



**Kilonzo and Aziz Co. Advocates v County Government of Kilifi (Miscellaneous Application 14 of 2020) [2024] KEELC 4796 (KLR) (18 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4796 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS APPLICATION 14 OF 2020  
FM NJOROGE, J  
JUNE 18, 2024**

**BETWEEN**

**KILONZO AND AZIZ CO. ADVOCATES ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF KILIFI ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of a Preliminary Objection dated 15<sup>th</sup> February, 2024 filed by the Applicant. The grounds of objection raised therein are as follows:
  - a. That by virtue of Section 45(2) of the Advocates Act the court lacks jurisdiction to entertain motion dated 9/2/2024;
  - b. That the application is a nullity as there is no challenge to the agreement dated 22<sup>nd</sup> October 2021;
  - c. That the application is time barred under the provisions of Section 45(2) (A) of the Advocates Act.
2. The preliminary objection dated was filed closely in the wake of the application dated 9/2/2024 which sought the following orders:
  - a. ....spent;
  - b. ....spent;
  - c. There be a stay of execution of the consent order entered and issued on the 10<sup>th</sup> May 2023 pending the hearing and determination of this application;
  - d. The consent order entered and issued on 10<sup>th</sup> day of May 2023 be and is hereby set aside and all orders or proceedings subsequent thereto be vacated;



- e. The advocate fees settlement agreement for provision of legal services between the County Government of Kilifi and the law firm of Kilonzo & Aziz Co. Advocates dated the 22<sup>nd</sup> day of October 2021 be upheld;
  - f. Costs of the application be provided for.
3. The grounds for the application are set out on its face and elaborated in the supporting affidavit attached thereto. They are as follows:
- a. The consent dated 10<sup>th</sup> May 2023 was procured by mistake and is contrary to public policy;
  - b. There was fraud, material non-disclosure and misrepresentation in the procurement thereof;
  - c. It is consequently illegal;
  - d. An order was issued in taxation of costs for payment of Kshs 31,000,000/= on 27/7/2021.
  - e. The advocates fee settlement agreement dated 22/10/21 between the parties stipulated that the final and conclusive fee exclusive of deductions would be paid as set out therein;
  - f. There is a modality for the resolution of disputes in the agreement;
  - g. Kshs 11,286,379.30 was paid to the advocates firm on 7/12/23;
  - h. Section 45(6) of the [advocates act](#) provides that where there is an agreement on fees an advocates costs shall not be subject to taxation and there is a valid agreement in this case and so the deputy registrar of the court lacked jurisdiction to endorse the consent order dated 10/5/23;
  - i. The agreement is fully binding on the law firm and the full fee provided for in the agreement having been paid the law firm is precluded from exercising its rights of enforcement of any order or judgment of the court in relation to the fees for the matters mentioned and covered by the fee in the agreement;
  - j. On 16/6/23 the law firm initiated execution of the order issued on 10/5/23 by the deputy registrar, seeking the arrest and committal to civil jail of one Winnie Luwali the Chief Officer of the Finance Department of the respondent.
4. A response by way of the sworn replying affidavit of Maurice Muteti Kilonzo, the managing partner of the law firm of Kilonzo and Aziz Co advocates was filed on 16/2/24 but as this court will first delve into the merits of the preliminary objection the contents thereof will not be analyzed for now. The court ordered that the preliminary objection be disposed of by way of written submissions and the objector filed submissions dated 16/2/2024 and 18/3/2024, the latter in which it pointed out, which I confirm to the correct, that the respondent had submitted on the wrong preliminary objection dated 22/9/23 in its submissions dated 5/3/2014.
5. I will begin with the first limb of the preliminary objection. The question that arises is whether by virtue of Section 45(2) of the [Advocates Act](#) the court lacks jurisdiction to entertain motion dated 9/2/2024.
6. The objector's argument is simply that the present dispute is between an advocate and a client and is not governed by the provisions of the [Advocates Act](#); that order 52 Rule 1 defines the Act to mean "the Act" to mean the [Advocates Act](#) and Section 2 of that Act defines "the court" as the High Court; that this court is a specialized court established under Article 162 of the [Constitution](#) and thus lacks jurisdiction to deal with the matters pertaining to advocate-client relationships. The objector cited [Samuel Kamau Macharia v Kenya Commercial Bank & 2 others](#) 2012 eKLR; [Karisa Chengo & 2 others](#)



*v R* 2015 eKLR; *Equity Bank Ltd v Bruce Mutie Mutuku T/A Diani Tour & Travel* 2016 eKLR for its submission regarding jurisdiction. I have taken cognizance of those authorities.

7. In the case of *Monyo & 2 others v Ngige* (Miscellaneous Civil Application E07 of 2020) [2023] KEHC 817 (KLR) (10 February 2023) (Ruling) the court held as follows:

“23. For purposes of taxation of party and party costs, that must be conducted in the suit in which costs were awarded, the act must be construed to vest the jurisdiction upon the judge of the Environment and Land Court to hear reference and even entertain application for extension of time so that the court take full charge of all disputes before it and the related and incidental disputes emanating and flowing therefrom. Like in this matter, there is a prayer for stay of the certificate of taxation. That certificate was issued in the Environment and Land Court file. To issue an order of stay in this matter would not only affront section 34 of the *Civil Procedure Act* but equally go against the dictates of article 162 (5) of the *Constitution* and paint the court as being bent on usurping the jurisdiction of that other court. On the basis that the taxation sought to be challenged was conducted and concluded in the Environment and Land Court file, the court determines that it has no jurisdiction to entertain the matter.

24. For avoidance of doubt, this court lacks jurisdiction on disputes as costs between parties litigating before the Environment and Land Court. If however the dispute was to be between counsel and client, wherever the service was offered and applied, the words of the *Advocates Act*, would have to be applied and construed to vest exclusive jurisdiction in the High Court and not the courts of equal status. The application thus fails and is struck out for want of jurisdiction.”

8. In *Tom Ojienda & Associates Advocates v County Government of Narok* (Miscellaneous Application E608 of 2019) [2021] KEHC 452 (KLR) (Commercial and Tax) (16 June 2021) (Ruling) the court held as follows:

“The Advocate- Client Bill of Costs is considered a commercial contract between the parties; advocate and client(s) enter into an Agreement; for the advocate to offer legal services and the client(s) to pay for those services rendered by the Advocate and thus such a contract is enforced & taxed by Taxing Officers within the Commercial & Tax Division of the High Court.”

9. In the present case the applicant alleges there was a fees agreement between it and the respondent before the respondent approached the court for taxation. That prior agreement notwithstanding, the parties entered into a consent once the present Miscellaneous Application was filed. The consent nevertheless remains a contractual engagement between the parties herein and in this court’s view and in accordance with precedent cited herein before, the appropriate court to approach for any dispute relating to that contract is the High court. I therefore agree with the objector regarding the first limb of the preliminary objection.

10. The second limb of the preliminary objection is that there is no challenge to the fee agreement dated 22/10/2021 for it to be set aside. It is necessary to verify the nature of the applicant’s complaint in this matter in order to conclude on the issue as to whether or not the second limb of the preliminary objection is merited even though it may result in some repetition of facts. The gravamen of the



application is that there was originally an agreement dated 22/10/21 regarding fees between the parties herein whose terms were that the applicant would pay Kshs 10,000,000/= in respect of certain legal services provided by the objector. Despite the existence of that agreement the parties entered into a consent order on 10/5/2023 for the payment by the applicant to the objector the sum of Kshs 20,410,000/= inclusive of taxes. The consent was made an order of the court and thus became a consent judgment. It is not the agreement dated 22/10/21 that is sought to be set aside yet the provisions of Section 45 (2) of the Advocates Act Cap 16 provide as follows:

“ 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.”

11. A formal fees agreement is different from a consent made within ongoing proceedings. It is the opinion of this court that the cited section refers only to a formal fees agreement made between the parties and not a consent order recorded in court. The only formal fees agreement entered into by the parties in this matter is the one dated 22/10/21. The objector is correct in that the applicant has only used that formal agreement as a launching pad to attack the consent later on recorded in court. Its terms do not form the applicant’s basic grievance. For that reason, I find that the proceedings herein are null and for that reason I uphold the second limb of the preliminary objection. However, it must be restated again here that nevertheless, the formal agreement being a contract between advocate and client the dispute, if any is lodged based on it, should be lodged before the High Court.
12. The third limb of the preliminary objection is to the effect that the application is time barred by dint of the provisions of Section 45(2) (A) of the Advocates Act. For the reason that the current application is not made for the purpose of challenging the fees agreement dated 22/10/2021 as found in the issue immediately preceding, there is no date of lodging of challenge by which to compute the time bar and it is thus needless to deal with this ground of the preliminary objection. It is superfluous.
13. The upshot of the foregoing is that the preliminary objection dated 9<sup>th</sup> February 2014 succeeds and thus the notice of motion dated 13/2/2024 is hereby struck out with costs.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18<sup>TH</sup> DAY OF JUNE 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

