



REPUBLIC OF KENYA



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**Mwangi t/a Karinga Mwangi & Co Advocates v Raei Investment Limited;
Wanyama & another (Interested Parties) (Environment & Land Miscellaneous
Case E076 of 2023) [2024] KEELC 7398 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7398 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E076 OF 2023
MD MWANGI, J
OCTOBER 31, 2024

BETWEEN

**EDWIN KARINGA MWANGI T/A KARINGA MWANGI & CO
ADVOCATES RESPONDENT**

AND

RAEI INVESTMENT LIMITED CLIENT

AND

PETER MANYONGE WANYAMA INTERESTED PARTY

MIRRIAM MUTANU KIMONDU INTERESTED PARTY

RULING

(In respect of the Client's Application dated 15th January 2024)

1. Before me is a Chamber Summons dated the 15th January, 2023 brought pursuant to the provisions of Rule 11(2) of the Advocates Remuneration Order, and all enabling provisions of the Law, where the Applicant seeks for orders that: -
 - i. The entire taxation Ruling dated 14th December, 2024 delivered by Hon. V. Kiplagat Deputy Registrar, be set aside in toto.
 - ii. The matter be remitted for re-taxation before another Deputy Registrar other than Hon. V. Kiplagat DR.
 - iii. The costs of this Reference be provided for.
2. The said application is supported by the grounds on the face of it and the supporting Affidavit sworn by Lihem Werede, the Client's Director, on the 15th January, 2023. The deponent avers that



the Advocate filed a Bill of Costs dated 23rd September, 2023 emanating from instructions to offer professional services in respect of the sale and purchase of mansionette Number A3 erected on L.R No. 3734/1449 valued at Kshs. 130,000,000/=. The Bill was opposed by the parties through their respective submissions. Subsequently, the Bill was taxed by Hon. V. Kiplagat on the 14th December, 2023 at the figure of Kshs. 1,810,805/-.

3. The Client being aggrieved by the said Ruling filed this Reference. The Client faults the Taxing Officer for awarding full instruction fees for an incomplete transaction. Further, that the Taxing Officer failed to consider the uncontested evidence on record proving that the work done by the Advocate was limited only to preparation of the agreement for sale between the Client and the Interested Parties. The Advocate did not complete the transaction or transfer the property from the Client to the Interested Parties. Therefore, the award of full instruction fees was erroneous and should therefore be set aside.
4. The Client further avers that the Taxing Officer erred in applying Schedule 1 of the Advocates Remuneration Order, instead of Schedule 5 during the taxation of costs for the incomplete transaction. The Client argues that the Taxing Officer too erred in his finding that items 3 to 126 were drawn to scale contrary to the law, the facts and the evidence on record. It is contended that most of the items were not only excessive but unjustified. It is on that basis that the Client seeks that the Taxing Master's decision to be set aside.

Grounds of Opposition

5. The Advocate opposed the application vide the Grounds of Opposition dated 5th February, 2024. The Advocate contention was that the application is misconceived, incurably defective and an abuse of the court process. He avers that the application is incompetent in the first instance and a blatant breach of the court procedure for failure by the Applicant to file or lodge a notice of objection to taxation against the decision of the taxing master prior to filing the application before the court. He asserts that no such notice was lodged within 14 days from the date of such taxation giving notice in writing to the taxing officer of the items of taxation to which it objects to.
6. Further, the Advocate argues that the application is time barred having been filed after the lapse of 14 days' period as provided in Rule 11 of the Advocate's Remuneration Order. That the Applicant is guilty of laches and unreasonable delay in filing the instant application. Consequently, the application should be dismissed with costs.

Replying Affidavit by the Interested Parties

7. The Interested Parties, the purchasers of the subject property filed a Replying Affidavit sworn by Peter Manyonge Wanyama, Advocate, sworn on the 16th April, 2024 in support of the Application. Counsel asserts that there was a retainer agreement between the Client and the Advocate but the Taxing Master in assessing the Bill of Costs, failed to factor in the retainer fees paid to the Advocate.
8. The Interested Parties fault the Taxing Master for ignoring the fact that the conveyance did not materialize under the Advocate. Further that he proceeded to tax the Advocate's bill despite the Bill of Costs being in breach of Section 45(6) of the *Advocates Act* which bars an Advocate from taxing costs where there is an Agreement for fees. They contend that the Taxing Master adopted a simplistic approach to taxation and failed to consider the pleadings and appreciate the history of the matter especially the duplication of items in the bill of costs.
9. Therefore, it would be unjust enrichment for the Advocate to be awarded the taxed amount while he did not complete the transaction. Further, that the Bill of Costs herein falls under the ambit of Schedule 5 of the Advocates Remuneration Order and not Schedule 1 which was applied by the Taxing Master.



Court's Direction

10. With the concurrence of the parties, the court directed that the application be canvassed by way of written submissions. All the parties complied. The Clients submissions are dated 11th July, 2024 whereas the Advocate's and the Interested Parties' submissions are dated 28th June, 2024 and 6th June, 2024 respectively.
11. Parties highlighted their respective submissions on the 15th July, 2024 before the court. The Court has considered the submissions in its determination.

Issues for Determination

12. Having perused the Chamber Summons Application herein, together with the supporting affidavit, the Grounds of Opposition, the Replying Affidavit and the written submissions filed by the parties, I am of the view that the first critical issue for determination is whether the Reference is incompetent for failure to comply with the provisions of paragraph 11 of the Advocates Remuneration Order. The second issue is whether there was a retainer agreement between the Client and the Advocate as raised by the Advocate for the Interested Parties.

Analysis and Determination

13. Rule 11 of the Advocates Remuneration Order makes provision for the procedure an aggrieved party must adopt. It stipulates as follows;
 - (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.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for 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.
14. In the case of *Twiga Motor Limited -vs- Hon. Dalmas Otieno Anyango* (2015) eKLR, the Court stated that;

“The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance.” [own emphasis]
15. Imperatively, the notice of objection to taxation must stipulate and/or contain the particular items, which the Applicant objects to. It is upon filing of the Notice of Objection that the taxing master is



required to avail the reasons for arriving at the decision in respect of those items, which are the basis of the objection.

16. Where a Notice of Objection to taxation is lodged, the same must be specific and must not be omnibus. For clarity, an omnibus notice if any, would be incompetent and incapable of grounding a Reference before this Honourable Court.
17. In the instant case, the Advocate contends that the Client has not complied with the mandatory requirement of filing a Notice of Objection. The Client on its part asserts that the competence of a reference is not pegged on the Notice of Objection. It argues that the purpose of the notice is not to initiate the court's jurisdiction, but rather its purpose is to obtain reasons for the taxation.
18. In the case of *Machira & Co. Advocates -vs- Arthur K. Magugu & Another* [2012] eKLR, the Court of Appeal agreed with the findings of Ringera J who had struck out the reference for being incompetent. The court held, inter alia, that;

“Sub-rule (1) requires the party objecting to give notice in writing within 14 days “of the items of taxation to which he objects”. As the trial judge correctly found, the Respondents notice of 1st August, 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.

As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeal or review was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August, 2001 was fatally defective. It follows that the Respondents' reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master's reasons for his decision.”

19. I have perused the court record and indeed confirm that in this case no Notice of Objection to taxation was ever filed by the Client leave alone an incompetent one. In the absence of a Notice of Objection to taxation, properly identifying the items objected to and filed within the statutory timeframe, the Reference before the Court is incompetent. The Notice of Objection to taxation is the equivalent of a memorandum of appeal which identifies the grounds of appeal in an appeal.
20. Advocate for the third parties Mr. Wanyama invited the court to focus on substantive justice as guided by article 159 of *the Constitution*. My view is that compliance with the rules of procedure is not



‘antithetical’ to article 159 of *the Constitution* as held by the Court in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court stated that;

“A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012* as follows:

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

21. On this ground alone, the entire application fails.
22. There was a second issue whether there was a retainer agreement between the Client and the Advocate. The agreement between the Client and the Interested Parties had a schedule which provided that the Advocate was to be paid Kshs. 1.9 million. Does this amount to a remuneration agreement under Section 45(6) of the *Advocates Act* which bars an Advocate from taxing costs where there is an Agreement for fees?
23. In the case of Lubulellah & Associates v Gilbi Construction Company Limited [2024] KEELC 4742 (KLR), the court cited with approval, the case of Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) EKLR, where it was held that:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co. Ltd –vs- Selfridge & Co Ltd* [1915] Ac 847, Lord Haldane, LC rendered the principles thus: “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation –vs- Lendetia Ltd*, quoting with approval from Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

24. Based on the doctrine of doctrine of privity of contract, it follows that the Applicant herein cannot be said to have been party to the sale agreement subject of these proceedings. An advocate drafting an agreement on behalf of a client does not become a party to the Agreement. Therefore, the Respondent cannot use the said agreement to preclude the Advocate from claiming his fees. An Advocate is only



precluded from taxing his costs if it is proved that there was a Retainer agreement as between the parties in accordance with the provisions of Section 45 of the *Advocates Act*.

25. In Black's Law Dictionary 6th Edition 1990 the word Retainer has been explained as follows: -

“In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. The act of employment is called the retainer. The retainer agreement between the client and attorney sets forth the nature of services to be performed. Costs, expenses and related matters.”

26. In Words and Phrases Legally Defined, 2ND edition, VOL 4 by JB Saunders, it is explained that:

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Consequently, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment.”

27. In Omulele & Tollo Advocates –vs- Mount Holdings Limited [2016] eKLR, the Court of Appeal stated: -

“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.....

From the above definition, ‘retainer’ covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client (see. Halsbury's Law of England, (supra) at page 14 para 765).”

28. The issue of validity of agreements between advocates and clients with respect to remuneration was dealt with by Ochieng, J in Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Limited (2) [2006] 1 EA 5 in which the learned Judge held that reading of section 45(1) of the *Advocates Act* reveals that the agreements in respect of remuneration would be valid and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorized in that behalf.

29. In this case, it is my finding that there was no fees agreement to preclude the Advocate from pursuing his costs, particularly through Taxation.

30. Consequently, the Chamber Summons dated the 15th January, 2023 is hereby struck out with costs to the Advocate.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024.

M.D MWANGI



JUDGE

In the Virtual Presence of:-

Mr. Odongo h/b for the Advocate/Respondent

Ms. Komen h/b for Mr. Peter Wanyama for the Interested Parties

N/A by the Client/Applicant

Court Assistant: Yvette

M.D. MWANGI

JUDGE

