



Mungai t/a Mungai JN & Company Associates v Kabogo (Environment & Land Case E004 of 2021) [2024] KEELC 13396 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E004 OF 2021**

JO MBOYA, J

NOVEMBER 7, 2024

BETWEEN

JAMES MUNGAI T/A MUNGAI JN & COMPANY ASSOCIATES ... APPLICANT

AND

NDEGWA KABOGO RESPONDENT

RULING

Introduction and Background

1. The Advocate/Applicant herein has approached the court vide Notice of Motion Application dated 5th June 2024, brought pursuant to Section 51(2) of the *Advocates Act*, Cap 16 Laws of Kenya, Order 51 Rules I of the Civil Procedure Rules, 2010, and in respect of which same sought for the following reliefs;
 - i. That judgment be entered for the Applicant against the Respondent for the sum of Kenya Shillings Nine Hundred and Seven Thousand Four Hundred and Sixty-Two and Twenty Cents (Kshs 907,462.20/=) together with interest thereon at Fourteen Percent (14%) per annum from 7th August 2023 until payment in full.
 - ii. That the Honourable court do adopt the certificate of taxation dated 29th September 2023 requiring the payment Kenya Shillings Nine Hundred and Seven Thousand Four Hundred and Sixty-Two and Twenty Cents (Kshs 907,462.20/=) as an order of this court.
 - iii. That the Applicant be at liberty to execute against the Respondent herein for Kenya Shillings Nine Hundred and Seven Thousand Four Hundred and Sixty-Two and Twenty Cents (Kshs 907,462.20/=).
 - iv. That the costs of this application be borne by the Respondent.



2. The Application beforehand is anchored on various grounds which have been enumerated in the body thereof. In addition, the Application is supported by the Affidavit of James Mungai [Advocate], sworn on 5th June 2024 and to which the deponent has annexed two documents including a copy of the certificate of taxation.
3. Upon being served with the application beforehand, the Respondent/Client filed a Replying Affidavit sworn on 29th July 2024 and to which the deponent has annexed one document, namely a complaint addressed to the Advocates Complaints Commission.
4. The instant Application came for directions on 15th July 2024 whereupon the advocates for the respective parties covenanted to canvass and ventilate the Application by way of written submissions. In this regard, the court has proceeded to and circumscribed the timelines for the filing of the written submissions.
5. Suffice it to point out that the Applicant has filed Written Submissions dated 8th August 2024 whereas the Respondent filed Written Submissions dated 14th of October 2024. For good measure, the two sets of Written Submissions form part of the record of the court.

Parties' Submissions

a. Applicant's Submissions:

6. The Applicant herein filed Written Submissions dated 8th August 2024 and in respect of which the Applicant has adopted the grounds at the foot of the Application. Furthermore, the Applicant has also reiterated the contents of the Supporting Affidavit.
7. Other than the foregoing, the Applicant has thereafter ventured forward and canvassed two salient issues for consideration by the court.
8. Firstly, learned counsel for the Applicant has submitted that the Applicant herein was instructed, engaged and/or retained by the Client/Respondent to act for the Client/Respondent in respect of a designated matter. In this regard, it has been submitted that upon receipt of the instruction from the Client, the Applicant proceeded to and filed proceedings vide Milimani ELC No. E094 of 2020.
9. Additionally, it has been contended that despite the filing of the said suit, Milimani ELC No. E094 of 2020, the Client/Respondent failed and/or neglected to pay the requisite professional fees. In this regard, the Applicant contends that same was constrained to cease acting and thereafter proceeded to file an advocate client bill of costs for taxation.
10. Besides, learned counsel for the Applicant has posited that upon the filing of the Advocate-Client Bill of Costs, same [Advocates-Client Bill of Costs] was set down for taxation and same was ultimately taxed by the taxing officer.
11. Additionally, it has been contended that arising from the taxation of the Advocates-Client Bill of Costs, the taxing officer proceeded to and issued a Certificate of Taxation dated 29th September 2023. Suffice it to point out that the said Certificate of Taxation has been attached to the Supporting Affidavit filed on behalf of the Applicant.
12. Based on the foregoing, learned counsel for the Applicant has therefore submitted that to the extent that the Certificate of Taxation has neither been challenged, varied and/or set aside, it suffices to adopt the Certificate of Costs and to enter judgment in accordance therewith.



13. In particular, learned counsel for the Applicant has invited the court to take cognizance of the holding in the case of *Mwangi Kengara & Co Advocates v Invesco Assurance Co Ltd* [2014] eKLR, *Joreth Ltd v Kigano & Associates* [2002] eKLR, *Donholm Rahisi Stalls v East Africa Portland Cement Ltd* [2005] and *First American Bank of Kenya v Shah & Others* [2002] eKLR, respectively.
14. At any rate, learned counsel for the Applicant has also submitted that it is the Respondent/Client who approach the Applicant and thereafter instructed same to act on behalf of the Client. In this regard, the Applicant contends that the Respondents cannot now turn around and decline to pay for the legal services that were rendered to and on his behalf.
15. Secondly, learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated a prima facie case with probability of success. In this regard, learned counsel for the Applicant has invited the court to examine the material on record and to come in conclusion that the Applicant has indeed established a prima facie case.
16. In support of the submissions, that the Applicant has established a prima facie case, learned counsel for the Applicant has cited and referenced *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, respectively.
17. Suffice it to point out that the submissions touching on and/or concerning disclosure of a prima facie case with a probability of success, appear to be misguided and out of place.
18. Be that as it may, learned counsel for the Applicant has thereafter proceeded to and invited the court to find and hold that the Applicant has established and met the requisite ingredients to warrant the grant of the order sought at the foot of the application dated 5th June 2024. In this regard, the court has been invited to adopt the certificate of taxation as the judgment of the court.

b. Respondent's Submissions

19. The Respondent filed Written Submissions dated 14th October 2024 and wherein the Respondent has adopted the contents of the Replying Affidavit sworn on 29th July 2024 and thereafter canvassed one issue for determination by the court.
20. Learned counsel for the Respondent herein has submitted that even though the Respondent proceeded to and instructed the Applicant to represent same [Respondent] in a matter, the Applicant herein failed to exercise due diligence on behalf of the Respondent.
21. In particular, learned counsel for the Respondent has submitted failed and/or neglected to file the suit on behalf of the Respondent. In this regard, learned counsel for the Respondent has submitted that the Respondent was thereafter constrained to lodge a complaint before the Advocates Complaints Commission as against the Applicant. To this end, learned counsel for the Applicant has referenced the annexure attached to the replying affidavit.
22. Additionally, learned counsel has submitted that despite being served with the complaint lodged by the Respondent before the Advocates Complaints Commission, the Applicant proceeded to and filed civil proceedings vide *Milimani ELC NO. E094 of 2020*. To this end, it has been contended that the filing of the said suit on behalf of the Respondent was a calculated scheme to defeat of the complaints before the complaints commission.
23. Notwithstanding the foregoing, learned counsel for the Respondent has submitted that the Applicant herein did not act diligently towards defending the rights and interests of the Respondent. Consequently, it has been posited that the Applicant herein should not be allowed to attract and/or accrue unjust enrichment.



24. Finally, learned counsel for the Respondent has submitted that the Respondent herein paid to and in favour of the Applicant the sum of KES.300, 000/= only on account of instructions fees, then the Applicant herein should be content with the fees that was paid and yet no services were rendered and thereafter let the matter lie.
25. In any event, learned counsel for the Respondent has submitted that the Applicant herein has also failed and/or neglected to surrender the file in respect of Milimani ELC No. E094 of 2020 which same [Applicant] alleges to have filed on behalf of the Respondent.
26. Arising from the foregoing, learned counsel for the Respondent has contended that the application is devoid of merits. In this respect, the court has been implored to proceed and dismissed the application with costs to the Respondent.

Issues for Determination

27. Having reviewed the Application dated 5th June 2024 and the response thereto and having taken into account the Written Submissions filed on behalf of the respective parties, the following issues crystallize and are thus worthy of determination;
 - i. Whether there exists a certificate of taxation and if so, whether same has been varied, rescinded and/or set aside.
 - ii. Whether there is any dispute as to retainer or otherwise

Analysis and Determination

Issue Number 1

Whether there exists a certificate of taxation and if so, whether same has been varied, rescinded and/or set aside.

28. The Applicant herein has averred that same [Applicant] was duly instructed and retained by the Respondent to file civil proceedings on behalf of the Respondent herein. To this end, the Applicant has contended that same thereafter proceeded to and indeed filed civil proceedings vide Milimani ELC No. E094 of 2020.
29. Other than the foregoing, the Applicant has contended that despite filing the said suit namely Milimani ELC NO. E094 of 2020, the Respondent herein failed to pay the requisite court fees and thus the Applicant was obligated to file a client advocates bill of costs. Suffice it to point out that the advocates client bill of costs was thereafter subjected to taxation culminating into a certificate of taxation issued and signed on the 29th of September 2023. For ease of reference, a copy of the certificate of taxation has been attached to the supporting affidavit
30. To the extent that the Applicant has attached and annexed a copy of the certificate of taxation, there is no gainsaying that indeed a certificate of taxation was generated and issued by the taxing officer.
31. On the other hand, the respondent herein does not deny the existence of the said certificate of costs. Furthermore, the Respondent herein also does not contend that the said certificate of taxation has ever been challenged, reviewed and/or set aside.
32. On the contrary, what I hear the Respondent is saying is that the Applicant herein failed to act on the instructions that were given to same timeously and as a result of such neglect, the Respondent was constrained to mount a complaint before the Advocates Complaints Commission.



33. Additionally, what also becomes apparent from the representation on behalf of the Respondent is to the effect that the complaint which was lodged against the Applicant was indeed dismissed by the Advocates Complaints Commission.
34. The third aspect that emanates from the response by the Respondent touches on and/or concerns the fact that the Applicant was paid KES. 300,000/= on account of instruction fees. However, it is contended that because the Applicant did not render any quality service or at all, same [Applicant] should be content with what was paid.
35. The arguments by and on behalf of the Respondent may very well be reasonable. However, it is imperative to underscore that those arguments and representation are being ventilated before a wrong forum.
36. Notably, this court whilst dealing with an application under Section 51[2] of the *Advocates Act* is not enjoined to interrogate whether or not the advocate rendered quality legal services or otherwise.
37. Similarly, the court is also not called upon to interrogate whether the amount which was paid should be accepted as full fees. On the contrary, the concern of a court, this court not excepted and which is dealing with an application under Section 51[2] of the *Advocates Act* is to discern whether a certificate of taxation has since been issued and if so, whether same [certificate of taxation] has been varied and/or set aside.
38. To my mind, the Applicant has placed before this court a certificate of taxation. Furthermore, the certificate of taxation has neither been impugned, varied and/or set aside. To this end, there is no gainsaying that there exists a certificate of taxation which is final on the question of costs payable to the Advocate.
39. To buttress the foregoing exposition of the law, it suffices to take cognizance of the holding in the case of Andrew Barney Khakula T/A J.S Khakula & Co Advocates v Tranquility Development Limited (Miscellaneous Application 30 & 31 of 2014) [2018] KEELC 2173 (KLR) (Civ) (27 July 2018) (Ruling), where the court considered the import and tenor of Section 51[2] of the *Advocates Act* [supra].
40. For coherence, the court stated and held as hereunder;
 7. Section 51(2) of the *Advocates Act* provides that 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.
 8. In Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR, the court held that the law is very clear that once a taxing officer has taxed the costs and issued a certificate of costs and there is no reference against the taxing officer's ruling or there has been a reference and a determination has been made on the reference, no other action would be required from the court save to enter judgment

Issue Number 2

Whether there is any dispute as to retainer or otherwise.

41. The second critical ingredient that is adverted to under the provisions of Section 51[2] of the *Advocates Act* [supra] relates to whether or not there is a dispute as to retainer. To start with, a retainer denotes



the relationship between an advocate and a client. Furthermore, a retainer an advocate and a client can arise in several dimensions, including by execution of a retainer agreement, acceptance of instructions by way of a letter or acting upon the instructions of a client.

42. The laws as pertains to what constitutes and/or comprises of a retainer was settled by the court of appeal in the case of *In Omulele & Tollo Advocates v Magnum Properties Limited* [2016] eKLR, where the court held as hereunder;

I will start by considering what a retainer is and what it entails and in so doing, I wish to borrow the words of Justice Gikonyo in the case of *Njeru Nyaga & Co. Advocates Vs George Ngure Kariuki, High Court of Kenya at Nairobi (Commercial & Admiralty Division) Case No. 723 of 2012* where the learned Judge said and I quote: -

“This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the *Advocates Act*, probably because of the special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the *Advocates Act*, the innumerable previous courts’ rendition on the phraseology...where the retainer is not disputed...provide the content of the term “retainer”. “Retainer” in the wider sense entails the instructions by a client or a client’s authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the Black’s Law Dictionary, 9th Edition. The appropriate sense of the word “retainer” as used in the *Advocates Act* and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of NBI HC Misc App No 698 of 2004 A.N. Ndambiri & Co Advocates v Mwea Rice Growers Multipurpose Co-op Limited, and Owino Okeyo & Co Advocates V Fuelex Kenya Limited [2005] eKLR, respectively. Let me quote what Waweru J said in the former case that;

My understanding of the term “retainer” as used in section 51(2) aforesaid [read...of the *Advocates Act*] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that “retainer” means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer.”

The term “retainer” was also considered in the case of *Hezekia Ogao Abuya T/a Abuya & Co. Advocates Vs Kunguru Food Complex Limited Nairobi, Misc. Appl. No. 400/2001* where an advocate who had been instructed by a client in a conveyance matter had his Advocate/Client Bill of Costs taxed and a judgment under Section 51(2) entered in his favour, in an Application by the client to set aside the said judgment inter-alia, on the ground that there was no retainer, Ringera J (as he then was) delivered himself at page 6 therefore: -

“In this case, such a defence is predicated on the client’s understanding of the word “retainer” in that regard, I note that in Black’s Law Dictionary the word retainer is 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. This Act of employment is called the retainer. The retainer agreement between



the client and the Attorney sets forth the nature of services to be performed, costs expense and related matters.”

43. Duly guided by the definition supplied in the case [supra] it is now apposite to turn to the matter beforehand and to discern whether there is any dispute as to retainer. Firstly, the replying affidavit by the Client confirms that same [Client] indeed instructed the Applicant to file a suit on his [Client’s behalf].
44. Furthermore, the same Respondent being knowledgeable of the fact that same [Respondent] had duly retained the Applicant confirms that he subsequently filed a complaint before the Advocates Complaints commission against the Applicant herein. Instructively, the filing of [sic] the complaint before the Advocates Complaints Commission denotes acknowledgement of a retainer.
45. Thirdly, the Respondent herein has also confirmed that same is aware that a suit was filed on his behalf vide Milimani ELC No. E094 of 2020. Even though the Respondent contends that the Applicant has declined to release the file unto him [Respondent] the failure to release the file does not defeat the existence of retainer. In any event, it is common ground that an Advocate is entitled to exercise lien over the file or such other property of the client pending payment of fees.
46. Arising from the foregoing discussion, there is no gainsaying that there exists a retainer between the Applicant and the Respondent. Indeed, the existence of the retainer has neither been controverted nor disputed.
47. To the extent that there is no dispute as pertains to retainer, it suffices to posit that the Applicant herein has met and established the two critical ingredients that underpins the provisions of Section 51[2] of the Advocates Act.
48. For ease of appreciation, it suffices to reproduce Section 51[2] of the Advocates Act. Same 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

Final disposition

49. Having analyse the two thematic issues that were highlighted in the body of the ruling, I come to the conclusion that the Applicant herein has indeed certified the threshold for entry of judgment in accordance with the certificate of taxation.
50. Consequently, and in the premises, I proceed to enter judgment and make the following orders;
 - i. The Application dated 5th June 2024 be and is hereby allowed.
 - ii. Judgment be and is hereby entered on the basis of the certificate of taxation dated 29th September 2023.



- iii. The judgment in terms of clause [ii] shall attract interests at 14% per annum from 17th August 2023.
- iv. Costs of the application be and are hereby awarded to the Applicant. For good measure, the costs be and are hereby assessed and certified in the sum of Kes.30, 000/= only.
- v. The Applicant is at liberty to execute for the judgment in accordance with the provisions of Order 22 of the Civil Procedure Rules, 2010.

51. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2024

HON. JUSTICE OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. James Mungai for the Applicant

Mr. Charagu for the Respondent/Client

