



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. CIVIL CASE NO. 73 OF 2017

[CORAM: HON. R.E.ABURILI J.]

OTIENO AMISI & CO. ADVOCATES.....APPLICANT

VERSUS

AFRICA MERCHANT INSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. This is a Miscellaneous Civil Application brought by way of Notice of Motion dated 8/3/2018 under the provisions of Section 51 (2) of the Advocates Act, Chapter 16 of the Laws of Kenya, Sections 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010. It seeks for one main order that:

(i) Judgment be entered for Kenya Shillings Eighty Six Thousand Four Hundred Only (Kshs. 86,400) in accordance with the certificate of costs dated 7/3/2018 and a decree to issue therefrom.

(ii) That costs be in the cause.

2. The parties herein being **OTIENO & AMISI ADVOCATES** as the Applicant, while the Respondent is **AFRICA MERCHANT ASSURANCE COMPANY LIMITED**

SUMMARY OF THE CASE

3. By a ruling delivered on 17/1/2018, the Advocate Client Bill of Costs dated 12/10/2017 between the Applicant Advocate and the Respondent client was taxed at Kshs. 86,400/= and a Certificate of Costs issued thereafter for the said sum on 7/3/ 2018.

4. It is thus the Applicant's claim that judgment should be entered by this court and a decree drawn for the taxed costs/the award be enforced because despite numerous notices to pay, the Respondent has failed to do so.

5. The Application is supported by the Affidavit of Bernard Otieno of Bernard Otieno & Amisi Advocates dated 7/3/2018. In the affidavit, it is deposed that the Applicant filed an Advocate Client Bill of costs on 12/ 10/ 2017 and by a ruling delivered on 17/01/2018 the same was taxed at 86,4000/= but the Respondent has not made good the amount despite several notices to them to pay. Annexed in the affidavit is a sample of the notices thereto to the Respondent.

6. The Applicant hence prays for judgment on the Certificate pursuant to Section 51 (2) of the Advocates act, stating that unless judgment is entered, the Applicant cannot execute against the Respondent within the parameters of law.

7. The Respondents filed **Grounds of Opposition** to oppose the motion of 8/3/2018 and in the grounds stated that the Respondent is a stranger to the Advocate /Applicant as it has never retained the firm of Otieno & Amisi Advocates to represent it or any part in Ukwala SRMCC No. 85 of 2014 wherefrom costs emanate and that Section 51 (2) of the Advocates Act only applies where the retainer is admitted.

8. That the applicant advocates have not fulfilled the requirements of Section 51 (2) of the Advocates Act adding that the certificate of costs has never been served upon the client or its Advocates.

9. The Applicant further filed a Supplementary Affidavit dated 8/5/2018 for the main purpose of producing the following documents before the Court in support of the Bill of costs; a) Letter of instructions dated 01/04/2015 from the Respondent to the Applicant. That the same was received by the Applicant on 21/04/2015 and in so doing annexed a copy of the said letter of instruction. From b) to f) they have annexed

letters from the Applicant to the Respondent dated 20/7/2015, 1/2/2016, 29/2/2016, 10/5/2016, 1/7/2016 served and received by the Respondent on 21/7/2015, 2/2/2016, 29/2/2016, 11/ 5/2016, 6/7 2016 respectively and that the letter dated 10/5/2016 was informing the Respondent of the outcome of the court attendance on 27/1/2016. A duly filed Memorandum of Appearance and Defence filed on behalf of the Respondent by the Applicant was annexed too.

SUBMISSIONS

10. The application was dispensed by way of written submissions by both parties as are discussed below.

APPLICANT'S WRITTEN SUBMISSIONS

11. In their submissions, the Applicant reiterates the above stated depositions in the case summary and frames the issues for determination as follows:

B. Issues for Determination.

i). Whether the Applicant was retained by the Respondent in Ukwala SRMCC No. 85 of 2014.

ii). Whether the Applicant complied with the provisions of Section 51 of the Advocates Act, Chapter 16 Laws of Kenya.

iii) Whether the Certificate of costs was served upon the Respondent.

iv) Whether the Application has merit.

12. On **Whether the Applicant was retained by the Respondent in Ukwala SRMCC No. 85 of 2014.** It was submitted that to dispense with the issue adequately, it would be important to understand the meaning of a retainer and thus state that according to the **Black's Law Dictionary, 9th Edition**, and a retainer is defined as:

A. A client's authorization for a lawyer to act in a case.

B. a fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.

C. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.

D. an advance payment of fees for work that the lawyer will perform in the future – also termed retaining fee

13. Further, that in Halsbury's Laws of England, 5th Edition, the concept of a Retainer is defined as follows: **The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment. It was therefore** submitted that "retainer" covers a broad spectrum; it encompasses the instructions given to an Advocate as well as the fees payable thereunder and that a retainer need not to be written, it can be oral, and can even be inferred from the conduct of the parties and state that however, if there is no evidence of a retainer, except a statement from the Advocate, which a client contradicts, the Court will treat the Advocate as having acted without authority from the client.

14. It was submitted that in light of the foregoing, by a letter dated 01/04/2015, the Respondent instructed the Applicant to represent and defend their insured in **UKWALA SRMCC NO.85 OF 2015**. That considering the fact that the Respondent had not disowned the letter and that it was upon receipt of the said letter dated 21/04/2015 that the Applicant proceeded to represent the Respondent in UKWALA SRMCC NO. 85 OF 2015.

15. That Section 35(1) of the Evidence Act, Chapter 80 Laws of Kenya provides inter alia:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document, and tending to establish the fact that on production of the original document be admissible as evidence of the fact if the following conditions are satisfied, that is say:

a) If the maker of the statement either;

i. had personal knowledge of the matters dealt with by the statement...'

16. It was thus submitted that the provision gives rise to the usual rule on production of documents and that the Court should take judicial notice that a document speaks for itself hence therefore, it was submitted that the issue of retainer is not in dispute since there was a written retainer on record and it follows that the Respondent in this matter retained the services of the Applicant and it should meet the costs taxed.

17. It was further submitted that in **Njougoro & Company Advocates vs. Dubai Bank Kenya Limited [2008] eKLR** a retainer was disputed in a Notice of Motion Applicant seeking for judgment to be entered for the Applicant against the Respondent in the sum taxed and certified by the principal deputy registrar and in relying on the instruction letter by the Respondent to the Applicant that was produced in

Court, Hon, Nambuye, J (as she then was, held that the party that retained the services of the Applicant is the Respondent and it is the party to meet the taxed costs.

18. On **Whether the Applicant complied with the provisions of Section 51 of the Advocates Act, Chapter 16 Laws of Kenya**. It was submitted that Section 51 of The Advocates Act provides as follows:

General provisions as to taxation:

1. Every application for an order for the taxation of an advocate's bill or for delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.

2. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court make such an order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that the judgment be entered for the sum certified to be due with costs.

19. It was thus submitted that the Applicant has complied with the provisions on Section 51 of the Advocates Act and that in any event, failure to comply with Section 51(1) of the Advocates Act is not prejudicial to the Respondent and the same is a procedural technicality curable under Article 159 (2) (d) of the Constitution, 2010 and in support thereof stated that in **Raila Odinga vs. I.E.B.C & Others [2013] eKLR**, the Supreme Court held that:

"Article 159 (2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to the procedural requirements at the expense of substantive justice.

19. On **whether the Certificate of Costs was served upon the Respondents**, it was submitted that while it is the Respondent's contention that they were never served with the Certificate of Costs, they on the other hand took part in the taxation proceedings and thereafter a ruling was delivered on notice by the Court to all parties to the proceedings which the Respondent failed to attend. That nevertheless, the Applicant proceeded vide a letter dated 13/02/2018 to the Respondent's Advocates notifying them of the outcome of the Ruling delivered on 17/01/2018 and requesting them to have their client settle the taxed costs in the sum of Kshs.86,400.

20. As such, it was submitted that the same cannot be a ground to challenge an Application under Section 51 (2) of the Advocates Act and that if the Respondent was not served with the Certificate of Costs as alleged, it duly received the same when the present Application was served upon it whereby a copy of the Certificate of Costs dated 07/03/2018 was attached. Reliance was placed on the holding by A. Mabeya, J in **Kithi & Company Advocates vs. Menengai Downs Limited [2015] eKLR**, where the Applicant was seeking judgment in its favour in the sum of costs taxed by taxing officer. That the said Application was made pursuant to Section 51 (1) and (2) of the Advocates Act similar to the Application currently before this Court and that the court held that;

As to the ground that no Certificate of Costs/taxation has been served upon the client, that cannot be a serious ground to challenge an application under Section 51 of the Advocates Act. If the Respondent had not been served with the Certificate of Taxation, it must have received the same when the present application was served upon it. This is because, produced and annexed as "GK1" to the Affidavit in support is a copy of the Certificate of Taxation dated 19th June, 2014.

21. It was thus submitted that it is therefore absurd for the Respondent to raise the same as a ground of opposition having participated in the taxation proceedings and several notices having been served upon them in order to comply.

22. On **whether the Application is merited**, it was submitted that the Application is premised on Section 51(2) of Advocates Act, Chapter 16 Laws of Kenya and that the Section provides for summary procedure in relation to entry of judgment on matters arising from taxation. That further, it gives this Honourable Court the discretion to enter judgment on Certificate for Taxation which has not been set aside or altered, where there is no dispute as to retainer, which is a mode of recovery of taxed costs provided by law in addition to filing of a suit.

23. Further, that the Respondent did not at any point file a reference challenging the taxation while stating that a Certificate of Taxation once issued is final and binding on the parties unless it is set aside or altered by the Court yet the present Certificate of Costs has not been set aside neither has it been altered, adding further that, on the issue of dispute of the retainer, they (Applicant) have adduced evidence through the Supplementary Affidavit to prove the retainer.

24. Reliance was placed on the case of **Wilfred Nyaundi Konosi t/a Konosi & Company Advocates vs. John Lokorio [2015] eKLR**, where the High Court sitting at Nakuru on an Appeal arising from an Advocate – Client Certificate of Costs issued by the taxing master in respect of services rendered by the Appellant to the Client (Respondent) held that:

"Once a Certificate of Costs is issued and has not been set aside or altered, no other action would be required from the Court save to enter judgment upon application."

25. It was submitted further that the Applicant is aware that the only caveat put under Section 51 (2) of the Advocates Act to an advocate obtaining Judgment on Certificate on Taxation is only, if there is a dispute to the retainer or the Certificate of Taxation has been set aside or altered, which they state has been sufficiently proved in this case. Further, that the Respondent has not adduced any rebutting evidence challenging retainer and it should be noted that the Respondent took part in the taxation proceeding to the very end and did not at any point dispute any of their (applicant) notices to it on retainer.

26. The applicant/ advocates prayed that their application be allowed as prayed.

RESPONDENT'S SUBMISSIONS

27. The Respondent submitted relying on its grounds of opposition, opposing the application on the main ground that it did not retain Messer **Otieno and Amisi** Advocates to represent any party in **Ukwala SRMCC No. 85 of 2014** and that in the supplementary affidavit sworn by Bernard O. Otieno on 8.5.2018, the Advocate has annexed a letter of 1.4.2015, from Africa Merchant Assurance Company Limited, the Respondent, saying that it is the letter that instructed the Applicant, **Otieno and Amisi Advocates**, to act in **Ukwala SRMCC No. 85 of 2014**.

28. It was however submitted that from that letter, the instructions were given to another M/S **Otieno and Abib** Advocates and not the Applicant. That there is no suggestion that Otieno and Amisi is the same as **Otieno and Abib** Advocates hence Otieno and Amisi Advocates had not demonstrated that they were ever retained by the Respondent to act for any of the parties in Ukwala SRMCC No. 85 of 2014. Further, that M/s Otieno and Abib were so instructed, and they are not the same as the Applicant. The respondent restated the provisions of Section 51 of the Advocates Act earlier stated by the applicants in submission above.

29. According to the respondent, although there was a certificate of costs that had not been set aside or altered by the Court, the retainer is **denied** and that once a retainer is disputed, no judgement can be entered in accordance with the certificate of costs under Section 51(2) of the Advocates Act and as such the current application must fail as the requirements in Section 51(2) of the Advocates Act have not been fulfilled.

DETERMINATION

30. Having considered the court record; the application and the supporting affidavit with the annexures thereto, grounds of opposition, supplementary affidavit and the annexures thereto and the submissions by both parties' advocates, the following is the only issue to be dealt with in determination of whether to allow the prayer sought in the application dated 8/3/2018;

Whether retainer existed between the firm of Otieno & Amisi Advocates and the Respondent herein (Africa Merchant Assurance Company Limited) and therefore whether the applicant is entitled to the prayer for judgment sought in the application.

31. The word retainer was defined in the case of **Njeru Nyaga & Co. Advocates Vs George Ngure Kariuki**, High Court of Kenya at Nairobi (Commercial & Admiralty Division) Case No. 723 of 2012 where the learned Judge said and I quote: -

“This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the Advocates Act, probably because of the special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the Advocates Act, the innumerable previous courts’ rendition on the phraseology...where the retainer is not disputed...provide the content of the term “retainer”. “Retainer” in the wider sense entails the instructions by a client or a client’s authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the BLACK’S LAW DICTIONARY, 9TH EDITION. The appropriate sense of the word “retainer” as used in the Advocates Act and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of NBI HC MISC APP NO 698 OF 2004 A.N. NDAMBIRI & CO ADVOCATES v MWEA RICE GROWERS MULTIPURPOSE CO-OP LIMITED, and OWINO OKEYO & CO ADVOCATES v FUELEX KENYA LIMITED [2005] eKLR, respectively. Let me quote what Waweru J said in the former case that:

“My understanding of the term “retainer” as used in section 51(2) aforesaid [read...of the Advocates Act] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that “retainer” means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer.”

“Justice Njagi, J in the case of Nyakundi & Co. Advocates gave the definition and form of retainer from Halsbury’s Law of England, 4th Edition, Re issue at paragraph 99, page 83 where it stated: -

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client. Thus the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment. Njagi J pointed out that in the same work, it is further explained that a retainer need not be in writing unless, under the general law of contract, the terms of the retainer or the disability of a party, to it make writing requisite. It is then further stated, the Judge added at paragraph 103 “even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case.”

32. Further in **Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR** where the court stated

“..... I think I have done enough to show that a retainer does not have to be in writing but the same can be inferred from the conduct of the parties or the circumstances of the case. In the case before the court, the Applicant has exhibited enough material before the court to show that an Advocate/Client relationship existed between it and the Respondent and at all material times.....”

33. And in **Omulele & Tollo Advocates v Mount Holdings Limited [2016] eKLR**, the court of appeal stated:

“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. Infact, 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.

The same onus of proof applies to a retainer. As said earlier, where a client disowns an oral retainer or even the existence of a retainer relationship, it is for the advocate who claims under that retainer to prove to court that such a relationship indeed existed, otherwise the court will deem that he acted without instructions.”

34. The court in **Ochieng Onyango and Kibet & Ohaga Advocates –vs- Akiba Bank Limited**, reiterated the above stated depositions in much clearer terms where the court held that; ***“it is not the law that an advocate must obtain a written authority from client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it maybe wide. And nevertheless it can be implied from the conduct of the Client/Advocate “relationship”.***

35. from the foregoing a retainer denotes a “*relationship*” between parties, a retainer per se need not be in writing and that it can be oral or even “*inferred from conduct of the parties*” and In this case, there is no doubt at all that on the evidence on record, the relationship that governed the appellants and the respondents was a retainer.

36. The Court ought not to allow the client take advantage of the work done by the advocate by failing to pay for services rendered, the client knew of the advocates actions assented, adopted verified and recognized their continued representation and the respondent is precluded from denying to effect payment on the presupposition that they conducted another person namely **Otieno and Abib Advocates** as opposed to **Otieno and Amisi Advocates**. The annexures thereto to the affidavits sworn by the applicant go to show/prove that there existed such a relationship as between them even if we are not to go by the instructing letter. Furthermore in the case of **Kenneth Kiplagat Vs. National Housing Corporation** where it was stated that all objections must be raised at the hearing of the bill of costs.

37. A retainer may be implied through conduct of the parties, and from the court records upto and including the taxation of the bill of costs, the Respondent in this case participated in the proceedings with no objection and even went further to draw submissions in respect of the bill of costs drawn by the applicant. It was part and parcel of all proceedings in the lower court case by dint of receiving and accepting the letters from the applicant informing it of the position of the case and went ahead to defend the bill of costs drawn by the applicant until the ruling stage. Accordingly, I find and hold that the respondent being the client then accepted legal representation by the applicant advocates. It is therefore estopped by its conduct from denying the right of the advocate to act or from denying the existence of the retainer for to do that would be to act in bad faith.

38. Consequently there was retainer of the advocate applicant by the client advocate.

39. On whether the application is merited, Section 51 (2) of the Advocates is clear that “Once a Certificate of Costs is issued and has not been set aside or altered, no other action would be required from the Court save to enter judgment upon application.” Accordingly, I find and hold that the issue of retainer was brought as an afterthought as no reference was filed challenging the taxation done by the Deputy Registrar on 16th January 2018 as per the Certificate of Taxation dated 7th March 2018.

40. Accordingly, I enter judgment for the applicant as per the certificate of Taxation dated 7th March 2018 and order that Decree do issue in terms thereof for execution.

41. To avoid escalation of costs between advocate and client, I order that each party shall bear their own costs of the application as allowed.

Dated, Signed and Delivered in open court at Siaya this 11th day of December, 2018.

R.E.ABURILI

JUDGE

In the absence of parties

In the presence of Court Assistants Brenda and Modestar