



Nyauke t/a Nyauke & Co Advocates v Trustees of Archdiocese of Kisumu (Miscellaneous Civil Application 209 of 2018) [2023] KEHC 2850 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 209 OF 2018**

JN KAMAU, J

MARCH 29, 2023

BETWEEN

SAMWEL OWINO NYAUKE T/A NYAUKE & CO ADVOCATES ADVOCATE

AND

THE TRUSTEES OF ARCHDIOCESE OF KISUMU RESPONDENT

RULING

INTRODUCTION

1. In his Notice of Motion dated August 31, 2018 and filed on September 26, 2018, the Advocate sought for order to compel the Client to settle the advocates fees from legal representation in Kisumu High Court Civil Commercial Case No 40 of 2018, formerly, ELC No 204 of 2017.
2. Samwel Owino Nyauke, an advocate practicing at the Advocate's Law firm swore an affidavit in support of the said application on August 31, 2018. He averred that he duly received instructions from the Client to act on its behalf and institute and prosecute Kisumu ELC No 204 of 2017 which was transferred to the High Court and was now Kisumu High Court Civil (Commercial) No 40 of 2018.
3. He stated that having received the said instructions, he filed suit and pursued it diligently but despite his efforts, the Client had been very uncooperative and had shown great disinterest in proceeding with its case. He added that the Client had failed to pay his fees and had refused to do so even after receiving his fee note which he served upon it on March 22, 2018.
4. He further contended that he had drawn a comprehensive Advocate-Client Bill of Costs that he would like this court to tax upon the hearing and determination of this application. He pointed out that he had since filed an application to cease acting for the Client.
5. He swore a Further Supporting Affidavit on May 14, 2019. The same was filed on May 15, 2019. He further stated that he received written instructions from the Client on June 8, 2017 which were duly



- signed by Rev. Fr. Moses N. Omolo on behalf of the Client. It was his case that he proceeded to file pleadings therein which the Client acknowledged and that he kept sending the Client updates from time to time, which updates were never received under protest and/or declined.
6. In opposition to the said application, the Client filed a Notice of Preliminary Objection dated December 10, 2018 and filed on February 11, 2019 on a point of Law on the grounds that the court lacked jurisdiction to hear and determine this application as the Client had not sought leave as required by law since there was a dispute as to the retainer. It was its case that the application was therefore vexatious, scandalous and an abuse of the court process.
 7. Additionally, on April 30, 2019, Clifford Ouko Gombe, a trustee of the Client, swore a Replying Affidavit on behalf of the Client. The same was filed on May 10, 2019. It denied ever having given the Advocate instructions to act on its behalf in the aforesaid case and that in case the contrary, was true then the Advocate should avail the instruction note or letter of instruction addressed to him by the Client requesting for his services.
 8. It was its contention that it was a religious institution of worldwide operations with headquarters at the Vatican City with its own internal regulation mechanism and that for matters pertaining the legal field, it had its own regulations on procurement of legal services which process required that its trustees appoint an attorney in an open and transparent manner through writing to represent them in any legal matters.
 9. It was emphatic that at no point did it write to the Advocate to represent it in any court case. It pointed out that sometime back the Advocate was requested by one of its lawyers to hold brief in a certain matter only for him to turn around and take over the whole brief without its consent and knowledge. It added that thereafter the Advocate began correspondences with it under the guise of updating it on the court proceedings and before long he approached it with false information that in case it wanted to be granted the injunctive relief it was seeking in that particular suit then it had to deposit Kshs 25,000,000/= with the court as security.
 10. It asserted that it was never issued with any order requiring it to fulfil the above pre-conditions but nonetheless released a sum of Kshs 25,000,000/= to the Advocate for onward transmission to court only for the Advocate to retain the money in his bank account. It stated that it was as a result of the illegal, fraudulent and unjust retention of the Kshs 25,000,000/= by the Advocate that led to the purported allegations of having been in an advocate-client relationship and filing several bills in files which it was a party and claiming to be its counsel thus seeking for costs.
 11. It further stated that the Advocate was duly paid upfront for all the matters that he held brief on behalf of its counsels and therefore ought not to lay any claim to its money let alone retain the same illegally and purport to claim his legal fees from the same.
 12. It was emphatic that there was no retainer contract between it and the Advocate to justify the claim for payment of legal fees but instead, the Advocate ought to release and/or refund the sum of Kshs 25,000,000/= which was currently in his possession and was intended to offset pending loans to Ecobank Ltd and Bank of Africa at Kshs 20,000,000/= and Kshs 5,000,000/= respectively.
 13. It was its assertion that the Advocate had not approached the court with clean hands and urged this court to direct the Advocate to pay the money to the aforesaid banks or deposit the entire amount with the court before seeking any relief from court.
 14. The Advocate filed three (3) sets of Written Submissions and on November 15, 2022, he urged the court to consolidate them. The first one was dated and filed September 29, 2020, the second one was dated September 29, 2020 and filed on November 12, 2020 and the third one was dated November 14,



2022 and filed on November 15, 2022. The Client did not file any Written Submissions despite being given time by court to do so. This Ruling is therefore based on the Advocate's Written Submissions only.

Legal Analysis

15. The Advocate invoked Section 51 (2) of the *Advocates Act* Cap 16 Laws of Kenya and argued that there existed a retainer relationship because there was a direct appointment and secondly, there was an implied conduct from the Client showing consensus with his actions. He submitted that he received instructions vide the Client's Letter dated June 8, 2017 drawn and signed by the said Rev Moses N. Omollo which he annexed to his Further Affidavit. He added that he filed the necessary pleadings after the said Rev. Moses N. Omollo verified the same.
16. He contended that a retainer need not be pegged on a written agreement but that the same could be inferred from the conduct of the client and hence, a client ought not to restrict an advocate to a written agreement between them if his or her conduct pointed at a consent to the services. In this respect, he relied on the case of *Omulele & Tollo Advocates vs Magnum Properties Limited* [2016] eKLR where it was held that even if there had been no written retainer, the court could imply the existence of a retainer from the acts of parties in the particular case.
17. He asserted that it was evident from the correspondence between him and the Client that he briefed it of the progress of its case which was a clear indication of an Advocate-Client relationship. He averred that the payment vouchers he had furnished the court with clearly indicated the flow of money from its Client's account was purposely for legal fees.
18. He further submitted that it offered itself as his client by dint of the definition as per Section 2 of the *Advocates Act* Cap 16 (Laws of Kenya). He was categorical that its allegations that he was only requested to hold brief on a matter were vague as it did not give particulars of the matter and those of the advocate who requested him to hold brief on his behalf. He urged the court to commit the Bill of Cost it filed to taxation so that it could settle his legal fees.
19. He was emphatic that he was an Advocate of the High Court of Kenya fully entitled to legal fee and protected by the provisions of the law under the *Advocates Act* and the *Advocates Remuneration Order* and that he effectively represented it and it appreciated the same. It therefore urged this court to grant him the reliefs he had sought in his application.
20. Notably, it was clear from the letter dated June 8, 2017 that the Advocate received instructions from the Client through its Vicar General, the said Very Rev Fr Moses N. Omolo and filed pleadings on the Client's behalf. He annexed a Replying Affidavit sworn on November 2, 2017 and another sworn on July 20, 2018 by the said Very Rev Fr Moses N. Omolo the Advocate- Client relationship. The Client did not file any affidavit to rebut this evidence.
21. Going further, it could be implied from the correspondences between parties vide letters dated July 27, 2018 and February 26, 2018 and the letter dated July 27, 2018 addressed to the Client from the Advocate which was received by the said Very Rev Fr Moses N. Omolo, that the Client was agreeable to the process and the steps taken by the Advocate in representing it in its matter.
22. It was therefore the considered view of this court that it would then be superfluous for the Client to claim it did not give any instructions to the Advocate or that there was no retainer.
23. As was correctly submitted by the Advocate, it is trite law that a retainer need not only be in writing but that the same could be implied from the conduct of the parties. In this regard, this court was guided by the case of *Ohaga vs Akiba Bank Limited* [2008] 1 EA 300, where it was held that a retainer could



be implied where the client acquiesced in and adopted the proceedings or that the client had by his conduct performed part of the contract or that the client had consented to a consolidation order and that the client was estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer.

24. The Client was therefore estopped from denying that it instructed the Advocate herein to act on its behalf. Its argument that the Advocate had only been requested to hold brief in one of its matters and he proceeded to the same on other matters was neither here nor there and was rendered moot.
25. Indeed, it did not prove by way of affidavit evidence that it had instructed a particular advocate who in turn asked the Advocate to hold his brief and/or disclose which matter that was. This court could not wholly make a determination of the monies it claimed from the Advocate herein had held was to offset loans as not only was it not pertinent to the application herein but it did not also demonstrate the same in its affidavit evidence.
26. Whereas the Client had the right to choose who would represent it in any legal matters, it was only fair for it to pay for services that had already been rendered to it. Indeed, it was wrong for the Client to assume that the Advocate would shoulder costs attracted by a project that it stood to benefit.
27. It was in the interest of justice that the Advocate-Client Bill of Costs proceeds for taxation before a taxing officer for purposes of ascertaining what was due to the Advocate.

Disposition

28. For the foregoing reasons, the upshot of this court's decision was that the Advocate's Notice of Motion application dated August 31, 2018 and filed on September 26, 2018 was merited and the same be and is hereby allowed in terms of Prayer No (1) therein.
29. As the Advocate represented himself, the court will deviate from the general principal that costs follow the event and direct that each party will bear its own costs of this application.
30. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2023

J. KAMAU

JUDGE

