



P. I Samba & Company Advocates v Buzeki Enterprises Limited (Miscellaneous Application 1054 of 2020) [2022] KEHC 12537 (KLR) (Commercial and Tax) (8 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12537 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 1054 OF 2020
DO CHEPKWONY, J
AUGUST 8, 2022
IN THE MATTER OF THE ADVOCATES ACT
AND
IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014 (SCHEDULE 5)
AND
IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT
BETWEEN
P. I SAMBA & COMPANY ADVOCATES ADVOCATE
AND
BUZEKI ENTERPRISES LIMITED CLIENT
RULING

1. This matter coming up for ruling is a Chamber Summons application dated July 13, 2021, expressed in terms of *Advocates (Principal) Remuneration Order*, Rules 2, 11(1) and (2) *Advocates Act*, Section 3A of the *Civil Procedure Act*, Article 159 of the *Constitution of Kenya* seeking for the following Orders;
 - a. That the decision of the taxing master delivered on July 12, 2021 in so far as the same relates to the reasoning and determination pertaining to the Taxation of the Amended Bill of Costs dated February 17, 2021 be set aside.
 - b. That the Honourable Court be pleased to refer the matter back for re-taxation of the Amended Bill of Costs dated February 17, 2021 and with proper directions thereof.



- c. That in the alternative to prayer 2, the Honourable Court exercises its inherent jurisdiction and be pleased to re-tax the Amended Bill of Costs dated February 17, 2021 afresh and/or make directions to a fresh taxation.
2. The Chamber Summons is supported by the annexed affidavit of Pennynah Samba and the grounds on the face of the application. In summary it deposes as follows; -
 - a. By the ruling of the Taxing Master delivered on July 12, 2021, the applicant's amended Bill of costs dated February 17, 2021 was taxed at an all-inclusive amount of Kshs 100,000/=.
 - b. The subject Bill of Costs was uncontested and was supported by a list and bundle of documents dated March 15, 2021 and canvassed by way of written submissions dated May 23, 2021.
 - c. Upon receipt of the ruling aforementioned the applicant dispatched a letter dated July 15, 2021 requesting for reasons of the ruling and also filed a Notice of Objection of even date.
 - d. The Taxing Master erred in law and in fact in finding that the applicant firm did not act for the respondent in the brief, where the respondent as a client was borrower of USD 125Million, but instead found that the firm of M/S Kisilu and Company acted for the respondent since the contract documents were drafted by the said firm.
 - e. The Taxing Master misapprehended the entire brief as borne out of the bundle of documents on record together with commercial practice in these kinds of transactions', where the lawyer for the lender authors the contract documents.
 - f. Through the entire transaction from the pre-contract to post contract stages, the applicant firm acted on instructions from the Borrower Respondent since August, 2017 and not December, 2017 as stated in the ruling.
 - g. The brief carried out was not limited to following up on disbursements of the funds sought to be borrowed but included carrying out loan prequalification briefs and providing the Borrower the necessary proposal to back the needs for funds, and perusing the draft facility documents and advising accordingly.
3. The application is opposed by the Respondent vide a Replying affidavit of Zedekiah Kiprop Bundotich dated December 3, 2021. In brief, the answering affidavit states as follows; -
 - a. The substantive prayer made by the Advocate/Applicant in its application is prayers No. (1) and (2) in which it seeks to 'set aside and refer the matter back to the taxation of the Amended Bill of costs dates February 17, 2021
 - b. Sometimes in 2014, the parties entered advocate client relationship vide an oral retainer. Under the said retainer, the parties agreed that the advocate would handle both contentious and non-contentious matters on behalf of the client and all of its other associate or related companies and the companies' directors. The mutual agreement and understanding was that the Advocate would raise a fee note of Kshs 150, 000/= each month together with a separate invoice for transport disbursements for payment by the Client for the work done.
 - c. The Respondent deposed that since the commencement of the retainer between the parties, the advocate diligently raised invoices for each month and the client duly honoured them.
 - d. The transaction in question was a joint venture agreement between the Client and a company in which the client was looking to raise financing in the sum of Usd 125Million. The said joint



venture agreement was prepared by the firm of M/S Kisilu Wandati & Company advocates and not the Advocate/Applicant.

- e. The instructions given to the Advocate/Applicant regarding the subject transaction was only limited to following up on disbursements of funds sought to be borrowed and it never included carrying out loan prequalification briefs, providing the Borrower the necessary proposal to back the need for funds, drafting the facility documents and advising the Client as alleged by the Advocate/Applicant. All the services were rendered by the firm of M/S Kisilu Wandati & Company Advocates.
 - f. Despite the limited role the Applicant played on following up on loan disbursements, the firm was still paid through the monthly retainers for the month's worked.
 - g. The advocate having her Bill of costs taxed at Kshs 100,000/= which she had already been paid for the retainer fee and when the transaction in question was handled by the firm of M/S Kisilu Wandati & Company advocates was as lenient as the Taxing Master could get.
 - h. The Respondent deposed that it is opposed to the Advocate/Applicant's prayer to have the decision of the taxing master delivered on July 12, 2021 set aside.
 - i. The taxed amount was already paid through the retainer and the applicant should not benefit twice.
 - j. The Client/respondent is opposed to the Advocate/Applicant's application dated July 13, 2021.
4. On December 8, 2021, the parties were directed to canvass the application was canvassed by way of written submissions and both parties filed their respective submissions in support and in opposition to the application. The Advocate/Applicant's submissions are dated February 1, 2022, while the Client/Respondent's submissions are dated December 21, 2021.
 5. This matter came up for highlighting of submissions on May 17, 2022 and both parties highlighted their respective submissions which this Court has considered.

Analysis and Determination

6. I have considered the reference by Chamber Summons Application, the affidavits and the written submissions alongside the oral submissions by both parties during the hearing and the cited authorities. I find the issues arising for determination before this Honourable Court being
 - (a) Whether there was a retainer between the parties and,
 - (b) Whether the Advocate/Applicant has made out a case to warrant grant of the orders sought.
7. The *Advocates Remuneration Order* upon which this application is anchored on provides under Paragraph 11 (1) and (2) that;
 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.



8. The Advocate/Applicant having been dissatisfied by the ruling of the Taxing Master delivered on July 12, 2022 preferred this reference for determination by this Honourable court.
9. Section 45 of the [Advocates Act](#) provides for the guidance as regards the first issue of retainer. It provides as follows;
 1. Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-
 - (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
 - (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
 - (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

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10. In the case of [Omulele & Tollo, Advocates v Mount Holdings Limited](#) (2016) eKLR, the Court of Appeal the Court held;

“Retainer encompasses the instructions given to an advocate as well as the fees payable, it can be written, it can be oral and can even be inferred from the conduct of the parties.”
11. The same definition was reiterated in the case of [Stephen Aluoch K'opot t/a K'opot & Company Advocates v Cornel Rasanga Amoth](#) [2017] eKLR, where the High Court said that;

“A retainer is the basis of a relationship between the advocate and client. Such a relationship may be oral or in writing, express or implied. It is not necessary that retainer be in writing. The purpose of section 45(1) of the [Advocates Act](#) is to regulate remuneration agreements between advocates and clients. It does not limit the nature of agreement that may be entered into between advocate and client for the provision of legal services.”
12. On the other hand, the Court in the after mentioned authority distinguished the terms retainer and retainer agreement and stated that;

“From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding; the same must have been put in writing and signed by the client or his agent. It is therefore erroneous as submitted by counsel for the respondent that retainer and retainer agreement mean one and the same thing.”
13. In the instant case before Court, there is no dispute that there indeed existed a relationship between the parties. However, the only issue that needs to be determined by this Court is whether a retainer and retainer agreement refer to one and the same thing in order to oust the jurisdiction of the Taxing Master.



14. From the above cited authority, the Court clearly distinguished the two terms retainer and retainer agreement. Thus in the absence of a retainer agreement, the Advocate/Applicant was entitled to institute a bill of costs before the Taxing Officer for determination to recover her legal fees in the matter.
15. The next question for determination is whether the Advocate/Applicant represented the Client/Respondent in the transaction. The Respondent submitted that the Applicant's role in regard to the transaction was only limited to following up on disbursement of funds sought to be borrowed and did not involve prequalification brief, providing the borrower necessary proposal to back the funds, drafting the facility documents and advising the client as alleged by the Advocate/Applicant.
16. Upon perusal of the Court record, I note that there are several documents in the bundle of documents by the Advocate/Applicant and several letters regarding the transaction.
17. This Courts attention has been brought to letters dated January 5, 2018, a demand letter by the Advocate/Applicant dated February 7, 2018, a letter dated February 26, 2018 and one dated December 13, 2017 addressed to the Kenya Revenue Authority which clearly proves that the Advocate/Applicant acted for the Client/Respondent in the transaction in question.
18. This position is also confirmed from the several email correspondences between the Advocate/Applicant, the Client/Respondent and the Firm of M/S Kisilu & Company, Advocates. It is clear from the said emails correspondences that the Advocate/Applicant was heavily involved in the transaction and did not only involve disbursements of funds as alleged by the Client/Respondent.
19. In light of the foregoing, it is my finding that the Advocate/Applicant has made out a case to warrant the orders sought in the application dated July 13, 2021.
20. The application is therefore allowed in terms of prayer (1) and (2) of the Chamber Summons Application dated July 13, 2021.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 8TH DAY OF AUGUST, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Samba for Advocate Applicant

M/S Mwamba for Client Respondent

Court Assistant Sakina

