Lubulellah and Associates Advocates v Gilbi Construction Company Limited (Environment & Land Miscellaneous Case E151, E153 & E154 of 2023) [2024] KEELC 4389 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4389 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND MISCELLANEOUS CASE E151, E153 & E154 OF 2023

JA MOGENI, J

MAY 30, 2024

BETWEEN

LUBULELLAH AND ASSOCIATES ADVOCATES ..... APPLICANT

AND

GILBI CONSTRUCTION COMPANY LIMITED ..... RESPONDENT

RULING

1. There are two applications before me for determination in respect of three matters all related the instant application, ELC Misc. No. E151 of 2023, ELC Misc. No. E153 of 2023 and ELC Misc. E154 of 2024. The applications before me are the Chamber Summons Application dated 23/02/2024 and the Notice of Motion Application dated 18/04/2024.

2. The Chamber Summons Application is filed by the Client/ Respondents under paragraph 11(2) of the Advocates (Remuneration (Amendment) Order, 2014 and Section 45(6) of the *Advocates Act* and seeks the following prayers:

    a. THAT the ruling by the Taxing Officer, Hon V. Kiplagat, Deputy Registrar of this court delivered on 16/01/2024 taxing the Advocate- Client Bill of Costs dated 7/06/2023 at Kshs. 520,470.00 be and is hereby set aside in its entirety.

    b. THAT the ruling by the Taxing Officer, Hon V. Kiplagat, Deputy Registrar of this court delivered on 16/01/2024, taxing the Advocate-Client Bill of Costs dated 7/06/2023 at Kshs. 520,470.00, be and is hereby substituted with an order dismissing the said Bill of Costs as it relates to the costs/fees of the advocate subject of a written and enforceable fees agreement.

    c. THAT the ruling by the Taxing Officer, Hon. V. Kiplagat, Deputy Registrar of this court delivered on 16/01/2024, taxing the Advocate-Client Bill of Costs

dated 7/06/2023 at Kshs. 520,470.00 be and is hereby substituted with an order dismissing the said Bill of Costs as it violates express and mandatory provisions of section 45 (6) of the *Advocates Act*.

d. THAT the costs of this application be awarded to the Client.

3. The advocate/respondent in response to the application filed grounds of opposition dated 8/05/2024 and enumerated 7 grounds upon which he opposes the chamber summons. The gist of the grounds of opposition is that this court lacks jurisdiction to entertain the application since it is in violation of paragraphs 11(1) and (2) of the Advocates Remuneration Order. Thus the Reference is a nullity of no legal consequence.

4. That in the absence of a competent application then Section 51(2) of the *Advocates Act* carries the day in that then this court lacks jurisdiction to interfere with the taxation in any way. That the applicant failed to show that the taxing officer erred in law and in principle in taxing the bills of costs. Therefore, the application should be struck out with costs to advocate/respondent.

5. In response to the grounds of opposition the client/applicant filed submissions dated 13/05/2024 in which he identified four issues which he addressed. On the first issue which was about the jurisdiction of the court and the client/applicant submits that that court has jurisdiction to entertain the client/applicant's application, that it was brought subject to paragraph 11 (2) of the Advocate's Remuneration Order and Section 45(6) of the *Advocates Act*. That the application was filed within the provided timeframe. It was their submission that the law requires that the taxing officer forwards the recorded reasons for his decision and that the objection is filed within 14 days by placing an application before the judge by way of Chamber Summons.

6. Thus, since the ruling was availed to the objector on 19/02/2024 and the application filed on 23/02/2024 only four days later then, the Client/applicant was within the 14 days statutory time. Further that the Certificate of Costs which the advocate state is final yet there was a pending application filed before this court already challenging the findings of the taxing master.

7. On the second issue the client addressed the issue of validity of the agreement and submits that the advocate/respondent was bound by the agreement clause 12 and Item 3 of the schedule of the vendor's advocate which has placed the fees at Kshs. 100,000. This is based on the Sale Agreement signed by the purchaser and the vendor and the advocate respondent herein who prepared the 10/11/2016 Agreement which is the basis for the dispute herein. It is the client/applicant's submission that the due to the fact that the provisions of payment of fees have been factored in the agreement, then that means that there is a retainer as provided under Section 45 (1) (b) and Section 45 (6) of the *Advocates Act*. Thus, there is a valid and legally binding retainer between the advocate/respondent and the client/applicant.

8. The third issue the client/applicant submits on is the extent of the applicability of the doctrine of privity of contract to the circumstances of the case. That although the general rule is that only the people who negotiated a contract are the ones to be bound by it by being privy to the contract and can enforce it, there are exceptions to the rule. It was its submissions that a third party may benefit even if they are not a party. The client has relied on the case of Mark Otenga Otiende vs Dennis Oduor Aduol [2021]eKLR and the case of Aineah Likuyani vs Aga Khan Health Services [2013]eKLR where it is not clear that a 3rd party was to benefit then when looking at the agreement the court is at liberty to consider the surrounding circumstances which are reasonably available to a 3rd party. It was their submission that the sale agreement provides circumstances for rooting for exceptions to the general

rule. Thus the parties to the agreement had the intention to have the vendor's advocates' fees capped at Kshs 100,000 which provision was reduced into writing.

9. On the fourth issue the client/applicant submits that the taxing officer erred by relying on resolution of non-existent grounds. In that the client/applicant submits that the taxing officer erred in law by addressing an issue that was not a ground in the preliminary objection yet the client/applicant had not been given opportunity to respond this issue.

10. In his submissions dated 22/05/2024 in response to the client/applicant the advocate/respondent contends that the application was filed outside the statutory time of 14 days. The advocate/respondent also filed further submissions dated 24/05/2024 where it responded to the issue of privity of contract by submitting that where the contract only impliedly benefits a third party there is no presumption that the contracting parties intended the 3rd party to have a right of enforcement. That unless a contract expressly gives a 3rd party a right to enforce a contract then they have no such rights thus the advocate/respondent had not right to enforce the sale agreement.

11. It was his submission that the case referred to by the Client/applicant of Mark Otanga Otiende vs Dennis Oduor Aduol 2021 eKLR is not relevant since it referred to an insurance case and the matter at hand is not about insurance nor third party risks. That the advocate was a witness to the contract between the vendor/client/applicant and the purchaser who agreed between themselves that they will pay the lawyer for drafting the agreement Kshs. 100,000 to reduce the intention of the parties in writing but not that this would be the entire legal fees for services rendered.

12. The advocate/respondent submitted that there is no advocate and client relationship between the purchaser and the advocate nor is there any privity of contract between the two since there is no collateral agreement nor contract on retainer or fees between advocate and the purchaser.

13. The second application is the Notice of Motion Application dated 18/04/2024 brought under Section 51 of the *Advocates Act* Chapter 16 of the Laws of Kenya; Rule 13 Advocates Remuneration Rules; Section 3A, 63 (e) of the Civil Procedure Rules; Order 41 Rule 1 of the Civil Procedure Rules seeking the following orders:

    i. THAT the court be pleased to enter judgment and issue a Decree in favour of the Applicant against the Respondent on the amount of Kshs. 520,470/- certified on the Certificate of the Taxation herein together with interest at the rate of 14% per annum from the 7th June 2023 being the date of lodgment of the Bill of Costs until payment in full

    ii. THAT the costs of this application be provided for

14. The application is premised upon three grounds on the phase of it being that the advocate's and Client Bill of costs has been taxed and a certificate issued. That the advocates wish to proceed and realize the costs taxed herein by way of execution hence judgment and decree are required therefrom.

15. The client/respondent filed a replying affidavit sworn on 6/05/2024 and averred that the advocate is only entitled to Kshs. 100,000 as per the agreement dated 10/11/2016. The client/respondent also reiterated paragraphs 4-31 of its submissions dated 13/05/2024 as being applicable to the advocate's application.

16. When the matter came up for directions, parties agreed to dispose of the same through written submissions which I have considered already and in writing this ruling I have paid due attention to the submissions.

Analysis and Determination

17. Having considered the pleadings and the decisions relied on and I find that the following are issues for determination:

    i. Whether this court has jurisdiction to entertain the application by the client/ applicant dated 23/02/2024

    ii. Whether the application dated 18/04/2024 is merited

    iii. Who bears the costs of both applications.

18. I will first address the issue of jurisdiction of this court before I consider the application dated 23/02/2024 in relation to the jurisdiction. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Therefore, the court is vested with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as ".....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes....."

19. Therefore, this court is endowed with the jurisdiction to determine both party and party and also advocate- client bill of costs just as the High Court. My reading of Section 7 of Schedule six of *the Constitution* which has also never been reversed it gives credence to Article 162.

20. It is clear under the Advocates Remuneration Order that after the taxation of the bill of costs, the procedure for the challenge of the results therefrom is provided under Paragraph 11 of the said Order which provides:

    (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

    (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

21. The client/applicant wrote to the taxing master on 22/01/2024 requesting for a copy of the ruling which had been delivered on 16/01/2024. The ruling was availed on 19/02/2024 and the chamber summons application was filed on 23/02/2024. This is 4 days after receiving the ruling from the taxing officer. Paragraph 11 of the Advocates Remuneration Order required that within 14 days of delivery of the decision a written notice was to be issued to the taxing officer. This was indeed done vide the letter dated 22/01/2024 from the Client. From my calculation I note that 14 days from 16/01/2024 brings us to 30/01/2024 or thereabout. I do however note that the client/applicant wrote to the Executive Officer on 22/01/2024 requesting for the ruling stating that he intended to file an objection.

22. The Advocate contends that the client reference is incompetent for being filed after 14 days out of time without the leave of the court. He referred to several court decisions to urge that a reference filed after the 14 days and without leave of the court is premature and incompetent under paragraph 11 of ARO.

23. The client has on the other hand denied that their reference is incompetent and contended that after requesting for the reasons the ruling good time, it was only availed 19/02/2024 and he filed his reference on 23/02/2024 which is four days after being availed with the ruling.

24. In the cases of Governors Balloon Safari Limited VS Skyship Company Limited and Another [2015] eKLR and Evans Thiga Gatimu Advocate VS Kenya Commercial Bank Limited [2012] eKLR the Court held that if reasons for taxation are available in the ruling by the taxing officer, the reference must be filed within 14 days after the taxation ruling or else the reference would be incompetent, if filed 14 days after the delivery of the ruling. In this instance the ruling was delivered on 16/01/2024 in the presence of counsels for both the client and the advocate.

25. The advocate has faulted the reference for being filed out of time and without the leave of the court. That the reference having been filed outside the 14 days provided by paragraph II of the ARO without leave of the court rendered the reference incompetent. The Client has however submitted that he received the ruling on taxation from the taxing officer on 19/02/2024 and filed the reference on 23/02/2024, only 4 days after receipt of the reasons. He therefore maintained that his reference was competent under paragraph 11 of ARO and leave was not necessary before filing the reference.

26. After careful consideration of the submissions by both sides and the divergent decisions from myriad judicial decisions from the courts on the obligation to provide reasons for taxation on the part of the taxing officer to an objecting party under paragraph 11 (2) of the ARO, I am of the view that the judge before whom the reference is brought must consider each case on its own circumstances. For example, the taxing Officer may not write a formal ruling but only calculated the costs on the bill of costs, then it is necessary for him to give the reasons for his decision in writing to the objecting party. Another is that the Taxing Officer may make a hand written ruling, as it is the case in most times and the parties are not availed a copy of ruling until such a time when a certified copy of the typed ruling is given to the parties. Lastly, there are few Taxing Officer who deliver an already typed ruling on the due dates and even supply copies to the parties on the spot.

27. In my view, and in consideration of different circumstances of each respective case, a judge should carefully apply paragraph 11 of the ARO considering the circumstances of each case but without taking away the objectors rights under the said paragraph. In that respect, where it can be shown that an objecting party has captured the reasons for taxation in the written ruling of the taxing officer, he can exercise the option of filing his reference, without waiting for reasons from the taxing officer as contemplated by paragraph 11(1) of the ARO, as soon as he serves his notice of objection on the taxing officer under paragraph 11(1) of ARO.

28. On the other hand, even where the reasons are apparent on the face of the ruling, the objecting party has the second option of not filing his reference until the Taxing Officer performs his mandatory obligation under paragraph 11(2) of the ARO, that is, to record and forward to the objector the reasons for his decisions on the objected items of the bill of costs. In my view it is not superfluous for the Taxing Officer to write to the objector stating that the reasons are contained in his written ruling and provide a certified copy of the ruling to enable the objector and eventually the judge to determine whether the taxation was grounded on sound legal reasoning. That was the view taken by Odunga J, in Evans Thiga Gaturu Advocate case, when he held that:

> "It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge

to make an informed decisions as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference".

29. From the foregoing analysis it is clear that the reference before me is competent. In this case, the taxing officer rendered a ruling on 19/02/2024. The Taxing Officer delayed to forward the ruling which contained the reasons. However, I would have punished the objector if there was evidence that, he failed to file the reference within 14 days after receipt of the reasons from the taxing officer because in such a case they would definitely require leave of the court before filing the reference as per paragraph 11(5) of the ARO.

30. The next issue for consideration is whether there was a retainer agreement and, depending on the answer to that issue, whether the certificate of taxation needs to be set aside.

31. The applicant has called upon this court to set aside the decision of the taxing officer on the basis that the taxing officer erred in taxing the advocate-client bill of costs despite the fact that the two had an agreement for fees which took the issue out of the jurisdiction of the taxing officer. In the applicant's view, the matter fell under section 45 of the *Advocates Act*.

32. The respondent on their part, argued that there was no agreement for fees between them and the applicant and therefore, the matter did not fall under section 45 of the Act. It was their case that there being no agreement for fees, the taxing officer was perfectly in order to tax their advocate- client bill of costs.

33. Section 45 broadly provides:

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

34. An agreement under section 45 is not absolute and conclusive. Subsection (2) grants a client a right to challenge such an agreement if it is harsh and unconscionable, exorbitant or unreasonable. It states:

> (2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—
>
> (a) that the agreement be upheld; or
>
> (b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or
>
> (c) that the agreement be set aside; or
>
> (d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.

35. From the depositions in the applicant's affidavit and submissions of both sides, there is disagreement on whether or not there was a legal fees agreement. Whereas the client/applicant argued that agreement for sale dated 10/11/2016 at clause 12 and Item 3 of the schedule of the vendor's advocate placed the fees at Kshs. 100,000. This is based on the Sale Agreement signed by the purchaser and the vendor and the advocate respondent herein who prepared the 10/11/2016 Agreement.

36. Section 45 (1) (c) is clear that an 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. The agreement for fees must not only be in writing, it must be signed by the client or by his authorized agent.

37. In summary of Section 45 above, an advocate is at liberty to agree with his client on the remuneration payable for the services rendered or to be rendered. The agreement is binding, provided that it is in writing, and is signed by the client or his agent. This Court does not think that such agreement must be in one document titled "agreement for payment of legal fees." It is sufficient that there be a memorandum in writing, and this would include correspondences, so long as these reveal that they are aimed at fixing the fee payable. Indeed, in the case of D Njogu & Company Advocates vs National Bank of Kenya Limited, Civil Appeal No 165 of 2007 (2016) eKLR, the Court of Appeal upheld an agreement between an advocate and client. The agreement was actually construed from a letter.

38. In the present case, the Advocate/Respondent filed their Bill of Costs, and the Client/Applicant filed an Affidavit through which he claimed that they had an agreement on the fee payable, and that this is what the Advocate/Applicant should be asking for. The Court has carefully gone through that affidavit. In it, the Client/Applicant alleges that the Advocate/Respondent and the Client/Applicant had a prior agreement for the sum of Kshs. 100,000/- which and therefore there is not jurisdiction for a bill of costs. The Client/Applicant annexed signed Agreement for sale thereto demonstrate the agreement on fees.

39. This Court has further gone through the Agreement for Sale annexed to the pleadings and noted that clause 12 stated that each party shall pay its own advocates. Further Item 3 in the schedule provided for the vendor's advocates' fees of Kshs. 100,000 which was to be paid before the signing of the agreement.

My simple understanding of this item is that the vendor and the advocate agreed to have this included in the sale agreement and even ensure to state that the fees shall be paid before the signing of the agreement.

40. Therefore, the said amounts should have been paid and one cannot run away from this provision it is binding and it is an agreement between the advocate/respondent and the client/applicant It points to there being a negotiated and binding agreement for fees as constructed by the client/applicant.

41. There being no any other documents to point to any contrary position, the only conclusion that the Court can reach is that there was an agreement between the parties as to the fees to be paid to the advocate/respondent in handling the transaction between the client/applicant and the advocate/respondent in relation to the sale agreement.

42. This is what the advocate/respondent should have been claiming before the court. Since it was to be paid before the signing of the sale agreement, he has not told the court whether it was paid or not. The law at Section 45 of the *Advocates Act* requires that there be proof in writing of the agreement, and in this instance, there is one. There is certainly a document before this Court that shows that the agreed fees for drafting the agreement is Kshs 100,000/=. This Court's, conclusion therefore is that there is proof of an agreement that the sum of Kshs 100,000/= was the agreed legal fees.

43. It is this court's finding that there is agreement disclosed between the Client/Applicant and Advocate/Respondent, that verifies that the two parties had an agreement of what is payable as legal fees.

44. Given my finding that there was an agreement between the client/applicant and the advocate/respondent the second application is therefore moot and I will not delve into the merit of the said application.

45. In conclusion I make the following disposal orders:

    a. THAT the ruling by the Taxing Officer, Hon V. Kiplagat, Deputy Registrar of this court delivered on 16/01/2024 taxing the Advocate- Client Bill of Costs dated 7/06/2023 at Kshs. 520,470.00 be and is hereby set aside in its entirety.

    b. THAT the ruling by the Taxing Officer, Hon V. Kiplagat, Deputy Registrar of this court delivered on 16/01/2024, taxing the Advocate-Client Bill of Costs dated 7/06/2023 at Kshs. 520,470.00, be and is hereby substituted with an order dismissing the said Bill of Costs as it relates to the costs/fees of the advocate subject of a written and enforceable fees agreement.

    c. THAT the ruling by the Taxing Officer, Hon. V. Kiplagat, Deputy Registrar of this court delivered on 16/01/2024, taxing the Advocate-Client Bill of Costs dated 7/06/2023 at Kshs 520,470.00 be and is hereby substituted with an order dismissing the said Bill of Costs as it violates express and mandatory provisions of section 45 (6) of the *Advocates Act*.

    d. THAT the costs of both applications is awarded to the Client.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF MAY 2024.____

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MOGENI J

JUDGE

In the Virtual presence of:

Mr. Wendoh holding brief for Lubulellah for Advocate/Respondent

Mr. Longwe holding brief for Ms. Ngeresa for client/Applicant

Caroline Sagina: -Court Assistant

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MOGENI J

JUDGE

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