



REPUBLIC OF KENYA



**Ng'ani & Oluoch Advocates v Mugo (Commercial Case E213 of 2025)  
[2026] KEHC 429 (KLR) (Commercial and Tax) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E213 OF 2025**

**AA VISRAM, J**

**JANUARY 22, 2026**

**BETWEEN**

**NG'ANI & OLUOCH ADVOCATES ..... PLAINTIFF**

**AND**

**GEORGE MUGO ..... DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. By the Originating Summons dated 19<sup>th</sup> March, 2025, and made under Section 45(1)(b) of the *Advocates Act* (Chapter 16 of the Laws of Kenya) and Order 52, rule 10 of the Civil Procedure Rules, the Plaintiffs seek to enforce a fee agreement dated 19<sup>th</sup> February, 2021, and recover legal fees amounting to Kshs. 7,233,332.00/= from the Defendant whom they aver was their client. The Originating Summons is supported by the affidavit of Earle Ng'ani, an Advocate practising in the Plaintiffs' firm, sworn on 19<sup>th</sup> March, 2025.
2. The Plaintiffs' case is that the Defendant retained them to sue Ace Capital & Credit Limited and Stephen Kinyua Kariuki for recovery of Kshs. 11,369,150.00/=. That on 19<sup>th</sup> February, 2021, a written Advocates-Client Fee Agreement was signed, agreeing that legal fees for the services was to be 20% of the judgment sum plus the assessed costs. The Plaintiffs filed the suit and obtained judgment on 31<sup>st</sup> October, 2023, for Kshs. 29,250,798.00/= and Kshs. 446,678.75/= as assessed costs, and therefore, according to the said agreement, were entitled legal fees in the amount of Kshs. 5,850,159.00/= plus the said assessed costs. The total fees payable to the Plaintiffs being, Kshs. 6,295,837.60/=.
3. The Plaintiffs aver that despite a letter of demand dated 11<sup>th</sup> March, 2023, the Client has, to date, refused to pay, and they now seek taxation of the bill to recover the fees. Based on the record, I note that despite service of the Summons, the Defendant has not proffered any response. The Plaintiffs have



also supplemented their arguments by filing written submissions which I have considered, and I will make relevant references to the same as part of my analysis and determination below.

### **Analysis and Determination**

4. Section 45(1) of the *Advocates Act* permits an Advocate and a client to enter into a written agreement on fees, which shall be valid provided it is signed by the client or their duly authorized agent. For such an agreement to be enforceable, its terms must be unequivocal, express mutual assent, and be entered into freely and voluntarily. In *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] KECA 523 (KLR), the Court of Appeal restated the proposition of the law that an agreement for fees contemplated under Section 45, is a contract whose terms and conditions must be clear and unambiguous.
5. I have read the Agreement presented by the Plaintiffs, and based on a plain and ordinary reading of the same, I find that the above criterion is met. The agreement is in writing, and it has been signed by both the Defendant and the Advocate, Vincent Otieno Oluoch, on behalf of the Plaintiffs. This satisfies the basic formal requirement of Section 45(1).
6. However, a reading of this Section 45 also provides that the said section is Subject to Section 46. The relevant part of Section 46(c) that:-

Nothing in this Act shall give validity to— c. any agreement by which an Advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the Advocate shall be remunerated at different rates according to the success or failure thereof; (Emphasis mine)

7. Therefore, whereas Section 45 gives Advocates and clients the discretion to agree on remuneration, this discretion is subject to Section 46 of the Act, which makes any agreement for remuneration that is based on the sum recoverable invalid. The Agreement between the parties provides in part that “...the fee payable to the Advocate in the above suit shall be 20% plus cost of the sum recoverable from the Defendants.” In my view, this provision of the Agreement creates a contingency-based fee structure. The Court of Appeal, in *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] KECA 85 (KLR) drew a direct link between recovery and success by stating that “a party can only make full recovery once he has been successful in the litigation.” Therefore, a fee calculated solely as a percentage of the “sum recoverable” is, in substance, a fee conditional on the success of the litigation because if the suit fails, there is nothing to recover.
8. Because the Plaintiffs’ legal fees comprising of 20% of the sum recoverable was solely dependent on the success of the suit, that part of the said agreement contravened Section 46 of the *Advocates Act* and is accordingly invalid and unenforceable.
9. In my view, the logic of Section 46 of the *Advocates Act* does not extend to the issue of the assessed costs payable to the Advocates. The distinction is doctrinal, statutory, and has been recognised in Kenyan jurisprudence. Section 46(c) of the *Advocates Act* is narrowly targeted. It prohibits agreements by which an Advocate’s remuneration is to be paid “only in the event of success” or is to vary depending on the outcome of contentious proceedings. The mischief addressed is champerty and maintenance, namely agreements that give an Advocate a direct financial stake in the success or failure of litigation in substitution for ordinary remuneration. The prohibition is concerned with outcome-dependent remuneration.
10. On the other hand, party and party costs are a statutory incident of litigation, not a success fee. Costs follow the event as a matter of discretion under Section 27 of the *Civil Procedure Act*. Once awarded and



taxed, they crystallize into a liquidated sum payable by the losing party. An agreement that the Advocate may receive or retain those taxed costs does not make the Advocate's remuneration contingent on success in the sense contemplated by section 46. The Advocate is not agreeing to act for nothing unless the case succeeds, nor to charge different fees depending on success or failure. Rather, the Advocate is agreeing with the client on how the Advocate's fees will be discharged if and when costs are recovered.

11. Finally, this distinction has been recognised by the Court of Appeal. In *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR. The Court was careful to emphasize that Section 45 fee agreements are lawful so long as they do not offend Section 46. The Court struck down success-based remuneration because it tied the Advocate's entitlement to the outcome of the case itself. Importantly, the Court did not suggest that recovery of fees through taxed costs was impermissible. On the contrary, the judgment proceeds on the accepted premise that costs, once taxed, are a lawful mode of remuneration, subject to the Advocates Remuneration Order. I therefore find that that part of the agreement is legal and enforceable.

### **Conclusion and Disposition**

12. Based on the reason set out above, the Originating Summons dated 19<sup>th</sup> March, 2025, is allowed in part only.
13. An order is issued for the enforcement of the Advocates – client agreement dated 19<sup>th</sup> February, 2021, in respect of only the part of the agreement stating that assessed costs of the litigation shall be payable by the client to the Advocates.
14. Judgment is entered in favour of the Plaintiff for the sum of Kshs. 445,678.75/= together with interest at the rate of 14% from the date the costs were assessed until payment in full.
15. Each of the parties shall bear their own costs given that Judgment was allowed in part only.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 22<sup>ND</sup> DAY OF JANUARY, 2026**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

Court Assistant: Lispa

.....for Plaintiff

.....for Defendant

