



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY

MISCELLANEOUS CIVIL SUIT NO. E078 OF 2023

SAMWEL O. NYAUKE T/A

ALUOCH ODERA & NYAUKE ADVOCATES
.....**ADVOCATE/APPLICANT**

VERSUS

JANE ATIENO
NYANDIGA.....CLIENT/RESPONDENT

RULING

[1] This ruling is in respect of the respondent’s Notice of Motion dated 25th November 2024. The application is expressed to have been filed pursuant to **Articles 50 and 159** of the Constitution of Kenya, **Sections 44 and 45(6)** of the Advocates Act, Cap 16 of the Laws of Kenya, **Paragraph 13A** of the Advocates (Remuneration) Order, **Order 51 Rule 1** of the Civil Procedure Rules, among other provisions of the law. The respondent in the substantive application, **Jane Atieno Nyandiga**, prayed that:

[a] Spent

[b] Pending the hearing and determination of the application, the Court be pleased to arrest and/or vacate and/or review the orders scheduling the ruling date for the 16th December 2024 with respect to the Advocate/Client Bill of Costs dated 18th October 2023, any further proceedings and/or consequential orders.

[c] Upon prayer **[b]** being granted, unconditional leave be granted to the applicant to file her Preliminary Objection and/or Grounds of Opposition and/or Response to the Advocates' Bill of Costs; and that the draft Preliminary Objection annexed to the Supporting Affidavit be deemed properly on record upon payment of requisite filing fees.

[d] In the alternative to prayer **[c]** above, the Court be pleased to consider the Notice of Preliminary Objection as a matter of priority and give directions on the manner in which the issues raised in the said Preliminary Objection alluded to herein above may be heard inter parties so as to put the matter to rest.

[e] There being no legal fees balance owed to the Advocate, the Court be pleased to declare and/or pronounce that the Advocate/Client Bill of Costs filed herein is untenable and that the Deputy Registrar has no jurisdiction to tax the Advocates Bill of Costs filed herein.

[f] The Advocate/Client Bill of Costs filed herein be struck out and/or dismissed with costs for being vexatious, frivolous, scandalous and an abuse of the Court's valuable time.

[g] The Honorable Court be pleased to issue any other, further or better orders as shall meet the ends of justice.

[2] The application was premised on the grounds that on or about 8th May 2023, the respondent instructed and retained the

services of **Mr. Samwel Nyauke**, an Advocate, trading as **Aluoch Odera & Nyauke Advocates**, to defend her in **Homa Bay ELC Pet No.1 of 2022** and **Homa Bay Succession Cause No. 191 of 2004**, which has presently culminated in **Homa Bay High Court Civil Appeal No. E003 Of 2024**. The respondent further stated that judgment in **Homa Bay ELC Petition No. 1 of 2022** was delivered on the 18th October 2023 whereupon the Petition was dismissed with an order that each party was to bear their own costs given the nature of the matter.

[3] Regarding the retainer, the respondent averred that a Fee Agreement was negotiated and entered into between her and the applicant herein for the total sum of Kshs. 150,000/=; and that she duly paid that sum to the applicant. She further contended that, upon completing her end of the bargain by paying the agreed legal fees, the applicant continued to demand for more payments from her in disregard of the Fee Agreement. Consequently, she ended up paying the applicant the total sum of Kshs. 295,051/=.

[4] She further averred that she was dismayed when, at the conclusion **of Homa Bay ELC Petition No. 1 of 2022**, the applicant filed an Advocate/Client Bill of Costs dated 18th October 2023 through the firm of **Aluoch Odera & Nyauko Advocates**, purporting that she had not paid his legal fees. She further averred that the application was disposed of *ex parte* without service upon her; thereby denying her the right to respond at the earliest opportunity. The respondent explained that she only

became aware of the matter when she was served with a Taxation Notice for 31st of October, 2024.

[5] The respondent was categorical that she has overpaid the applicant; and therefore it would be unjust for the taxation to proceed in the manner proposed by the applicant as it would amount to unjust enrichment on the part of the applicant. Consequently, the respondent prayed that the Ruling on Taxation be arrested and/or vacated; and that she be granted leave to file her Notice of Preliminary Objection and/or Grounds of Opposition and/or Response to the said Bill of Cost so as not to be condemned unheard.

[6] The respondent expounded on the above grounds in her Supporting Affidavit sworn on 25th November 2024 to which she annexed copies of the receipts and M-Pesa transactions to back up her averments. She also annexed a copy of the draft Preliminary Objection, among other documents, to demonstrate that she has an arguable response to the Bill of Costs.

[7] In response to the respondent's application, the applicant, **Mr. Nyauke, Advocate**, filed a Replying Affidavit sworn by him 27th June 2025. He confirmed that he was retained by the respondent to act for her in the three matters mentioned by her, including **Homa Bay ELC Constitutional Petition No. 1 of 2022**. He however denied that the payments alluded to by the respondent were for the Petition aforementioned. He denied

having received any of the M-Pesa payments mentioned in the statement annexed to the respondent's application.

[8] The applicant further averred that the procedure taken by the respondent in challenging the Bill of Costs is unlawful as she can only challenge specific items of the Bill but not seek to stop assessment. He therefore prayed for the dismissal of the application with costs.

[9] The application was canvassed by way of written submissions. The respondent relied on her written submissions dated 14th January 2025. She proposed two issues for determination, namely:

[a] Whether she was served with the application dated 18th October 2023 and the subsequent Taxation Notices preceding the Taxation Notice for 31st October 2024.

[b] Whether she owes the applicant any money in respect of the retainer.

[10] The respondent essentially reiterated her averments and emphasized that she overpaid the sums due to the Advocate in terms of their Fee Agreement. She relied on **Masore Nyangau & Co. Advocates v Solai Group of Companies & another** [2021] eKLR and **Balala & Abed Advocates v Bajaber** (Miscellaneous Application E193 of 2022) [2024] KEELRC 1848 (KLR) (12 July 2024).

[11] The applicant also filed his written submissions as ordered and proposed the following issues for determination:

[a] Whether the respondent's application is merited.

[b] Who should bear the Costs of these proceedings?

[12] In the submission of the applicant, the only recourse available for a party who feels aggrieved by a decision of the Taxing Officer is by way of Reference to a judge pursuant to **Paragraph 11** of the Advocates (Remuneration Order). He relied on the **Matter of Winding Up of Leisure Lodges Limited**, Winding Up Cause No. 28 of 1996 and submitted that there is no prejudice to be suffered by the respondent if the bill of costs is canvassed *inter partes* as the applicant will have an opportunity to contest the items therein. According to him, since the applicant has averred that she had made full payments of the legal fees amounting to Kshs. 295,051/= she should allow the Bill of Costs to be canvassed so that she can challenge the items in the bill. Counsel prayed that the application be dismissed with costs.

[13] The taxation procedure as provided for in the **Advocates Act** and the **Advocates (Remuneration) Order** is a special procedure intended for the expeditious resolution of disputes arising between advocates and their clients. Hence in **Donholm Rahisi Stores (firm) v EA Portland Cement Ltd** [2005] eKLR **Hon. Waweru, J.** held:

"Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn

into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.

[14] Ordinarily, the procedure is resorted to following disagreement and non-payment; and therefore it is only logical that upon taxation, an applicant be in a position to recover the costs as taxed. Accordingly, I am in complete agreement with the position taken in ***Lubulellah & Associates Advocates v N K Brothers Limited*** [2014] eKLR that:

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his 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. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25th November 2012.”

[15] This is the approach adopted by the applicant herein; and therefore he was correct in postulating that the only recourse for the respondent would have been on reference to the Court. Indeed, this is provided for in **Paragraph 11** of the Advocates (Remuneration) Order. It is nevertheless the case that a ruling on taxation is yet to be delivered and that what the respondent now seeks is the setting aside of the entire process to enable her be heard on whether or not the applicant is entitled to taxed costs in the first place, granted that they had a Fee Agreement pursuant to which she alleges to have paid more than the sums agreed.

[16] In the light of the foregoing, it is manifest that the parties are not in agreement as to the nature of their dispute. The respondent’s contention is that there was a Fee Agreement in which the parties agreed on the sum payable for the applicant’s

services; in which case, **Section 45(1)** of the Advocates Act provides that:

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

[17] Needless to say that where there is a Fee Agreement, there would be no need for the Advocate to file his Bill of Costs for taxation. (see Section 49 of the Advocates Act. Hence, there is considerable merit in the contention by the applicant that she has a plausible response to the applicant's initial application for the taxation of his Bill of Costs.

[18] A perusal of the court record confirms that, indeed, the initial application by the Advocate, dated 18th October 2023 was disposed of ex parte. The proceedings of 16th November 2023 show that, although counsel for the applicant was present, the respondent was not. There is merit therefore in the contention of the respondent that she was not given an opportunity to respond to that application. The record further shows that the respondent was absent in each of the occasions the matter was fixed for taxation before the Deputy Registrar. She only started participating in these proceedings after filing the instant

application. It is therefore probable that she was never notified of the previous dates. It is therefore a fact, borne out of the court record, that on the 21st November 2024 when the matter was reserved for ruling on the 16th December 2024 in respect of the applicant's Bill of Costs, the respondent was absent.

[19] In the premises, the justice of the case requires that this suit be re-opened by setting aside the *ex parte* proceedings of 16th November 2011 to enable the respondent be heard on the existence or otherwise of the Fee Agreement before taxation can be proceeded with.

[20] In **CMC Holdings Limited v Nzioki [2004] 1 KLR 173** that:

"In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."

[21] Similarly, in **Philip Chemwolo & Another v Augustine Kubende [1982-88] KAR 103**, it was observed that:

"...the broad equity approach to these matters is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs..."

[22] In the premises, I find merit in the application dated **25th November 2024**. The same is hereby allowed and orders granted as follows:

[a] That the *ex parte* orders granted herein on 16th November 2023 together with all consequential proceedings including the proceedings before the Deputy Registrar be and are hereby set aside.

[b] Leave be and is hereby given to the applicant to file a response to the applicant's Notice of Motion dated 18th October 2023. The same be filed and served within 14 days from the date hereof.

[c] Costs of the application to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY
OF APRIL 2026**

.....
OLGA SEWE
JUDGE