



**Ako Advocates LLP v Mehata (Commercial Appeal E324 of 2023)  
[2025] KEHC 2300 (KLR) (Commercial and Tax) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2300 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E324 OF 2023  
CJ KENDAGOR, J  
JANUARY 27, 2025**

**BETWEEN**

**AKO ADVOCATES LLP ..... APPELLANT**

**AND**

**NEERAJ SANDEEP MEHATA ..... RESPONDENT**

*(Being an Appeal against the Ruling and Orders of the Hon. A.G. Njuguna  
in Milimani SCCCOMM E4209 of 2023 delivered on 29th November, 2023)*

**JUDGMENT**

**Introduction**

1. The Respondent procured the services of the Appellant to render him legal services in a civil case where the Respondent was a party. The Respondent's instructions were captured in a letter of engagement in which they agreed on legal fees at Kshs.300,000/= exclusive of VAT and disbursements at Kshs.30,000/= . According to the alleged agreement, the Respondent was required to clear the legal fees by 30<sup>th</sup> March, 2022. The Respondent paid Kshs.50,000/= and failed to pay the balance as agreed. The Appellant withdrew their services before the completion of the matter citing the Respondent's breach of contract and sued to recover the outstanding legal fees at Kshs. 324,800/=.
2. The Respondent filed a Defense in which he denied contractual breach. Although he acknowledged the letter of engagement, he sought to vitiate it by claiming that the legal fees were procured through undue influence, misrepresentation, and was unconscionable. He also raised a Preliminary Objection on the jurisdiction of the Court to entertain the matter and argued that the Small Claims Court lacked the requisite jurisdiction to entertain the dispute. He claimed that the dispute ought to first go for taxation before the Deputy Registrar of the High Court of Kenya before the Appellant can institute



proceedings for recovery of the same. He also argued that the matter is not ripe for litigation as taxation cannot be done earlier than the settlement of a matter in Court.

3. The trial Court delivered a ruling on 29<sup>th</sup> November, 2023 in which it upheld the Respondent's Preliminary Objection. The trial Court relied on Section 62A (1-3) of the Advocates (Remuneration) Order, 1962 and agreed with the Respondent that the matter cannot be taxed before the conclusion of the suit in question.
4. The Appellant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 1<sup>st</sup> December, 2023. It listed the following Grounds of Appeal;
  1. The Honourable Court erred in law by allowing the Respondent's preliminary objection dated 16<sup>th</sup> September, 2023 despite the fact that the said preliminary objection does not meet the test for such an objection to succeed.
  2. The Honourable Court erred in law by contradicting itself while he held that the Respondent's Preliminary Objection dated 16<sup>th</sup> September, 2023 is multipronged and a reminiscent of a fishing expedition, and yet again goes ahead to hold that the grounds raised by the Respondent in the Preliminary Objection meets the test of what amounts to a preliminary objection.
  3. The Honourable Court erred in law by holding that the Respondent's preliminary objection meets the test of what amounts to a preliminary objection.
  4. The Honourable Court erred in fact and in law in failing to recognize the fact that Respondent's preliminary objection dated 16<sup>th</sup> September, 2023 does not raise a pure point of law.
  5. The Honourable Court erred in law in holding that it lacks the jurisdiction to hear the Appellant's suit, which is contrary to section 48 (1) and (2) of the Advocates Act.
  6. The Honourable Court erred in law by limiting itself to Section 10 of the Advocates (Remuneration) Order, 1962 with respect to recovery of an Advocates costs.
  7. The Honourable Court erred in law and in fact in holding that the Appellant's suit cannot be heard or taxed before the conclusion of the suit in question.
  8. The Honourable Court erred in law by failing to appreciate that the Appellant's claim was capped at Kshs. 324,800/= due to the Small Claims Court's capped pecuniary jurisdiction.
5. It asked the Court to allow the appeal and set aside the entire Ruling/Orders of the Magistrate Hon. A.G. Njuguna dated the 29<sup>th</sup> November, 2023 in Nairobi SCCCOMM No. E4209 of 2023. It also asked the court to substitute the Ruling with an order directing that the Appellant's suit before the Small Claims Court be set for hearing on priority basis. It also prayed that this honourable Court directs that the Appellant's suit before the trial Court be placed before another magistrate, other than Hon. A.G. Njuguna.
6. The Appeal was canvassed by way of written submissions.

### **Appellant's Written Submissions**

7. The Appellant submitted that the Respondent's objection did not have merit because Section 48 (2) of the Advocates Act gives the Appellant the right to bring a suit for the recovery of costs due to an advocate in any Court of competent jurisdiction. It argued that the trial Court erred in law by limiting itself to only Section 10 of the Advocates (Remuneration) Order, 1962 with respect to recovery of



an Advocates fees and totally ignored the provisions of Section 48 (1) and (2) of the *Advocates Act*. It submitted that there was a contract between the Appellant and the Respondent, and the Respondent did breach the retainer agreement between him and the Appellant, and thus the Appellant is entitled to invoke Section 48 (1) and (2) of the *Advocates Act*.

8. It also submitted that no taxation is required in the instance and that the dispute should be determined per the retainer agreement. It argued that the sum being claimed thereof is specific and the same needs no conclusion of the matter before the Magistrates' Court for costs payable to the Appellant to be assessed. It submitted that no law stipulates when such fee under the retainer agreement can be claimed, save for Section 48 of the Act, which requires 30 days' notice/demand to the client to settle such fees, a condition which the Appellant complied with. Thus, it submitted that the trial Court was wrong to hold that the fee payable to the Appellant under the Retainer Agreement can only be dealt with upon conclusion of the matter before the Magistrate's Court.

### **The Respondent's Written Submissions**

9. The Respondent submitted that the Small Claims Court lacks the requisite jurisdiction to entertain disputes involving legal fees between advocates and their clients. It argued that such disputes have to go for taxation before the Deputy Registrar of the High Court of Kenya before the Advocate can institute proceedings for recovery of the same in the appropriate forum. It submitted that the suit offends Section 62A of the Advocates (Remuneration) Order which provides that where there is a change of Advocates, the final advocate on record shall draw a single bill which shall then be taxed accordingly.

### **Issues for Determination**

10. I have considered the Grounds of Appeal and submissions by both counsels for the parties and I am of the view that the issue for determination is;

#### **a. Whether Small Claims Court has jurisdiction to determine disputes emanating from the enforcement of remuneration agreements between Advocates and their clients.**

11. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

#### **Whether Small Claims Court has jurisdiction to determine disputes emanating from the enforcement of remuneration agreements between Advocates and their clients**

12. The lower Court determined the matter on a preliminary objection. As correctly acknowledged by the trial Court, the Preliminary Objection was multi-pronged; the trial Court limited itself to the issue of jurisdiction, which is a point of law. I have looked at the pleadings placed before the lower Court and the exhibits presented by the parties, and I have ascertained that the Respondent and Appellant



entered into a remuneration agreement in which they agreed that the Respondent would pay legal fees at Kshs.300,000/= and disbursements at Kshs.30,000/=. Both parties agree that the Appellant withdrew their services before the completion of the matter. The Appellant seeks to enforce the retainer agreement and recover the entire amount agreed as per the retainer agreement. The Respondent argued that the Appellant is not entitled to the entire amount because they did not prosecute the dispute to completion as agreed.

13. Based on this factual background, I am of the view that the main issue for determination is whether the Small Claims Court has jurisdiction to determine disputes emanating from the enforcement of remuneration agreements between Advocates and their clients. The peculiar facts of this case are that the parties had a remuneration agreement and there was a change of advocates before the conclusion of the matter.

14. Remuneration agreements between clients and their advocates are provided for under Kenyan law, under the *Advocates Act*, Cap. 16 Section 45. The provision allows advocates to make an agreement fixing the amount of their remuneration in respect of any contentious business. It provides;

45. Agreements with respect to remuneration

(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.

15. Notably, the *Advocates Act* contemplates the possibility of disputes on the enforcement of a remuneration agreement where there has been a change of advocates before the completion of the matter as it happened in this case. The Act offers two remedies one in Section 45 (5) and the other Section 62A (1) of the Advocates (Remuneration) Order

16. Section 45 (5) of the *Advocates Act* provides as follows;

“If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.”



17. Order 52 of the Civil Procedure Rules includes provisions related to the Advocates Act, and Order 52 Rule 3 addresses applications concerning remuneration, which Section 45 (5) of the Advocates Act falls under.

18. Section 62A (1) of the Advocates (Remuneration) Order provides as follows;

“(1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on record shall draw a single Bill of Costs for the whole of the matter in respect of which costs have been awarded.

(2) On taxing the bill, the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity for costs, which he has not paid.

(3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.” (Underlining by this court).

19. The Courts have interpreted these two provisions on several occasions. In *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR, the Court of Appeal interpreted Section 45 (5) of the Advocates Act as follows:

“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 Capital Corporation Limited v. Albert Mario Cordeiro & Another* [2014] eKLR and Section 107 of the Evidence Act Cap 80). Under the proviso to Section 45 (5) of the Act, an advocate who is a party to a retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. In fact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee. Consequently, it behooves such advocate to ensure that the retainer agreement once made, is reduced into writing...”

20. In *Hamzaali Jiwaji V The Lamu Dreams Limited* [2011] eKLR, the High Court in Malindi interpreted section 62A (1) of the Advocates (Remuneration) Order, in the following terms;

“The guiding provision is found in Cap 16 subsidiary legislation that is Advocate Remuneration Order at section 62A (1).

“Where there has been a change of advocates or more than one change of advocate the advocate finally on record shall draw a Single bill for the whole of the matter in respect of which costs have been awarded”

3. The bill shall be accompanied by a certificate setting out the dates during which all advocates acted together with all agreements for remuneration made with then, all sums paid to them for costs and whether those sums were paid in full settlement”



The language used in that provision is unambiguous and does not require any further interpretation or analysis. The fears expressed by Mr Mouko that Timamy may eventually not draw a bill favourable to Mr Jiwaji is taken care of by provision of section 62 A (3).

I think the intention of this provision is to avoid a situation where a litigant ends up perpetually attending court to participate in taxation of a bill relating to one cause of action where there has been change of advocate as that becomes burdensome and vexing.”

21. My understanding is that Section 62A of the Advocates (Remuneration) Order addresses situations where a bill needs to be submitted for the taxation of costs in contentious and other matters, specifically, for the costs associated with the entirety of the matter regarding which costs have been awarded at the conclusion of the case. Taxation under Section 62A is handled in the Court and the original case where the claim is lodged. My interpretation of Section 45 relates to the recourse available to a party or advocate to apply to set aside or vary the fee agreement; this application is made before the High Court, as earlier expounded.
22. The circumstances of the current case, which is the subject before the Small Claims Court for recovery of costs, differ in that there is an agreement in place, and further, the case (to which the fee agreement between the parties herein was made) is still pending. In a case where an agreement has been made by virtue of Section 45, the costs of an advocate are not subjected to taxation. What recourse, then, does the Appellant (Advocate) have to enforce this fee agreement? Section 48 of the *Advocates Act* provides that a suit may be brought to in the matter of the advocate recover costs due to an advocate in any court of competent jurisdiction.
23. A Court derives its jurisdiction from the *Constitution* or statute, as seen in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others (2012) eKLR. In that case, the Supreme Court of Kenya held that: -

“A court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
24. The *Advocates Act* defines ‘Court’ as the ‘High Court.’ The ‘taxing officer’ is defined in the Advocates (Remuneration) Order as the Registrar or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint, with the exception for the Bills under Schedule 4 on trademarks. If there is a dispute over the exact amount of fees, the court may refer the matter to a taxing officer to determine the appropriate costs, and the officer can call for any fee agreements between the parties for consideration. The Remuneration Order contains provisions on what happens if any party is aggrieved by the taxing officer’s decision.
25. In a case similar to the current one, Hon. Justice Mabeya ruled on the jurisdiction of the Small Claims Court regarding the advocate-client contractual relationship as follows:
  - “ 12. Section 12(1) of the Small Claims Act of 2016 sets out the jurisdiction of the Small Claims Court to include, inter alia, “a contract for sale and supply of goods or services and set off and counterclaim under any contract”.
  13. In the present case, it is common ground that the claim was based on an advocate client relationship. That might have been matters contract but the issues pertaining to the business of an advocate, conduct as well as remuneration, there is a whole legal framework set out in the *Advocates Act* and the Advocates Remuneration Order.



14. In that legal regime, the procedure of raising fees, charging and recovery is very elaborate. Sections 44 and 45 of the *Advocates Act* deals with claims for legal fees and agreements between Advocates and clients.”

26. Based on the above authorities, I hold that the Small Claims Court, despite having a cap on pecuniary jurisdiction, does not have jurisdiction to determine disputes relating to the enforcement, variation, or setting aside of remuneration agreements between Advocates and their clients.

27. The Appellant’s claim at the Small Claims Court was incompetent for want of jurisdiction.

**Disposition**

28. The Appeal is hereby dismissed with costs to the Respondent.

29. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 27<sup>TH</sup> DAY OF JANUARY. 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

No attendance by the Parties

