



Chaudhri & Associates v Registered Trustees of Sheikh Zayed Bin Sultan Al – Nahyan (Miscellaneous Civil Application E202 of 2022) [2024] KEELC 13803 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E202 OF 2022
MD MWANGI, J
DECEMBER 11, 2024**

BETWEEN

CHAUDHRI & ASSOCIATES ADVOCATE

AND

THE REGISTERED TRUSTEES OF SHEIKH ZAYED BIN SULTAN AL – NAHYAN CLIENT

(Pursuant to the Ruling of the Taxing Master delivered on 11th April, 2024 for this Court to determine whether or not there was a valid agreement for payment of legal fees)

RULING

(Pursuant to the Ruling of the Taxing Master delivered on 11th April, 2024 for this Court to determine whether or not there was a valid agreement for payment of legal fees)

Background

1. The Advocate/Applicant filed an Advocate- Client Bill of Costs dated 23rd September, 2022. Vide the Ruling dated 19th April, 2023, the Taxing Master struck –out the said Bill of Costs on the basis that there was an agreement for fees between the Advocate/Applicant and the Client/ Respondent. Aggrieved by the said decision, the Advocate/Applicant filed a Reference dated 26th May, 2023 seeking to set aside the Taxing Officer’s decision delivered on 19th April, 2023.
2. This Court determined the Reference and delivered its Ruling on the 18th January, 2024. In setting-aside the Ruling of 19th April, 2023, the Court directed that Advocate-Client Bill of Costs dated 23rd September, 2022 be placed before a different Taxing Officer for taxation.
3. The Advocate-Client Bill of Costs was subsequently placed before a different Taxing Officer; whom upon deliberating on the matter, delivered her Ruling the 11th April, 2024. In the said Ruling, the



Taxing Officer held that the Bill of Costs was not ripe for taxation until a determination whether or not there was a valid and binding agreement for legal fees. The Taxing Master then referred the matter to this Court for determination of that issue.

Court's Direction

4. On 29th April, 2024, with the consensus of the parties, the Court directed that the issue be canvassed by way of written submissions and parties to highlight their submissions on the issue of whether there was a binding and valid agreement for legal fees only.

Submissions by the Parties

5. The matter came-up for highlighting on the 15th October, 2024 after several adjournments at the instance of the Client/Respondent. The Advocate/Applicant relied on its submissions dated 4th December, 2023 filed earlier in support of the Reference.
6. The Client/Respondent on the other hand and despite being granted ample time to file its submissions, had not complied on the day scheduled for highlighting of the submissions. The Court declined the Client/ Respondent's request for more time to comply noting that the Respondent had been granted adequate opportunity to file submissions and prepare for highlighting.
7. The matter was then reserved for Ruling on 21st November, 2024.
8. Surprisingly, the Client/ Respondent filed submissions dated 15th November, 2024 accompanied by an undated Replying Affidavit on the 18th October, 2024 and without leave of the Court. Although, the court would ordinarily strike out the said submissions, the same having been filed without leave of the court, I will nonetheless admit them in the interest of justice. The undated replying affidavit is however expunged from the record of this court.
9. The Court has had a chance to read the submissions filed by both parties which submissions forms part of the record of the court. The Court has considered them in its determination.

Issues for Determination

10. As earlier noted, the only issue for determination is whether there was a binding and valid agreement for legal fees between the parties herein.

Analysis and Determination

11. It is not in dispute the Applicant/Advocate was retained and/or instructed by the Client/Respondent herein to represent it in a matter for review of grants and disposition of titles to public land within Nairobi County.
12. It is settled law that an Advocate is precluded from taxing his fees 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](#).
13. 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.
- 14. An agreement entered into pursuant to the above section is what is 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.
- 15. 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. In the case of *Omulele & Tollo Advocates -vs- Mount Holdings Limited* [2016] eKLR, the Court of Appeal stated that: -

“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.....”

- 16. The Court of Appeal in the same case placed the onus of proving the existence of a Retainer Agreement on the party who alleges its existence. 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 Captial Corporation Limited v. Albert Mario Cordeiro & Another* [2014] eKLR and Section 107 of the *Evidence Act*

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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.”

- 17. Ochieng J (as he then was) in *Abmednasir Abdikadir & Co. Advocates -vs- National Bank of Kenya Limited* (2) [2006] 1 EA 5, held stated that a 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.
- 18. My understanding of the above provisions and as interpreted in the cited authorities is that a retainer agreement between an advocate and a client has to be signed by the Client to be valid and enforceable.



19. In the instant case, the Client/Respondent asserts that there was a Retainer Agreement. The Advocate/Applicant on the other hand contends that there was no retainer agreement, therefore the Bill of Costs ought to be taxed. The burden of proof was on the Client/Respondent to prove existence of a valid agreement. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
20. In the case of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
21. I have perused the alleged Legal Services Contract dated 24th October, 2018. From the document, the Client’s signatory did not sign on the space where it was supposed to sign. The section is blank. It is only the Advocate’s section that is stamped and signed.
22. Although there is an unclear stamp from one Abubakar on the “clear” copy produced before the Taxing Master, no evidence was adduced proving that the signature thereon was indeed his and not that of the Advocate’s witness. There is further no explanation as to why the Client’s agent would opt to sign on the Advocate’s part and not on the part indicated for the Client.
23. Parties have also adduced correspondences between them. The Client argues that the correspondences confirm agreement of fees payable to the Advocate. The Advocate on the other hand contends that the correspondences, particularly the email dated 10th November, 2021 does indeed confirm that the alleged agreement was not signed.
24. The email of 10th November, 2021 from Abubakar Dindia, the Client’s representative, addressed to the Advocate reads in part;

‘...The Foundation may consider paying only the 80,000 USD legal fees as enshrined in the unsigned contract.

If this is acceptable to you, then the contract has to be signed and you proceed with the case up to its logical conclusion.’ (emphasis is mine)
25. A subsequent email dated 25th November, 2021 from the Client’s representative to the Advocate shows that parties had not agreed on the issue of legal fees. The email shows that the Directors wished to have a meeting with the Advocate to prepare for the hearing of the suit as well as ironing out issues related to the payment of the Advocate’s legal fees.
26. Evidently from the correspondences adduced above, the Retainer Agreement was never signed by both parties. The Client’s representative categorically acknowledged in his email of 10th November, 2021 that the Agreement of 24th October, 2018 was yet to be signed.
27. It then follows that the Client has not discharged its evidentiary burden of proving that it in deed signed a Retainer Agreement with the Advocate/Applicant as alleged.



28. The upshot of the foregoing is that the court finds and holds that there was no valid retainer agreement between the parties herein. The Advocate is therefore entitled to tax his bill of costs. Accordingly, I direct the Taxing Master to proceed with taxation of the Advocate- Client Bill of Costs dated 23rd September, 2022 in accordance with the law. The Advocate/Applicant shall have the costs of this application.
29. This ruling will apply to the other two related files, ELCMISC/E203/204/2022.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF DECEMBER, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Bruno for the Advocate/Applicant

Ms. Juma & Ms. Mohammed h/b for Khatib for the Client/Respondent

Joan: Court Assistant

M.D. MWANGI

JUDGE.

