Lubulellah & Associates v Gilbi Construction Company Limited (Environment & Land Miscellaneous Case E155 of 2023) [2024] KEELC 7570 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7570 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND MISCELLANEOUS CASE E155 OF 2023

JO MBOYA, J

NOVEMBER 14, 2024

IN THE MATTER OF: AN AGREEMENT FOR SALE OF GO-DOWN NO'S 38 TO 41 CONSTRUCTED ONLAND REFERENCE NUMBER 10426/308; MAVOKO MUNICIPLITY [I.R NO. 172327/1]

BETWEEN

LUBULELLAH & ASSOCIATES ..... ADVOCATE

AND

GILBI CONSTRUCTION COMPANY LIMITED ..... CLIENT

RULING

Introduction And Background:

1. The instant Ruling relates to two [2] applications, namely; the application dated the 3rd of May 2024 filed by the Advocate/Applicant and the application dated the 6th of May 2024 [Reference], the latter which is filed by the Client/Respondent.

2. Given the diverse reliefs sought at the foot of the two [2] applications, it is instructive to highlight and reproduce the said reliefs. For coherence, the application dated the 3rd of May 2024 seeks the following reliefs [verbatim]:

    i. That the court be pleased to enter judgment and issue a decree in favour of the Applicant against the Respondent on the amount of Kshs.512,470/= certified on the Certificate of Taxation herein, together with interest at the rate of 14% per annum from the 8th June 2023 being the date of lodgment of the Bill of Costs until payment in full.

    ii. That the costs of this Application be provided for.

3. The application herein is anchored and premised on the various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one Eugene Lubale

Lubulellah, sworn on the 3rd of May 2024 and in respect of which the deponent has annexed two [2] documents.

4. Upon being served with the subject application, the Client/Respondent filed a replying affidavit sworn by one Harish Gopal Vekaria and in respect of which same has denied the claims by and on behalf of the Applicant. In any event, the Client/Respondent has contended that the Applicant herein was fully paid the professional fees arising from and attendant to the professional services rendered.

5. The second application is dated the 6th of May 2024 and same has been filed by the client. The [Reference] beforehand seeks the following reliefs;-

   i. That the Ruling by the Taxing Officer, Hon. V. Kiplagat, Deputy Registrar of this court delivered on 23/04/2024.

   ii. That the Ruling by the Taxing officer, Hon. V. Kiplagat, Deputy Registrar of this court delivered on 23/04/2024, taxing the Advocate-client bill of costs dated 7/06/2023 at Kshs.512,470.00 only, be and is hereby substituted with an order dismissing the said bill of costs as it relates to the costs/fees of the Advocate subject of a written and enforceable fees agreement.

   iii. That the Ruling by the Taxing officer, Hon. V. Kiplagat, Deputy Registrar of this court delivered on 23/04/2024, taxing the Advocate-client bill of costs dated 7/06/2023 at Kshs.512,470.00 be and is hereby substituted with an order dismissing the said bill of costs as it violates express and mandatory provisions of Section 45 (6) of the *Advocates Act*.

   iv. That the costs of this application be awarded to the client.

6. The subject application is premised on the various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of Harish Gopal Vekaria [Deponent] sworn on even date, namely, the 6th of May 2024.

7. Suffice to point out that upon being served with the subject application, the Advocate/Respondent filed a replying affidavit sworn on the 1st August 2024. In particular, the Advocate/Respondent has contended that there was no retainer/fee agreement between the Client/Applicant and the Advocate/Respondent.

8. The two applications beforehand came up for hearing on the 30th of July 2024, whereupon the Advocates for the respective parties covenanted to canvass and dispose of the two (2) applications simultaneously. Furthermore, the Advocates also agreed to file and exchange written submissions.

9. Arising from the foregoing, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. In this regard, the Advocate/Applicant thereafter filed written submissions dated the 3rd of August 2024 whereas the Client/Respondent filed written submissions dated the 10th of September 2024.

10. The two [2] sets of written submissions form part of the record of the court.

Parties Submissions:

Applicant's Submissions:

11. The Applicant filed two [2] sets of written submissions dated the 24th of May 2024 and the 30th of August 2024, respectively, and in respect of which the Applicant adopted the grounds contained at

the foot of the application dated the 3rd of May 2024. In addition the Applicant also highlighted the contents of the supporting affidavit.

12. On the other hand, the Applicant has also adopted and reiterated the contents of the replying affidavit sworn by Eugene Lubale Lubulellah on the 30th of August 2024 and which relates to the application [Reference] by the Client/Respondent.

13. Additionally, the Applicant has thereafter raised and canvassed four (4) salient issues for consideration by the court. Firstly, learned counsel for the Applicant has contended that the application/reference by the Client/Respondent is incompetent and thus invalid for non-compliance with the provisions of Rule 11 (1) of the Advocate Remuneration Order.

14. In particular, learned counsel for the Applicant has submitted that it was incumbent upon the Client/Respondent to file/lodge the requisite notice of objection to taxation, highlighting the items of the taxation, which the Client/Respondent seeks to impeach and/or challenge.

15. Furthermore, it was submitted that where the Objector does not lodge the requisite notice of objection to taxation, any intended reference or reference, if any, filed, is rendered invalid for want of compliance with Rule 11 (1) of the Advocate Remuneration Order.

16. In support of the foregoing submissions, learned counsel for the Applicant has thereafter cited and referenced various decisions including Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited [2017] eKLR; Machira & Co. Advocates Vs Arthur K. Magugu & another [2012] eKLR.

17. Secondly, learned counsel for the Applicant has submitted that the Applicant and the Client herein did not enter into and/or execute a retainer agreement. In any event, it was contended that the sale agreement which has been referenced by the Client/Respondent was entered into between the Client [as the Vendor] and a third party purchaser.

18. For good measure, it has been contended that the Advocate/Applicant herein merely executed the agreement as an attesting witness and not a party. In this regard, learned counsel has submitted that the sale agreement cannot therefore be relied upon to underpin a contention that the there was a retainer agreement between the Applicant and the Client/Respondent.

19. In addition, learned counsel for the Applicant has submitted that a retainer agreement, if any, must be executed between the Advocate and the Client or better still, must be evidenced in writing, duly executed by the Client or the Client's authorized agent.

20. However, in respect of the instant matter, it has been submitted that there was no such retainer agreement. Further and in any event, learned counsel for the Applicant has cited and referenced the provisions of Section 45 of the *Advocates Act*, Chapter 16, Laws of Kenya, which underpins the manner in which a retainer agreement must be executed.

21. To this end, learned counsel for the Applicant has cited and referenced the decision in the case of Omulele & Tollo Advocates v Mount Holdings Limited [2016] eKLR, wherein the Court of Appeal elaborated on the meaning and import of what constitutes a retainer and a retainer agreement.

22. Thirdly, learned counsel for the Applicant has submitted that the doctrine of privity of contract only binds parties to the contract and not third parties. In this regard, it has been submitted that the sale agreement being referenced by the Client/Respondent is only binding on the client [who was the Vendor] and the third party purchaser. Furthermore, learned counsel has posited that the Applicant

herein was only discharging professional duties when same prepared the sale agreement and thereafter attested the execution thereof.

23. To buttress, the submissions pertaining to and concerning the question of privity of contract, learned counsel for the Applicant has cited and referenced various decisions including Agriculture Finance Corporation Vs Lengatia Limited & Another [1985] eKLR; Savings & Loans Kenya Limited Vs Kanyenje Karangaita Gakombe [195] eKLR, Kenya Women Finance Trust Vs Bernard Oyugi Jaoko & 2 others [2018] eKLR; Kenindia Assurance Co. Limited Vs New Nyanza Wholesalers Limited [2017] eKLR; and Aineah Likuyani Njirah Vs Aga Khan Health Service [20134] eKLR.

24. Fourthly, learned counsel for the Applicant has submitted that the Applicant herein was not paid any monies on account of the client. To the contrary it has been submitted that the monies at the foot of the sale transactions were remitted and paid out directly to the Client/Respondent [who was the Vendor].

25. At any rate, it has been contended that if there was any money that was paid out to and in favour of the Applicant, then such monies can only be addressed in a separate and distinct suit in accordance with the provisions of the Order 52 of the Civil Procedure Rules 2010, and not otherwise.

26. Finally, learned counsel for the Applicant has submitted that the application for entry of judgment dated 3rd of May 2024 has not been opposed. In any event, learned counsel for the Applicant has submitted that the certificate of taxation which underpins the application for entry of judgment has neither been set aside nor quashed.

27. Furthermore, learned counsel for the Applicant has also submitted that there is no dispute as pertains to retainer. To the contrary, learned counsel for the Applicant has submitted that the question of retainer has been conceded and acknowledged by the Client/Respondent.

28. In a nutshell, learned counsel for the Applicant has therefore submitted that the application dated 3rd of May 2024, meets and satisfies the threshold set vide the provisions of Section 51 (2) of the *Advocates Act*, Chapter 16 laws of Kenya.

29. Arising from the foregoing, learned counsel for the Applicant has therefore implored the court to find and hold that the application dated the 3rd of May 2024 is meritorious. On the other hand, learned counsel for the Applicant has submitted that the application [Reference] by the client is not only premature and misconceived, but same is legally untenable.

Client's/respondent's Submissions:

30. The Respondent filed written submissions dated the 10th September 2024 and in respect of which same [Respondent] adopted the grounds contained at the foot of the application dated the 6th of May 2024 as well as the supporting affidavit thereto. In addition, the Respondent has also reiterated the contents of replying affidavit sworn on the 14th of August 2024.

31. Additionally, the Respondent has proceeded to and highlighted three (3) salient issues for consideration by the court. First and foremost, learned counsel for the Respondent has submitted that the reference dated 6th of May 2024, is neither incompetent nor invalid in the manner contended by the Applicant herein.

32. In particular, learned counsel for the Respondent has submitted that the failure to issue and lodge a notice of objection to taxation in accordance with Rule 11 (1) of the Advocate Remuneration Order, does not invalidate the reference, if any filed. In any event, learned counsel for the Respondent has submitted that the provisions of Rule 11 (1) (supra) deploys [uses] the word 'may' and not 'shall'.

In this regard, counsel has posited that the word 'may' does not therefore translates to a mandatory requirement.

33. On the other hand, learned counsel for the Respondent has submitted that in respect of the instant matter the Respondent filed and lodged a notice of objection to taxation. In any event, it has been contended that the notice of objection to taxation related to the entire certificate of taxation.

34. Flowing from the foregoing, learned counsel for the Respondent has therefore submitted that the reference that was filed is lawful and valid. Furthermore, it has been contended that the court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject reference.

35. In support of the foregoing submissions, learned counsel for the Respondent has cited and referenced the decision in *Macharia Mwangi & Njeru Advocates v Ecobank Limited (Civil Appeal E474 of 2021*) [2023] KECA 1501 (KLR) (8 December 2023) (Judgment),to underpin the position that a failure to issue/lodge the notice of objection to taxation does not invalidate the reference.

36. Secondly, learned counsel for the Respondent has submitted that the Advocate and the Respondent herein had a retainer/fee agreement, which was reduced into writing. Furthermore, it has been contended that it is the Applicant herein who crafted the sale agreement and inserted the clause pertaining to the payment in the schedule of fees.

37. Learned counsel for the Respondent has therefore contended that in so far as there was a clause touching on and concerning the payment of the Advocates fees, the said clause thus operates to create a fee agreement between the Applicant herein and the Respondent.

38. To underscore the foregoing submissions, learned counsel for the Respondent has cited and referenced various decisions including Omulele & Tollo Advocates v Mount Holdings Limited [2016] eKLR; Sheetal Kapila v Narriman Khan Brunlehner [2021] eKLR; and Owino & Company Advocates v Kisaka (Miscellaneous Case E041 of 2020) [2023] KEELRC 2325 (KLR) respectively.

39. Thirdly, learned counsel has submitted that owing to the existence of a fees agreement between the Applicant and the Respondent, the Applicant herein is barred and prohibited from mounting an Advocate/Client bill of costs for purposes of taxation. To this end learned counsel has cited and referenced the provisions of Section 45 and 46 of the *Advocates Act* Chapter 16, Laws of Kenya.

40. Finally, learned counsel for the Respondent has submitted that the application dated the 3rd of May 2024, is premature and thus legally untenable. In this regard, learned counsel has submitted that the application has been filed during the pendency of a reference challenging the certificate of taxation.

41. Owing to the fact that there is a pending reference, learned counsel for the Respondent has submitted that it cannot be contended that the certificate of taxation has become final. For good measure, counsel has posited that the certificate of taxation can only become final once the reference has been heard and determined.

42. Arising from the foregoing submissions, learned counsel for the Respondent has therefore implored the court to find and hold that the application dated the 3rd of May 2024, is misconceived and devoid of merits. On the contrary, it has been posited that the application [reference] by the client is meritorious.

Issues For Determination

43. Having reviewed the two [2] applications as well as the responses thereto and upon taking into consideration the written submissions filed by the parties, the following issues crystallize [emerge] and are thus worthy of determination:-

i. Whether the reference filed by the Respondent complies with the provisions of Rule 11 (1) of the Advocate Remuneration Order or otherwise.

ii. Whether the failure to comply with Rule 11 (1) of the Advocate Remuneration Order renders the reference invalid or otherwise.

iii. Whether there was a retainer/fee agreement between the Applicant and the Respondent.

iv. Whether the application dated the 3rd of May 2024 satisfies the conditions envisaged vide Section 51 (2) of the *Advocates Act* or otherwise.

Analysis And Determination

Issue Number 1 And 2 Whether the reference filed by the Respondent complies with the provisions of Rule 11 (1) of the Advocate Remuneration Order or otherwise. Whether the failure to comply with Rule 11 (1) of the Advocate Remuneration Order renders the reference invalid or otherwise.

44. The application by the Respondent, namely, the application dated the 6th of May 2024, constitute a reference and in respect of which the Respondent herein is challenging the certificate of taxation issued by the Taxing Officer on the 23rd of April 2024. For good measure, the Respondent contends that same is aggrieved by the entirety of the certificate of taxation.

45. Arising from the dissatisfaction by the Respondent, same [Respondent] proceeded to and filed a notice of objection to taxation, but which notice of objection to taxation did not highlight and/or enumerate the items sought to be challenged by the Respondent. Instructively, the notice of objection to taxation, which was lodged by and on behalf of the Respondent is an omnibus notice.

46. Having lodged an omnibus notice of objection to taxation, a question has thereafter arisen as to whether the omnibus notice of objection to taxation, which has been filed by the Respondent, would suffice to underpin the reference. Notably, learned counsel for the Applicant has submitted that an omnibus notice of objection does not suffice.

47. Furthermore, learned counsel for the Applicant has contended that in so far as the omnibus notice does not meet and/or satisfy the ingredients of Rule 11 (1) of the Advocates Remuneration Order, the resultant reference is therefore invalid and thus ought to be struck out.

48. On the contrary, learned counsel for the Respondent has submitted that the omnibus notice of objection suffices. In any event, it has been contended by the Respondent herein that the objection relates to the entirety of the certificate of taxation.

49. Having considered the rival submissions by the Applicant and the Respondent, I beg to take the following position. Firstly, the provisions of Rule 11 (1) of Advocates Remuneration Order, requires that a person desirous to object to the certificate of taxation must lodge a notice of objection to taxation within fourteen (14) days from the date of the delivery of the Ruling underpinning the certificate of taxation.

50. Though the provisions of Rule 11[1] of the Advocates Remuneration Order uses/ deploys the word 'may', the reading of the entirety of the Rules, suggests that the filing/ lodgment of the Notice of objection to taxation is peremptory and mandatory. For coherence, it is the said Notice of Objection to taxation that set[s] in motion the rests of the activities belying the filing of the Reference.

51. Other than the timelines adverted to and espoused by Rule 11 (1) of the Advocates Remuneration Order, it is also important to underscore that the said Rule espouses a requirement that the notice of objection to taxation ought to highlight and/or enumerate the items of the taxation sought to be challenged.

52. Additionally, upon the lodgment of the notice of objection to taxation, which highlights the items being challenged, the Taxing Officer is obligated vide the provisions of Rule 11 (2) of the Advocates Remuneration Order to generate and supply the Objector with the reasons for taxation. Instructively, the reasons for taxation must relate to the items highlighted/enumerated at the foot of the notice of objection to taxation.

53. Furthermore, there is no gainsaying that the timeline for the filing/lodgment of the reference is reckoned and computed from the date when the Taxing Officer avails and/or supplies the Objector with the reasons for taxation. [See Rule 11 (2) of the Advocates Remuneration Order].

54. From the foregoing exposition of the law and taking into account the prescription contained in both Rule 11 (1) and (2) of the Advocates Remuneration Order, respectively, there is no gainsaying that the two (2) provisions are critical in determining whether or not the reference if any filed, is valid or otherwise.

55. To my mind, the lodgment of a compliant notice of objection to taxation is a jurisdictional prerequisite. In this regard, the notice of objection to taxation envisaged under the law must therefore meet and/or satisfy the set ingredients, including enumeration of the items which are sought to be challenged/impeached.

56. Where the Objector, like the Respondent herein does not highlight and/or enumerate the items of the taxation sought to be impeached, such failure goes to the root/ heart of the jurisdiction of the court. In addition, such failure impacts upon the validity of the reference.

57. To underscore the foregoing position, it is imperative to cite and reference the decision of the Court of Appeal in the case of Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR, where the court stated thus;-

> 11. Two points were argued on the issue of whether or not the Respondents' reference was competent. The first one related to the time within which the reference should have been lodged and the second to the basis of the reference. As both of them are based on Rule 11 and for ease of reference we wish to set it out verbatim. It reads:
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> "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.
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> (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."

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.

58. From the excerpts which have been reproduced in the preceding paragraph, what becomes apparent is that the Court of Appeal engaged with the provisions of Rule 11 of the Advocate Remuneration Order and thereafter returned a verdict that the provisions of Rule 11 (1) of the Advocate Remuneration Order are peremptory and not optional.

59. Additionally, there is no gainsaying that the court of appeal elaborated the process that must be complied with and/or adhered to by an Objector desirous to challenge the certificate of taxation.

60. In my humble view, the position espoused by the Court of Appeal in the decision supra, reflects the intendment of the Rules Committee. For good measure, it is the issuance of the notice of objection to taxation, which provokes the preparation and provisions of the reasons for taxation by the Taxing Officer.

61. Furthermore, it is also important to underscore that the timeline for the filing of the reference, if any, is dependent upon the generation of the reasons by the Taxing Officer. In this regard, it then means that if there is no notice of objection to taxation, then the Taxing Officer is not obligated to generate and avail the reasons for taxation.

62. In the absence of the reasons for taxation, which provide the benchmark for the computation of time for filing a reference, then no reference can therefore arise and/or ensue. [See Rule 11[2] of the Advocates Remuneration Order that prescribes the benchmark for reckoning the timelines for filing a reference].

63. Pertinently, the provisions of Rule 11 of the Advocates Remuneration Order therefore need to be given the technical meaning and interpretation, which accords with the entirety of the said provisions. Instructively, a failure to comply with Rule 11 (1) of the Advocates Remuneration Order, renders the rest of the provisions of Rule 11 of the Advocates Remuneration Order, redundant and inoperative.

64. Before departing from this issue, I beg to underscore that my attention has been drawn to yet another decision of the Court of Appeal which touches on the interpretation of Rule 11 (1) of the Advocates Remuneration Order. This is the decision in the case of *Macharia Mwangi & Njeru Advocates*

v Ecobank Limited (Civil Appeal E474 of 2021) [2023] KECA 1501 (KLR) (8 December 2023) (Judgment).

65. In respect of the said decision, [supra], the Court of Appeal posits that the lodgment of the notice of objection to taxation is not mandatory. For coherence, the Court of Appeal [per Omondi JA] held thus;-

> 3. The whole contestation revolves around use of the word "MAY" and the import or significance of such a term. Can the word MAY be clothed in such a context as to be construed as being mandatory, so that the failure to comply with the provision being interpreted, would invalidate what was done in contravention of the provision? The rule in interpreting a statute is in the language itself, which when clear and unambiguous in its ordinary status, conveys a clear and conclusive meaning, unless there is an express legislative intention to the contrary.
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> 4. The definition given in Black's Law Dictionary, 9th Edition, for the word "may" includes: "to be permitted to, to be a possibility, or confers discretion to admit; and is in contradistinction to the use of the word "shall" which postulates a mandatory requirement. For purposes of clarity, I do not think the use of the word MAY is elusive or ambiguous. I take note that Paragraph 7, (a) & (b), use the word "shall", and I am in agreement with Ngenye, J.A, that in using 'may' and 'shall' in the same provision, the Legislature intended to convey a different meaning. Indeed, it cannot be said that it was the intention of the Legislature to have parties enter into a general agreement for every non-contentious debt collection matter; otherwise, it would have used the word "shall" as opposed to "may". I have no hesitation in concluding that the word 'may' can only connote a discretionary mandate.

66. Even though the Court of Appeal [per Omondi JA] took a different trajectory in the latter decision, there is no indication that the Court of Appeal in the latter bench, distinguished and/or explained the previous decision of the same court. In this regard, what comes to the fore is the existence of two [2] conflicting decisions from the Court of Appeal pertaining to the same provisions of the law.

67. Suffice to posit that the existence of the two (2) conflicting decisions, with the latter not overruling the previous decision, poses a dilemma to the Superior courts below. In this respect, the Superior courts below, this Court not excepted, are then left with an option of discerning which of the two divergent positions of the Court of Appeal to apply.

68. On my account, I choose to go by the decision in Machira & Co. Advocates Vs Arthur K. Magugu & another [2012] eKLR, which has subsisted for some time. In any event, I hold the humble view that the latter decision ought and should have clarified whether the positon hitherto highlighted in the previous decision is now bad law.

69. Arising from the foregoing, my answer to issue number One and two, respectively, is to the effect that a failure to lodge the requisite notice of objection to taxation, which accords with the provisions of Rule 11 of the Advocate Remuneration Order, invalidates the reference. Consequently, I come to the conclusion that the reference beforehand is incompetent and thus invalid.

70. At any rate, there is no gainsaying that where the provisions of the law stipulate the doing of an Act, in this case the lodgment of a notice of objection to taxation, then it behooves all and sundry to comply. In the event of non-compliance, it is apposite for the defaulting party to account for the default and/or explain the difficulty, if any.

71. Nevertheless, it cannot be left for the parties to choose whether or not to comply with a certain provision of the law or otherwise. To my mind, such a scenario would bring to the fore unequal playing

field, where other litigants comply and others disregard. Simply put, there must be uniformity in the application of the provisions of the law. [see Article 27[1] and[2] of *the Constitution* 2010].

72. To buttress the foregoing position, it suffice to take cognizance of the holding of the Court of appeal in the case of *Opiyo, Chairperson & 5 others Vs Migori County Assembly & 6 others (Civil Appeal E174 of 2023*) [2024] KECA 529 (KLR) (14 May 2024) (Judgment), where the court stated thus;-

> 43. Whereas we are generally sympathetic to the appellants' position regarding the effect of rigid technicalities on substantive justice, we are not prepared to accept the view that the imprimatur of Article 159(2)(c) of *the Constitution* is to permit litigants to disregard all rules of procedure with licentious abandon. The constitutional provision exists, as we pointed out above, to relieve conscientious litigants of the oppression occasioned by the rigid application of procedural rules. It does not exist to give warrant/licence to litigants to ignore directions of the court when those directions have been issued to ensure the orderly regulation and determination of disputes.
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> 44. In the present case, as the learned Judge pointed out, the appellants were late in filing their substantive judicial review application. They may well be right that the delay was excusable, and was, perhaps, even caused by the court registry. In such a situation, however, the appropriate recourse for a litigant cannot be to ignore the court or a rule-based time limitation by simply terming it a "technicality". The proper recourse would be to approach the court under a certificate of urgency seeking for extension of time to make the filing. At the very least, a litigant in that position ought to file a contemporaneous application seeking the court's permission to deem the application filed late, as properly filed.

73. By parity of reasoning, I beg to underscore that the Client/Respondent herein cannot take it up upon herself to chose whether or not to comply with the provisions of Rule 11[1] of the Advocates Remuneration Order or better still, which segment of the said rule to comply with.

74. Pertinently, such an endeavour would render the import and tenor of Rule 11[1] of the Advocate Remuneration Order redundant and otiose. Suffice it to posit that no provision of the law exists in the rule book for the sake of beauty or cosmetic purposes

Issue Number 3 Whether there was a retainer/fee agreement between the Applicant and the Respondent.

75. The other issue that merits discussion touches on and concerns the question of retainer/fee agreement. In this regard, it is worthy to recall that learned counsel for the Client/Respondent has contended that the Applicant herein was retained and engaged by the Respondent to represent same [Respondent] in the sale transaction touching on and concerning the designated go-downs.

76. Additionally, it was contended that pursuant to the instructions, the Applicant herein proceeded to inter-alia craft the sale agreement between the Respondent and the third-party purchaser. Besides, it was contended that in the sale agreement the Applicant herein included various clauses which spoke to the payment of the advocates fees.

77. In particular, learned counsel for the Respondent has adverted to the schedule contained at the foot of the sale agreement and wherein it was posited that the advocates fees for the sale agreement would be Kes.100, 000/= only. In this regard, learned counsel for the Respondent has submitted that the contents of the schedule and wherein the fees for the sale agreement was capped at kes.100, 000/= only, constitutes a fees/retainer agreement.

78. On the other hand, learned counsel for the Applicant has submitted that the sale agreement which have ben adverted to and highlighted by learned counsel for the Respondent was entered into and executed by the Respondent [who was the vendor] and the third-party purchaser. In this regard, it has been posited that the said sale agreement therefore binds the parties thereto and not otherwise.

79. Other than the foregoing, learned counsel for the Applicant has also contended that the sale agreement which was crafted by the Applicant contained clause 12 wherein it was mutually agreed that either party shall meet own advocates costs for the completion of the sale and purchase of the designated go-down.

80. According to learned counsel for the Applicant the sale agreement which was crafted by the Applicant herein was for a specific purpose. Furthermore, it was posited that it was the agreement between the vendor and the purchaser. In this regard, it has been contended that the sale agreement can therefore not constitute and/or be construed to be retainer/fee agreement between the Applicant and the Client.

81. Having considered the rival submissions by the parties, I beg to point out that a retainer/fee agreement between an advocate and a client is by law required to be reduced into writing and thereafter be executed by the parties. In the alternative the retainer agreement can be evidenced in writing provided that same is executed by the client or the client's authorized agent.

82. Notwithstanding the foregoing, it is common ground that the evidence in writing, duly executed by the client or the clients authorized agents must be accepted by the advocate. Instructively, there must be a meeting of minds between the advocate and the client as pertains to the retainership.

83. To underscore, the exposition of the law that a retainer/fees agreement must be reduced into writing and thereafter executed by the parties, it suffices to cite and reference the provisions of Section 45 of the *Advocates Act*. For ease of appreciation, the provisions of Section 45 [supra] are reproduced as hereunder;

> 45. Agreements with respect to remuneration
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> 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;
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> (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.

84. Flowing from the provisions [supra], it suffices to point out that where there is a contention that a retainer agreement was entered into and executed between the advocates and the client, then it behooves the person propagating such position to demonstrate to the satisfaction of the court that indeed there was a retainer agreement.

85. In this case, it is the Respondent/client who is contending that there was a retainer/fee agreement. To this end, the Respondent/Client bore the responsibility [obligation] of placing before the court the retainer agreement, if any, that was executed.

86. At any rate, it is not lost on this court that the retainer agreement must be in writing and signed between the concerned parties. In this regard, a retainer agreement therefore must be one involving the Applicant and the Respondent/client and not otherwise.

87. In this respect, I beg to adopt and reiterate the holding of the Court of Appeal in the case of Omulele & Tolo v Mount Holding Ltd [2016]eKLR, where the court considered what constitutes a retainer agreement. For coherence, the court stated and held thus;

> 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.

88. To my mind, the sale agreement which has been adverted to and relied upon by learned counsel for the Respondent/Client, to underpin the contention that there existed a retainer agreement, does not constitute an agreement between the applicant and the respondent. Furthermore, there is no gainsaying that the Applicant herein was neither privy nor party to the sale agreement.

89. In my humble view, the doctrine of privity of contract does not bind the Applicant to the impugned sale agreement. Instructively, the Applicant herein can derive no legal benefit or accrue any legal liability arising from the sale agreement in question save for the professional fees chargeable for the services rendered at the instance of the Respondent.

90. Before departing from this issue, it is instructive to cite and reference the decision in the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR, where the Court of Appeal elaborated on the Doctrine of privity of contract and the scope thereof.

91. For coherence, the Court stated thus:

> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation V Lengetia Ltd (supra), Kenya National Capital Corporation Ltd V Albert Mario Cordeiro & Another (supra) And William Muthee Muthami V Bank Of Baroda, (supra).
>
> Thus in Agricultural Finance Corporation V Lengetia Ltd (supra), 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."

92. My answer to issue number three [3] is therefore threefold. Firstly, the sale agreement which was crafted by the Applicant between the Respondent/Client and the third-party purchaser was/is only binding on the parties thereto. For good measure, the mere fact that the Applicant crafted the sale agreement and thereafter witnessed the execution thereof, does not make the Applicant [advocate] a party to the said agreement.

93. Secondly, the doctrine of privity of contract espouses a legal position that an agreement/contract is only binding on the parties thereto. To the extent that the Applicant herein was not a party to the sale agreement, the terms of the said sale agreement cannot now be deployed to circumscribe the rights and interests of the Applicant.

94. Thirdly, the impugned sale agreement does not constitute a retainer agreement between the Applicant and the Client/Respondent. On the contrary, a retainer agreement must be one entered into between the advocate on one hand and the client on the other hand. Pertinently, the retainer agreement must be in writing and not otherwise.

Issue Number 4 Whether the application dated the 3rd of May 2024 satisfies the conditions envisaged vide Section 51 (2) of the *Advocates Act* or otherwise.

95. Other than the application that was filed by and on behalf of the Client/Respondent and wherein same [Respondent] sought to rescind the certificate of taxation, the advocate/applicant herein also filed an application and wherein same sought for entry of judgment in accordance with the certificate of taxation.

96. Suffice it to point out that the Applicant herein contended that the certificate of taxation arising from the ruling delivered on the 23rd April 2024, has neither been set aside nor varied. In this regard, the Applicant posited that the certificate of taxation was therefore final.

97. On the other hand, learned counsel for the Applicant also submitted that the issues of retainer is also not in dispute. For coherence, learned counsel for the Applicant contended that the issue of retainer had been conceded by the Respondent.

98. On the contrary, it was submitted that the only issue that was being disputed was an existence of a retainer agreement, fixing the fees/remuneration payable to the advocate. In any event, it was posited that there is a distinction between retainer and retainer agreement.

99. I have reviewed the totality of the evidence on record and I beg to underscore that there is no dispute as pertains to retainer. For good measure, the Respondent concedes that indeed the Applicant was retained and/or engaged to act for the Respondent in respect of the sale transaction affecting the designated go-downs.

100. Furthermore, it is also not lost on this court that learned counsel for the Respondent did not make any precipitated submissions on the question of retainer. In this regard, it is my finding and holding that there existed retainer between the Applicant and the Respondent.

101. Arising from the foregoing, there is no gainsaying that the Applicant has been able to meet and satisfy the twin requirements/ ingredients espoused/envisaged by the provisions of Section 51[2] of the *Advocates Act* Chapter 16 Laws of Kenya.

102. Pertinently, the provisions of Section 51[2] [supra] provide 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.

103. Arising from the foregoing, it is my finding and holding that the Applicant herein is indeed entitled to entry of judgment in accordance with the certificate of taxation. In any event, it suffices to underscore that the certificate of taxation under reference has become final for all intents and purposes.

104. Finally, the Applicant sought to be awarded interests from the date of the filing of the bill of costs. However, it is instructive to underscore that interests are not awarded from the date of filing of the bill of costs but from the date of service of the advocate fee note/bill of costs, where apposite. In this regard, I beg to underscore that the notice of taxation was not issued until the 4th July 2023.

105. Arising from the foregoing and taking into account the provisions of Rule 7 of the Advocates remuneration Order, I proceed to decree and direct that the Applicant herein shall be entitled to charge interests at 14% w.e.f July 2023.

106. For ease of reference, Rule 7 of the Advocates Remuneration Order, stipulates thus;

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 :

107. Flowing from the discussions [details highlighted in the body of the Ruling], I come to the conclusion that the reference [application dated the 6th of May 2024] is not only premature and misconceived but same is equally devoid of merits.

108. On the other hand, is it my finding and holding that the application dated the 3rd of May 2024 and wherein the Applicant seeks for entry of judgment in accordance with the certificate of taxation, is meritorious. For good measure, there is no gainsaying that the certificate of taxation has since become final.

109. In the premises, the final orders that commend themselves to me are as hereunder;-

i. The Application dated 6th of May 2024 be and is hereby dismissed with costs.

ii. The Application dated 3rd of May 2024 be and is hereby allowed with costs save for the interests which shall accrue in accordance with clause [iv] hereof.

iii. The costs attendant to Clause (i) & (ii) be and are hereby assessed and certified in the sum of Kshs.40,000/= only and same to be borne by the Respondent/Client.

iv. The Judgment in favour of the Advocate/client at the foot of the Application dated 3rd May 2024 shall accrue interest w.e.f. July 2023 until payment in full.

110. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2024

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – Court Assistant.

Mr. Eugene Lubulellah for the Advocate/Applicant .

Miss Lily Ngeresa for the Client/Respondent.