



REPUBLIC OF KENYA



KENYA LAW
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Otwal t/a Asembo Soko Limited v Onyango Jonjo & Company Advocates (Miscellaneous Case E017 of 2024) [2025] KEHC 1056 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CASE E017 OF 2024**

DK KEMEL, J

FEBRUARY 28, 2025

BETWEEN

GEORGE OTIENO OTWAL T/A ASEMBO SOKO LIMITED APPLICANT

AND

ONYANGO JONYO & COMPANY ADVOCATES RESPONDENT

RULING

1. The Applicant herein has filed a chamber summons application (Reference) dated 22/10/2024 pursuant to the provisions of section 1A, 3B, 3A of the [Civil Procedure Act](#), Rule 11 of the Advocates Remuneration Order. It seeks the following reliefs:
 - a. That the reference filed herein be allowed
 - b. That this Honourable Court be pleased to set aside the Ruling of the taxing officer delivered on 9th October 2024 and the reasons contained therein entirely for want of jurisdiction.
 - c. That the costs of this application be provided for.
2. The application is supported by the grounds set out on the face thereof and by affidavit of Bruce Odeny learned counsel for the Applicant sworn on even date. The Applicant's gravamen is inter alia; that the Respondent herein lodged his Advocate-Client Bill of costs dated 16/8/2024 against the Applicant for taxation; that the Applicant raised a preliminary objection dated 24/8/2024 challenging the jurisdiction of the court to tax the said bill of costs; that the taxing officer upon admitting that it had no jurisdiction went ahead to enter judgement against the Applicant for the sum of Kshs 500, 0000/ with costs and interest; that it was erroneous for the taxing master to purport to handle the matter yet he had no jurisdiction and ought to down his tools; that the decision of the taxing master was in error and should be set aside; that this court has jurisdiction to overturn the decision of the taxing master.



3. The Respondent opposed the application and maintained that the application is incurably defective and should be dismissed with costs and that this court should invoke its powers and direct the Applicant to pay the Respondent the sum of Kshs 500, 000/ as per the retainer agreement dated 30/5/20224.
4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. The Applicant in his submissions reiterated the contents of his supporting affidavit sworn by his advocate Bruce Odeny. It was submitted further that due to the existence of a retainer agreement, the Respondent's Bill of Costs was void ab initio by virtue of section 45(6) of the Advocates Act. Finally, it was submitted that the chamber summons reference application be allowed with costs.
6. The Respondent on his part submitted that there is a retainer agreement between him and the Applicant in the sum of Kshs 500,000/=. It was submitted further that the taxing officer did not tax the bill but rather entered judgment as guided by the retainer agreement on record.
7. I have given due consideration to the application as well as the submissions filed. It is not in dispute that there was a retainer agreement between the Applicant and the Respondent dated 30/5/2024 in the sum of Kshs 500, 000/. I find the following issues necessary for determination namely:
 - i. Whether the taxing officer had jurisdiction to tax the Respondent's Bill of Costs.
 - ii. Whether the Applicant's application has merit.
8. As regards the first issue, it is noted that the Applicant did file a Preliminary Objection dated 26/8/2024 to the Respondent's Bill of Costs dated 16/8/2024 on the grounds that the taxing master had no jurisdiction to tax the said bill in view of the fact that there existed a retainer agreement between the Applicant and the Respondent and which offends the provisions of section 45 (6) of the Advocates Act. It is noted from the impugned ruling by the taxing master that he had no jurisdiction to tax the Bill of Costs but nevertheless went ahead to rule otherwise as can be seen from his disposition when he held thus:

“The agreement dated 30/05/2024 is a valid Remuneration/Retainer Agreement between the Applicant and the Respondent/client...The Remuneration Agreement ousts the Court's jurisdiction by virtue of section 45(6) of the Advocates Act to order for taxation of the Bill of Costs.... Judgment is entered for the applicant against the Respondent/client for Ksh 500,000/= with interest at courts rate and costs.”
9. It is thus clear that the learned taxing master upon finding that he lacked jurisdiction, should have downed his tools at that juncture but not to make one more step in the matter other than to order the Respondent's Bill of Costs struck out. In the case of Owners of Motor Vessel "Lillian S " Vs Caltex Oil (K) Ltd [1989] eKLR Nyarangi JA held thus: "jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
10. The Retainer Agreement dated 30/5/2024 was duly signed by the parties herein. That being the position, the salient provisions of the Advocates Act on this point are as follows:



- i. sections 45(1) of the *Advocates Act* provides as follows:

“ An 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.”
- ii. Section 45(2) of the said Act provides as follows:

A client may apply by chamber summons to the court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors...
- iii. Section 45(2A) of the Advocate’s Act provides:

An application under subsection (2) may be made within one year after the making of the agreement, or within three months after the demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise , whichever is the later.”
- iv. Section 45(6) of the *Advocates Act* provides as follows:

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.”

Going by the foregoing provisions of the *Advocates Act* and being guided by the Preliminary Objection raised by the Applicant before the taxing master, the prudent action to be taken by the taxing master was to down his tools in view of the lack of jurisdiction. Indeed, the Retainer Agreement ousts the jurisdiction of the court by virtue of section 45(6) of the *Advocates Act* to order for the taxation of bill of costs.

11. In the case of Richard Akwesere Onditi versus Kenya Commercial Finance Company Limited Kisumu *CA No. 329 of 2009* (UR) the court of appeal made observation inter alia thus: -

“ These were terms agreed between the parties in respect of the loan and ordinarily it is not in the province of the courts to re-write those terms for the parties however onerous they may be to one of them.”

As the parties had agreed on the retainer, it was not the business of the court to interfere with the same.

12. In view of the foregoing observations, it is clear that the learned taxing master went into error by proceeding to determine the Respondent’s bill despite having found that he lacked jurisdiction. I find that the decision of the taxing master must therefore be interfered with.
13. Consequently, the Applicant’s application (Reference) dated 22/10/2024 has merit. The same is allowed as prayed. The ruling by the taxing master delivered on 9/10/2024 is hereby set aside and substituted with an order striking out the Respondent’s Bill of Costs dated 16/8/2024 with costs to the Applicant herein.

It is so ordered.

DATED, AND DELIVERED AT SIAYA THIS 28TH DAY OF FEBRUARY, 2025.

D. KEMEI



JUDGE.

In the presence of:

Ms. Omondi for Odeny..... for Applicant

Onyango Jonjo..... for Respondent

Ogendo..... Court Assistant

