Githogori and Harrison Associates Advocates, LLP v Thika Coffee Mills Limited (Miscellaneous Criminal Application E022 of 2024) [2025] KEHC 1078 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISCELLANEOUS CRIMINAL APPLICATION E022 OF 2024

EM MURIITHI, J

FEBRUARY 27, 2025

BETWEEN

GITHOGORI AND HARRISON ASSOCIATES ADVOCATES, LLP APPLICANT

AND

THIKA COFFEE MILLS LIMITED .... RESPONDENT

RULING

1. The Respondent raised a Preliminary Objection to the applicant's Bill of Costs dated 29th July, 2024 on the following grounds:

    1. The Applicant has in his affidavit in support dated 15th July, 2024 at paragraph 2 admitted that there was an agreement on the fees between the parties as captured in the deposit fee noted dated 11th November, 2019 which indicates that the total fees was Kshs. 585,000/=

    2. That in the premise the Applicant bill of costs filed herein for Kshs. 1,056, 295/= is misconceived and contrary to the agreement on payment of fees accepted by the Applicant.

    3. The Applicant's bill of costs filed herein is in breach of Section 45 (6) of the *Advocates Act* which provides that; "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."

    4. This Honourable Court therefore lacks jurisdiction to tax the Applicant's bill of costs in view of the Applicant admitting that there was an agreement on fees and bill of costs before the Taxing Officer is an abuse of the court process.

    Reasons wherefore the Respondent prays that the bill of costs dated 29th April, 2024 be dismissed/struck off with costs to the Respondent.

2. The Counsel/applicant filed a response to the Preliminary Objection dated 20th August, 2024 that the Client attempts to mislead the Honourable Court by averring that there was a retainer agreement

between the parties herein whereas there was none. The respondent/client fails to attach the agreement he alludes to. The document filed herein and marked HML1 is a “Deposit Request Fee Note”. That the above said document is addressed to Kenya Alliance Insurance Company and not the Client herein. Furthermore, the author of the document is very clear that the amounts captured thereon shall be exclusive of disbursements. The document is not in any manner an agreement and the parties are not parties to this taxation cause. That Section 45(1) of the *Advocates Act* recognizes that there can be agreements with respect to Advocates remuneration. It provides that such agreements shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized.

Respondent/ client submissions

3. Section 18 (1) of the *Evidence Act* provides that; “Statements made by a party to proceedings or by an agent to any such party, who the court regards in the circumstances of the case as expressly or impliedly authorized to make them, are admissions”, which renders contents of the affidavit in support of Harrison Musyoka Lusyola dated 15th July, 2024 an admission that there was an agreement on fees with the Applicant despite the fee note having indicated that it was addressed to Kenya Alliance Insurance Co. Ltd.

4. The Respondent submits that Thika Coffee Mills Ltd and Kenyan Alliance Insurance Company have common directorship and ownership as indicated in the CR12 attached to the Replying affidavit of David Kimotho Kingori dated 13th September, 2024 and the Chairman/director of the Respondent company duly instructed Kenyan Alliance Insurance Company to pay the Applicant's legal fees on behalf of the Respondent in good faith which facts the Applicant was at all material times aware about.

5. The Applicant has failed to explain why he addressed the fee note that was about defending Thika Coffee Mills Ltd to Kenyan Alliance Insurance Company Ltd. which confirms that he was aware of the relationship between the two companies otherwise it would have been irrational to send the fee note to a strange and unrelated entity, if the Applicant was not aware of the connection between the two companies where the directors had approved that the fee note be sent to Kenyan Alliance Insurance Company Ltd.

6. The respondent submits that the fee note dated 11th November, 2019 that was addressed to Kenyan Alliance Insurance Company Ltd explicitly indicated that it was for instructions to defend Thika Coffee Mills Ltd and indicated at the first paragraph that, “Kindly note that the total fees in all the matter herein shall be Kshs. 585,000/= shall be payable as encapsulated under the advocates remuneration order, 2014”

   Further, the Applicant having admitted in writing that the fee note dated 11th November 2019 captured “the agreed fees to be charged by the Applicant in Criminal Case No.8 of 2018-Kianyaga” is precluded from denying the existence of an agreement of fees between the applicant and the Respondent in view of the principle of estoppel which is applicable herein. The respondent urged that the principle of estoppel was laid out in the case of *Gitaru Peter Munya-Vs-Dickson Mwenda Kithinji & 2 Others* 2014 eKLR where the Court of Appeal held that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary or inconsistent to what is implied by a previous action or statement of that person. Lastly, the respondent submits that the Applicant is not entitled to any fees beyond the amount of Kshs.585,000/= that he indicated to the Respondent to be the total fees payable for representing it in Criminal Case No.81 of 2018-Kianyaga which was the basis on which the Respondent relied on in instructing the Applicant, which renders the Applicant's bill of costs dated 29th April 2024 where the Applicant seeks fees in the amount of Kshs.1.056.295 an abuse of court in view of the estoppel operating against the Applicant and arising from his admission and representation to the Respondent.

7. The Respondents rely on the case of *Ntoitha MP Mithiaru v P.M.Wamae Advocates* Nyeri Civil Appeal No.17 of 2013 where the Court of Appeal in a similar situation held that:

> " We find that the respondent was bound by the representations made in its letter dated 20th March 2003 and was estoppel from seeking further fees. . .We find that the learned Judge erred by not appreciating that the respondent was bound by the representation he had made to the appellant... For avoidance of doubt the fees shall be taxed at a maximum of Kshs. 400,000/=."

Applicant/ advocate submissions

8. The applicants cite the principles of preliminary objection as laid down in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, at page 700 (Law JA):

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

9. The applicant submits that the Client has not raised any point of law in its alleged "preliminary objection" and that the entire argument is premised on facts, evidence and conjecture from which they want the court to make inferences.

Whether there was an agreement for fees

10. The applicant submits that the client would have provided a written agreement signed between the parties as contemplated under Section 45 of the *Advocates Act*. However, there is no agreement to furnish to the court. The advocates served the client with a "Deposit Request" and not a claim for full fees. The same can make an inference of "a retainer" between the parties but can in no way constitute "a retainer agreement". No doubt given the nature of the matter; the fees was indeterminate at the time of issuing instructions. The proviso of Section 45 of the *Advocates Act* under which the client raises the preliminary objection are self-explanatory. Not a single limb of the said proviso has been satisfied by the client in its preliminary objection.

11. What existed between the parties was a retainer (which is the issuing of instructions by the client to an advocate) and not a retainer agreement. The distinction of the two terms has over years been a subject before the courts. In the case of *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR

> " ... 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.

12. In this case, it is common ground that was no written but oral agreement regarding the retention and payment of the appellant's fees by the respondent. There was therefore no retainer agreement as envisioned by section 45 of the *Advocates Act* but simply a retainer. It is also common ground that the appellant had been duly instructed to act for the respondents and in so acting, used to be paid monthly fees as remuneration, as evidenced by the invoices adduced in evidence detailing those monthly payments.

Issue

13. The issue for determination is whether the Respondent has established the preliminary objection.

Analysis

14. The Respondent Client herein filed a Notice of Preliminary Objection dated 29th July, 2024 to the Applicant/ Advocate's bill of costs dated the 29th April, 2024 whereby it has raised a preliminary point of law that this Honourable Court lacks jurisdiction to tax the Applicant's bill of costs in view of the Applicant admitting that there was an agreement on fees and bill of costs before the Taxing Officer is an abuse of the court process.

15. That the Applicant has in his affidavit in support dated 15th July 2024 at paragraph *2* admitted that there was an agreement on the fees between the parties as captured in the deposit fee noted dated 11th November, 2019 which indicates that the total fees was Kshs. 585,000/=.

16. Further, the respondent argue that the Applicant's bill of costs dated 29th April 2024 filed herein for Kshs. 1,056,295/= is misconceived and contrary to the agreement on payment of fees accepted and admitted by the Applicant in writing as contained in the fee note dated 11th November, 2019 and the affidavit in support dated 15th July, 2024.

17. Thus, the applicant's bill of costs dated 29th April 2024 filed herein is therefore in breach of Section 45 (6) of the *Advocates Act* which provides that:

> " 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."

18. The principles of the nature of preliminary objection are set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*., *supra*. At page 701 At p. 701 Newbold, P. said:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop"

19. The Respondent/client's case is that the Applicant's bill of costs filed herein is in breach of Section 45 (6) of the *Advocates Act* which provides that "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."

20. The respondent submits that the fee note dated 11th November, 2019 that was addressed to Kenyan Alliance Insurance Company Ltd explicitly indicated that it was for instructions to defend Thika Coffee Mills Ltd and indicated at the first paragraph that, "Kindly note that the total fees in all the matter herein shall be Kshs. 585,000/= shall be payable as encapsulated under the advocates remuneration order, 2014" and that the applicant/ client is estopped from denying the fact the

document is an agreement on fees. They rely on the case of *Ntoitha MP Mithiaru v P.M.Wamae Advocates* Nyeri Civil Appeal No.17 of 2013 where the Court of Appeal in a similar situation held that:

> " We find that the respondent was bound by the representations made in its letter dated 20th March 2003 and was estoppel from seeking further fees. . .We find that the learned Judge erred by not appreciating that the respondent was bound by the representation he had made to the appellant... For avoidance of doubt the fees shall be taxed at a maximum of Kshs. 400,000/=."

21. However, the applicant/ client argues the said document filed herein and marked HML1 is a "Deposit Request Fee Note". It is not a claim for full fees. The same can make an inference of "a retainer" between the parties but can in no way constitute "a retainer agreement". The applicant/client avers that the said document is addressed to Kenya Alliance Insurance Company and not the Client herein. Furthermore, the author of the document is very clear that the amounts captured thereon shall be exclusive of disbursements. The document is not in any manner an agreement and the parties are not parties to this taxation cause.

22. Further in this case, it is common ground that was no written but oral agreement regarding the retention and payment of the appellant's fees by the respondent. In the case of *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR

> " ... 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.

23. Section 45 of the *Advocates Act* under which the client raises the preliminary objection are self-explanatory. It would appear that not a single limb of the said proviso has been satisfied by the client in its preliminary objection. There is no express agreement between the parties on legal fees. The purported deposit fee note dated 11th November, 2019 which indicates that the total fees was Kshs.585,000/= has been disputed by the applicant/client.

24. The law on preliminary Objections is clear that a preliminary objection "cannot be raised if any fact has to be ascertained....". The disagreement on the existence of an agreement is a matter of fact and law, which shall be ascertained by the Deputy registrar/Taxing Officer and, consequently, the applicant's bill of costs should be taxed.

25. The Court respectfully notes the decision of the Court in *Omulele & Tollo Advocates v Mount Holdings Limited* (*supra*) that:

> In this case, there is no doubt at all that on the evidence on record, the relationship that governed the appellant and the respondents was a retainer and in the event of a disagreement, the appellant was entitled to tax its bill of costs.

26. The Deputy Registrar taxing officer must ascertain and determine whether there was an agreement between the advocate and the client, and this may only be done at the hearing/taxation of the Bill of Costs.

27. Order

28. Accordingly, for the reasons set out above, the Court finds that the preliminary Objection was wrongly raised and it is dismissed.

29. The Taxation of the Bill of Costs shall proceed on such dates to be fixed by the Taxing Officer in consultation with the parties.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Orunga for the Applicant.

Mr. Thuo for the Respondent.