unreported) and gave the definition and form of retainer from Halsbury's law of England, 4th Edition, re issue at paragraph 99, page 83 where it stated:

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment...”

Njagi J. pointed out that in the same work, it is further explained that a retainer need not be in writing, unless, under the general law of contract, the terms of the retainer or the disability of a party to it make writing requisite. It is then further stated, the Judge added, at paragraph 103:

“Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case...”

In *Ochieng Onyango Kibet & Ohaga Advocates –vs- Akiba Bank Limited [2007] eKLR*, the court held as follows;

“... it is not the law that an advocate must obtain a written authority from client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client...And nevertheless it can be implied from the client/ advocate relationship”

From the foregoing conduct of the Respondent, there is no doubt that she instructed the Applicant to act for her in Judicial Review **Application No. 269 of 2014**. The Applicant is therefore entitled to legal fees for representation.

SUBMISSIONS OF THE CLIENT/RESPONDENT

The Applicant Advocate has not complied with paragraph 11 of the Advocates(Remuneration) order with respect to giving notice in writing to the taxing officer of the items of taxation to which he objects;

The Client/Respondent submitted that paragraph 11(1) of the Advocates Remuneration Order states that:-

“should any party object to the Decision of the Taxing Officer, he may within 14 days after the Decision, give notice in writing to the Taxing officer of items of taxation to which he objects....”

The court should decline the invitation to exercise discretion to enlarge the prescribed time for filing the reference for want of procedure

He further submitted that the taxing officer rendered the ruling/decision on 6th November 2018. Paragraph 11 of the Advocates Remuneration Order which is the provision on an objection to a decision on Taxation and appeal to the Court of Appeal provides:-

“ (1) should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the terms of taxation to which he objects;

(2) the taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection;

(3) any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) the High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

The reasons given for delay in lodging the reference are inadequate taking into account the following;

- a. That the ruling was rendered on 6th November 2018;
- b. The Applicant give notice in writing to the taxing officer of the items of taxation to which he objects fourteen days after the decision;
- c. The Applicant sought reasons of the decision by a letter dated 12th November 2018;
- d. The taxing officer responded by a letter dated 22nd November 2018 which was received by the Applicant on 8th December 2018, and the reasons given promptly by the taxing officer,
- e. The courts registry is open during court vacation.

The taxing officer in the ruling was magnanimous enough to even guide the Applicant by granting leave to move the right forum since the taxing officer lacked jurisdiction after the objection of the Respondent on the grounds as follows;

- i. The Applicant Advocate received instructions and was paid a total of Ksh 2,450,000/- plus VAT and disbursements in respect of **High Court Miscellaneous Civil Application No. 547 of 2012** on account of agreed fees;
- ii. That the amount already paid to the Advocate in any case is a fair and reasonable compensation for services rendered;
- iii. The Advocates has no instructions to act for the Respondent with respect to **Judicial Review Application No. 269 of 2014** a matter which the Respondent was not a party to.

DETERMINATION

The Court considered the pleadings and submissions made by Counsel on behalf of their clients and outlines the following as the issues for determination;

- a. Did the Applicant comply with Paragraph 11 of Advocates Remuneration Order?
- b. Is the Applicant entitled to enlargement of time as envisaged by Section /Paragraph 11 of Advocates Remuneration Order?
- c. Should the decision of Taxing Master to strike out Bill of Costs arising out of High Court Miscellaneous Application 547 of 2012 and Judicial Review 269 of 2014 be upheld or dismissed or set aside?

ANALYSIS

The Applicant filed Bill of Costs on 24th October 2017, Grounds of Opposition were filed by the Respondent on 18th April 2018. The parties relied on filed written submissions that culminated by the Taxing Master's Ruling of 6th November 2018.

The Applicant wrote to Taxing Master vide letter dated 12th November 2018 to furnish reasons for the decision made from the Ruling. On 22nd November 2018, the Deputy Registrar/Taxing Master confirmed the reasons were in the said Ruling of 6th November 2018.

The Applicant indicated that on receipt of the Taxing Master's letter on 8th December 2018 they delayed to file the reference within the requisite period as the Court was on vacation and time was frozen.

The Respondent contested the Applicant's non compliance with **Rule 11(2) of Advocates Remuneration Order** as the reference was filed on 11th January 2019, clearly outside the prescribed 14 days after receipt of the Taxing Master's reply to the request for reasons for the Taxing master's decision.

The Respondent contended that the reasons given for delay in lodging the Reference were inadequate taking into account among other reasons, the Court Registry is open during Court vacation.

The Applicant relied on **Rule 11(4) Advocates Remuneration Order** on the High Court's discretion to enlarge time to file reference.

This Court is inclined to exercise discretion and enlarge time relying on the provisions of **Article 159 2 (d) COK 2010**

“justice shall be administered without undue regard to procedural technicalities;

Order 50, Rule 6 CPR 2010 provides;

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after

the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

With regard to the notice required by **Rule 11(1) ARO**, there is no prescribed format and in the absence of such format the letter of 12th November 2018 should suffice. With regard to the timeline for filing reference within 14 days after receipt of the Taxing Master's response on 8th December 2018 and the Applicant filed the Reference on 11th January 2019, whereas it is true the Court Registries are open during Court vacation, Court activities are at bare minimum with attendance only to urgent matters. Secondly, possibly the 14 day deadline fell just before onset of festive season. 2 weeks delay in the circumstances is/was not inordinate delay and no prejudice was occasioned. Since the law provides remedy for such eventuality, the Court exercises judicial discretion to consider and grant enlargement of time. It is so granted. The Applicant is deemed to have complied with **Rule 11 of Advocates Remuneration Order (ARO)**;

On whether there was a retainer Agreement between the Applicant /Advocate and the Client /Respondent in **High Court Miscellaneous Civil Application 547 of 2012 and Judicial Review 269 of 2014** the Applicant took issue with the Taxing Master's findings as follows;

“Both parties agree there was an agreement, a clear indication of meeting of minds. However, the Respondent contends that the job done was inadequate. On this I have no jurisdiction this aspect of the Bill under Section 45 of the Advocates Act since the Agreement is alleged to have been fully paid for the party performed services.

On the issue of JRA 269/2014, the Respondent claims there were no instructions. Again the issue of jurisdiction comes up. In the case of Hezekiel Oira vs KBC Misc 35 & 36 of 2011, the Court observed Taxing Officer can only tax a bill where there is an existing advocate/client relationship and where there is no dispute as to the retainer. It is on this basis that the Respondent having disputed instructions to the Applicant, I will strike out the bill with leave to the Applicant to move [to] the right forum.”

The Applicant found the above rendition to be in error as there was no retainer written agreement between the parties in **High Court Miscellaneous Application 547 of 2012** as contemplated by **Section 45 (1) of the Advocates Act**. **The Applicant reiterated that the Respondent instructed the Applicant to act on their behalf in Judicial Review 269 of 2014 and the Applicant is entitled to compensation for the work done.**

The Applicant relied on the case of ;

Omulele & Tollo Advocates vs Mount Holdings Ltd C.A.75 of 2015 which held;

“A retainer means the instruction, employment or engagement of an advocate by his client.

On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship...

As the Section [45 of Advocates Act] indicates, under such agreement, the parties fix or put a cap on the advocates instruction fees....both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer Agreement....It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent. It is erroneous as submitted By Counsel for the Respondent that retainer and retainer agreement mean one and the same thing.”

In the instant case, the Applicant deposed that at the meeting of 28th November 2013, the legal fees were agreed at Ksh 3.5 million. There are correspondence from the Applicant to the Respondent; letters dated 31st July 2014 marked **KK1**, 14th October 2013 and 3rd December 2013 briefing the client on the position with regard to **High Court Civil Application 547 of 2012.**

In particular, letter dated 14th October 2013 in part reads;

“All in all I have no doubt that there will be a lot to be done going forward. I propose to Ksh 3.5 million plus disbursements and VAT.”

The Client/Respondent did not respond to the proposal of Ksh 3.5 m Legal fees. The Letter from the Client attached to the Applicant’s documents is an earlier letter of 12th June 2013 through the Respondent’s Office Administrator/Personal Assistant Ms Winnie Waweru that they were preparing payment to the Applicant’s firm. However, there was no confirmation from the client that the proposal was accepted, approved and/or consented to. The parties did not fix and/or put a cap to the legal fees chargeable in the case. The totality of these pleadings and annexures is that the Applicant and Respondent had/have a retainer with regard to **High Court Civil Application 547 of 2012.** It is **not a Retainer Agreement envisaged by Section 45 (1) Advocates Act** that provides that such agreement is only valid and binding on the parties provided it is in writing and it is signed by the client or his/her agent duly authorizes in that behalf. Therefore, the Deputy Registrar/Taxing Master has/has jurisdiction to tax the Bill of Costs that was struck off and take into account the admitted and paid funds in settling the Fee Notes raised by the Applicant’s Firm and consider whether the amounts paid are a fair and reasonable compensation for services rendered in the matter.

This Court concurs with Taxing Master that he lacked jurisdiction to determine the issue of the quality of legal representation employed by the Applicant firm in the instant proceedings **High Court Civil Application 547 of 2012.**

With regard to in **Judicial Review 269 of 2014**, the Respondent deposed that there was advocate-client relationship and in the proceedings did not include the Respondent as a party.

The Respondent relied in the case of **County Council of Bureti vs Kennedy Nyamokeri T/A Nyamokeri & Co Advocates [2006] eKLR** where the Court held;

“For the Taxing Officer to embark on taxing a bill of costs, it must be established that there exists an Advocate/Client relationship and that the advocate was instructed as per law provided. Since the Applicant failed to demonstrate the above, I find that there is no basis for varying or setting aside the Taxing Officer’s orders. Even if the Bill went to another Taxing Officer, it would suffer the same fate. For this reason, I dismiss the application...with costs to the Respondent.”

In the instant case, the Applicant claimed that the Respondent instructed him to oppose the Judicial Review application on her behalf which the Applicant executed. The Respondent’s mother executed the Affidavit as a shareholder and Director of the Company under statutory management.

The Applicant relied on correspondence on instructions and the Replying Affidavit filed in opposition of Judicial Review proceedings produced at **Pages 29-41** of bundle annexed to the Applicant’s Replying Affidavit filed on 5th September 2018.

This Court observed from the documents filed;

a. Letter dated 4th August 2014 by the Applicant to the Respondent stating;

“I forward a set of the papers filed by Eliud Mureithi in the new case. I will review them. I look forward to payment of our fees.

The Respondent did not acknowledge respond and /or consent on the contents of the letter.”

b. The letter of 25th July 2014 from the Applicant to the Respondent referenced **High Court Misc Civil Application 547 of 2012** read in part;

“We appeared before Gikonyo J Earlier today. We learnt that Mr. Eliud Mureithi had filed a fresh suit challenging

his removal. The suit was before a different Judge, Odunga J in the Judicial Review Division. When Odunga J Learnt of the existence of this suit, he said the 2 suits should be placed before Gikonyo J.....”

Again, the Respondent did not reply, confirm and/or give instructions. the 2 matters were to be mentioned before the same court.

c. On 13th August 2014, the Applicant wrote to the Respondent as follows;

“We forward for your consideration the Replying Affidavit we intend to file on your behalf to oppose the new case filed by Mr. Eliud Mureithi. Do let us have your comments if any on the affidavit today. If you are happy with the affidavit kindly print and execute 7 copies and let us have the executed copies today for filing in Court.”

Again, the Respondent did not formally reply to the letter.

d. The annexed affidavit filed on Respondent’s behalf by the Applicant is with regard as inscribed in the citation, **JR Misc App 269 Of 2014 & Misc Civil Suit 547 of 2012.** The Affidavit was filed where both matters tackled heard before the same court.

e. The Ruling delivered by Justice Gikonyo on 25th June 2015 is with regard to **Misc Civil Suit 547 of 2012.** At Pages 8 & 10 of the Ruling, the Court alluded to the issues raised in **JR. Misc App 269 of 2014** and at Pg 26 made findings and orders that included issues raised in **JR. Misc App 269 of 2014.**

f. The Applicant did produce/attach a separate Ruling /Judgment/ Order/Decree by the Court with regard to **JR. Misc App 269 of 2014** by itself or alone/separately.

The totality of the correspondence, pleadings and Ruling of the Court discloses, the Respondent did not expressly instruct the Applicant to represent them in **JR Misc App 269 of 2014.** Admittedly, from the instructions issued by the Respondent to the Applicant to represent in **Misc Civil Suit 547 of 2012** when the JR Misc App. 269 was heard before same court as **Misc Civil Suit 547 of 2012** the same instructions were used in representing the Respondents in **JR. Misc App 269** which was not a separate suit after it was consolidated with **Misc Civil Suit 547 of 2012.**

Both mention were heard together and a single Ruling was delivered on 25th June 2015 which addressed issues raised in both suits.

DISPOSITION

1. The Taxing Master’s Ruling of 6th November 2018 is partly set aside with regard to striking out Bill Costs of MISC CIVIL SUIT 547 of 2012. The Evidence on record confirms that there was a retainer as opposed to retainer agreement and hence subject to taxation by Taxing Master. In the specific circumstances of the matter, payments already made shall be acknowledged and taken into account.

2. The Taxing Master’s Ruling of 6th November 2018 is partly upheld with regard to striking out the Bill of Costs of JR MISC APP 269. The advocate client relationship was subsumed in MISC CIVIL SUIT 547 of 2012. JR MISC APP 269 was transferred from Judicial Review Division to Commercial & Tax Division and heard together as MISC CIVIL SUIT 547 of 2012 culminating with the Ruling in MISC CIVIL SUIT 547 of 2012 delivered by Justice Gikonyo on 25th June 2015.

3. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 7TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. APPOLO FOR THE APPLICANT

MR. OWITI FOR THE RESPONDENT

COURT ASSISTANT - TUPETT