Morgan Omusundi t/a Morgan Omusundi Law Firm v Muchina (Environment and Land Miscellaneous Application 32 of 2020) [2024] KEELC 5603 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5603 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 32 OF 2020

JM ONYANGO, J

JULY 29, 2024

BETWEEN

MORGAN OMUSUNDI T/A MORGAN OMUSUNDI LAW FIRM ... ADVOCATE

AND

SAMUEL MATUNDE MUCHINA ..... CLIENT

RULING

1. The Applicant filed a Chamber Summons application under Rule 11 of the *Advocates (Remuneration) Order* 1962 dated 18th September, 2023, seeking the following orders:
    a. Spent
    b. That there be a stay of execution of the taxed costs in this matter pending the hearing and determination of the reference.
    c. That the time for lodging the reference be extended and the reference herein be validated.
    d. That the decision of the Taxing Master/Deputy Registrar as taken on the 12th May, 2023 on the taxation of the Advocate-Client Bill of Costs be set aside.
    e. That the Bill of costs be re-submitted for taxation afresh with directions from the Judge.
    f. That the costs of the reference be awarded to the Applicant.
2. The Application is based on the grounds on the face of the Motion, which are: that the Taxing Master/Deputy Register (DR) committed errors of principle. That the Applicant was prevented from filing the reference on time due to illness. Further, that sufficient grounds exist to interfere with the decision of the DR. The Applicant also swore an Affidavit dated 18th September, 2023 in support of his application. He deponed that the Advocate filed his Advocate-Client Bill of Costs against him on 30th November, 2020 seeking to recover KShs.1,013,435/- as legal fees. He deponed that he filed a response

to the application for taxation and filed submissions thereto. He deponed that vide ruling delivered on 12th May, 2023 the DR taxed the Bill at KShs.494,705/-.

3. The Applicant deponed that he sought reasons for the decision vide letter dated 25th May, 2023 which reasons were given on 16th August, 2023. He explained that he was not able to file the reference on time as he has been ailing over time and was admitted in hospital severally as per the attached medical records. That he could not execute the Affidavit because he was on treatment under the doctors instructions. He asserted that the DR made errors of principle in taxing the bill at KShs.494,705/- because he failed to address his jurisdiction to entertain the application for taxation while the Advocate had demanded his fees in the sum of KShs.446,600/- on 19th August, 2020. That having so demanded the fees, the Advocate's recourse was to file a suit for recovery of fees and not taxation.

4. The Applicant also deponed that the DR applied the wrong scale in taxing the Bill of Costs as the application for taxation was for a matter in the Magistrate's Court being Eld CME&L No. 127 of 2018. That the scale applicable ought to have been Schedule 7 and not Schedule 6 of the *Advocates (Remuneration) Order* (ARO) 2014. That the amount of KShs.200,000/- awarded on instruction fees is excessive as the minimum set in the appropriate scale is KShs.20,000/-. In addition, the award on getting up fees, drawing and perusals were improper, as the said Schedule 7 does not provide for the same. Moreover, the awards for attendances were also excessive as they were not based on the limits set under Schedule 7 of the 2014 *order*. Further, that the award for VAT at 16% was also erroneous because the Advocate did not submit proof of the registration certificate from the Kenya Revenue Authority (KRA). Finally, that the amount taxed was in excess of what the Advocate had billed him.

5. The Respondent filed a Replying Affidavit dated 26th September, 2023 and deponed that the Application is misconceived, an abuse of the court process and lacks merit. He deponed that it was agreed that the Applicant would pay the Advocate's legal fees and disbursements arising from ELD CM ELC Case No. 127 of 2018, hence the instant application is brought in bad faith to defeat the course of justice. He deponed that the decision of the DR was made pursuant to the right taxation principles. That the Applicant has refused to pay the sum taxed by the DR herein and given no commitment to settle any amount at all. Further, that the Applicant has not demonstrated why a stay of execution should issue or why the Bill of Costs should be resubmitted for fresh taxation. The Respondent deponed that the correct scale for the Bill of Costs is Schedule 7 of the *ARO (Amendment)* 2014 because the matter took place in the Chief Magistrate's Court. The Advocate deponed that the award of instruction fees was not excessive and was based on the law. He prayed that the application be dismissed with costs.

Applicant's Submissions

6. The Application was canvassed by way of written submissions and the Applicant/Advocate's submissions were filed on 30th October, 2023. Counsel submitted that the Respondent failed to pay the amount taxed and only ran to court with unclean hands when the Advocate sought to execute. He submitted that the client/Respondent did not give the 14 days objection notice as required and delayed in filing the reference. Counsel urged this court to safeguard the principle that he who comes to equity must come with clean hands and dismiss the application. Counsel argued that the application has been brought after an inordinate delay and is meant to delay execution and deny the successful party of the fruits of its judgment and his labour. He submitted that the orders sought are not a matter of right or mandatory relief but rely on the discretion of the court.

7. Counsel submitted that the Client/Respondent had not met the requisite conditions for grant of stay orders pending hearing of the application or otherwise as set out under Order 42 Rule 6(2) of the *Civil Procedure Rules*. Counsel cited *Machira T/a Machira & Co. Advocates v East African Standard*

(N0. 2) [2002] KLR 63 where the court held that the successful party is entitled to enjoy the fruits of its judgment, which right ought to be considered when handling applications for stay of execution. Counsel argued that before the orders can be granted, it is a mandatory requirement for one to show proof of substantial loss, yet the Client/Respondent herein had failed in that regard. That the court therefore has no basis upon which to assess the risk and loss that the Client/Respondent may suffer, he relied on *Andrew Kuria Njuguna v Rose Kuria*; Nairobi Civil Case 224 of 2001 (unreported).

8. Counsel submitted that in *First American Bank of Kenya v Shah & Others* [2002] EA, the court held that a court cannot interfere with the decision of a Taxing Master unless it was based on an error of principle or the fee awarded is manifestly excessive to justify an interference. Counsel asserted that the Client had not proved any error of principle committed by the DR in taxing the Bill of Costs, and he relied on *Otieno Ragot & Company Advocates v Kenya Airports Authority* [2021]eKLR. Counsel was of the opinion that the instruction fee awarded is not excessive and was considered on the basis of the law. He urged the court to dismiss the Application with costs.

Client/Respondent's Submissions

9. The Client/Respondent's Submissions were filed on 17th November, 2023 where his Counsel acknowledged that extension of time is an exercise of the Court's discretion. That the principles that guide the courts in the exercise of its discretion were laid down by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR. He submitted that the Respondent is entitled to an order for extension because he has tabled proof that he has been ailing and the Applicant has not rebutted this averment. He argued that the Applicant will not suffer any prejudice which cannot be compensated by way of costs, since if the Respondent fails, the Applicant will be at liberty to execute. He asked the court to exercise its discretion and extend time for filing of the reference.

10. Counsel submitted that the Respondent was challenging the decision of the DR of 12th May, 2023 because the DR made errors of principle which forms a basis for the court's interference. He submitted that the Advocate had by letter dated 19th August, 2020 demanded fees of KShs.446,600/-, thus his remedy was a suit for recovery of the amount. On this he cited the case of *Kipkorir and Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR. That there is a retainer relationship with legal fees of KShs.150,000/- in partial satisfaction of which the Client had paid KShs.125,000/- in 4 instalments. Counsel pointed out that the Advocate did not dispute receiving the payments, and that in receiving the partial payments, the Advocate had implied the existence of an agreement on legal fees. He opined that the Advocate was thus estopped from denying its existence. He relied on *D.M. Njogu & Co. v National Bank of Kenya Ltd* Misc. 730 of 2006 & Misc. No. 165 of 2007 [2016] eKLR.

11. Counsel also submitted that the DR erred in principle by applying the wrong scale in taxing the Bill of Costs since it was related to a matter before the Magistrate's court. That the applicable scale is Schedule 7 of the *ARO* and not Schedule 6 which provides for proceedings in the High Court. Counsel submitted that the awards on instruction fee and attendances are manifestly excessive whereas getting up fees, drawings and perusals were improper as Schedule 7 does not provide for the same. Further that the award of 16% VAT was made erroneously as the Advocate did not submit proof of the registration certificate from the KRA. Counsel also relied on *Odera Obar & Co. Advocates v Chatterhouse Bank Limited* [2018] eKLR, where it was held that: where a taxation is shown to have been based on an error of principle or the fee awarded is not supported by the relevant schedule of the *ARO*, the court shall interfere with the Taxing Master's decision.

Analysis and Determination

12. Having carefully considered the application together with the grounds and affidavit in support thereof, as well as the response thereto, the submissions and authorities cited therein, I am of the opinion that the following issues lend themselves for determination by this court:

    a. Whether the court should enlarge the time for filing of the Reference;

    b. Whether the ruling on the Bill of Costs was based on an error of principle; and

    c. Whether there was a Retainer Agreement on fees that the court ought to have considered.

a. Whether the court should enlarge the time for filing of the reference

13. The procedure for filing a Reference to oppose a taxed Bill of Costs is set out in Paragraph 11 (1) and (2) of the *Advocates Remuneration Order*. It stipulates that:

> "(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."

14. Acknowledging that he filed the Reference out of time, the first substantive prayer in the Applicant's Motion is for enlargement of time for filing of the Reference. This Court has inherent power to enlarge time within which a party is required to do any act, which power is provided under various provisions. One such provision is Section 95 of the *Civil Procedure Act*, 2010 which provides that:-

> "Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion from time to time enlarge such period, even though the period originally fixed or granted may have expired."

15. There is also Order 50 Rule 5 of the *Civil Procedure Rules*, which provides that:-

> "Where a limited time has been fixed for doing any act or taking any proceedings under these *Rules*, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

16. More specifically where filing of References is concerned, Paragraph 11(4) of the *ARO*, grants this court the discretionary power to enlarge the time for filing a reference. It states as follows:-

> "(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving

to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

17. Paragraph 11(4) above does not stipulate any factors that a court should take into account in exercising such discretion. The Supreme Court has had an opportunity to pronounce itself on this matter, listing a set of principles to be considered in permitting or withholding discretion on an application of this nature. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR, the Supreme Court held that:-

> " From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay; and
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

18. It goes without saying that this court is bound by the above decision. The facts in this case are that the DR delivered the ruling on the Bill of Costs on 12th May, 2023. The request for reasons under the law was to be submitted within 14 days. Pursuant thereto, the Applicant sought reasons by a letter dated 25th May, 2023 which is 13 days from the date of the ruling, meaning that it fell within the requisite timeline. The Reference was to be filed within 14 days after the receipt of reasons, and the reasons herein were given on 16th August, 2023. Counting 14 days from the date of delivery of the reasons would put the deadline for filing the reference on 30th August, 2023. The Reference was however filed on 18th September, 2023 approximately 19 days past the statutory timeline. There was a 3 months waiting period from the date of request for reasons to the date of giving of the reasons. Notably, most of the delay of 83 days was occasioned by the DR after the request was lodged for the reasons to be issued. The Applicant on his part filed his Reference 18 days from the time he received the reasons from the Taxing Master.

19. In addition, the reason given for the delay in filing is that the Applicant has been indisposed and has been in and out of hospital, and been admitted on some occasions and was put on bed rest so he could

not go to his Advocate's office to sign the Affidavit. The Applicant annexed to his Affidavit treatment notes dated 22nd June, 2023 indicating that he was diagnosed with hypertension. The notes also indicate that the Client had been treated elsewhere without improvement and that he was to go back for review after a week. The delay attributed to the Applicant's ill health is reasonable. The Applicant has therefore satisfactorily explained the delay in filing the Reference by giving a justifiable excuse. For this reason, the court shall exercise its discretion and enlarge the time for filing of the reference herein.

b. Whether the ruling on the Bill of Costs was based on an error of principle

20. With respect to the merits of the proposed Reference, the application is premised on the grounds that the decision was made based on an error of principle. Ideally, a court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the trial court in doing so, misdirected itself in some matters and as a result arrived at a decision that was erroneous. A higher court will only interfere with the decision of a trial court where it is clear that the court was manifestly wrong in the exercise of judicial discretion and that as a result consequently, justice was not done. I am guided by the decision in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where the Court of Appeal held that;

> " On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
>
> > " where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".
>
> An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles - see *Arthur v Nyeri Electricity Undertaking* (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel (No. 2)*, [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D'Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel (No. 2)* (*supra*)."

21. The Bill of Costs itself does not indicate what schedule it was drawn under. I have read the ruling of the Taxing Officer delivered on 12th May, 2023 and it is clear that the Taxing Officer based his decision on Schedule 6B of the *ARO* 2014. As rightly submitted by the Applicant, Schedule 6B of the *ARO* 2014 is on Advocate-Client Costs for proceedings in the High Court. The Advocates Advocate/Clients Bill of Costs dated 4th November, 2020 clearly indicated that it was raised on Eldoret Chief Magistrate's E&L No. 127 of 2018, Samuel Matunde Muchina v Joshua Kirwa Bett & Samwel Kiprugut.

22. The Respondent at paragraph 2(b) of his Replying Affidavit also admits that the legal fees and disbursements arose from Eldoret Chief Magistrate's E&L Case No. 127 of 2018 above. For

proceedings in the subordinate courts, Schedule 7 is the requisite provision that ought to have been applied in taxing the Advocate/Client Bill of Costs. By relying on Schedule 6B of the *ARO* instead of schedule 7A paragraph *2*, the Taxing Officer applied the wrong principle thus warranting interference with decision by this court.

c. Whether there was a retainer Agreement on fees that the court ought to have considered

23. In his Affidavit dated 6th August, 2021 filed in response to the Notice of Motion dated 4th November, 2020 the Applicant annexed a Letter dated 19th August, 2020 where the Advocate made a demand for legal fees and disbursements in the amount of KShs.446,600/-. It is this demand that the Applicant refers to as a retainer agreement on fees between him and the Advocate. He averred that pursuant to that demand, he had so far paid 4 instalments totaling to KShs.125,000/- which the Advocate did not dispute. It is the Applicant's case that since the Advocate chose to demand for his fees, which the Applicant alleges he settled in part by paying KShs.125,000/-, his recourse upon failure to settle the amount was a suit for the recovery of the amount demanded. However, despite accepting payment, the Respondent chose to abandon the agreement on fees and taxed his costs, and he is therefore estopped from abandoning the retainer.

24. The question then is whether the letter dated 19th August, 2020 constitutes an enforceable retainer agreement in terms of the Section 45 of the *Advocates Act*. Under the said provision, an advocate and his client may make an agreement fixing the amount of the advocate's remuneration before, after or in the course of any contentious business. 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. Section 45 of the *Advocates Act* provides inter alia:

> " 45. Agreements with respect to remuneration
>
> (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) ... 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."

25. The proviso to Section 45(5) allows an advocate who is a party to a retainer agreement, having acted diligently for his client, to sue and recover the whole retainer fee if his client should default in payment thereof. For an agreement on retainer fees to be binding, it must be in writing and signed by the Client and/or his agent. In the case of *Omulele & Tollo Advocates v Mount Holdings Limited*]2016] eKLR the Court explained that;

> " An agreement entered into pursuant to the above section is what can be termed as a 'retainer agreement'. As the section indicates, under such agreement, the parties 'fix' or put a cap

on the advocate's instruction fee, meaning that both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent."

26. The letter dated 19th August, 2020 is only a letter demanding for fees in the terms tabulated thereunder. It is only signed by the Advocate and not his Client. It cannot therefore constitute a retainer agreement in terms of Section 45 of the *Advocates Act*. That aside, being the party alleging the existence of the retainer agreement, the onus of proving its existence lay on the Client, as was held in *Muriithi Kireria & Associates Advocates v Kenya Planters Co-operative Union Limited* [2017] eKLR where the court rendered itself thus:

> " The onus rests on the person who alleges the existence of a retainer to prove its existence where it is material to a claim. Thus an advocate must establish a retainer where he seeks remuneration and, likewise, it may have to be the client bearing the onus of proving the retainer where he or she wishes to make the advocate accountable for breaching a duty which the retainer would attract: see generally *Ohaga v Akiba Bank Ltd* [2008] 1 EA 300 and also section 107 of the *Evidence Act* (Cap 80). Generally, proof of a retainer will be deemed upon the establishment of facts and circumstances sufficient to establish a tacit agreement to provide legal services."

27. In the instant suit, the Applicant has failed to prove the existence of the alleged retainer agreement on fees to the required standard by failing to place before the court a valid and binding retainer agreement. In addition, the allegation that the client had paid an amount of KShs.125,000/- to the Advocate was not substantiated. In his Affidavit dated 6th August, 2021, the Applicant claimed that he dealt with the Advocate as a professional and based on trust, he paid the money but never bothered with receipts for the money paid. It is trite that he who alleges must prove.

28. By merely alleging that he paid fees and not providing receipts or evidence of such payment, the Applicant cannot claim to have discharged the burden of proof on a balance of probabilities. The Taxing Master in the reasons given on 16th August, 2023 similarly notes that the Applicant claimed to have made payments but receipts were never issued and further, that it is not clear whether payments were made. There is nothing to show that the Taxing Master overlooked relevant evidence or ignored material evidence on the issue of fees allegedly already paid to the advocate and I find no basis to fault his findings on this issue.

29. The totality of the foregoing is that the application partially succeeds and I make the following orders, that:

    a. The time for lodging the Reference is hereby extended and the reference herein is validated.

    b. The decision of the Taxing Master/Deputy Registrar made on 12th May, 2023 on the taxation of the Advocate-Client Bill of Costs is hereby set aside.

    c. The Advocates-Client Bill of Costs be placed before a different Taxing Officer, for appropriate consideration.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 29TH DAY OF JULY 2024

J.M ONYANGO

JUDGE