**Kwengu & Company Advocates v Raja (Environment and Land Miscellaneous Application 94 of 2017) [2024] KEELC 7027 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7027 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 94 OF 2017**

**MD MWANGI, J**

**OCTOBER 17, 2024**

**BETWEEN**

**KWENGU & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**HITENKUMAR A RAJA ..... RESPONDENT**

**RULING**

## Background

1. This is my fourth ruling in this matter. The first one was delivered on 21st August 2017 after the Taxing Master taxed the Advocate's bill of costs filed on 22nd May 2017 at the sum of Kenya shillings 1,319,894.88.

2. On 23rd March 2023 this court delivered its 2nd ruling extending the time within which the Client was to file an objection and or reference to the ruling by the Taxing Master dated 21st August 2017 by 21 days from the date of the ruling.

3. The Client indeed filed a reference vide the application dated 6th April 2023 seeking inter alia for orders that the ruling by the Taxing Master be varied and or set aside. The Advocate's response to the reference was by way of a preliminary objection which was determined alongside the Client's reference. The court rendered its 3rd ruling in this matter on 28th September 2023 upholding the Client's reference and setting aside the ruling on taxation by the Taxing Master and all consequential orders thereof. The court referred the Advocate's bill of costs dated 22nd May 2017 to the Deputy Registrar of this court for fresh taxation before a different Taxing Master.

4. It is in the course of the fresh taxation that the Client/respondent raised objections to the taxation of the Advocate's bill of costs. The Taxing Master found that the objections were beyond her jurisdiction and with the concurrence of the parties accordingly referred the matter to this court for the

determination of the objections pursuant to the provisions of rule 12 of the Advocates Remuneration Order.

5. The objections were raised in the Client's replying affidavit sworn on 1st November 2023. The Client objected to the taxation of the Advocate's bill of costs filed on 22nd May 2017 on the basis that the parties had entered into a settlement on fees payable by the Client to the Advocate vide a deed of settlement dated 22nd June 2017. Further that the filing of the Advocate's bill of costs amounted to an abuse of the process of court.

**Objections by the Client.**

6. The Client in the replying affidavit sworn on 1st November 2023 deposes that the remuneration which the Advocate seeks to recover vide the bill of costs filed in this matter is alleged to have been in respect of the Advocate's services rendered in Milimani ELCC 312 of 2009. The Client however asserts that he fully and finally settled the Advocate's dues for his services in the matter amongst others at an agreed lump sum of Kenya shillings 10,000,000/- as agreed by the parties vide the Deed of Settlement dated 22nd June 2017. The Deed of Settlement is attached and marked as 'HAR 2'.

7. The Client asserts that the Deed of Settlement signed between him and the advocate qualifies as a valid fee agreement. The Advocate's costs cannot then be subjected to taxation by virtue of the provisions of sections 45 (6) of the *Advocates Act*.

8. The Client elaborates that the Advocate's claim for costs in ELCC 312 of 2009 was identified to be part of the claims covered by the Deed of Settlement. ELCMISC 200 of 2014 was an Advocate - Client bill of costs arising out of services rendered in ELCC 312 of 2009: (Hitenkumar A. Raja and Ano vs Jacob Juma & Ano.)

9. The Client was to pay the lump sum amount agreed in full in final settlement of all the Advocate's claims for costs arising out of ELCC 312 of 2009 and the others listed therein. Upon payment of the lump sum, Hitenkumar Amritlal Raja being the Client would have no further claim against the Advocate and the Advocate would equally have no further claim against the Client. All matters between the parties were to be marked as fully settled.

10. The Client insists that the Deed of Settlement serves as a legally-binding agreement between him and the Advocate. Therefore, the Advocate's Bill of Costs filed herein cannot be subjected to taxation by virtue of the provisions of Sections 45(6) of the *Advocates Act*.

11. Additionally, the Client stated that the Advocate's bill of costs was duplicitous. The Advocate had previously lodged two other taxation proceedings seeking to recover remuneration for services rendered in Milimani ELCC 312 of 2019, being ELCMisc. E233 of 2022 and ELCMisc 200 of 2014.

12. ELCMisc. E233 of 2022 was struck out on the ground that it was an abuse of the process of court considering that the subject matter of the bill was also the same subject matter of ELCMisc. 200 of 2014.

13. On the other hand, ELCMisc 200 of 2014 was marked as settled on 22nd August 2017 with no orders as to costs.

**Issues for Determination**

14. Two issues present themselves for determination in this matter, namely:-

    a. Whether the Deed of Settlement dated 22nd June 2017 executed between the parties in this matter constitutes an agreement on remuneration under Section 45 of the *Advocates Act*.

b. Whether the issue of remuneration of the Advocate by the Client is settled.

**Analysis and Determination**

15. I will begin with the second issue i.e. whether the issue of remuneration of the Advocate by the Client in respect to services rendered in HCCC 312 of 2009 (Hitenkumar Amritlal Raja & Another – vs- Jacob Juma and another) is settled.

16. In the course of writing this ruling, I took the liberty of calling from the archives two files that have prominently featured in this matter, being ELCMisc. 200 of 2014 and ELCMisc. E233 of 2022.

17. File number ELCMisc. 200 of 2014 was in respect to an Advocate - Client bill of costs filed by Kwengu and Company Advocates against Hitenkumar A. Raja in respect of Advocate's services rendered in HCC ELC 312 of 2009. The Bill of Costs filed was dated 3rd June 2014. The matter was concluded on 22nd August 2017 with an order that, 'the bill of costs dated 3.6.2014 is marked as settled with no orders as to costs'. The Taxing Master proceeded to mark the file as closed.

18. The file number ELCMisc. E233 of 2022 on the other hand was in respect to an Advocate - Client Bill of Costs dated 21st October 2022 by Kwengu and Company Advocates against Hitenkumar Amritlal Raja again in respect of legal services rendered in HCC (ELC) 312 of 2009.

19. This matter (ELCMisc. E233 of 2022) was concluded on 8th March 2023 when the Taxing Master struck out the bill of costs for being an abuse of the process of court taking into account that ELCMisc 200 of 2014 between the same parties over the same subject matter had been marked as settled on 22nd August 2017.

20. The matter before the court now is in respect to the Bill of Costs which is undated but filed on 22nd May 2017 by Kwengu and Company Advocates yet again against Hitenkumar Amritlal Raja in respect of legal services rendered in HCC (ELC) 312 of 2009.

21. An Indian Judge by the name of J.R. Midha of Delhi High Court in his farewell speech in the year 2021, upon retirement as a Judge after 13 years of service stated that;

> " In the court of justice both parties know the truth. It is the judge who is on trial."

22. That is exactly how I feel as I consider this matter. The parties deep in their hearts know the truth but for one reason or another this matter is before the court for determination.

23. I say so because, when a matter is marked as settled, it means only one thing; there cannot be two ways about it; the matter is resolved, ended and concluded.

24. The order of 22nd August 2017 recorded in ELCMisc. 200 of 2014 meant that the dispute between Kwengu and Company Advocates and Hitenkumar Amritlal Raja in respect to the Advocate's fees payable for services rendered by Kwengu and Company Advocates to the Client in HCC (ELC) 312 of 2019 was resolved, ended and concluded.

25. Consequently, the Advocate is not entitled to lodge any other or further claim in respect of the same subject matter. There must be finality to litigation of whatever nature.

26. The Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another versus Cabinet Secretary for Transport and Infrastructure & 3 others (2021) eKLR, emphasized and re-affirmed its position on the principle of finality spelt out in the Muiri Coffee case and stated that,

> " The principle of finality is one of the pillars upon which our Judicial system is founded."

27. The Supreme Court asserted that the doctrine of res judicata, applies across the board including in constitutional litigation. It is based on the principle of finality which is a matter of public policy to prevent abuse of the process of court, and

> " ... a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end..."

28. The Indian Supreme Court in the case of Lal Chand versus Randha Kishan, AIR 1977 SC 789, too had this to say on the rationale for res judicata;

> " The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

29. The subsequent actions by the Advocate after the order in ELCMisc. 200 of 2014 marking the matter as settled amounts to abuse of the process of court. As Mativo J (as he then was) tacitly stated in the case of Satya Bhama Gandhi vs DPP & 3 others (2018)eKLR, instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties amount to an abuse of the process of court. He concluded that,

> " It is settled law that a litigant has no right to purse paripasu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks."

30. If the Advocate was dissatisfied with the order, he should have either appealed or sought to review and set it aside. He was estopped from filing any other matter in respect of the same subject matter.

31. Consequently, the Advocates bill of cost filed in this matter amounts to an abuse of the process of court. For that reason, I would strike it out with costs for being an abuse of the process of court.

32. I will, as good practice demands, proceed to consider the second issue in spite of my above finding.

**B. Whether the Deed of Settlement dated 22nd June 2017, executed between the parties in this matter constitutes an agreement on remuneration under section 45 of the *Advocates Act*.**

33. Undoubtedly, Section 45 of the *Advocates Act* permits agreements on remuneration between an Advocate and a Client, subject to section 46 of the Act. The section provides that;

> " 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 cause of any contentious business, make an agreement fixing the amount of the Advocate's remuneration in respect thereof,
>
> b. Before or after or in the cause 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 cause 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."

34. The Section (at sub-section 6) prohibits taxation of an Advocate's costs where there has been an agreement on remuneration.

35. It is on the premises of the sub-section 6 of Section 45 of the *Advocates Act* that the Client raised an objection to the taxation of the advocate's bill of costs filed in this matter. The Client asserted that he signed a remuneration agreement with the Advocate in the form of the Deed of Settlement dated 22nd June 2017.

36. The Deed of Settlement is duly signed allegedly by the Advocate and the Client and attested before an Advocate. It sets the Advocate's fee at Kshs. 10,000,000/- (all inclusive) in respect to the following cases.

    a. Misc. 150 of 2014 being a bill of costs for taxation arising out of HCC No.262 of 2010; HitenKumar Raja – VS- Greenspan Ltd & others.

    b. Misc. 200 of 2014 being a Bill of Costs for taxation arising out of HCC No.302 of 2009; HitenKumar Raja – vs – Jacob Juma & others.

    c. A claim of costs arising out of HCC 261 of 2010; HitenKumar Raja – vs- Greenspan Ltd & others.

37. The Deed as provided under paragraph 1.3 thereof, constituted the entire agreement of the parties and superseded all previous negotiations, representations and agreements. No variations to the Deed would be effectual unless agreed in writing and signed by all parties thereto.

38. The Client's unyielding position is that the Deed of Settlement was a valid agreement on remuneration under Section 45 of the *Advocates Act*.

39. On his part, the Advocate as put in his submissions, vehemently denies executing the deed of settlement. He submits that the alleged deed is not a valid agreement on fees and cannot be considered an agreement for purposes of section 45 (6) of the *Advocates Act*. He asserts that the onus of proving the existence of the alleged Deed rests with the Client who wishes to rely on it.

40. The Advocate denies his purported signature on the Deed of Settlement, terming it as a forgery.

41. The Advocate further affirms that the Client has not adduced evidence of his performance of the alleged Deed of Settlement. The Advocate denies receiving any payments from the Client pursuant to the provisions of the Deed or at all.

42. The Advocate refers to Section 107 and 109 of the *Evidence Act* and reiterates that he who alleges must prove.

43. The Client produced the Deed of Settlement in contention as his proof that there indeed was a remuneration agreement with the Advocate. The Advocate on his part alleges that his signature on the agreement was forged, otherwise terming the Deed fraudulent.

44. Was it then still upon the Client to prove that the Advocates signature on the Deed was not forged?

45. It is trite law that allegations of fraud must be pleaded and strictly proved. In Kinyanjui Kamau –v- George Kamau (2015) eKLR, the Court of Appeal restated the position and further held that;

> " .....We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him....the standard of proof required of him was obviously higher than that requested in ordinary civil cases."

46. In this case it was the Advocate who was alleging that the Deed of Settlement was a forgery. The burden to prove that allegation lay squarely on him. The evidentiary burden of proof shifted to the Advocate to prove that his signature on the Deed presented by the Client was a forgery. It was a misapprehension of the law for the advocate to allege that the onus was on the Client to prove that his signature on the Deed was not a forgery.

47. The onus of proof of the existence of the agreement first rested on the Client who discharged it by presenting the Deed of Settlement. Once the Client discharged the legal burden, then the evidential burden shifted to the Advocate to prove the vitiating factor of fraud or forgery as he termed it.

48. In the case of Ahmed Mohammed Noor –v- Abi Aziz Oman (2019) eKLR, Justice Mrima explained the issue of burden of proof. He stated that;

> " For clarity, the legal burden of proof in a case is always static and vests on the claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the claimant."

49. The burden of proving the alleged forgery was squarely upon the Advocate. That burden has not been discharged. Therefore the allegation that the Advocate's signature on the Deed of Settlement was a forgery remains that, a mere allegation and nothing more.

50. The same applies with respect to the suggestion that the sum of Kshs.10,000,000/- agreed upon in the Deed of Settlement would amount to undercharging. Besides alleging so, the Advocate did not even attempt to demonstrate how that would be so. There is nothing presented before the court to prove that the Deed of Settlement or the figure agreed between the parties contravenes the Advocates Remuneration Order.

51. In any case, the holding by the Court of Appeal in Njogu & Company Advocates vs. NBK Ltd, (2016) eKLR, would apply in this case; the Advocate is estopped by his conduct from seeking the court's intervention. The court in the above case stated that;

> " In our view an Advocate who willingly and knowingly enters into an agreement in regard to payment of fees that is contrary to the Advocates remuneration order; cannot maintain proceedings whose purpose is to avoid the illegal agreement by reverting to the court to tax his Advocate-Client bill of costs, in accordance with the ARO. We concur with the learned Judge that the appellant having made his bed, he must lie on it. That is to say, notwithstanding the illegality of the contract, this court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention."

52. I am clear in my mind that the issue before me is not whether the amount agreed in the deed of Settlement was paid by the Client to the Advocate or not. That must be canvassed in a different forum, if at all. The issue before me and which issue I decide in the affirmative is whether the Deed of Settlement dated 22nd June 2017 constitutes a valid remuneration agreement in accordance with the provisions of Section 45 of the *Advocates Act*.

53. Consequently, I uphold the Client's objection. My finding is that the Advocates Bill of Costs filed herein is improper by virtue of Section 45 (6) of the *Advocates Act*, since the costs of the Advocates sought to be taxed are the subject of the Deed of Settlement dated 22nd June, 2017. The Deed of Settlement is a valid remuneration agreement in accordance with the provisions of Section 45 of the *Advocates Act*. Secondly and as the court already held, the Advocate's bill of costs amounts to an abuse of the process of court.

54. The Bill of cost filed by the Advocate as originally filed and as subsequently amended is hereby struck out with costs to the Client. This ruling in respect to the validity of the Deed of Settlement as a remuneration agreement under section 45 of the *Advocates Act* shall apply in ELCMisc/E267/2022. For avoidance of doubt, the Advocate's bill of costs filed in ELCMisc/E267/2022 is struck out with costs to the Client.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. E. Mwangi for the Client

Mr. Khaseke for the Advocate

Court assistant - Yvette