



**Mugane and Company Advocates v Maxam Limited (Miscellaneous Application E121 of 2021) [2022] KEELRC 13531 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13531 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E121 OF 2021**

**L NDOLO, J**

**DECEMBER 15, 2022**

**BETWEEN**

**MUGANE AND COMPANY ADVOCATES ..... APPLICANT**

**AND**

**MAXAM LIMITED ..... RESPONDENT**

**RULING**

1. On May 12, 2022, Hon Daisy Mutai, deputy registrar, delivered a taxation ruling by which she upheld a preliminary objection raised by the respondent to the effect that she lacked jurisdiction to tax the advocate/client bill of costs filed by the applicant.
2. In reaction to the determination by the deputy registrar, the applicant filed a reference by way of chamber summons dated May 26, 2022 seeking the following orders:
  - a. That the decision of the taxing master delivered on May 12, 2022, in so far as it relates to the reasoning and determination pertaining to the taxation of the bill of costs dated June 30, 2021 be set aside;
  - b. That the court be pleased to refer the matter back for taxation of the bill of costs dated June 30, 2021 with proper directions thereof;
  - c. That in the alternative to prayer (b) the court exercises its inherent jurisdiction and thereby proceed to tax the bill of costs dated June 30, 2021.
3. The application is supported by an affidavit sworn by George Mugane, advocate and is based on the following grounds:
  - a. That the taxing master erred in her ruling in finding that she did not have jurisdiction to tax the applicant's bill of costs dated June 30, 2021;



- b. That the taxing master erred in her ruling in finding that the retainer agreement dated January 25, 2017 barred the applicant from raising the bill of costs dated June 30, 2021;
  - c. That the taxing master erred in her ruling and misapplied section 45(6) of the *Advocates Act*, in finding that the items on the bill of costs dated June 30, 2021 were covered by the retainer agreement dated January 25, 2017, yet she did not fully interrogate the scope of the said retainer agreement.
4. In his affidavit in support of the application, counsel George Mugane depones that on January 25, 2017, the applicant entered into a retainer agreement with Mr Kiuna Ngugi Kiuna, a director of several companies including the respondent.
  5. As per the agreement, which was referred to as a service level agreement, the applicant agreed to provide legal services to the respondent, from time to time.
  6. Counsel depones that the applicant duly performed its obligations under the agreement and executed various instructions issued by the respondent and other companies belonging to Kiuna Ngugi Kiuna.
  7. Counsel further depones that the parties had a fruitful advocate/client relationship until sometime in the year 2019, when the client and group of companies failed and/or refused to pay legal fees on several matters including the suit giving rise to these proceedings, being Nairobi ELRC Cause No 273 of 2018.
  8. The respondent's response to the applicant's chamber summons is by way of a replying affidavit sworn by Kiuna Ngugi Kiuna who describes himself as the managing director of the respondent.
  9. Kiuna depones that on January 25, 2017, he entered into a retainer agreement with the applicant on behalf of his group of companies, by which the applicant would provide an array of legal services in exchange for a quarterly fee of Kshs 300,000.
  10. Kiuna concedes that there was a caveat in clause 6 of the retainer agreement stating that legal fees would be charged separately on specific legal briefs, which fees would be negotiated by the parties upfront.
  11. According to Kiuna, the applicant and the respondent did not negotiate separate legal fees to be paid in respect of ELRC Cause No 273 of 2018. He therefore maintains that the legal fees in this matter was covered within the retainer fees.
  12. The issue for determination in this reference is whether the taxing master was right in declining to assume jurisdiction on the basis of the retainer agreement executed by the parties.
  13. Section 45(6) of the *Advocates Act* provides that:
    - (6) subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.
  14. The purpose of this provision is to allow advocates and their clients to negotiate and agree on chargeable fees and where such agreements have been executed, the courts should be slow to interfere.
  15. In declining to tax the bill of costs filed by the applicant, the taxing master relied on the case of *Sheetal Kapila v Narriman Khan Brunlechner* [2021] eKLR where it was held that the existence of a retainer agreement ousts the jurisdiction of the court to undertake taxation by virtue of section 45(6) of the *Advocates Act*.
  16. However, like every other agreement, agreements on fees between an advocate and their client cannot be said to be immune from the interrogative intervention by the court. As held by Mwita J in *Ali*



*Mohammed Egai v Maina Onsare Partners Advocates* [2021] eKLR an agreement on legal fees under section 45 of the *Advocates Act* is not absolute.

17. The reference now before me turns on the question whether the fees payable on account of Nairobi ELRC Cause No 273 of 2018 was covered under the quarterly retainer fee of Kshs 300,000.
18. In her ruling, the taxing master rendered herself as follows:

“It becomes clear that the service level agreement entered into by the parties formed the basis of issuance of instructions upon the applicant to undertake ELRC Cause No 273 of 2018 and particularly because no other agreement or set of instructions [has] been provided by the applicant as proof that the applicant’s legal undertaking of proceedings in ELRC Cause No 273 of 2018 fell outside the auspices of the service level agreement. I find therefore that the retainer agreement entered into by parties on January 25, 2017 is the base of instructions in Cause No 273 of 2018.”
19. Having so found, the taxing master declined to entertain the question whether the applicant had been paid for the service rendered in respect of Nairobi ELRC Cause No 273 of 2018. She states:

“I find that to proceed to analyse this issue, would be to so act outside the jurisdiction of the deputy registrar given the finding that the retainer agreement dated January 25, 2017 covered the matter giving rise to the application herein.”
20. It is not clear on what basis the taxing master drew the foregoing conclusions. I say so because under clause 6 of the retainer agreement it is clear that the intention of the parties was not that all matters handled by the applicant on behalf of the respondent would be covered by the retainer fee. The said clause bears verbatim reproduction:
  6. The client will pay a quarterly retainer to the law firm for the services in the amount of Kenya shillings three hundred thousand only (Kshs 300,000/-). This fee shall be payable in advance upon contract signing. It is hereby agreed that legal fees shall be charged separately on specific legal briefs instructed on and the same shall be negotiated between the parties upfront...
21. Significantly, clause 1 of the retainer agreement provides for the scope of services to be provided by the applicant as:
  - a. rendering legal opinions;
  - b. payment and updating of land rates and rent on behalf of the client;
  - c. preparation of leases/tenancies;
  - d. investment matters, specifically in the Nairobi stock exchange.
22. It was not lost on the court that there was no specific mention of representation in contentious matters as part of the services to be provided by the applicant under the retainer agreement.
23. At any rate, clause 5.1 and 5.3 of the agreement recognised that the applicant may raise fee notes on specific matters and there is evidence on record that the applicant did in fact raise a fee note on Nairobi ELRC Cause No 273 of 2018.
24. According to the applicant, it was understood by both parties that not all matters and legal instructions would be covered by the Kshs 300,000 quarterly retainer fee and therefore those matters where fees had not been agreed upon were to be charged in accordance with the *Advocates Remuneration Order, 2014*.



25. The contents of the retainer agreement confirm this position and the court is persuaded to agree with the applicant in this regard.
26. The respondent pursued the argument that because there was no separate negotiation on the legal fees to be paid on account of Cause No 273 of 2018, then the matter was covered under the retainer fee. In light of the foregoing analysis of the retainer agreement, the court finds the argument by the respondent unconscionable and therefore rejects it.
27. In the end, i find and hold that the applicant's bill of costs dated June 30, 2021 was properly before the taxing master and the said taxing master erred in law by declining to tax it.
28. The decision by the taxing master is therefore set aside and the bill of costs dated June 30, 2021 is transmitted for taxation by any other taxing master other than Hon Daisy Mutai.
29. The costs of the application will be met by the respondent.

**DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Gaitho for the Applicant

Ms. Mamburi for the Respondent

