



Lubulellah & Associates v Gilbi Construction Company Limited (Miscellaneous Application E166 of 2023) [2024] KEELC 7416 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E166 OF 2023
MD MWANGI, J
OCTOBER 17, 2024**

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATE

AND

GILBI CONSTRUCTION COMPANY LIMITED CLIENT

RULING

(In respect of the Advocate's Application dated 12th January, 2024)

Introduction

1. The Ruling herein relates to the Application dated the 12th January, 2024 filed by the Advocates/Applicant expressed to be brought under Rule 11(1) - (4) of the Advocates Remuneration Order seeking the following reliefs;
 - a. That this Court be pleased to extend time for the Advocate/Applicant to file a Reference against the taxation Ruling before the Taxing Officer, Hon. Tessa Marienga, delivered on the 15th December, 2022 on account of the said Taxing Officer's failure to give written reasons for taxation within 14 days of the filing of a Notice of Objection to Taxation by the Advocate/Applicant.
 - b. That this Court be pleased to set aside the Taxing Officer's ruling and taxation on the Advocate/Applicant's Bill of Costs dated 6th June, 2023, and remit the same for re-taxation before a different Taxing Master or assess the Bill of Costs itself.
 - c. That the costs of this application be provided for.
2. The application is premised and anchored on various grounds which have been stated on the face of the application. The application is further supported by the supporting affidavit sworn by Eugene Lubale Lubulellah, of even date. The Deponent avers that the Taxing Officer made a Ruling on the Applicant's



Advocate and Client Bill of Costs on 15th December, 2023. Being aggrieved by the said Ruling, the Advocate/Applicant filed a Notice of Objection to the Taxation on the same day, seeking the written reasons for taxation. However, to date, the Taxing Master has not provided the written reasons for her ruling/decision hence necessitating this application.

3. The Applicant argues that the Taxing Officer made a legally unsound finding that there was a Fee/ Retainer Agreement within the Sale Agreement executed between the Client and the Purchaser of the subject property and consequently failed to tax the Bill of Costs.
4. The Applicant faults the Taxing Master for disregarding long-standing principles of the law of contract, particularly the doctrine of privity of contract. The Taxing Officer therefore committed a grave error in principle. It is therefore in the interest of justice and fairness that the orders sought in the application be granted.

Respondent's Replying Affidavit

5. The Respondent opposed the application through a Replying Affidavit of its Managing Director, Mr. Harish Gopal Vekaria sworn on the 29th January, 2024. The Deponent avers that the Respondent instructed the Applicant to represent it in various conveyancing matters including sale and purchase of Godown No. 44 on L.R Number 10426/314 Mavoko Municipality between the Respondent as the Vendor and a one Mr. Maurice Odhiambo Owiti, as the Purchaser.
6. The Respondent contends that the issues of attendant costs and who was to bear the costs of the Advocate were agreed upon. The Advocate's fees was agreed to be a sum of Kshs. 170,000/= exclusive of VAT. The amount was to be paid by the Purchaser in the transaction. It is the said understanding that informed clause 12 of the agreement for Sale.
7. The Respondent asserts that the payment of the aforesaid fees to the Applicant by the Purchaser having been a precondition for the transaction, the Applicant is precluded from claiming costs. It is argued that the Applicant having presided over the negotiations and drafted the agreement indicating the quantum of its fees and from whom the same was to be settled, the Respondent is bound by the terms therein. The Applicant maintains that the application herein is unmerited and should be dismissed with costs.

Court's Direction

8. With the concurrence of the parties, the court directed that the application be canvassed by way of written submissions. Both parties complied. The Advocate's submissions are dated 22nd November, 2023 whereas the Respondent's submissions are dated 13th May, 2024. Parties highlighted their respective submissions on the 19th July, 2024 before the court.
9. The Court has considered the submissions in its determination.

Issues for Determination

10. Having perused the Chamber Summons Application herein, together with the supporting affidavit, the Replying Affidavit and the written submissions filed by both parties, I am of the view that the issues for determination are; -
 - a. Whether the applicant is entitled to orders for enlargement of time within which to file a Reference.
 - b. Whether this Court should set aside of the ruling of the taxing officer delivered on the 15th December, 2023.



Analysis and Determination

A. Whether the applicant is entitled to orders for enlargement of time within which to file a Reference.

11. Paragraph 11 of the Advocates Remuneration Order 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.
 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."
12. The discretion of a court to enlarge time was elaborately discussed in the case of the County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR, where the Supreme Court of Kenya held thus:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated 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”.
13. The Advocate/Applicant avers that he did not comply with the provisions of Paragraph 11(1) and (2) of the ARO which spells out the time within which to file a Reference. The Applicant attributes the delay to the alleged failure by the Taxing Master to give reasons for taxation and availing the Ruling in good time.
 14. Mohammed J. (as he then was) held as follows in the case of *George Kagima Kariuki & 2 Others vs George M. Gichimu & 2 Others* [2014] ECLR, on the issue of delay: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”
 15. The same position was taken in *Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited* [2015] eCLR, where the court was of the view that: -

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”
 16. From the decisions cited above the court has the discretion to allow an application for extension of time where the applicant demonstrates a plausible reason for the delay. From the record, the Taxing Master’s Ruling was delivered on 15th December, 2023. The Advocate/Applicant filed a Notice of Objection to taxation on the same day requesting for reasons to enable him file a Reference as provided in law. However, there was no response from the Taxing Master, informing the instant application.
 17. The instant application was filed on the 12th January, 2024. The delay in filing the application is about 13 days as the Application ought to have been filed on 29th December, 2023.
 18. A perusal of the impugned ruling however clearly indicates that there was no taxation but rather the Bill of Costs dated 6th June, 2023 was struck out and the reasons stated therein. Therefore, there was really no need for the Advocate/Applicant to make a request for reasons for taxation.
 19. I am guided by the decision in *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* (2) (2006) 1 EA 5, where the court held as follows: -

“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub rule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”



20. Similarly, Odunga J. (as then was) stated as follows in *Evans Thiga Gaturu, Advocate vs.- Kenya Commercial Bank Limited* [2012] eKLR;

“However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference....”

21. Nonetheless, the delay is not inordinate. In any event, the period 21st of December to 6th January in any year should not be included in computation of time.

22. In *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015]eKLR, the Court of Appeal articulated that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

23. The Court of Appeal in the above case agreed with the sentiments of the learned Judge of the High Court and I concur that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”

24. The ultimate goal and purpose of the justice system is to hear and determine disputes on their merits and upon affording the parties a right of hearing. It follows that no person who has approached the court seeking an opportunity to ventilate his/her grievances should be locked out. In the instant case, I don’t see the prejudice that will be suffered by the Respondent by the reason of the court exercising its discretion to extend time in favour of the Applicant.

25. No doubt, the discretion of this court to enlarge time for filing of a Reference is unfettered. However, that discretion must be exercised judiciously and not capriciously. On the material placed before me and supported by the above decisions, I am satisfied that the delay in filing the application is neither inordinate nor unreasonable.



26. Consequently, I find and hold that the prayer for enlargement of time to file a Reference out of time is merited and the same is hereby allowed.

B. Whether this Court Should Set Aside the Ruling of the Taxing Officer Delivered on the 15th December, 2023.

27. It is common ground that the Applicant herein as an advocate was retained and/or instructed by the Respondent to draft and or prepare a sale agreement between the Respondent on one hand and Maurice Odhiambo Owiti on the other hand. In accordance with the instructions from the Respondent, a Sale Agreement was drafted and duly executed by the parties on the 11th March, 2017.

28. Clause 12 of the Agreement on costs provides that the Vendor shall meet the costs of the transaction whereas the Purchaser shall meet the costs of this transaction more specifically as set out in the schedule hereto. The schedule of costs provides that the Vendor's Advocate's fees is Kshs. 170,000/=.

29. It is on the basis of Clause 12 and the contents of the schedule at the foot of the sale agreement, that the Respondent argues that the sale agreement provided for the quantum of professional fees due and payable to the Applicant herein. Further that the Applicant herein is duly bound by the terms of the said sale agreement.

30. The Applicant on the other hand argues that he is not bound by the terms of the Agreement as he was not a party to it. He avers that he is not bound by the said contract being a third party. The fact that he had been retained by the Respondent to act for it in the transaction does not make him a party to the Agreement. The sale agreement is only binding to the parties thereto.

31. The sale agreement was between the Respondent as the Vendor and the Purchaser on the other hand. It is therefore binding only to the parties who executed it. The doctrine of privity of contract highlights the legal position that a contract is only binding on the principal parties thereto and not otherwise unless there is a clear provision in the contract that alludes to and seeks to provide a clear benefit to and in favor of a third party. However, in respect of the instant matter, it is evident that the Applicant herein was not intended to be a beneficiary of the contract and thus the same cannot be invoked in respect of the fees payable to him by the Respondent.

32. 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.”

33. 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 party does not become a party to the Agreement. Therefore, the Respondent cannot use the said agreement to preclude the Advocate from claiming his fees.
34. The Respondent contends that the Advocate having been paid the sum of Kshs. 170,000/=, he cannot claim further fees. Having found that the Sale Agreement is not binding upon the Advocate/Applicant, the Respondent’s argument is not legally tenable.
35. 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.
36. 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.”
37. 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.”
38. What constitutes a retainer in my understanding is a contractual relationship which begins when an Advocate agrees to render professional services to a Client. The agreement may be express or implied from the conduct of the parties and need not always be in writing. 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. *Halbury’s Law of England*, (supra) at page 14 para 765).”



39. The Court of Appeal in the same case placed the onus of proof upon the advocate. The court stated –

“As with any other agreement, the onus of proving the existence of the retainer agreement lies with he that wishes to enforce it. This is in line with the ordinary rules of contracts and evidence. (See Kenya National Capital Corporation Limited v. Albert Mario Cordeiro & Another [2014] eKLR and Section 107 of the *Evidence Act*

The same onus of proof applies to a retainer. As said earlier, where a client disowns an oral retainer or even the existence of a retainer relationship, it is for the advocate who claims under that retainer to prove to court that such a relationship indeed existed, otherwise the court will deem that he acted without instructions.”

40. Section 45 of the *Advocates Act* provides as hereunder:

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. 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”.

.....

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.

41. 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.

42. My understanding of the above provisions and as interpreted in the cited authorities is that a retainer agreement between an advocate and a client denotes an agreement between the said parties and not otherwise. Notably, the agreement must be one that speaks to the retention of the designated advocate and thereafter highlights the agreed professional fees.

43. Section 37 of the *Companies Act*, Number 17 of 2015 specifies that a document is validly executed by a company if it is signed on behalf of the company: by two authorized signatories; or by a director of the company in the presence of a witness who attests the signature.

44. In the instant case the, the Respondent has not adduced a duly executed Retainer Agreement to preclude the Advocate from seeking its costs, particularly through Taxation. The Respondent has not denied instructing the Advocate in the transaction. It is therefore my finding that the Advocate is entitled to tax his costs.



45. Consequently, I will allow the Chamber Summons dated 12th January, 2024 and set aside the Taxing Officer's ruling delivered on the 15th December, 2023. The Bill of Costs dated 6th June, 2023 shall be remitted for taxation before a different taxing officer of this Court.

46. It is so ordered

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

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Eugene Lubulellah for the Advocate/Applicant

Ms. Ngeresa for the Client/Respondent

Court Assistant: Yvette

M.D MWANGI

JUDGE

