



**John Bwire & Associates Advocates v Maghanga, Speaker of the
County Assembly of Taita Taveta (Miscellaneous Civil Application
E007 of 2021) [2023] KEHC 18444 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E007 OF 2021**

OA SEWE, J

MAY 25, 2023

BETWEEN

JOHN BWIRE & ASSOCIATES ADVOCATES APPLICANT

AND

**MESHACK MAGHANGA, SPEAKER OF THE COUNTY ASSEMBLY OF TAITA
TAVETA RESPONDENT**

RULING

1 Before the Court for determination is the Notice of Motion dated September 13, 2022. It was filed by the respondent, Hon Meshack Maghanga, Speaker of the County Assembly of Taita-Taveta, under Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) and Order 47 Rule 7 of the [Civil Procedure Rules, 2010](#), for orders that:

- (a) Taxation of the applicant's Bill of Costs dated November 26, 2021 be stayed until further orders;
- (b) The application be placed before the Judge for directions and/or determination on whether a retainer existed between the firm of M/s John Bwire & Associates Advocates and the respondent;
- (c) Directions be given to determine whether the retainer existed between the firm of M/s John Bwire & Associates Advocates and the respondent;
- (d) The application for taxation dated November 26, 2021 by the firm of M/s John Bwire & Company Associates be dismissed;
- (e) That the costs of the application be borne by the applicant.



2. The application was premised on the grounds that at no time did the respondent retain the services of the applicant to defend him in Constitutional Petition No 89 of 2020: Hon Christopher Mwabingu v Ho Meshack Maghanga, Speaker of the County Assembly of Taita Taveta. The respondent averred that, whereas he had previously retained the firm of John Bwire & Company Associates to act for him in Voi CMCC No 85 of 2020 where the parties were the same as the parties in Petition No 89 of 2020, those instructions did not automatically carry over to the Constitutional Petition No 89 of 2020. He therefore asserted that there is no Advocate-Client relationship between him and the applicant for which a Bill of Costs can arise for taxation.
3. The application was predicated on the Supporting Affidavit sworn by Gadiel Maghanga, the Clerk of the County Assembly of Taita-Taveta in which it was averred that the respondent's office of Speaker, County Assembly of Taita-Taveta County, is a public office that only gives instructions in accordance with the provisions on public expenditure as set out in the *Constitution of Kenya* and the *Public Procurement and Asset Disposal Act*, No 33 of 2015, as read with Section 131(1) of the *County Governments Act*, No 17 of 2012. It was therefore deposed by the respondent that, there being no written instructions as required by law, the applicant's proposed Bill of Costs, even if taxed will not be payable.
4. In his Replying Affidavit titled "Supplementary Affidavit" Mr Bwire Okano, who is the applicant's Managing Partner of the applicant, conceded that their firm was instructed by the respondent to defend him in Voi CMCC No 85 of 2020, which was later withdrawn vide a Notice of Withdrawal dated August 21, 2020. He averred that soon after the withdrawal, Mombasa High Court Petition No 89 of 2020 was lodged; whereupon the respondent supplied the applicant with pleadings including supporting documents with clear instructions that the applicant takes conduct of the matter on the respondent's behalf. The applicant then proceeded to file a Notice of Appointment and a Replying Affidavit sworn by the respondent Mr Meshack Maghanga. He added that in the said affidavit, Mr Maghanga stated clearly that he had instructions to swear the affidavit on behalf of the County Assembly of Taita-Taveta, the 2nd respondent in the suit, and therefore the applicant had no reason to believe otherwise.
5. Mr Okano further deposed that, throughout the period in issue, the applicant had been sending out regular updates to the respondent on the progress of the suit; and that no issue has ever been raised as to whether the applicant was properly retained. He added that, since it was the duty of the respondent to issue the letter of instructions, he cannot turn round and rely on its own omission to prove lack of retainer. Annexed to the applicant's Affidavit were copies of the Withdrawal Notice for Voi CMCC No 85 of 2020 (Exhibit 1), Notice of Appointment of Advocate (Exhibit 2), Replying Affidavit (Exhibit 3) as well as a bundle of extracts of email correspondence to the respondent (Exhibit 4) to support the applicant's averments.
6. In response to the applicant's Supplementary Affidavit, the respondent filed a Replying Affidavit on September 19, 2022 reiterating the averments in the Supporting Affidavit. The respondent deposed that, the applicant, being a firm of advocates, ought to have demanded to know whether written instructions had been given since every court case amounts to procurement of services by the contracting agency. The respondent added that it was totally wrong for the applicant to assume that instructions given for Voi CMCC No 85 of 2020 were sufficient to cover Mombasa High Court Petition No 89 of 2020.
7. When the matter came up for hearing on April 20, 2023, there was no representation by the applicant. Accordingly, Ms Nyange for the respondent urged the Court to make its ruling on the basis of the affidavits filed.



8. Needless to say that where a dispute arises as to whether or not there was a retainer between an Advocate and Client, the dispute must first be determined by the Court before a Bill of Costs arising therefrom can be taxed by the taxing officer of the Court. (See *Abincha & company Advocates v Trident Insurance Company Ltd* (2013) eKLR). As to what amounts to a retainer was well discussed in by Hon Ringera, J (as he then was) in *Hezekia Ogao Abuya t/a Abuya & Co Advocates v Kuguru Food Complex Ltd* NRD Misc Appl No 400 of 2001 (UR), as follows:

“...I am persuaded that the word retainer as used in Section 52(2) of the Advocates Act is synonymous with “employment”, “engagement” or “instruction.” An Advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute.”

9. Similarly, in *Njeru Nyaga & Co Advocates Vs George Ngure Kariuki*, High Court of Kenya at Nairobi (Commercial & Admiralty Division) Case No 723 of 2012, Hon Gikonyo, J held: -

“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 An 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.”

10. In the instant matter, it is plait that the word “retainer” is employed in its widest sense to mean instructions to act. With that in mind I have taken into consideration the parties’ averments herein. It is not in dispute that the applicant’s services were procured by the respondent for purposes of Voi CMCC No 85 of 2020; and that the suit was withdrawn shortly thereafter on August 21, 2020 when Mombasa Petition No 89 of 2020 was filed. The documents annexed to the applicant’s Supplementary Affidavit show that Notice of Appointment was filed by the applicant in Mombasa Petition No 89 of 2020 on August 31, 2020. Thereafter a detailed Replying Affidavit was sworn by the respondent, drawn and filed by the applicant, on November 23, 2020 for purposes of the Mombasa High Court Petition No 89 of 2020. All these go to confirm that the parties intended the instructions given for Voi CMCC No 85 of 2020 to extend to Mombasa High Court Petition No 89 of 2020; a petition between the same parties suing or being sued in the same capacity.



11. Further to the foregoing, the applicant exhibited a bundle of email correspondence between the parties between February 3, 2021 and May 8, 2021 to show that the applicant furnished the respondent with regular briefs on the progress of Mombasa High Court Petition No 89 of 2020. There is no indication that the respondent had an issue with the applicant's services.
12. In the circumstances, I find no merit in the respondent's application dated September 13, 2022. The same is hereby dismissed with costs.
- 13 It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH MAY 2023

OLGA SEWE

JUDGE

