



Gikaria t/a Anthony Gikaria & Co Advocates v Syumah (Environment and Land Miscellaneous Application E285 of 2022) [2024] KEELC 13428 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13428 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E285 OF 2022
JO MBOYA, J
NOVEMBER 21, 2024
IN THE MATTER OF AN APPLICATION FOR TAXATION OF ADVOCATE-CLIENT
COSTS IN RESPECT OF PROFESSIONAL LEGAL SERVICES RENDERED

BETWEEN

ANTHONY GIKARIA T/A ANTHONY GIKARIA & CO
ADVOCATES ADVOCATE

AND

CHRISTINE MUSEO SYUMAH CLIENT

RULING

Introduction And Background

1. The Applicant/Advocate herein has approached the court vide Notice of Motion Application dated the 15th July 2024, brought pursuant to the provisions of section 51 (2) of the Advocates Act, Order 51(1) of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act, Paragraph 7 of the Advocates Remuneration Order; and in respect of which same has sought for the following reliefs[verbatim]:
 - i. That this Honourable Court be pleased to enter judgement for the Advocate/ Tax Applicant as against the Respondent for the taxed and certified amount of Kenya Shillings Two Hundred and Ninety-Two Thousand, One Hundred and Forty-Eight and Sixty Cents (Kshs.292,148.60) as per the Certificate of Taxation issued on the 28th August, 2023 by Honourable Isabella Barasa, Deputy Registrar.
 - ii. That the said sum of Kenya Shillings Two Hundred and Ninety-Two Thousand, One Hundred and Forty-Eight and Sixty Cents (Kshs.292,148.60) be paid with interest at the rate of 14% per annum from the 5th July, 2023, being the date of taxation until payment in full.



- iii. That subsequent to the entry of judgement herein, a Decree be issued herein.
- iv. That the costs of this Application be borne by the Respondent.
2. The instant application is premised on the various grounds which have been highlighted in the body thereof. In addition, the application is supported by the supporting affidavit sworn by one Antony Gikaria [Advocate] and which affidavit is sworn on even date. Notably, the deponent has annexed a copy of the certificate of taxation issued on the 28th August 2023.
3. Upon being served with the application beforehand, the Respondent filed a Replying affidavit sworn on the 14th November 2024. Instructively, the Respondent herein has deponed that the Applicant acted for her over and in respect of a matter pertaining to the purchase and acquisition of a property known as L.R No. Nairobi/Block 82/5846.
4. Other than the foregoing, the Respondent has averred that during the course of the engagement of the Applicant herein same [Respondent] paid to and in favour of the Applicant various sums of monies towards and on account of the professional fees. To this end, the Respondent has highlighted the various payments and [sic] the relative dates when the payments were made.
5. The subject application came up for hearing on the 20th November 2024 whereupon the advocates for the respective parties covenanted to and disposed of the application vide oral submissions. In this regard, the court thereafter granted the liberty to the Parties to canvass the Application and the application was duly canvassed

Parties' Submissions:

Applicant's Submissions:

6. The Applicant herein adopted the contents of the Ground[s] at the foot of the application as well as the averments in the body of the supporting affidavit. In addition, the Applicant herein also highlighted the contents of the certificate of taxation issued on the 28th August 2023.
7. Furthermore, learned counsel for the Applicant thereafter highlighted and canvassed three [3] salient issues for consideration. Firstly, learned counsel for the Applicant has submitted that the Applicant herein filed/lodged an advocate/client bill of costs dated the 18th November 2022 and which bill of costs was thereafter served upon the Respondent. Besides, it has been submitted that the advocate-client bill of costs was subsequently taxed culminating into the issuance of a certificate of taxation. To this end, learned counsel referenced annexure AG1 attached to the supporting affidavit.
8. It was the further submissions by learned counsel for the Applicant that the certificate of taxation under reference has neither been challenged nor set aside. In any event, it was contended that there is no pending reference as pertains to the certificate of taxation. In this regard, learned counsel for the Applicant has posited that the certificate of taxation has therefore become final.
9. Secondly, learned counsel for the Applicant has submitted that the Applicant herein was duly instructed and retained by the Respondent. At any rate, it has been contended that the question of retention of the applicant herein has neither been disputed nor contested. On the contrary, learned counsel for the Applicant has submitted that the issue of retainer has been acknowledged and conceded vide the Replying affidavit.
10. Thirdly, learned counsel for the Applicant has submitted that to the extent that the question of retainer is not in dispute, it is apposite that the court be pleased to enter judgment in terms of the certificate of



taxation. Furthermore, learned counsel has also contended that the Applicant is entitled to interests in accordance with the provisions of Rule 7 of the Advocates Remuneration Order.

11. In a nutshell, learned counsel for the Applicant has implored the court to allow the application and to enter judgment as sought.

Respondent's Submissions:

12. The Respondent herein has relied on upon the contents of the Replying affidavit sworn on the 14th November 2024 and thereafter highlighted three [3] salient issues. First and foremost, learned counsel for the Respondent has submitted that the Applicant herein was duly paid the entire professional fees by the Respondent. In this regard, learned counsel for the Respondent has invited the court to take cognizance of the contents of paragraph 17 of the replying affidavit.
13. To the extent that learned counsel for the Applicant was duly paid the entirety of the professional fees, it has been contended that the subject application is therefore superfluous and therefore constitutes an abuse of the due process of the court.
14. Secondly, it has been submitted that though the Applicant contends that the certificate of taxation was duly served on the Respondent, no evidence has been placed before the court to demonstrate service. In the absence of service, it has been contended that it is not possible to discern when the impugned certificate of taxation was served.
15. Thirdly, learned counsel for the Respondent has submitted that the client/Respondent is not satisfied with the ruling and certificate of taxation. In any event, it has been contended that the monies spoken to at the foot of the certificate of taxation had long been paid and settled. In this regard, it has been contended that the Respondent does not owe any money.
16. Arising from the foregoing, learned counsel for the Respondent has therefore implored the court to find and hold that the subject application is not only misconceived, but same is legally untenable. In this regard, the court has been invited to dismiss the application with costs.

Issues For Determination:

17. Having reviewed the subject application and the response thereto and upon consideration of the oral submissions ventilated on behalf of the respective parties, the following issues do emerge[crystallise] and are thus worthy of determination.
 - i. Whether the certificate of taxation issued by the taxing officer has become final or otherwise.
 - ii. Whether the Applicant herein has met or satisfied the provisions of Section 51[2] of the Advocates Act or otherwise.

Analysis And Determination:

Issue Number 1 Whether the certificate of taxation issued by the taxing officer has become Final or otherwise.

18. The Applicant herein proceeded to and filed an advocate- client bill of costs dated the 18th November 2022 and which bill of costs was thereafter subjected to the usual taxation. For coherence, the bill of costs was taxed and thereafter a certificate of taxation was issued. Instructively, the certificate of taxation was issued on the 28th August 2023.



19. It is imperative to state and underscore that the fact that a certificate of taxation was duly issued by the taxing officer is not in contest. For good measure, the Respondent herein has neither contested nor disputed the existence of the certificate of taxation.
20. To the extent that a certificate of taxation was duly processed and issued by the taxing officer, there is no gainsaying that if the Respondent herein was aggrieved and or dissatisfied with same [Certificate of Taxation] then same [Respondent] could only challenge the certificate of taxation vide reference in terms of Rule 11 of the Advocates Remuneration Order.
21. Suffice it to state that the provisions of Rule 11 of the Advocates Remuneration Order constitute the only mechanism [avenue] for challenging a certificate of taxation. Instructively, the provisions of Rule 11 of the Advocates Remuneration Order stipulate as hereunder;

“ 11

- (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 subparagraph (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.”
22. Additionally, the import and tenor of Rule 11 of the Advocates Remuneration Order have also been elaborated in a number of decisions. Notably, the Court of Appeal considered the said provision[s] in the case of *Machira & Co. Advocates v Arthur K. Magugu & another* [2012] eKLR, and wherein the Court stated thus:
 12. 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.
 13. 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 appeals or reviews 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.

14. 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.
23. As pertains to the instant matter, there is no gainsaying that the Respondent/ client herein neither lodged any notice of objection to taxation nor filed a reference. For good measure, there is no mention of any pending reference or at all.
24. To the extent that there is no pending reference in accordance with the provisions of Rule 11 of the Advocates Remuneration Order, it suffices to state and underscore that the certificate of taxation issued by the taxing officer has not been impugned. Consequently and in this regard, there is no gainsaying that the certificate of taxation has become final in all respects.

Issue Number 2 Whether the Applicant herein has met or satisfied the provisions of Section 51[2] of the Advocates Act or otherwise.

25. Having procured and obtained a certificate of taxation from the taxing officer, the Applicant herein has now approached the court seeking to have the certificate of taxation adopted and endorsed as the judgment of the court. Instructively, the Applicant has invoked and relied on the provisions of Section 51[2] of the Advocates Act, chapter 16 Laws of Kenya.
26. Given the significance of Section 51[2] of the Act [supra] to the instant application, it is apposite to reproduce the said provisions.
27. For ease of appreciation, Section 51[2] of the Advocates Act are reproduced as hereunder;
 51. General provisions as to taxation
 - (1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
 - (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.
28. My reading of the provisions of Section 51[2] of the Advocates Act [supra] drives me to the conclusion that an Applicant desirous to procure judgment in terms of the certificate of taxation is obligated to satisfy the court on two critical issues. Firstly, an Applicant must satisfy the court that there is in existence a certificate of taxation which has become final in all respects. To this end, it suffices that there is a certificate of taxation which is not the subject of any reference or otherwise.
29. The second limb that must be satisfied by an Applicant relates to proof that there is no dispute as pertains to retainer. Suffice it to point out that what constitute retainer has received judicial elaboration in a number of decisions.



30. Pertinently, what constitutes retainer was highlighted by the Court of Appeal in the case of Omulele & Tolo v Mount Holdings Ltd [2016]eKLR, where the court stated thus;

The resolution of this dispute appears to us to turn on the definition of two concepts; a retainer and a retainer agreement and the rights of the parties thereto.

According to the Black's Law dictionary, (supra) a retainer is defined as:

- “1. A client's authorization for a lawyer to act in a case.
2. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.
3. A lump sum fee paid by the client to engage a lawyer at the outset of a matter-also termed engagement fee.
4. An advance payment of fees for work that the lawyer will perform in the future-also termed retaining fee. “

In Halsbury's Laws of England, (supra) at page 13 para 763; the concept is also defined thus:-

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

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 Laws of England, (supra) at page 14 para 765).

31. Taking into account the holding of the Court of Appeal in the decision [supra], it is now apposite to return to the subject matter and to discern that there existed any retainer between the Applicant and the Respondent. Notably, the answer to this question is not difficult to ascertain and/or discern.
32. Suffice it to point out that the Respondent filed a replying affidavit and wherein the Respondent concedes the existence of a retainer between herself and the Applicant. Furthermore, the Respondent has ventured forward and posited that same [Respondent] has even paid to the Applicant various monies on account of professional fees. [See paragraphs 15, 16, 17 and 18 of the replying affidavits].
33. To my mind, the entirety of the replying affidavit confirms and underscores the existence of a retainer. In this regard, there is no gainsaying that there was an advocate client relationship [retainer] between the Applicant and the Respondent. To the extent that there existed a retainer, there is no gainsaying that the Applicant has equally met and satisfied the second limb of Section 51[2] of the Advocates Act, Chapter 16 Laws of Kenya.
34. Arising from the foregoing, it is therefore my considered view that the Applicant has met and satisfied the twin ingredients that underpin the provisions of Section 51[2] of the Advocates Act, Chapter 16 Laws of Kenya. In this respect, there is no gainsaying that the application beforehand is meritorious.
35. Before departing from the issue herein, it is instructive to recall that the Applicant herein has also sought for interests at 14% per annum from the date of taxation of the advocate client bill of costs.



Suffice it to underscore, that an advocate is entitled to levy/charge interests on costs at 14% per annum in accordance with the provisions of Rule 7 of the Advocates Remuneration Order.

36. The provisions of Rule 7 of the Advocates Remuneration Order which underpins the charging of interests stipulate as hereunder;

7. Interest may be charged

An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.

Final Disposition:

37. Flowing from the foregoing analysis [details highlighted in the body of the ruling], it must have become apparent that the Applicant herein has met and satisfied the twin ingredients which underpins the provisions of Section 51[2] of the *Advocates Act* Chapter 16 Laws of Kenya.

38. In the premises, the final orders of the court are as hereunder;

i. The Application dated 15th July 2024 be and is hereby allowed.

ii. Judgment be and is hereby entered in terms of the certificate of taxation issued on the 28th August 2023.

iii. The sum of Kes.292, 148/60 only [being the principal sum] shall attract interest at 14% w.e.f 5th July 2023 until payment in full.

iv. Costs of the Application be and are hereby awarded to the Applicant.

v. At any rate, the costs in terms of clause [iv] is assessed in the sum of kes.20, 000/= only.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Antony Gikaria for the Applicant.

Mr. Bundi for the Respondent/Client.

