

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. E016 OF 2021

NIGEL WESUTSA KUNDU t/a KN WESUTSA & CO. ADVOCATES.....APPLICANT

VERSUS

LUCAS AHULA OCHENYO.....RESPONDENT

RULING

1. This is a client/advocate dispute between the applicant and the respondent, with respect to Kakamega HCCA No. 174 of 2014, where the applicant, in his capacity as Advocate for the respondent, lodged a memorandum of appeal, in court on 27th December 2018. It would appear that the appeal was dismissed, and the applicant is now pursuing his fees, arising from the services that he allegedly rendered to the respondent with respect to the appeal.

2. The respondent is advancing a two-barreled approach to the matter. Firstly, he says there was no retainer between him and the applicant, on the basis that the appeal was filed against his wish. Secondly, he argues that the fees were agreed at Kshs. 10,000.00, which he had paid, and, therefore, he does not owe the applicant anything.

3. With regard to retainer, it is now notorious that a retainer need not be in writing. It can be inferred from conduct. The applicant drew and filed in court a memorandum of appeal. The respondent concedes that he was aware that the applicant filed a memorandum of appeal on his behalf, although he claims that he had not agreed on it with the applicant. I note that the respondent never withdrew the appeal, either before it was served on the other side or even after that. He acquiesced to the act of the filing of the appeal by the applicant. He went along with it. He says they agreed on Advocates fees at Kshs. 10, 000.00 for the appeal, and that he even paid the amount agreed. A retainer can be inferred from his conduct. See *Ochieng' Onyango, Kibet & Ohaga Advocates vs. Akiba Bank Limited* [2007] eKLR (Warsame J), *Njeru Nyaga & Co. Advocates vs. George Ngure Kariuki* [2014] eKLR (Gikonyo J), *Omulele & Tollo Advocates vs. Mount Holdings Limited* [2016] eKLR (**Makhandia, Ouko & M'inoti JJA**), *Zakhem Construction (Kenya) Ltd vs. Mereka & Company Advocates* [2017] eKLR [2017] eKLR (**Musinga, Gatembu & Murgor JJA**) and *Stephen Aluoch K'Opot t/a K'Opot & Company Advocates vs. Cornel Rasanga Amoth* [2017] eKLR (Majanja J).

4. On the agreement of fees at Kshs.10, 000.00, the answer lies in Schedule 6 of the Advocates Remuneration Order, 2014. With respect to appeals, it is provided that to present or oppose an appeal, the fees should be not less than Kshs. 25,200.00. It is unlawful to undercut, and, therefore, if there was an agreement to settle instruction fees at Kshs. 10,000.00, for the appeal between applicant and the respondent, then the same was illegal, and unenforceable. See *Ahmednasir Abdikadir & Co Advocates vs. National Bank of Kenya Limited* [2006] eKLR (F. Ochieng J), *Ibrahim Issack & Company Advocates vs. National Bank of Kenya Limited* [2016] eKLR (Chemitei J) and *Hakika Transport Services Limited vs. Isaac Onyango & Company Advocates* [2021] eKLR (Ndolo J).

5. The respondent also raises the issue of getting up fees. Under Schedule 6 of the Advocates Remuneration Order, 2014, an advocate would only be entitled to getting up fees where a respondent appeared at the hearing of the appeal, and the court certified, at the conclusion of the appeal, that, in view of the extent or difficulty of the work involved, it was proper for consideration of a getting up fee. The respondent did not file written submissions, and does not appear to have had attended court at the hearing of the appeal. No certificate was issued by the court for consideration of getting up fees. Consequently, there can be no basis for charging getting up fees. See *National Bank of Kenya vs. Rachuonyo & Rachuonyo Advocates* [2021] eKLR (Tuiyott J).

6. The only issue for me to determine, is whether there was a retainer, and I have found and held, above, that there was one. The objection raised, therefore, has no basis, and the matter should be referred back to the taxing officer for taxation. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25th DAY OF February 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Nafuye, instructed by KN Kundu & Co., Advocates, for the applicant.

Mr. Manyoni, instructed by Achero Mufuayia & Co., Advocates, for the respondent.