

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISCELLANEOUS CIVIL APPLICATION NO. E231 OF 2024

ONYANGO, JONYO & CO. ADVOCATES.....
.....APPLICANT

VERSUS

EMMEY ATIENO OMONDI.....1ST
RESPONDENT

JACK DAVID ODHIAMBO.....2ND
RESPONDENT

RULING

1. The Applicant’s notice of motion dated 28th August, 2024 is expressed to be brought under *Section 51* of the *Advocates Act, Cap 16 Laws of Kenya* and seeks the following orders against the Respondents:

- a. **THAT the certificate of costs dated 6th August, 2024 in respect of the order made on 6th August, 2024 for the sum of Ksh.133,155/- be adopted as judgement and decree of this Honourable Court.**
- b. **THAT the Applicant be awarded interest accrued on the costs at 14% per annum from 6th August, 2024 until payment in full.**
- c. **THAT the costs of this application be borne by the Respondents.**

2. The grounds upon which the application is premised are in precis that the Respondents instructed the Applicant to represent them in *Kisumu CMCC/E352/2023* and that the Applicant professionally acted for the Respondents in the said matter. The Applicant complains that the Respondents did not pay him his professional fees as their Counsel, which then resulted in the Applicant filing an Advocate/Client bill of costs, which was on 6th August, 2024 taxed at Ksh.133,155/- and a certificate of costs issued to that effect on even date.
3. The Applicant contends that his fees, despite having been determined, remain unpaid, hence the instant application.
4. The application is supported by the affidavit of **Oscar Onyango, Advocate**, the proprietor of Onyango, Jonyo & Company Advocates, sworn on 28th August, 2024. The said deponent has restated and expounded on oath the above grounds and has annexed as “OJ1” and “OJ2” the bill of costs and the certificate of costs respectively.
5. The application is opposed and to that end the 1st Respondent filed what is purported to be a replying affidavit dated 17th December, 2024. The said document does not bear the stamp or signature of a commissioner for oaths.
6. With leave of the court, the Applicant filed a supplementary affidavit sworn by Mr. Onyango on 16th January, 2025 in which

he restates and reiterates that the Respondents instructed him to act for them in *Kisumu CMCC/E352/2023* and that he rendered the professional services. He has annexed to the said affidavit as “O-1” a printed copy of the CTS tracker for the matter in which he acted, which shows that the suit in the said matter was filed by his law firm, for and on behalf of the Respondents.

7. The Applicant has further annexed to the supplementary affidavit as “O-2” a copy of the plaint that was filed in *Kisumu CMCC/E352/2023*. It is indicated in the plaint that the same was drawn and filed by the Applicant’s law firm.
8. The Respondent also filed what is purported to be a statement of defence and counterclaim dated 7th February, 2025 to counter the contents of the Applicant’s supplementary affidavit.
9. For reasons that I will state shortly, I will not consider the 1st Respondent’s purported replying affidavit and the defence and counterclaim as those documents are not relevant in determining the application.
10. The application proceeded by way of written submissions.
11. I have considered the notice of motion dated 28th August, 2024, the affidavit in support thereof, the supplementary affidavit filed with leave of the court, and the written

submissions filed by the Applicant. I have equally examined the documents filed by the Respondents with the intention of opposing the application. The determination herein is therefore based on the material properly before the court and the applicable law.

12. The first issue that the court must address is whether the application is opposed in law. While the Respondents purported to challenge the motion, the court is under a duty to examine whether such opposition complies with procedural and evidential requirements.
13. Upon a careful perusal of the court record, it is evident that no valid replying affidavit was filed by the Respondents in response to the Applicant's application. The document described as a replying affidavit dated 17th December, 2024 is not commissioned as it does not bear the stamp or signature of a commissioner for oaths.
14. Affidavits constitute evidence and their validity is strictly governed by statute. *Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya*, requires that affidavits be sworn before a commissioner for oaths or other authorized officer. A document that is not sworn or commissioned in accordance with the *Act* does not qualify as an affidavit in law.

15. Courts have consistently held that an affidavit which is not properly commissioned is incompetent and of no evidential value. In **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another [2001] eKLR**, the High Court held that an affidavit which is not sworn is not an affidavit at all and must be struck out. Similarly, in **Mohamed Abduba Dida v Judicial Service Commission & Another [2023] eKLR**, the court reaffirmed that compliance with the *Oaths and Statutory Declarations Act* is not a technicality but a substantive requirement that goes to the root of affidavit evidence.
16. In the premises, the purported replying affidavit filed by the 1st Respondent is incompetent and is hereby disregarded in its entirety.
17. The Respondents also filed a statement of defence and counterclaim dated 7th February, 2025. That document, however, does not assist the Respondents in opposing the present application. A defence and counterclaim is a pleading envisaged under *Order 7* of the *Civil Procedure Rules*, intended to respond to a plaint in an ordinary suit. The present proceedings were commenced by way of a notice of motion under *Section 51* of the *Advocates Act* and the proper mode of opposition was either by affidavit evidence, grounds of opposition, a preliminary objection or by raising pure points of law.

18. It is a settled principle of civil procedure that pleadings and affidavits serve distinct and non-interchangeable purposes. In **Kisya Investments Ltd v Kenya Finance Corporation Ltd [2005] eKLR**, the Court of Appeal emphasized that pleadings are not evidence and cannot be used to controvert affidavit evidence in interlocutory applications. Consequently, the defence and counterclaim filed by the Respondents is irrelevant to the determination of this application and is disregarded.
19. *Order 51 Rule 14* provides that a party that wishes to oppose an application must file one or a combination of the following documents: a replying affidavit, which is the standard way to provide factual evidence in opposition to an application; a statement of grounds of opposition, which sets out legal and factual points opposing the application; or a preliminary objection, which challenges the competence of the application or jurisdiction as a pure point of law.
20. In the present scenario, the Respondents filed neither a valid replying affidavit nor a statement of grounds of opposition nor a preliminary objection. They therefore failed to comply with *Rule 14 of Order 51*. Therefore, under the very wording of the *Rule*, this court is justified in treating the application as effectively unopposed and in proceeding to hear and determine it on that basis.

21. The net effect of the Respondents' failure to file a valid replying affidavit or grounds of opposition is that the factual depositions contained in the Applicant's affidavits remain unchallenged. In such circumstances, the Respondents' only remaining option would have been to raise pure points of law, either through grounds of opposition or in their submissions.
22. However, a careful review of the Respondents' submissions reveals that no points of law were raised to challenge the application, the validity of the certificate of costs or the existence of an advocate/client relationship. What is stated in the submissions are inadmissible factual matters. It is trite law that submissions are not evidence and cannot replace pleadings or affidavits. This principle was firmly restated by the Supreme Court in ***Daniel Toroitich arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR***.
23. From the foregoing, the Court distils the following issues for determination as outstanding:
- a. Whether the Applicant established the existence of an advocate-client relationship with the Respondents.
 - b. Whether the certificate of costs dated 6th August, 2024 should be adopted as a judgment of the Court pursuant to *Section 51(2)* of the *Advocates Act*.

c. Whether the Applicant is entitled to interest on the taxed costs.

d. A determination as to the costs of the application.

24. On the first issue, which is that of retainer, the Applicant deponed that he was instructed by the Respondents to act for them in *Kisumu CMCC/E352/2023* and that he rendered professional services. He annexed a CTS tracker printout indicating that the suit was filed by his firm on behalf of the Respondents, as well as a copy of the plaint drawn and filed by his firm. These are official court documents and constitute cogent evidence of professional engagement.

25. The law is settled that a retainer need not be in writing and may be inferred from conduct. In ***Omulele & Tollo Advocates v Mount Holdings Limited [2016] eKLR***, the Court of Appeal held that once it is shown that an advocate acted for a client in a matter, a retainer is established unless the same is specifically disputed by credible evidence. No such evidence has been placed before this court. Moreover, the Applicant annexed to his supplementary affidavit as part of “O-2” two notices of intention to act in person that were filed by the Respondents, effectively acknowledging that the Applicant was prior to the changes on record for them.

26. This court is therefore satisfied that an advocate/client relationship existed between the Applicant and the Respondents.

27. The second issue for me to address is whether the certificate of costs dated 6th August, 2024 should be adopted as a judgment of the court pursuant to *Section 51(2)* of the *Advocates Act*.

28. *Section 51(2)* of the *Advocates Act* empowers the court to enter judgment for the sum certified where a certificate of costs has been issued and there is no dispute as to retainer. The Applicant's Advocate/Client bill of costs was taxed on 6th August, 2024 in the sum of Ksh.133,155/- and a certificate of costs issued on the same date.

29. The Respondents did not present any evidence to demonstrate that they challenged the taxation by way of a reference under *Paragraph 11* of the *Advocates Remuneration Order*. The certificate of costs therefore remains final and binding.

30. In the case of **Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR**, the Court held that a certificate of costs is conclusive as to the amount payable unless set aside or varied. The court held as follows:

“Once a taxing master has taxed the costs, issued a Certificate of Costs and there is no reference against the ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment.”

31. This court therefore finds no reason to depart from that settled position.

32. On interest, which is the third issue for determination, *Rule 7 of the Advocates Remuneration Order* permits an advocate to charge interest on costs, and the court retains discretion to award interest from the date of taxation.

33. Given that the Respondents have failed to settle the taxed costs, this court finds it just and reasonable to award interest at the rate sought. Interest at the rate of 14% per annum from 6th August, 2024 until payment in full is accordingly awarded.

34. The last issue to address is the costs of the application. *Section 27 of the Civil Procedure Act* dictates that costs ought to follow the event.

35. The court observes that when the matter came up on 23rd October, 2025, **Mr. Onyango**, acting in good faith, extended an olive branch to the Respondents by proposing that the matter be marked as closed with no order as to costs,

notwithstanding that the Applicant's fees had already been taxed and a certificate of costs issued.

36. The offer was made in the spirit of fairness, taking into account that the Respondents had formerly been his clients, and would have allowed them to resolve the matter without incurring further liability.

37. Despite the court's guidance and the generous offer extended by the Applicant, the Respondents indicated that they were not interested in settling the matter on the proposed terms and insisted, in my view unnecessarily, that the application proceeds. For reasons not explained, they chose to disregard the advice of the court and the opportunity to avoid unnecessary litigation, thereby electing to proceed at their own peril. The consequences of this decision are properly to be borne by the Respondents.

38. The Applicant has successfully prosecuted the application and was compelled to approach the court to enforce payment of costs lawfully taxed in his favour. There is therefore no reason to depart from the general rule under *Section 27* of the *Civil Procedure Act*. The Respondents shall therefore bear the costs of the application.

39. In the result, the notice of motion dated 28th August, 2024 is allowed as follows:

- a. **The certificate of costs dated 6th August, 2024 in the sum of Ksh.133,155/- is adopted as the judgment and decree of this court as against the Respondents jointly and severally.**
- b. **Interest on the said sum of Ksh.133,155/- is awarded to the Applicant, against the Respondents jointly and severally, at the rate of 14% per annum from 6th August, 2024 until payment in full.**
- c. **The costs of the application, which I assess at Ksh.4,000/- shall be borne by the Respondents jointly and severally and shall form part of the decree herein.**

40. This file is hereby closed.

DELIVERED (virtually), DATED & SIGNED this 9th day of
February, 2026.

JOE M. OMIDO.

JUDGE

FOR APPLICANT: **Mr. Jonyo.**

1ST RESPONDENT: No appearance.

2ND RESPONDENT: No appearance.

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**