



Fedha v Shibanda t/a Shibanda & Co Advocates (Miscellaneous Civil Application 4 of 2021) [2024] KEHC 4841 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION 4 OF 2021
AC MRIMA, J
APRIL 25, 2024**

BETWEEN

JANET FEDHA APPLICANT

AND

VIVIAN SHIBANDA T/A SHIBANDA & CO ADVOCATES RESPONDENT

RULING

Background

1. Janet Fedha, the Applicant herein, filed a Reference by way of a Chamber Summons dated 8th September 2021. It was supported by the Affidavit of Jerimiah Onger Samba deposed to on a similar date.

PARA 2.

3. The application sought the following reliefs: -

- a. That the Ruling of the Deputy Registrar made on 17th August be set aside;
- b. Cost of this reference be provided for;
- c. Any other alternative order that this honourable court may deem just to grant.

4. In the grounds in support of the application, the Applicant stated that the Deputy Registrar did not give any reasons for costs awarded and applied the wrong Schedule of the [Advocates Remuneration Order](#).

5. It was further her case that the Deputy Registrar ignored and disregarded her written submissions and instead went on a frolic of her own thus arriving at a wrong decision.



6. The Applicant asserted that the applicable Schedule regarding instructions to file an objection on a Succession Cause is Schedule 10(1)(f) of the *Advocates Remuneration Order* which sets fees chargeable at Kshs 10,000/- but the Registrar applied Schedule 10(1)(a) which deals with instructions fees.
7. Further, the Applicant claimed that the Deputy Registrar disregarded a fees agreement between the Applicant and the Respondent dated 14th September 2021 duly executed by both parties setting the fees at Kshs 300,000/- thus arriving at the wrong decision.
8. To that end, she pleaded that the Deputy Registrar failed to consider the sum of Kshs 200,000/- which she had already deposited with the Respondent and receipt thereof duly acknowledged.
9. In the Supporting Affidavit, it was deposed that the instant dispute arose as a result Kitale High Court Succession Cause No 109 of 2007 where she instructed the Respondent to lodge an application for annulment/objection of a confirmed Grant.
10. To that end, it was deposed that the Applicant executed a fees agreement of Kshs 300,000/- as instructions fees. It was stated that the sum of Kshs 1,190,346/- granted to the Respondent by the Taxing master for merely filing an application amount to a denial of access to justice and a misconception of the principles of taxation.
11. It was deposed that the in the Ruling, the Deputy Registrar allowed item 1,2,3, and 4 without considering that they were premised on Schedule 10(1)(a) instead of Schedule 10(1)(f).

The Submissions

12. In its submissions dated 16th June 2024, the Applicant submitted that according to Section 45 of the *Advocates Act*, Advocates and their Clients are permitted to negotiate and enter into an Agreement on remuneration and in such instances costs of an Advocate shall not be subject to taxation.
13. To buttress the foregoing, the Applicant referred to *Sbiva Enterprises v Mwangi Njenga & Company Advocates* (2020) eKLR and *Majanja Luseno & Company Advocates v Leo Investments Ltd. & another* (2017) eKLR. In the latter it was observed:

.... In my considered opinion, correspondences are capable of giving rise to agreements provided that there was an offer, an acceptance and consideration which can be discerned from the correspondence that would mean that there was an agreement.
14. It was the Applicant's position that considering the fixed fees in the Agreement dated 14th September 2014, the Respondent was estopped from pursuing any other further fees. The Applicant relied on Section 120 of the *Evidence Act* and the decision in Miscellaneous No 165 of 2007 *D. M Njogu & Co. v National Bank Ltd* (2016) eKLR.
15. In submitting that the Deputy Registrar fell into error in her taxation, it was submitted that she failed to give reasons and the factors that gave rise to Kshs 1,190,346/= were not laid out. It was her case that it was manifestly excessive and unreasonable in view of the fairly simple case.
16. In urging the Court to interfere with the decision of the Taxing Master, the decision *First American Bank of Kenya v Shab & others* (2002) 1 EA 65 was referred to in which it was observed;

.... The Court cannot interfere with taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle...



17. In the end, the Applicant submitted that there was a valid Fees Agreement and as such the Deputy Registrar had no jurisdiction. She urged this Court to strike out the application in view of Section 45(6) of the *Advocates Act*.

The Response:

18. Vivian Shibanda challenged the application through her Replying Affidavit deposed to on 21st September 2021.
19. The Respondent denied the existence of a valid written agreement between herself and the Applicant. It was her case that what was there is instruction fees from the Respondent sent to the Applicant but the Applicant edited it making it to include instructions fees and terms of payment which amendments she did not agree to.
20. The Respondent claimed that the Applicant refused to pay the legal fees leading to the disputed taxation. It was her case that there were no agreed fees between the partes herein.
21. On the foregoing, she urged the Court to dismiss the application.

Submissions:

22. In its submissions dated 21st June 2023, the Respondent stated that the Applicant had faulted the Taxing master's decision but had not stated the specific items that were erroneous.
23. As regards the claim that the figure was excessive, the Respondent, based on the decision in *Republic v Ministry of Agriculture & 20 others Ex-parte Muchiri W. Njuguna* (2006) eKLR, submitted that there was no error committed by the Taxing Officer.
24. The Respondent submitted further that there was no valid agreement rather, an instruction form that the Applicant signed and sent to the Applicant only for the Applicant to amend it and send it back to the Respondent.
25. The Respondent submitted that since the Respondent neither filed a Preliminary Objection challenging the jurisdiction of the Deputy Registrar nor objected to the proceedings thereon, she could not now challenge the Registrar's Ruling.
26. She urged that the reference be dismissed with costs.

Analysis:

27. From the presentation of the respective parties' cases, the following issues emerge for determination: -
 - i. Whether there was an agreement between the Applicant and the Respondent on legal fees.
 - ii. Depending on (i) above, the validity of The Taxing Master's decision.
28. This Court will, however, consider the two issues together.
29. The whole dispute herein revolves around the question whether there was an agreement between the parties to govern their engagements from the very outset.
30. I say so because, once it is established that there was an agreement, it essentially ousted the application of the *Advocates Remuneration Order* at the peril of the Respondent.



31. Undoubtedly, there is on record instructions from Client to Advocate. Due to its centrality on the question as to whether it comprised an agreement, I will reproduce its contents as hereunder;

INSTRUCTIONS FROM CLIENT TO ADVOCATE

Name of the client: Janet Khevali Fedha

ID No XXXXXXXXX

AUTHORITY

I Janet Khevali Fedha of e-mail address xxxxxxxxx telephone No xxxxxxxxx do hereby instruct the firm of V.A Shibanda & Company Advocates to pursue this claim on my behalf with regard to Kitale High Court Succession Cause Number 190 of 2007.

Agreed fees Kshs 300,000/- (three Hundred Thousand Shillings Only) All inclusive.

Signature xxxxxxxxx Date 14/09/2020

To be paid as follows:

1st Instalment of Kshs 100,000/- for commencement of the application

2nd Instalment of Kshs 100,000/- after hearing date is obtained

3rd Instalment of Kshs 100,000/- to be discussed.

32. In paragraph 5 of the Replying Affidavit, the Respondent claimed that the foregoing was not a valid agreement. It was just instructions form from the Firm mailed to the Applicant in PDF formant for her signature. Instead of signing it, the Applicant amended it to include instructions fees and terms of payment.
33. I will briefly look the basics of formation of a contract. In *Stancom Sacco Society Ltd v Alliance one Tobacco Ltd* [2018] eKLR, the Court observed as follows: -
- To create a contract, there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly...
34. The instructions note was prepared by the Advocate/Respondent in an official letterhead. Although the document shows that it was done in two different fonts, there are no erasures or any overwriting thereto.
35. The Respondent contended that the Client amended the document, which amendments she did not approve of. However, the Respondent did not favour the Court with the original document sent to the Client.
36. By assuming that indeed there were some amendments, which were not proved, the Respondent acknowledged receipt of the amended instruction note [which she did not approve of the amendments], but surprisingly she did not in any way raised any protest to it. Instead, she continued representing the Applicant/Client.
37. Respectfully, the Respondent's conduct cannot be viewed favourably by this Court. Essentially, the continued representation of the Client in circumstances of this matter gave rise to an implied contract by conduct that there was a valid Fees Agreement in place.



38. The foregoing position is fortified by the Court of Appeal in *Ali Abdi Mohamed v Kenya Shell & Co. Ltd* [2017] eKLR where it was observed: -

.... It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded....

39. Having received Kshs 200,000/- pursuant to the Agreement, the Respondent is estopped from turning around and claiming that there was no agreement. As an Advocate, the Respondent was duty bound to ensure that her conduct did not set into operation Sections 45(1) and 45(6) of the *Advocates Act* which allows Fees Agreements between Advocates and Clients and bars any taxation in their place.

40. This Court's attention is further drawn to Nairobi Civil Appeal No 165 of 2007 *D. Njogu & Company Advocates v National Bank of Kenya Limited* (2016) eKLR where the Court of Appeal observed that: -

... In our view an Advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the *Advocates Remuneration Order*, cannot maintain proceedings whose purport is to void the illegal contract by reverting to Court to tax his Advocate/Client Bill of Costs in accordance with The *Advocates Remuneration Order*. This Court cannot come to the Appellant's aid as the Appellant is estopped by his conduct from seeking the Court's intervention.

41. That said, it goes that the Taxing Master did not have any jurisdiction to tax the Respondent's Bill of Costs.

42. Therefore, this is a matter in which the taxation by the Taxing Officer was based on an error of principle and failed to consider the relevant fact that there was indeed a valid Fees Agreement between the Applicant and the Respondent.

43. The upshot is that instant Reference is meritorious and the following final Orders hereby issue: -

- a. The Ruling of the Deputy Registrar delivered on 17th August 2021 is hereby set aside in its entirety.
- b. The Respondent's Advocate/Client Bill of Costs dated 2nd March 2021 is hereby struck out.
- c. Costs of the application to be borne by the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

No appearance for Mr. Samba, Learned Counsel for the Applicant.

No appearance for Miss. Shibanda, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

