



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CORAM: F. MUGAMBI, J
MISC APPLN NO. E011 OF 2023**

BETWEEN

**MOHAMED & SAMNAKAY ADVOCATES
APPLICANT/ADVOCATE**

VERSUS

**NIZARALI DHANJI MOHAMED HUDANI
RESPONDENT/CLIENT**

RULING

Background and Introduction

1. Before the Court is the application dated 13th December 2024, brought under **Rule 61(1) of the Advocates Remuneration Order (ARO)**, seeking the following orders:

a) That the Advocate/Applicant do show cause why items 177 to 459 (both inclusive) of the Advocate/Client Bill of Costs dated 19th February 2021 should not be disallowed for having been improperly incurred, incurred without reasonable

cause, or proven fruitless by reason of the Advocate's default or negligence; and

b) That the costs of and occasioned by this application be borne by the Advocate/Applicant.

- 2.** The client relies on the grounds on the face of the motion and supporting affidavit sworn by **Nizali Dhanji Mohamed Hudani** on 13th December 2024, to the effect that he was the defendant and counter-plaintiff in **Nairobi HCCC No. 639 of 2007** (*the suit*). He further urges that the advocate, as his legal representative in the suit, became aware of the plaintiff company's cessation of operations on 5th July 2013. Notwithstanding having this information, the advocate continued to prosecute the counterclaim and incurred substantial costs reflected under items 177 to 459 of the Bill of Costs (the Bill).
- 3.** The client's main contention is that, in the circumstances, the advocate's continued prosecution of the counterclaim was without instruction, was negligent and the costs incurred were improper, incurred without reasonable cause

and fruitless because there was no realistic prospect of recovery against a dissolved party.

4. The advocate opposes the application by way of a replying affidavit sworn by **Zul Mohamed** on 20th January 2025, on the grounds that the issues raised were *res judicata*, as the issues argued therein had been raised by the client in its submissions, and the court had directed the Bill to proceed for taxation.
5. Both parties filed their submission. By this court's Ruling of 18th July 2025, the Court determined that the claim of *res judicata* could not stand as the issues raised in the application had neither been formally pleaded nor substantively adjudicated. On matters **Rule 61(1) of the ARO**, the court was convinced that sufficient cause had been shown to require the advocate to show cause why the costs under items 177 to 459 of the Bill of Costs should not be disallowed.
6. Pursuant to the order of the Court dated 18th July 2025, the advocate filed the Replying Affidavit sworn by **Zul Mohamed** on 25th July 2025, urging that the costs under items 177 to 459 should not

be disallowed as they were incurred with reasonable cause. Particularly, the advocate avers that items 177 to 185 of the Bill were incurred before the publication of the Notice of Dissolution in the Kenya Gazette on 6th September 2013. In the alternative and without prejudice, the advocate urges that the firm had good and reasonable grounds to continue its legal representation and incur items 177 to 459 of the Bill.

7. To this end, the advocate urges that even before the publication of the Notice of dissolution of the plaintiff company in the Gazette Notice, during a pretrial conference on 5th July 2013, the plaintiff company's advocate informed the court that the plaintiff was no longer in operation. It is urged that by a letter dated 6th September 2013, the client was duly informed of the court proceedings of 5th July 2013 and advised that prosecuting the counterclaim in view of the plaintiff company's cessation of operation was an exercise in futility. Despite the advice, the client remained adamant and insisted on proceeding with his counterclaim against the plaintiff company. The advocate contends that the client was aware but chose not

to reveal the existence of the said Kenya Gazette to the advocate.

- 8.** Following its letter dated 6th July 2013, the advocate outlined the subsequent sequence of actions as follows: The plaintiff company's law firm, M/S Daly & Figgis, proceeded with the prosecution of the plaint by filing pleadings and setting the matter down for hearing. On 12th August 2013, the advocate communicated these developments to the client through a letter and requested further instructions. When no response was forthcoming, the advocate arranged an appointment with the client.
- 9.** Thereafter, by an email dated 29th August 2013 and through subsequent meetings, an additional witness statement from the client was prepared and filed in court. The matter was then scheduled for hearing on 5th February 2014, with the advocate notifying the client of this date by a letter dated 30th October 2013. Subsequently, on 23rd January 2014, the client submitted further documents (as evidenced by an email of the same date), which necessitated the filing of an application on 28th

January 2014 seeking leave to amend the defence and counterclaim.

10. The advocate contends that, by a letter dated 8th April 2014, it informed the client that the application for leave to amend the pleadings had been allowed. Consequently, the amended defence and counterclaim were filed on 15th April 2014. On 11th April 2014, the client confirmed via email receipt of the advocate's earlier letter dated 6th July 2013, which had communicated that the plaintiff company had ceased operations. In response, the advocates wrote to the client on 14th April 2014, advising on the appropriate way forward and requesting further instructions.

11. Subsequently, on 15th May 2014, the client instructed the advocate to commence investigations into the assets of the plaintiff company and to explore other avenues for prosecuting the counterclaim. Despite being advised of the futility of pursuing the counterclaim, the client failed to provide the necessary instructions, either through neglect or procrastination. This was notwithstanding several

follow-up communications, including letters dated 5th June 2014 and 2nd February 2015, as well as phone calls and emails, which required additional time and effort from the advocates in managing the matter.

12. The advocate further asserts that, by a telecommunication on 3rd May 2016 subsequently confirmed through a letter and an email dated 18th May 2016, the client instructed the advocate to withdraw the counterclaim. In compliance, the advocates prepared an application for dismissal of the plaintiff company's suit and withdrawal of the client's counterclaim, forwarding the pleading for the client's signature by a letter dated 5th September 2016, which the client duly signed. However, on 17th October 2016, the client reversed these instructions via text message, directing the advocate to prosecute the matter ex parte.

13. This reversal was acknowledged by the advocate's firm in an email of the same date, wherein the firm reiterated its policy against prosecuting matters with minimal prospects of recovery and requested advance payment of legal fees prior to

commencement of the ex parte hearing. Subsequently, by an email dated 18th October 2016 and a letter dated 19th October 2016, the advocates communicated their intention to cease acting for the client. This was confirmed by the client's email dated 24th October 2016, and the application to cease acting was filed on 26th October 2016. Thereafter, when the advocates' claim for payment of the itemized fee note was dishonored despite several reminders, the advocate proceeded to file the Bill now before this court.

- 14.** In response to the replying affidavit, the client filed a further affidavit restating his averments in support of the application, and denying the assertions by the advocate. He further contends that the advocate's letter dated 6th July 2013 was not received until 11th April 2014, and contrary to the advocate's contention, he became aware of the Gazette Notice dissolving the plaintiff company in 2017 after the advocate had ceased acting for him.
- 15.** The client further urges that it is the duty of the advocate as an officer of the Court to ascertain the

position of the plaintiff company, conduct a basic company search, and inform the court of the same. He argues that, in any event, having not given his instructions as requested in the advocate's letter dated 6th July 2013, any further steps taken by the advocate and the costs incurred in the suit were without instructions, were negligent, and must be disallowed.

16. In response to the client's further affidavit, the advocate filed a supplementary affidavit to the effect that, contrary to the client's assertion that the law firm failed to conduct a company search, by its letter dated 6th July, 2013, the advocate had alerted the client of the need to investigate the financial solvency of the plaintiff company. It is urged that the client failed to instruct the advocate as requested on 6th July 2013. The advocate urges that had the client given his instructions, the investigation would have involved a company search, which would have ascertained, among others, the plaintiff company's legal status.

17. The advocate refutes the client's assertion that he was not served with the letter dated 6th July 2013,

which had informed him of the dissolution of the plaintiff company and sought further instructions on how to proceed. In any event, the advocate emphasizes that several reminders requesting instructions were subsequently issued through letters dated 12th August 2013, 28th August 2013, 3rd September 2013, 8th April 2014, and 28th May 2014. Moreover, the client expressly acknowledged receipt of the letter dated 28th August 2013 by his email of 29th August 2013. Despite this acknowledgment, the client failed to provide instructions for the withdrawal of the counterclaim until 18th May 2016.

- 18.** In reply to the advocate's supplementary affidavit, the client filed a second further affidavit restating his assertion that he did not receive the letters dated 6th July 2013, and the advocate has not proved otherwise. He restates that the advocate was well aware of the futility of prosecuting the counterclaim, but the firm negligently proceeded to undertake work without instruction.
- 19.** The advocate filed submissions dated 30th July 2025 and further submissions dated 4th September

2025, to the effect that costs incurred under items 177 to 459 of the Advocates Bill of costs should not be disallowed as the same were incurred properly and with reasonable cause. The advocate contends that the impugned items were incurred before the publication of the gazette notice of 6th September 2013 containing the appropriate Notice of Dissolution.

- 20.** In the alternative and without prejudice to the foregoing, the advocate relies on the affidavits, the averments therein and submits that the firm duly communicated and advised the client of the dissolution of the plaintiff company, warned him of the difficulty in executing against a dissolved company, sought instructions on how to proceed with the counterclaim, followed up with several reminders and the client had not disputed receipt of the letters referred to until after the Bill of Costs was filed. The advocate contends that the client instead remained adamant and insisted on proceeding with his counterclaim despite the firm's consistent advice. In the foregoing, it is the advocate's submission that the firm had good and

reasonable grounds to continue working, and therefore, the costs incurred cannot be disallowed.

- 21.** The client filed his submissions dated 3rd October 2025 in support of the application to disallow items 177 to 459 of the Bill of Costs. He submits that the costs in the disputed items were incurred without instructions, without legal basis and in breach of the advocate's duty to act with diligence and competence. It is his case that it was the advocate's duty to verify the plaintiff company's status before continuing with the proceedings, and having failed to do so, amounted to professional negligence, rendering the advocate liable for the consequences of such oversight.
- 22.** It is the client's further case that the advocate owed him a continuing duty to act with diligence, competence and in his best interest. Furthermore, the advocate's failure to inform him and the court of the dissolution at the earliest opportunity and proceeding with the prosecution of the counterclaim compounded the prejudice, was a waste of judicial time, and any further costs

incurred thereafter could not be legally recoverable.

Analysis and Determination

23. I have considered the pleadings, submissions and evidence presented by the parties with respect to this application. The only issue for my determination is *whether the advocate has shown cause why the costs under items 177 to 459 of the Bill of Costs should not be disallowed.*

24. Particular reference has been made to the letter dated 6th July 2013, alleged to have been posted to the client notifying him that the plaintiff company's advocate had informed the court that the plaintiff had ceased its operation. In the same letter, the advocate claims that the firm advised the client that it was important to investigate the plaintiff company's financial solvency and sought instructions from the client on how to proceed in the circumstances. The relevant paragraph of the said letter reads:

“The plaintiff’s advocate informed the court that the plaintiff company is no longer in

operation and it would be important to know the plaintiff's financial solvency so as to know whether we shall be able to execute in the event that we succeed in the counterclaim. Let us have your instructions in that respect."

25. The Client vehemently opposed this contention. It is his case that the said letter was not received, as a result, he was not aware of the communication, and did not give any instructions to the advocate to proceed with prosecuting his counterclaim to the suit. As per the Ruling dated 18th July 2025, I determined that the advocate has not proved that indeed the letter of 6th July 2013 was posted or delivered to the client. No certificate of postage has been adduced in support of the advocate's assertion.

26. However, it is also the advocate's case that, in addition to the letter dated 6th July 2013, the Law Firm sent several reminders to the client, communicating the status of the plaintiff company

or seeking instructions, in light of the plaintiff's legal status, which the client ignored, omitted, or neglected to give.

- 27.** From a perusal of the record is evident that by a letter dated 12th August 2013, the advocate sent a letter to the client, reading in part:

“We refer to our letter dated 6th July 2013 and would appreciate your urgent response thereto ...”

It is imperative to note that by an email dated 29th August 2013, the client acknowledged receipt of the letter dated 12th August 2013, a telephone conversation with the Firm's advocate on 28th August 2013 and a Short Message Service (SMS) from the Firm's secretary booking an appointment for 3rd September 2013, between the client and the firm's advocates.

- 28.** By a letter dated 8th April 2014, the advocate again made a follow-up on the letter dated 6th July 2013 in the following words:

“We attach hereto a copy of the plaintiff's application dated 4th

April 2014 for your perusal and records. Let us have your instructions on the contents of the last paragraph of our letter dated 6th July 2013 (copy attached).

29. Therefore, from the totality of the record, it is evident that the client was well informed that the plaintiff company had ceased its operations. He was also aware of the plaintiff's legal status and the possibility that any execution against the plaintiff company would be difficult or even futile.

30. Even with this information, the client ignored or failed to give direct, proper instructions to the advocate. However, from the record, by an email sent by the client to the advocates on 29th August 2013, the client gave a narration of his response to the plaintiff company's witness statement. In one of the paragraphs, it was noted that:

“... However, I give here under my comments on the issues raised by the plaintiff in the order they appear in the

plaintiff's witness statement, and I hope that these will enable you to respond suitably to the plaintiff's advocates.

- 31.** Moreover, by an email dated 23rd January 2014, the client sent additional documents in support of its counterclaim, which necessitated the filing of an application for leave to amend the defence and counterclaim. The client also communicated his observations, proposing that the valuation report prepared by Robertson-Dunn be produced in evidence rather than having to put him on the witness stand.
- 32.** The client's conduct implies or infers indirect instructions to the advocates to prosecute the counterclaim. The client, therefore, cannot now allege that the advocate acted without instructions to defeat the costs or fees incurred thereafter.
- 33.** In any event, the plaintiff company's advocate proceeded to file further pleadings and fix a date for the hearing of the suit. The advocate was thus professionally bound and compelled to continue

defending the suit and prosecuting the counterclaim by virtue of the plaintiff company's advocate's insistence on prosecuting the plaintiff's suit despite the plaintiff's cessation of operations and lack of otherwise express instructions from the client.

- 34.** This position is supported by the record. On 5th August 2013, the plaintiff company's advocate, M/S Daly & Figgis, filed and served the plaintiff's list and Bundle of documents, List of Witnesses and Witness Statement of one Elijah Waweru. This information and developments were communicated to the client on 12th August 2013. On 29th August 2013, the client gave his comprehensive instructions to the advocates, directing the advocate to proceed and respond suitably to the plaintiff's advocates.

Disposition

- 35.** The upshot is that I do find that items 177 to 459 (both inclusive) of the advocate's Bill of Costs were incurred after the client had been duly advised of the plaintiff company's legal status and the attendant consequences. These costs cannot be

attributed to any default or negligence on the part of the advocate. Rather, if they proved unproductive, it was solely due to the client's insistence on pursuing the prosecution of the counterclaim. Accordingly, items 177 to 459 of the Bill are not liable to be disallowed as sought by the client.

- 36.** The advocate's Bill of Costs dated 9th March 2021 is remitted to the Taxing Officer for taxation on its merits in its entirety. The client shall bear the costs of this application.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 13TH DAY OF FEBRUARY 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Mr Mohammed for the advocate

Ms Zeinab HB for Mr Sarvia for client/respondent

Court Assistant: Lillian