



**Babu Law Firm v Kabiru (Environment and Land Miscellaneous Application  
E107 of 2020) [2023] KEELC 597 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E107 OF 2020  
SO OKONG'O, J  
FEBRUARY 9, 2023**

**BETWEEN**

**BABU LAW FIRM ..... ADVOCATE**

**AND**

**ANJELA KABIRU ..... CLIENT**

**RULING**

1. Sometime in July 2018, the respondent instructed the applicant to act for her and advise her generally in the purchase of a property known as Unit B2 situated on L R no Subdivision 368 Section III Mainland North, Kilifi (hereinafter referred to only as “the suit property”). The respondent had expressed interest in purchasing the suit property from a company known as Martova Limited. The applicant acted for the respondent as instructed. On July 23, 2018, the applicant served the respondent with a demand for fees in the sum of kshs 320,000/-. A dispute arose thereafter as to the nature of the instructions that were given to the applicant by the respondent, particularly on the services that the applicant was supposed to undertake for the respondent. Several e-mails were exchanged by the parties on the issue resting with the e-mail from the applicant to the respondent dated September 6, 2018 in which the applicant stated as follows in part:

“...I wrote to you several emails last week to try to resolve this matter and I received no response I even went as far as prompting you to read your emails via cellular text and I received no response. It is only when I threatened to withdraw my services, that I got a response from George and yourself. Nevertheless, if you read the said emails note that I asked you not to pay any legal fees as you were disgruntled about the services offered, stating that I only read the sale agreement and overcharged you disregarding the changes that I effected in the sale agreement to suit you and even went further on to assist in execution of the documents which I delivered to you on the ground of mutual respect. Fair enough with my experience, morality and integrity I chose to walk away as of September 4, 2018.



2. All that said and done, I believe now its crystal clear that I expect no pay from you neither am I moving forward as your lawyer in this transaction. I regret how things punned out but all in all I wish you well going forward.”(emphasis added)
3. On August 19, 2020 after about 2 years from the date of the said email from the applicant, the applicant served the respondent with a letter through Horeria Kamau & Company Advocates demanding payment of a sum of kshs 320,000/- as outstanding legal fees. The respondent did not pay the said sum of kshs 320,000/- that was demanded by the applicant as a result of which the applicant filed the bill of costs herein dated October 27, 2020 for taxation. In the bill of costs, the applicant claimed a sum of kshs 300,000/- as instruction fees for acting for the respondent in the purchase of the suit property together with 14% VAT amounting to kshs 20,000/- and disbursements of kshs 20,000/- making a total of kshs 362,000/- all inclusive. The applicant’s bill of costs came up for taxation before the deputy registrar, Hon Diana Orago who dismissed the same on June 24, 2021 on the ground that the applicant had agreed to waive the legal fees due from the respondent and as such, it was estopped from filing a bill of costs for taxation.
4. The applicant was dissatisfied with the said decision of the taxing officer and brought this reference by way of Chamber Summons dated July 7, 2021. In its application, the applicant sought an order that the taxing officer’s decision made on June 24, 2021 dismissing the applicant’s bill of costs dated October 27, 2020 be set aside and for the court to proceed to either reassess the fees due to the applicant or in the alternative remit the bill of costs to another taxing officer for taxation.
5. The application that was supported by the affidavit of Wambui Babu was brought on several grounds. The applicant averred that in dismissing its bill of costs, the taxing officer misdirected herself on the discretion bestowed upon her by the law and also omitted to take into account relevant factors. The applicant averred that the taxing officer failed to take into account the work undertaken by the applicant and the respondent’s response to the applicant’s demand for fees. The applicant averred that the taxing officer failed to consider the events that led to the applicant telling the respondent that it did not expect any payment from her. The applicant averred that its email to the respondent to the effect that it expected no payment from her did not amount to a waiver of legal fees. The applicant averred that the taxing officer ignored its submissions. The applicant averred that the taxing officer who had also dismissed the applicant’s bill of costs in another matter on the same day was biased against the applicant.
6. The respondent opposed the application through a replying affidavit sworn on September 24, 2021. The respondent admitted that she instructed the applicant to review an agreement for sale in respect of a property (the suit property) that she was purchasing. The respondent stated that the applicant thereafter sent to her a fee note for kshs 300,000/- which she found high for the services rendered. The respondent averred that she asked the applicant to clarify the fee note and to give a breakdown of the fees charged. The respondent averred that instead of responding to the concerns that she had raised, the applicant voluntarily agreed to waive its legal fees and also ceased to act for the respondent in the matter. The respondent averred that the applicant was not entitled to file a bill of costs for taxation of the costs that it had waived. The respondent averred that there was no evidence of bias by the taxing officer. The respondent averred that the taxing officer did not commit any error of principle in dismissing the applicant’s bill of costs.
7. The application was argued by way of written submissions. The applicant filed its submissions on July 6, 2022. The applicant submitted that the taxing officer erred in her finding that the applicant did not act for the respondent in the sale transaction while it was clear from the sale agreement that the applicant was the advocate for the purchaser (respondent). The applicant submitted that there was no



- dispute that it had been instructed by the respondent to act for her in the transaction and that she executed the said instructions. The applicant submitted that the applicant had stated in her e-mail of September 13, 2018 that she was willing to pay for the services rendered but made no payment despite several reminders. The applicant submitted that its legal fees was charged in accordance with the scale and that instead of negotiating the fees, the respondent refused to pay the same claiming that it was excessive.
8. The applicant submitted that it decided not to fight with the respondent over fees but to seek legal redress which the respondent mistook for waiver of fees. The applicant submitted that it did not waive its legal fees due from the respondent. The applicant submitted that the statement in its email to the respondent to the effect that it expected no payment from the respondent which was misinterpreted by the taxing officer to mean fees waiver was just an expression of its frustration in pursuing the recovery of its fees from the respondent. The applicant submitted that it had rendered services and raised a fee note and as such it could not be taken to have been acting for the respondent pro bono. The applicant reiterated that the taxing officer was biased against it and urged the court to allow the application.
  9. The respondent filed submissions dated September 24, 2021. The respondent framed one issue for determination by the court namely, whether the taxing officer's ruling of June 24, 2021 on the applicant's Advocate-Client Bill of Costs dated October 27, 2020 should be varied. The respondent submitted that the taxing officer's ruling of June 24, 2021 should be affirmed without any variation. The respondent submitted that the grounds put forward in support of the applicant's Chamber Summons application dated July 7, 2021 were baseless. The respondent submitted that the applicant waived her right to legal fees for the work done after it declined to unbundle and explain the fees charged choosing instead to waive the entire fee. The respondent submitted that with the express waiver of legal fees by the applicant, any interrogation by the taxing officer on the nature, importance or amount involved in the brief given to the applicant by the respondent would have been moot. The respondent submitted that the email dated September 6, 2018 by the applicant to the respondent reproduced above provided clearly that the relationship between the applicant and the respondent had ended and that the applicant had waived any claim to legal fees as against the respondent.
  10. The Respondent submitted that the taxing officer could not be faulted for dismissing the Applicant's bill of costs since she only gave effect to the will of the Applicant as expressed in her email aforesaid. The Respondent submitted that as observed by the taxing officer, the applicant could not be allowed to blow hot and cold air at the same time. The respondent submitted that the applicant was engaged by the respondent to provide her with legal services in the course of which she raised a fee note for kshs 300,000/-. The respondent submitted that when she sought clarification on how the fee was arrived at, the applicant indicated that it was disengaging from the assignment and would not claim any fees from the respondent. The respondent submitted that surprisingly, 2 years after waiving legal fees, the applicant filed the bill of costs in contention which the taxing officer dismissed on account of the applicant's express indication that it would not claim any fees from the respondent. The respondent submitted that having waived its fees, it was irregular for the applicant to turn around and file a bill of costs for taxation against the respondent. The respondent submitted that the taxing officer was correct in dismissing the said bill of costs. The respondent urged the court to dismiss the applicant's application with costs.

#### **Analysis and determination:**

11. I have considered the applicant's application and the response thereto by the respondent. I have also considered the submissions by the parties and the authorities cited in support thereof. The following is my view on the matter: It is common ground that the taxing officer did not tax the applicant's bill



of costs. The entire bill of costs was dismissed on the ground that the applicant had agreed to waive its legal fees that were due from the respondent for the services rendered to her.

12. In *748 Air services Ltd v Theuri Munyi* [2017] eKLR, the Court of Appeal cited the case of *Banning v Wright* (1972) 2 All ER 987 at page 998; where the House of Lords stated as follows on waiver:

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.

13. In *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2007] eKLR the court stated that:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

14. In *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 16 at page 992, waiver has been defined as follows:

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.”

15. In *Njogu & Company Advocates v National Bank of Kenya Ltd* (2016)eKLR the court stated as follows:

“(26) 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 avoid the illegal agreement by reverting to the court to tax his advocate/client bill of costs in accordance with the Advocate's Remuneration Order. We concur with the learned judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention. We find no merit in this appeal as the appellant's bill of costs was properly struck out. Accordingly, the appeal is dismissed with costs.”



16. What I need to determine is whether the applicant had agreed to abandon its right to legal fees. As stated in the cases that I have cited above, a waiver must be intentional. Can it be said from the tone of its email dated September 6, 2018 that the applicant intentionally agreed to waive its legal fees for the services rendered to the respondent? My answer is negative. The applicant was instructed by the respondent to act for her in the purchase of a property. The applicant was entitled to legal fees for the services rendered. The applicant executed the respondent's instructions after which it raised a fee note for settlement. The respondent objected to the fee note on the ground that it was exorbitant. The parties tried to resolve the dispute unsuccessfully. The email dated September 6, 2018 was just one of the many emails that the parties exchanged. The parties continued communicating over the issue of fees even after that email. In the respondent's email to the applicant dated September 13, 2018, the respondent stated that what she wanted was clarity and a breakdown of the charges and that she was willing to pay for the services rendered. If at all the applicant had waived its fees for the services rendered through its email dated September 6, 2018, why was the respondent still engaging it on the issue on September 13, 2018? It is my finding that the applicant had no intention of waiving its legal fees for the services rendered to the respondent. The tone of the email dated September 6, 2018 leaves no doubt that the same was written by the applicant out of frustration with the manner in which the respondent handled the issue of its fees. The email was not an intentional unequivocal agreement to waive legal fees. It follows therefore that the applicant was entitled to file its bill of costs for taxation since the respondent had contested its itemized bill.
17. In *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, the court stated that:
- “The circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are:
1. that the court cannot interfere with the taxing officer's discretion 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 interference that it was based on an error of principle;
  2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
  3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
  4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
18. In the South African case of, *Visser v Gubb* 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in *KTK Advocates v Baringo County Government* [2017] eKLR, the court stated as follows:
- “The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for



example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

19. From what I have set out above, I am in agreement with the applicant that the taxing officer committed an error of principle when she dismissed the applicant’s bill of costs on the ground that the applicant had waived its legal fees which was not the case. The applicant has therefore made out a case for this court to interfere with the decision of the taxing officer.

20. In *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] 1KLR528 the court stated as follows:

“ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D’Sonza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (no 2) [1978] KLR 243.”

21. Since the taxing officer did not tax the applicant’s bill, I am of the view that it would not be in order for this court to undertake the taxation. The taxing officer is in my view well placed to carry out that exercise. In *Republic v Kenyatta University & Another Ex parte Wellington Kihato Wamburu* [2018] eKLR the court cited with approval the Ugandan Supreme Court case of *Bank of Uganda v Banco Arabe Espanol SC Civil Application no 23 of 1999*, where the court stated as follows:

“Save in exceptional circumstances, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge.”

**Conclusion:**

22. In conclusion, I find merit in the applicant’s application dated July 7, 2021. The ruling by the taxing officer dated June 24, 2021 dismissing the applicant’s advocate-client bill of costs dated October 27, 2020 is set aside. The bill is remitted back to the taxing officer for taxation. The taxation shall be undertaken by any other deputy registrar apart from Hon D Orago. Each party shall bear its own costs.

**DATED AND DELIVERED AT KISUMU ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**S OKONG’O**

**JUDGE**

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

**N/A for the applicant**

**Mr Simiyu for the respondent**

**Ms J Omondi-court assistant**

