



Njuguna Kahari & Kiai Advocates v Gacanja (Miscellaneous Civil Application E006 of 2023) [2024] KEELC 13804 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E006 OF 2023**

SO OKONG'O, J

DECEMBER 11, 2024

**IN THE MATTER OF A REFERENCE FROM THE DECISION OF
THE TAXING OFFICER HON. M. SHIMENGA DELIVERED ON
11TH JULY 2024 IN THE ADVOCATE/CLIENT BILL OF COSTS**

BETWEEN

NJUGUNA KAHARI & KIAI ADVOCATES APPLICANT

AND

WILSON GACANJA RESPONDENT

RULING

Background

1. The Respondent was sued by Ethics and Anti-Corruption Commission (EACC) in Kisumu ELC No. E020 of 2022 (hereinafter referred to as “the primary suit”). The Applicant entered appearance and filed a statement of defence on behalf of the Respondent in the said primary suit. The primary suit was heard and a judgment delivered on 4th July 2024. The Respondent did not participate in the hearing of the suit.
2. On 21st August 2023, the Applicant filed an advocate and client bill of costs dated 17th August 2023 for taxation. The bill of costs was drawn in the sum of Kshs. 3,113,494.14. The Respondent filed a replying affidavit dated 28th October 2023 and a notice of preliminary objection dated 30th October 2023 in opposition to the bill of costs. The Respondent contended that there was no advocate and client relationship between the Respondent and the Applicant in the primary suit. The Respondent contended that he never instructed the Applicant to act for him in the primary suit.
3. When the bill of costs came up for taxation before the Deputy Registrar, the Applicant applied to cross-examine the Respondent on his replying affidavit. The application was allowed by the Deputy Registrar and the Respondent was cross-examined by the Applicant’s advocate on 14th March 2024.



On cross-examination, the Respondent maintained that he never instructed the Applicant to act for him in the primary suit. The Respondent contended that since he never instructed the Applicant to act for him, the Applicant rendered no services to him for which he could claim fees. The Respondent contended that if the Applicant rendered any services in the primary suit, he was not a party to the same.

4. The Deputy Registrar considered the Respondent's objection to the Applicant's bill of costs and made a ruling on the same on 11th July 2024. In her ruling, the Deputy Registrar made a finding that the Respondent did not instruct the Applicant to act for him in the primary suit and since there was no advocate and client relationship between the parties, the advocate and client bill of costs filed by the Applicant had no basis. The Deputy Registrar struck out the bill of costs for want of jurisdiction.

The application before the court

5. What is now before me is the Applicant's Chamber Summons application dated 23rd July 2024 brought under Paragraph 11(2) of the Advocate's Remuneration Order seeking an order that the court be pleased to review, vary and/or set aside the ruling and order of the Deputy Registrar made on 11th July 2024 striking out the Applicant's bill of costs dated 17th August 2023. The Applicant also sought an order that the Applicant's bill of costs be taxed by a different taxing officer.
6. The Applicant's application that was supported by the affidavit of Paul Njuguna was brought on the ground that the taxing officer erred in her finding that there was no advocate and client relationship between the Applicant and the Respondent. The Applicant averred further that the Deputy Registrar erred in failing to consider the pleadings that were filed by the Applicant on behalf of the Respondent in the primary suit.
7. The Respondent opposed the Applicant's application through Grounds of Opposition dated 23rd September 2024 in which the Respondent contended that the application was incompetent and was fatally defective and amounted to an abuse of the process of the court. The Applicant's application was heard by way of written submissions. The Applicant filed its submissions dated 7th October 2024 while the Respondent filed his submissions dated 30th October 2024. I have considered the application, the grounds of opposition filed by the respondent and the submissions by the advocates for the parties. The issue that was before the taxing officer for determination was whether there was a client and advocate relationship between the Applicant and the Respondent. I agree with the Respondent that the burden was upon the Applicant to prove that it had been instructed by the Respondent to act for him in the primary suit. The Respondent admitted in his submissions that the retainer can be express or implied. This court handled the primary suit. When the Deputy Registrar delivered her ruling on the Respondent's preliminary objection, this court had already delivered its judgment in the primary suit on 4th July 2024. I have noted from the ruling of the Deputy Registrar that the Deputy Registrar called for the primary suit file and perused the same. It is common ground that the Applicant entered appearance and filed a statement of defence in the primary suit on behalf of the Respondent. On cross-examination before the Deputy Registrar, the Respondent admitted that he was served with Summons to enter appearance in the primary suit. The Respondent admitted further that the Applicant was known to him and was acting for him in several matters. The statement of defence that was filed by the Applicant on behalf of the Respondent was not a mere denial of the claim in the primary suit. The defence was detailed. I agree with the Applicant that the Deputy Registrar did not consider or take into account the memorandum of appearance and the statement of defence that the Applicant filed on behalf of the Respondent in the primary suit. If the Deputy Registrar had considered the said memorandum of appearance and the statement of defence, the Deputy Registrar would not have come to a finding that there was no advocate and client relationship between the Applicant and the Respondent. In my view, the instruction by the Respondent to the Applicant in the primary suit



could be implied from these pleadings. There was no way in which the Summons to enter appearance together with the plaint served upon the Respondent could have reached the Applicant's office without the Respondent's knowledge. The Applicant could not also have come up with the kind of defence that it filed in the primary suit without instructions. I, therefore, agree with the Applicant that the Deputy Registrar erred in her finding that there was no advocate and client relationship between the Applicant and the Respondent.

8. As concerns the Respondent's contention that the Applicant's application is defective for want of a Notice of Objection, I find no merit in the same. The Deputy Registrar did not tax the Applicant's bill of costs. The bill was struck out for want of jurisdiction. There was therefore no taxation to which the Applicant could have filed an objection. In the circumstances, the Applicant was entitled to file a reference without the need to first file a notice of objection under Paragraph 11(1) of the Advocate's Remuneration Order. The reference was filed within 14 days of the ruling by the Deputy Registrar. I find no defect in the Applicant's application.

Conclusion

9. In conclusion, I find merit in Chamber Summons dated July 23, 2024. The ruling and orders made by the Deputy Registrar, Hon. M. Shimenga on July 11, 2024 are set aside. The Applicant's bill of costs dated August 17, 2023 is remitted back to the Deputy Registrar for taxation on merit. Each Party shall bear its own costs.

DATED AND DELIVERED AT KISUMU ON THIS 11TH DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mugo for the Applicant

N/A for the Respondent

Ms. J. Omondi-Court Assistant

