

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
MISC APPLICATION NO. E004 OF 2025

**IN THE MATTER OF TAXATION OF ADVOCATES-CLIENT
BILL OF COSTS**

AND

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS
OF KENYA**

AND

**IN THE MATTER OF THE ADVOCATES (REMUNERATION)
ORDER
BETWEEN**

**L K OBWANDA
ADVOCATES.....ADVOCATE/APPLICANT
VERSUS**

**MARY OTIENO
JOEL.....CLIENT/RESPONDENT**

RULING

[1] Before the Court for determination is the Notice of Motion dated 17th January 2025 brought under **Sections 1A, 1B and 3A** of the Civil Procedure Act, Cap 21, **Order 51** of the Civil Procedure Rules, 2010, **Schedule 7** of the Advocate (Remuneration) Order; and all other enabling provisions of law. The applicant thereby sought the following orders:

[a] That an order be issued to the respondent/client to settle the Advocate's fee for legal representation accorded to the respondent in **Oyugis SPM's Succession Cause No. 234 of 2023.**

[b] That upon prayer 1 being granted, the bill annexed herein be taxed and subsequently be deemed to be decree of this honourable court.

[c] That costs of the application be provided.

[2] The application was premised on the grounds that the firm of **M/s L.K. Obwanda Advocates** had been instructed by the respondent to file succession proceedings, which they duly commenced; but that, without any prior notice, the respondent later engaged another Advocate to take over the matter at the confirmation stage. The applicant averred that it had diligently prosecuted the succession cause and was only awaiting the proposed mode of distribution to enable the matter to proceed to confirmation by the time the matter was taken over by another Advocate.

[3] The applicant further deposed that that although the respondent had not paid any legal fees, the firm proceeded with the matter on the understanding that payment would be made upon conclusion of the case, as had allegedly been agreed. The applicant asserted that it has repeatedly approached the respondent to settle the outstanding fees, but she has declined to do so. Additionally, the applicant averred that it had filed a Bill of Costs before the trial court for assessment, but that respondent denied ever having instructed the firm, despite having benefitted from its legal services.

[4] The applicant also mentioned that it wrote to the respondent, through her newly appointed Advocates, who responded on 28th May 2024 denying that the respondent had instructed the applicant and requesting a copy of the Retainer Agreement, pursuant to **Section 51(2)** of the **Advocates Act**. The applicant reiterated its stance that the respondent was its client and urged the court to allow its application with costs.

[5] The application was supported by the affidavit of **Ms. Obwanda Linah**, sworn on 17th January 2025 to which she annexed copies of the documents comprising the Succession Cause, draft application for confirmation, Bill of Costs and the letter mentioned at Paragraph 4 above.

[6] The respondent opposed the application vide her Replying Affidavit sworn on 11th March 2025. She denied ever instructing the applicant and contended that no notice or letter of instruction had been produced by the applicant. She averred that any purported instructions were given by an interloper who had attempted to pressure her into giving out the deceased's land. The respondent further averred that a Bill of Costs can only be taxed by the taxing master and not by this Court.

[7] Directions were given on 5th May 2025 that the application be disposed of by way of written submissions. Although the applicant complied and filed written submissions dated 14th April 2025, the respondent did not. The applicant reiterated its posturing that the respondent was its client in the Succession matter. It contended that it had provided sufficient evidence demonstrating that it represented the respondent and acted on the instructions she had given. The Court was referred to the case of **Mwangi Kengara & Co Advocates v Invesco Assurance Co. Ltd [2014] eKLR** to support the proposition that an advocate is entitled to fees for services rendered to a client, and that whether the advocate ceases acting or the client terminates the engagement, the advocate is entitled to charge fees for all work done up to the point at which the Advocate/Client relationship ends.

[8] The applicant further submitted that an Advocate/Client relationship had been duly established, and therefore the applicant is entitled to have its Bill of Costs taxed, notwithstanding that it ceased acting before the confirmation of the grant. The applicant referred to the case of **Christine James Kioko v J. A Makau & Co & Advocates [2021] KEHC 6980 (KLR)** where the court held that an advocate who has been instructed by a client has a legitimate expectation to be paid for work done, regardless of whether the Advocate/Client relationship later ends; and that it would be unjust to deny an advocate the right to claim fees merely because they ceased acting.

[9] Lastly, the applicant urged the court to proceed and tax the annexed Advocate's Bill of Costs as provided under paragraph 7 of the Advocates (Remuneration) Order. The applicant pointed out that the Bill had been filed before the lower court but had to be filed before this Court due to its contentious nature. The applicant relied on the decision of **Mugambi & Co Advocates v John Okal Ogwayo & another [2013] KEHC 6894 (KLR)** where it was held the taxing officer's jurisdiction under the Advocates (Remuneration) Order is limited to taxing bills of costs where there is no dispute over the advocate's retainer or where costs have already been awarded by the court. If the fundamental question of whether an advocate was duly retained arises, that issue must first be determined by the High Court, not by the taxing officer or deputy registrar. In the circumstances, the applicant urged the court to find merit in its application and to allow it as prayed.

[10] I have considered the application, the respondent's Replying Affidavit and submissions filed herein. The two issues for determination are whether there was a retainer of the applicant's services by the respondent and whether the parties entered into a Retainer Agreement in that regard; and if so, whether this court can tax the Bill of Costs attached to the Supporting Affidavit.

[11] According to **Halsbury's Laws of England, 5th Edition, 2009 Vol 66** at page 13 at paragraph 763, the term "**retainer**" is defined as follows:

"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..."

[12] The applicant deposed that that it was instructed by the respondent to act on her behalf in the **Succession Cause No. 234 of 2023** filed at Oyugis Law Courts. It is noteworthy however that although some of the documents annexed to the applicant's Supporting Affidavit appear to have been signed by the applicant, none of the critical documents were signed by the respondent to signify her commitment.

This is significant because, at paragraph 3 of her affidavit the respondent contended that the applicant was retained by an interloper who was keen of defrauding her of her inheritance.

[13] In **Omulele & Tollo v Mount Holdings Limited [2016]** eKLR the Court of Appeal expressed the view that:

"... 'retainer' covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client."

[14] Similarly, in the case of **Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited** [2007] KEHC 2677 (KLR) it was held that:

"...The retainer is the foundation upon which the relationship of Advocate/client rests. Without a retainer the relationship cannot come into being. Retainer is the mode and method in which the Advocate accepts the offer of employment by the client. It can be express or by implication. The Advocates undertake to fulfill certain obligation and binds himself to protect, preserve and safeguard the interest of the client in a particular matter.

It is the position of the law that if there is no evidence of retainer except the oral statement of the Advocate which is contradicted by the client, the court will treat the Advocate as having acted without authority/permission.... the burden of proof to establish the retainer is always on the shoulder of the Advocates. That is the correct proposition of the law. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yardstick for such proof is not beyond reasonable doubt. In fact it is the normal the perimeter of balance of probability..."

[15] It is also significant that although the applicant averred that there was a Retainer Agreement, no proof thereof was availed. Needless to mention that **Section 45** of the **Advocates Act** does recognize that an advocate and his client may make an agreement fixing the amount of the advocate's remuneration in a matter in respect of which the Advocate is retained. The parties would accordingly be bound by such an agreement if expressed in writing and signed by the client or his agent duly authorized in that behalf. This is why in **Omulele & Tollo v Mount Holdings Limited (supra)** the Court of Appeal was explicit that:

"An agreement entered into pursuant to the above section is what can be termed as a '*retainer agreement*.' As the section indicates, under such agreement, the parties '*fix*' or put a cap on the advocate's instruction fee, meaning that 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. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent."

[16] In the circumstances, the applicant has not furnished sufficient evidence to establish that it was retained by the respondent to act for it in the subject Succession Cause, or that a Retainer Agreement was ever entered into between it and the respondent. Consequently, the Court is unable to find that an Advocate/Client relationship was created so as to entitle the applicant to pursue the attached Bill of Costs.

[17] In the result, I find no merit in the application dated 17th January 2025. The same is hereby dismissed. Each party to bear their own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 13TH DAY OF FEBRUARY 2026

.....
OLGA SEWE
JUDGE