



**Owino & Company Advocates v Kisaka (Miscellaneous Case E041 of 2020)
[2023] KEELRC 2325 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2325 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E041 OF 2020
AN MWAURE, J
SEPTEMBER 29, 2023**

BETWEEN

OWINO & COMPANY ADVOCATES APPLICANT

AND

ERASTUS SIFUNJO KISAKA RESPONDENT

RULING

1. The Applicant filed a notice of motion vide the application dated 14th December 2021 in which it sought orders that:
 1. the honourable court be pleased to enter judgment for Kshs 137,610 in favour of the applicant/advocate plus interest at court rates in terms of certificate of taxation dated 26th October 2021.
 2. the costs of this application be provided for.

Applicant/ Advocate Case

2. The application was supported by an affidavit dated 14th December 2021 and a supplementary affidavit dated 3th March 2023 sworn by Ooko S. Owino and advocate practicing in the firm of the applicant/advocate.
3. The applicant averred that he was instructed by the Respondent/Client to file a suit and to represent him in Nairobi ELRC Petition No 7 of 2019; Erastus Sifunjo Kisaka Vs University of Nairobi, which the firm conducted and rendered services accordingly.
4. The applicant averred that upon reinstatement in employment, the respondent terminated its services and appointed another advocate.



5. That the applicant firm filed its bill of costs dated 15th September 2020 which was served on the respondent/client's advocates and the same was subsequently taxed at Kshs 137,610 in a ruling delivered on 19th February 2021.
6. The applicant/advocate avers that despite serving the respondent/client through his counsel on record as well as personally through his usual email address he has failed and/or neglected to settle the amount owed.
7. The applicant/advocate avers that it has suffered loss and prejudice due to the non-payment and prays that the taxation ruling and certificate of costs herein be adopted as the full and final judgment of this court and that this court enters judgment in its favour against the respondent/client as follows:
 - a. The taxed amount of Kshs 137,610/-
 - b. Interest at court rates from the date of this judgment
 - c. Costs of this application

Respondent's Case

8. The respondent opposed the application vide a replying affidavit dated 18th October 2022.
9. The respondent avers that on 26th October 2018, he entered into a retainer agreement for legal fees and other charges for Kshs 50,000 which was executed by himself and the applicant and he proceeded to pay the entire amount.
10. The respondent avers that the ruling in Nairobi ELRC Petition No 7 of 2019; Erastus Sifunjo Kisaka Vs University of Nairobi was delivered on 20th January 2020 before Hon. Lady Justice Wasilwa who directed the respondent therein to proceed with the stalled disciplinary process within 3 months and restrained the employer from terminating his services unless the disciplinary process is done justly and fairly or until hearing and determination of the petition.
11. The respondent avers that the disciplinary process led to his reinstatement and the ruling ensured the stalled disciplinary process was fast tracked.
12. The respondent avers that upon his reinstatement applicant informed him that the main suit had been resolved and the only outstanding issue was who was to meet the employer's lawyer's fees which took him aback as the petition had several unresolved issues which could only be resolved through the hearing and determination of the petition.
13. The respondent avers that the applicant's demand for additional legal fees was contrary and in breach of their mutual agreement on legal fees, further, the respondent felt the applicant was no longer looking out for his interest and the matter was yet to be heard and determined.
14. The respondent avers that he terminated the applicant's services due to its conduct and on 9th September 2021 prior and was represented by M/s Oduor Henry John Advocates who served the applicant with a notice of change of advocates on 7th October 2020.
15. The respondent denied being aware and/or being served with the filed bill of costs or taxation thereof and/or ruling and certificate of taxation and puts the applicant to strict proof.
16. The respondent avers having entered into a retainer agreement with the applicant the parties herein are bound by the terms of the contract and the said bill of costs was illegal and contrary to the agreement and the subsequent certificate of taxation arising null and void.



17. The respondent averred that the taxing officer lacked jurisdiction to tax the bill of costs by dint of section 45(6) of the *Advocates Act* as the parties had reached an agreement on legal fees.
18. The applicant was canvassed by way of written submissions.

Analysis and Determination

19. The Court considered the pleadings and submissions filed by parties through their respective advocates and find the main issue for determination is whether there was a retainer agreement/ agreement on fees between the parties
20. On the first issue, the respondent/client submitted that there is an agreement for fees between the parties dated 26th October 2018 that is in writing and signed by S.O Owino for the Advocate and Erastis Sifunjo Kisaka for the client therefore the retainer agreement is valid and binding.
21. The applicant/advocate in denial of the legitimacy of the aforementioned agreement, submitted that the alleged document does not amount to a fee agreement as :
 - a) it is dated 26th October 2018 yet on that date both parties were far from finalization of discussion of legal fees
 - b) the document is contradictory and illogical because it purported that the respondent/client paid Kshs 50,000 on that date yet the first part of the deposit was paid on 14th November 2018 after receipt of the first fee note.
 - c) That upon payment of the initial deposit of Kshs 30,000, the applicant issued a demand letter dated 15th November 2018 on his employer.
 - d) It is not logical and feasible that a fee agreement can set out the full fees to be Kshs 50,000 for undertaking a constitutional petition and in the same document indicates that a deposit of the same amount has been paid.
 - e) It is not logical that the respondent/client would give written instructions to that the advocates fees would be governed by the government the remuneration order only for the parties to sign such a hollow document.
 - f) That the document is a strange document which does not emanate from the applicant's office and appears to have been superimposed on the applicant's letterhead to appear as an agreement.
 - g) The document does not contain any relevant terms validly drawn document that can constitutes a binding agreement.
22. Section 45 of the *Advocates Act* in this regard provides as follows;

“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.

- (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 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.

An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.

- (3) An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof:

Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.”

23. In *Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited* [2020] eKLR the court held:-

“The Court adopts the reasoning and finding of the case of *D.M Njogu & Co vs National Bank of Kenya Ltd Misc 730 Of 2006 & Misc 165 of 2007* [2016] eKLR both in the High Court and quoting from the Court of Appeal decision;

In our view, an advocate who willingly and knowingly enters into an agreement in regard to the payment of his Fees that is contrary to the Advocates Remuneration



Order, cannot maintain proceedings whose purport is to avoid the illegal contract by reverting to Court to tax his advocate/Client Bill of Costs in accordance with The Advocates Remuneration Order.....this Court cannot come to the Appellant's aid as the Appellant is estopped by his conduct from seeking the Court's intervention.

Similarly, in the instant case, the Applicant and Respondent entered into a contract on legal services and remuneration. The parties are bound by the terms of the Retainer Agreement and the Appellant is estopped from seeking intervention from taxation under the Advocates Remuneration Order. Where there is a Retainer Agreement the Taxing Officer lacks jurisdiction to tax the Bill of Costs.”

24. In *Mercy Nduta Mwangi t/a Mwangi Kengara & Company Advocates v Invesco Assurance Company Limited* [2016] eKLR

“In this respect it is notable that section 45 (3) of the *Advocates Act* allows for taxation of costs in contentious business but with respect to other persons other than an Advocate, and it is evident that where an agreement fixing remuneration is in place, the costs of an Advocate shall not be subject to taxation except upon application under section 45(2) which is when the Court can order that the costs be taxed.”

25. This court observes that although the applicant/advocate alleges the agreement for fee is a forgery it is quite evident that it bears its firm's logo and was signed by Ooko S Owino, the signature on the agreement for legal fees and that on the affidavits submitted before this court are similar and defeats logic how it is a forgery. In any case it is trite law that he who alleges must prove. Section 109 of the *evidence act* states:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

26. This court is persuaded by the court's pronouncements in *Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited* [2020] eKLR where the court held:-

“The Court adopts the reasoning and finding of the case of *D.M Njogu & Co. vs National Bank of Kenya Ltd Misc 730 Of 2006 & Misc 165 of 2007* [2016] eKLR both in the High Court and quoting from the pronouncements of the court in civil appeal no 165 of 2007

In our view, an advocate who willingly and knowingly enters into an agreement in regard to the payment of his Fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal contract by reverting to Court to tax his advocate/Client Bill of Costs in accordance with The Advocates Remuneration Order.....this Court cannot come to the Appellant's aid as the Appellant is estopped by his conduct from seeking the Court's intervention.

Similarly, in the instant case, the Applicant and Respondent entered into a contract on legal services and remuneration. The parties are bound by the terms of the Retainer Agreement and the Appellant is estopped from seeking intervention from taxation under



the Advocates Remuneration Order. Where there is a Retainer Agreement the Taxing Officer lacks jurisdiction to tax the Bill of Costs.”

27. On whether the agreement was validly drawn, the court relies in the case of Omulele & Tollo Advocates vs Mount Holdings Ltd C.A.75 of 2015; the Court held;

“A retainer means the instruction, employment or engagement of an advocate by his client. On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship.....

As the Section [45 of *Advocates Act*] indicates, under such agreement, the parties fix or put a cap on the advocates instruction fees....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.....It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent. It is erroneous as submitted By Counsel for the Respondent that retainer and retainer agreement mean one and the same thing.”

28. In view of the foregoing, the agreement for legal fees is valid and binding on the parties as it conforms with section 45 of the *Advocates Act* and the applicant/advocate is estopped from seeking intervention from taxation under the Advocates Remuneration Order as laid down in Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited [2020] eKLR in which the court held:-

“The Court adopts the reasoning and finding of the case of D.M Njogu & Co vs National Bank of Kenya Ltd Misc 730 Of 2006 & Misc 165 of 2007 [2016] eKLR both in the High Court and quoting from the Court of Appeal decision, Civil Appeal No 165 of 2007;

In our view, an advocate who willingly and knowingly enters into an agreement in regard to the payment of his Fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal contract by reverting to Court to tax his advocate/Client Bill of Costs in accordance with The Advocates Remuneration Order.....this Court cannot come to the Appellant’s aid as the Appellant is estopped by his conduct from seeking the Court’s intervention.

Similarly, in the instant case, the Applicant and Respondent entered into a contract on legal services and remuneration. The parties are bound by the terms of the Retainer Agreement and the Appellant is estopped from seeking intervention from taxation under the Advocates Remuneration Order. Where there is a Retainer Agreement the Taxing Officer lacks jurisdiction to tax the Bill of Costs.”

29. On the issue on whether the respondent can challenge the decision of the taxing master, the respondent/client submitted that he was not aware of the taxation proceedings until the present application and there being annexure marked ‘OSO (S) 8 to the applicant’s supplementary affidavit showing that the respondent’s advocate firm was instructed on 9th September 2021 while the ruling on taxation was delivered on 19th February 2021 and no evidence was produced showing their immediate predecessor M/s Oduor Henry John Advocates had been served with the bill of cost, however, there is an affidavit of service on record dated 23rd October 2020 and a copy of email sent to the respondent/client and his then advocate forwarding the taxation notice and advocate-client bill of cost. The respondent may well have been served with the bill of costs and it would have been prudent if the



respondent to the same but from the law an advocate cannot challenge a retainer agreement. The same is almost similar to a consent.

30. In view of the foregoing the court is persuaded the applicants/advocates application dated 14th December 2021 is not merited and so is dismissed. Accordingly.

31. Under the circumstances let each party meet their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2TH DAY OF SEPTEMBER 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

