

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**MISCELLANEOUS CIVIL APPLICATION NO. E037 OF 2024**

**PETER M. WARINDU T/A**

**PETER M. WARINDU & CO.**  
**ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**ARCHDIOCESE OF KISUMU**

**CATHOLIC CHURCH.....CLIENT/RESPONDENT**

**RULING**

1. The Appellant’s notice of motion is dated 12<sup>th</sup> September, 2024 is expressed to be brought under *Sections 1A, 1B, 3, 3A, 27 and 89 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 51 Rule 1, Order 52 Rule 1, Order 5 Rule 3 of the Civil Procedure Rules, 2010 and Sections 45 and 51 of the Advocates Act, Cap 16 Laws of Kenya* and all other enabling provisions of the law and seeks the following orders:

**1. [Spent].**

**2. THAT the Honourable Court be pleased to grant the Applicant leave to file and tax his bills of costs in respect of the following matters: KISUMU HCCC NO. 25 OF 2015; KISUMU ELC NO. 426 OF 2018; NAIROBI HCCCOM NO. E69 OF 2020; NAIROBI HCCCOM NO. 447 OF 2015; KISUMU HCCCOM NO. 40 OF 2018;**

**KISUMU HCCC NO. 13 OF 2018; KISUMU HCCC NO. 75 OF 2018; KISUMU ELC NO. 788 OF 2018; KISUMU CMCC NO. 465 OF 2018; KISUMU HCCMISC NO. 209, 210, 211 ALL OF 2018; KISUMU CMMISC 201 OF 2018; KISUMU CMELC NO. 88 OF 2018; KISUMU HCPET NO. 19 OF 2016; KISUMU CMELC NO. 429 OF 2018; KISUMU CMCC NO. 124 OF 2020.**

**3. THAT costs of this application be provided for.**

2. The grounds upon which the application is premised are set out on its face and are in precis as follows:

- a. **That the Respondent/Client herein retained the services of the Applicant/Advocate to sue and defend in the various matters.**
- b. **That the Applicant/Advocate upheld his end of the retainer by rendering services to the Respondent/Client on the various matters for a period running close to over 10 years.**
- c. **That the Applicant/Advocate herein upon rendering the services pursuant to the retainer sought from the Respondent/Client payment of professional fees for the various matters.**
- d. **That the Respondent/Client despite several reminders and demands has refused, neglected or ignored to pay for the services rendered by the Applicant/Advocate.**

- e. **That the Respondent/Client has instead of paying the Applicant/Advocate their dues, the Respondent/Client has opted to terminate the retainer and engage the services of another Advocate thus exposing the Applicant/Advocate to financial ruin.**
  - f. **That it is in the interest of justice and fair play that the Application herein be allowed.**
  - g. **That the Respondent/Client stands to suffer no prejudice whatsoever if it pays the Applicant/Advocate for the services rendered to it.**
3. The application is supported by the affidavit of **Peter M. Warindu**, the proprietor of **Peter M. Warindu & Company Advocates**, a law firm, sworn on 12<sup>th</sup> September, 2024.
4. The said deponent restates and expounds on the above grounds in his affidavit.
5. In precis, **Mr. Warindu** states that the Respondent instructed his firm to represent it in the above matters. The deponent has annexed to his affidavit as PMW-1 copies of letters of instructions from the Respondent.
6. Counsel further states that his firm professionally executed the Respondent's instructions and maintained correspondence with the Respondent in the various matters. Counsel annexed as PMW-2 copies of correspondences with the Respondent.

7. In his further deposition, Counsel states that he has sent letters of demand to the Respondent requesting that he be paid his professional fees but that the Respondent has failed to acknowledge receipt of or reply to the same, effectively failing to settle the Applicant's fees for services rendered. Annexed to the supporting affidavit as PMW-3 are copies of the demand letters and bills of costs.
8. Counsel further states that the Respondent has since terminated his firm's retainer and has since engaged and retained another law firm to act for it.
9. The application is resisted and to that end the Respondent filed a replying affidavit sworn on 5<sup>th</sup> March, 2025 by **Rev. Father Vincent Odundo**, the Vicar General of the Respondent and one of its trustees. He has annexed to his affidavit as VOO-1 a copy of the authority to swear the affidavit on behalf of the Respondent.
10. In his affidavit, **Fr. Odundo** states that the Applicant's application is defective, misconceived and bad in law and is for dismissal. He states that the application and its supporting affidavit only state the case numbers of the matters in which the Applicant alleges to have acted for the Respondent but the parties in those matters are not stated, making it difficult for the Respondent to respond to the application appropriately.

11. The Respondent's deponent further states that advocate/client matters are contractual and that any application to pursue fees through taxation that is brought after 6 years is statute barred under by the *Limitation of Actions Act, Cap 22 Laws of Kenya*.
12. Further, **Fr. Odundo** states that the Applicant has not provided any evidence that it was instructed by the Respondent to act for it in the matters, and points out the following that the letter (part of annexure PMW-1) that is copied to the Applicant, was addressed to Bank of Africa Kenya Limited and was on "*Without Prejudice*" basis and cannot, therefore, form the basis of instructions to the Applicant.
13. The Respondent's deponent further states that the Applicant has not provided evidence in his affidavit to demonstrate that the law firm was legally registered from 2015 to 2020 and that it had legal capacity to act for and on behalf of the Respondent.
14. It is further stated in the replying affidavit that the Respondent's present Advocates wrote to the Applicants vide a letter dated 2<sup>nd</sup> November, 2011 requesting for copies of letters of instructions but no response was received from the Applicant. The deponent has annexed to his affidavit the letter

dated 2<sup>nd</sup> November, 2023 to the Applicant as VOO-2. Thus then, the Respondent denies instructing the Applicant to act for and on its behalf in the matters that the Applicant listed.

15. The Applicant filed a further affidavit sworn by **Mr. Warindu** to which he has annexed documents that he states demonstrate that the Respondent sent several cheques in settlement of some of the law firm's professional fees and that the same is proof of the existence of the Advocate/Client relationship between the parties, hence the existence of a retainer. He stated that the documents and affidavits that were prepared in the various matters were signed by the representatives of the Respondent hence proof that the Respondent issued and was aware of the instructions to the Applicant.

16. The application was canvassed by way of written submissions, which I have had an opportunity to peruse.

17. In its submissions, the Applicant reiterates the position taken in its submissions that it was instructed by and acted for the Respondents in the respective matters, for a period of over 10 years. Some of the cases have since been determined while the pending ones have been taken over by another or other Advocate(s) on the instructions of the Respondent.

18. While urging that the application be allowed, the Applicant has placed reliance on the authority of **A.N. Ndambiri & Co. Advocates v Mwea Rice Growers Multi-Purpose Co-operative Ltd [2005] eKLR** in which the court (HPG Waweru, J.) defined the word *retainer* in the context of *Section 51(2)* of the *Advocates Act* to mean the instructions given by a client to a lawyer to act in the matter in which costs have been taxed and proceeded to expressly hold that a retainer does not have to be in writing for purposes of an application under *Section 51(2)* of the *Advocates Act*.
19. In rejoinder, the Respondent submits that having denied that it gave the Applicant instructions to act for it in the listed matters, it is incumbent upon the latter to prove that the former issued such instructions.
20. The Respondent places reliance on the case of **Omulele and Tollo Advocates v Magnum Properties Limited [2016] eKLR**. The Respondent states that the court held, in the above case, that instructions given to a client must be proved to have been given either directly or indirectly. Although that is the correct position in law, I have carefully gone through the authority that was provided by the Respondent and cannot find that holding therein. As a matter of fact, the court only issued an order on directions in the said matter and did not make any substantive determination or finding.

21. In its submissions, the Respondent reiterates the position taken in the replying affidavit that the letter (part of annexure PMW-1) that is copied to the Applicant, was addressed to Bank of Africa Kenya Limited and was on “*Without Prejudice*” basis and cannot, therefore, form the basis of instructions to the Applicant
22. The Respondent further submits that the Applicant has not provided evidence in his affidavit to demonstrate that the law firm was legally registered from 2015 to 2020 and that it had legal capacity to act for and on behalf of the Respondent.
23. It is further stated in the Respondent’s submissions that in the cases listed, the Applicant was represented by the firms of **Nyauke & Co. Advocates** and **Ken Omollo & Co. Advocates** and not by the Applicant and that the firm of **Nyauke & Co. Advocates** had already filed bills of costs in pursuance of its fees and obtained decrees and that as such, the application filed herein is mischevious.
24. The Applicant states in his submissions that some of the cases that they intend to tax on had the firm of **Nyauke** representing the Respondent but adds that the Applicant was instructed to take over the cases, which they did. The Applicant further submits that some cases were previously handled by the firm of **Ken Omollo** for and on behalf of the

Respondent, in which firm **Mr. Warindu** previously worked before leaving to found his own law firm and that appropriate notices of change of advocates were filed when the Respondent instructed the Applicant to take over conduct of the matters in the place of the firm of **Ken Omollo**.

25. In rejoinder, the Respondent's complain in their further submissions that the Applicant did not serve upon them with their supplementary or further affidavit and further submissions and asked the court not to consider those documents.

26. Upon a careful and deliberate examination of the sworn affidavits, the written submissions filed by the parties, the notice of motion dated 12<sup>th</sup> September, 2024 and the record of proceedings herein, the central fulcrum of this dispute is whether the Applicant has demonstrated, on a balance of probabilities, that he was retained by the Respondent in the matters listed, and thus is entitled to leave to file and tax bills of costs under *Section 51(2) of the Advocates Act, Cap 16 Laws of Kenya*.

27. The determination of this application requires that this court first define with precision the legal concept of *retainer* as interpreted in our jurisprudence.

28. The court's attention is directed to the decision in **A.N. Ndambiri & Co. Advocates v Mwea Rice Growers Multi-Purpose Co-operative Ltd [2005] eKLR**, where **Waweru J.** cogently articulated the meaning of *retainer* in the context of *Section 51(2)* of the *Advocates Act*.

29. In that case, the learned judge stated with clarity that:

***“My understanding of the term ‘retainer’ as used in section 51(2) aforesaid is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that ‘retainer’ means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to the retainer”.***

30. I subscribe to **Waweru J.’s** exposition, which in my view is well grounded in the principle that *retainer* connotes the giving of instructions by a client to an Advocate to act in specific proceedings.

31. It follows that the existence of a retainer is a pre-requisite for an Advocate to procure judgment on taxed costs without first having to institute a substantive action for recovery of fees.

32. As the court in **Owino Okeyo & Co. Advocates v Fuelex Kenya Ltd [2005] eKLR** observed:

***“An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute.”***

33. In the instant application, the Respondent’s principal contention is that the Applicant has not discharged the burden of proving that he was instructed by the Respondent to act in the listed matters.

34. It is common ground, and indeed not disputed, that retainer is contractual in nature and arises from instructions by or on behalf of the client. The Respondent asserts that the documents exhibited do not demonstrate that the firm was ever instructed on its behalf, that some documents were addressed to third parties and were on “without prejudice basis” and that the Applicant’s own pleadings amount to assertions without evidentiary support.

35. I am, however, constrained to observe that the Applicant has exhibited letters of instructions (PMW-1), correspondence (PMW-2), and demand letters together with draft bills of costs (PMW-3). Even assuming, without accepting, that some instruction letters were addressed to third parties, the totality of the documentary evidence when viewed holistically points to an ongoing relationship between the parties over a protracted period.

36. It is necessary, at this stage, to address the Respondent's objection in respect of the letter marked "*Without Prejudice*" which forms part of annexure PMW-1.
37. With respect, the Applicant does not rely on the contents of the said letter as proof of instructions or as evidence of any substantive matter between the parties. The purpose of tendering the letter is solely to demonstrate that the Applicant was copied therein, and thereby establish his involvement and notice of communications relevant to the matters in question.
38. In my understanding, the designation "*Without Prejudice*" operates to exclude the contents of a communication from being used as evidence of admissions or substantive claims. It does not, however, preclude the document from being adduced to show that it was received, or that a party was included in the communication chain.
39. In the circumstances, the Applicant's reliance is confined strictly to establishing that he was in receipt of, or copied in, the communication, and not on the contents thereof.
40. I am therefore persuaded that there was an Advocate/Client relationship between the parties, as posited by the Applicant, which culminated in the rendition of professional legal services over nearly ten years, as evidenced by

correspondences, filings in court processes and engagement in litigation.

41. The presence of such documentation, supported by the deponent's personal knowledge, suffices at this interlocutory stage to demonstrate a *prima facie* case of retainer. The relationship is further evidenced by the history of payments provided by the Applicant and the fact that the Applicant's assertion that it filed notices of change on the instructions of the Respondent is not rebutted by affidavit evidence.
42. The Respondent's complaint that the Applicant has not proven that his firm was legally registered or had capacity to act raises a fundamental issue but one which has not been substantiated by evidence. There is no affidavit evidence or certificate produced by the Respondent to show that the Applicant lacked capacity or that his firm was unregistered throughout the relevant period.
43. It is a trite principle that absence of evidence is not evidence of absence. In the absence of affirmative evidence to the contrary, this court cannot lightly infer that an advocate engaged in practice lacked professional capacity; to do so would be to speculate without foundation.
44. On the question of statute of limitation, the Respondent invoked the provisions of the *Limitation of Actions Act, Cap 22,*

contending that the claims for taxation of bills of costs more than 6 years after completion of the work are statute-barred.

45. With respect, this submission, though understandable, is not determinative at this interlocutory stage. In **Abincha & Co. Advocates v Trident Insurance Co Ltd [2013] eKLR**, the High Court extensively considered the *Limitation of Actions Act* in respect of advocate's bills of costs and, quoting *Halsbury's Laws of England* at Paragraph 879, held that:

***“The statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor ... time does not begin to run against the solicitor, if he continues to act as such, until the appeal is decided ... time runs from the judgment.”***

And further that:

***“...in respect of miscellaneous work done ... time under statutory limitation begins to run from the completion of the whole of each piece of work.”***

46. The principles extracted from **Abincha** are instructive that limitation does not run against an Advocate's entitlement to costs while the retainer subsists and where appeals or further related proceedings endure, the period of limitation may be extended accordingly.

47. It follows then that where a retainer has continued, as is alleged by the Applicant, the period of limitation cannot be

construed in isolation without first establishing when the retainer terminated and when each substantive matter concluded. Such an issue ordinarily arises at taxation or in a substantive action for costs, not at the preliminary stage of leave to file and tax a bill of costs.

48. Moreover, the Respondent's reliance on limitation ignores the fact that the Applicant is not seeking a declaration of entitlement to payment but merely asking for leave to file and tax his bills of costs. The taxing officer, guided by law, will ultimately determine whether specific items are allowable, duplicative or time-barred. This court's role at this stage is limited to determining whether there is a sufficient foundation upon which leave to tax should be granted.

49. The Respondent also points to the involvement of other law firms in some of the matters, suggesting that the Applicant is disentitled to claim costs arising from files previously handled by third parties.

50. This argument, however, overlooks the Applicant's evidence that he was instructed to take over the conduct of certain matters from other advocates and that notices of change were filed appropriately.

51. The law does not forbid successive advocates from being remunerated for work done. In the absence of evidence

showing that the Applicant took no part in the listed matters or that his involvement was *de minimis*, this submission cannot stand to deprive the Applicant of his right to taxation.

52. It must also be noted that taxation itself is a neutral process whereby the taxing officer is required to assess, item by item, the work done and determine fair remuneration. The Advocate will not be entitled to itemized fees, at taxation, for work not done. To deny an advocate the opportunity to file bills of costs simply because other advocates were concurrently or previously engaged would equate to substituting speculation and conjecture for evidence and due process.

53. It is pertinent to observe that the Respondent raises the complaint regarding non-service of the Applicant's further affidavit and supplementary submissions for the first time in written submissions. The law is settled that submissions are not evidence and cannot be used to introduce new factual issues that were not pleaded or sworn in an affidavit.

54. The Respondent did not raise this matter during the court attendances or through affidavit. In these circumstances, the issue cannot be properly entertained at the stage of submissions.

55. Had the Respondent considered the alleged non-service material to the conduct of the proceedings, it would have raised the issue at the earliest opportunity, either during court

attendances or by way of affidavit evidence seeking appropriate directions. The failure to do so, coupled with the fact that the parties proceeded with the matter and filed written submissions, indicates that the Respondent was content to engage in the proceedings on the record as it then stood. Silence on such a procedural concern is, in itself, a strong indicator of acquiescence and waiver of the right to object.

56. Moreover, no prejudice would be occasioned to the Respondent by the court's consideration of the further affidavit and supplementary submissions. The documents in question are already part of the court record and were readily accessible to the Respondent through the Court Tracking System.

57. This observation is, however, made without in any manner condoning the sharp practice of non-service, which is frowned upon and ought to be avoided in all proceedings. The position I have taken in this matter merely recognizes that, procedurally, the Respondent cannot now resuscitate a technical objection that it failed to raise at the appropriate time and that the Respondent is not prejudiced by the non-service, if any.

58. Having considered all the evidence, the competing submissions and the applicable jurisprudence, I find that the

Applicant has laid a sufficient evidential foundation to justify the grant of leave to file and tax his bills of costs.

59. The evidence on record demonstrates that the Respondent did, at the very least, engage the Applicant's services over significant periods, corresponded with his firm on multiple occasions and that the parties exchanged communications indicative of a professional relationship.

60. It therefore follows that the Applicant has demonstrated a *prima facie* retainer such that leave to file and tax the bills of costs ought to be granted.

61. It is not the role of this court at this stage to determine the ultimate merits of the bills. Rather, the threshold question is whether the Applicant should be allowed to pursue taxation and that threshold has been satisfied.

62. In conclusion, the notice of motion dated 12<sup>th</sup> September, 2024 is merited to the extent that the Applicant seeks leave to file and tax his bills of costs in the matters enumerated in prayer (2). That prayer is hereby granted.

63. Orders shall issue accordingly, with a reservation as to the costs of this application.

64. This file is hereby closed.

DELIVERED (virtually), DATED & SIGNED this 9<sup>th</sup> February, 2026.

**JOE M. OMIDO.**

**JUDGE**

FOR APPLICANT: **Mr. Gwada.**

FOR RESPONDENT: **Ms. Marucha** for **Ms. Owino.**

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