



**Nzaku and Nzaku Advocates v Kilungu (Miscellaneous Application
E369 of 2024) [2026] KEELRC 752 (KLR) (13 March 2026) (Ruling)**

Neutral citation: [2026] KEELRC 752 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E369 OF 2024**

**AK NZEI, J
MARCH 13, 2026**

BETWEEN
NZAKU AND NZAKU ADVOCATES ADVOCATE
AND
JOHN MUTUNGI KILUNGU RESPONDENT

RULING

1. Before the Court for determination is the Advocate/Applicant's Notice of Motion dated 4th November, 2025. The application, expressed to be brought under Section 45(1)(a) of the *Advocates Act* (Cap. 16 Laws of Kenya) and Order 51 Rule 1 of the Civil Procedure Rules, seeks the following Orders:-
 - a. That the Court be pleased to adopt the legal fees agreement/instructions note dated 30.06.2014 for 15% [of] general damages plus costs, and Judgment be entered in favour of the Applicant, and consequently a decree be issued against the Client/Respondent as follows:-
 - i. Kshs.288,555.00 plus VAT, being 15% of Kshs.1,923,700/= awarded.
 - ii. that costs be assessed.
 - b. That costs of the application be provided for.
2. The application sets out on its face the grounds on which it is brought, which grounds are replicated and amplified in the affidavit of Steven Nzaku Advocate sworn on 4th November, 2024 in support of the application. It is deponed in the said application:-
 - a. that the Applicant and the Respondent entered into a fee(s) agreement vide an instruction note dated 30.06.2014 for the fees for prosecuting the matter, being 15% of the general damages plus costs.



- b. That by a consent recorded on 29th April, 2019, the Respondent was awarded Kshs.1,923,700/ = all-inclusive, with each party to bear its own costs.
 - c. that since each party was to bear its own costs, it was incumbent that the same is (sic) determined for actualizing of the instruction note.
3. Documents annexed to the foregoing supporting affidavit include copies of the Instruction Note dated 30.06.2014 and a decree dated 29th April, 2019 and issued in Nairobi ELRC Cause No. 1077 of 2014 (John Mutungi Kilungu – vs – Filmaid Kenya).
4. The aforesaid Instruction Note, duly signed by both the Advocate/Applicant and the Client/Respondent, states in part:-

“ . . . I hereby instruct you to seek compensation from the said company/firm on my behalf. I will undertake to pay your fees being 15% of the general damages plus costs after all disbursements.”
5. The application is opposed by the Respondent/Client vide grounds of opposition dated 30th April, 2025, on grounds:-
 - a. that the application is misconceived, fatally defective, bad in law, incompetent and a gross abuse of the Court’s process.
 - b. that the application is filed in contravention of Section 48(1) of the Advocates Act which provides that no suit shall be filed for recovery of any costs until the expiry of 30 days after service on the Client of a tabulated and signed bill of costs by the Advocate.
 - c. that recovery of costs is pre-mature in the absence of proof of delivery of a bill of costs.
 - d. that the Respondent has already filed Originating Summons Civil Suit No. E100 of 2024 wherein the Respondent has raised issues that are similar to the motion application herein, which is yet to be determined.
 - e. that orders sought herein are unenforceable, and the Applicant is seeking issuance of orders in vain.
 - f. that the application is brought with maliciously calculated aim to delay the quick and just conclusion of the case herein.
6. Before delving into determining the application before me, it is worthy pointing out that a party who wishes to raise matters of fact in opposing an application must file a replying affidavit deponing to the matters of fact that he or she raises, and annexing/exhibiting any relevant documents. Alluding to the pendency of court proceedings vide grounds of opposition and without exhibiting copies of pleadings/ documents filed in the alleged Court proceedings cannot be the basis of a Court’s finding in favour of the party making such allegations.
7. Having considered the application, the affidavit filed in support thereof and the grounds of opposition filed by the Respondent; and having taken note of the fact that the validity of the Instruction Note (Retainer Agreement dated 30.06.2014) is not disputed by Client/Respondent, the sole issue falling for determination is whether the Orders sought by the Advocate/Applicant are merited.
8. Section 45 of the Advocates Act (Cap. 16 Laws of Kenya) allows an Advocate and a Client to enter into an agreement fixing the Advocates remuneration. Where such agreement exists, and is valid, it binds



the parties thereto. The Advocate need not file an Advocate/Client Bill of Costs in order to recover his fees and disbursements/costs. Section 45(6) of the *Advocates Act* provides as follows:-

“(6) Subject to this Section, the costs of an advocate in any case where an agreement has been made by virtue of this Section shall not be subject to taxation nor to Section 48”.

9. The Respondent has not disputed the correctness of the sum sought by the Advocate/Applicant, Kshs.288,555/= being 15% of the general damages awarded to him by the Court (Kshs.1,923,700/=). As already stated in this Ruling, the validity of the agreement dated 30.06.2014 is not dispute. The agreement states that the Advocate is to be paid 15% of general damages plus costs. The Advocate is therefore also entitled to costs and disbursements incurred by him in representing the Respondent/Client; over and above the said 15% [legal] fees.

10. The Court of Appeal stated as follows in the case of National Bank of Kenya Limited – vs – Otieno Ragot & Company Advocates [2020] eKLR:-

“It is common ground that parties herein had a valid retainer agreement. The question then was whether the said agreement was enforceable. As with any other agreement, the onus of proving the existence of the retainer agreement lies with the party that wishes to enforce it as is indeed the case of contract and the evidence in support thereof. (See Kenya National Corporation Limited – vs – Albert Mario Cordeiro & Another [2014] eKLR and Section 107 of the *Evidence Act*). The proviso to Section 45(5) allows an advocate who is a party to a retainer agreement and who has acted diligently for the client to sue and recover the whole retainer Fee should his client default in payment thereof. In fact, as long as an advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax nor give statutory notice to the client prior to his pursuit of the said fees.”

11. In view of all the foregoing, and having considered written submissions filed on behalf of both parties herein, the Notice of Motion dated 4th November, 2024 is hereby allowed in the following terms:-

- a. The Legal Fees Agreement/Instruction Note dated 30.06.2014 for 15% of general damages plus costs is hereby adopted by this Court, and consequently, Judgment is hereby entered for the Advocate/Applicant against the Client/Respondent for a sum of Kshs.288,555/= being 15% of the Kshs.1,923,700/= awarded in general damages.
- b. Disbursements payable to the Advocate/Applicant shall be assessed by the Deputy Registrar in the Court file wherein the legal services in issue were rendered (Nairobi ELRC Cause No. 1077 of 2014 – John Mutungi Kilungu – vs – Filmaid Kenya).
- c. A decree shall issue.
- d. Each party shall bear its own costs of the proceedings herein.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2026

AGNES KITIKU NZEI

JUDGE

Order



This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Muriithi for the Applicant

Mr. Akbar for the Respondent

