



Oloo & Oloo Advocates v County Government of Kitui (Miscellaneous Civil Application E004 of 2022) [2023] KEELC 17417 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
MISCELLANEOUS CIVIL APPLICATION E004 OF 2022**

LG KIMANI, J

MAY 11, 2023

BETWEEN

OLOO & OLOO ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF KITUI RESPONDENT

RULING

1. The Applicant's Advocate – Client Bill of Costs dated 27th April 2022 arises from legal services said to have been rendered to the Respondent in Machakos ELC 109 OF 2018: *B2 Yatta Ranching Co-operative Society Limited v County Government of Kitui and 11 others* involving LR. No. 12010 and LR. 11802 both measuring 41,200 acres. The Bill of Costs is supported by the attached supporting affidavit and annexed pleadings.
2. The Advocate claim that they acted for the Respondent until the time the Respondent instructed another law firm to take over conduct of the matter but failed to settle their legal fees. The Advocates tabulated their bill at Ksh. 376,830,019/=.
3. The Respondent filed Grounds of Opposition and a Replying affidavit stating that it did not instruct the firm of Oloo & Oloo Advocates LLP to act in Machakos ELC 109 OF 2018: *B2 Yatta Ranching Co-operative Society Limited v the County Government of Kitui* as claimed. The Respondent stated that it is a public entity and any payments it makes are public funds which must be expended in accordance with the *Constitution*, the *County Government Act* and *Public Finance Management Act*. The Respondent averred that being a public entity it could only give instructions, if any, in writing and upon procuring the services in terms of the *Public Procurement and Asset Disposal Act* (PPAD Act) as read together with Section 131(1) of the *County Government Act*, on public finance expenditure and Section 121 of the *Public Management Act*.



4. That pursuant to sections 134 and 135 of the *Public Procurement and Asset Disposal Act*, there must be an agreement/contract following a procurement procedure for there to be a contractual relationship between the Respondent and the Applicant. In the instant case, it is claimed that there was no procurement process; pre-qualification, or letter of instruction from the Respondent to the advocates and therefore there is no Advocate/Client relationship.
5. The Respondent stated on a without prejudice basis that on the date at which the Applicant purports to have filed a notice of appointment as advocates on 6th August 2019, the Respondent had already instructed the firm of Katunga Mbuvi & Co. Advocates on 16th July 2019 and there was no need for extra voluntary representation.
6. Further, the Respondent claims that Machakos ELC 109 of 2018 was transferred to Kitui ELC and is now known as Kitui ELC 20 of 2021 and it has now instructed the firm of Kimanthi & Associate Advocates to take over conduct of the matter.

The Applicant's Further affidavit

7. The Applicant filed a further affidavit by Dr. Martin Oloo sworn on 22nd November 2022 deposing that by a letter dated 1st February 2018, the firm received instructions from the Respondent to act on its behalf in Machakos HC Civil Suit No.76 of 2003. They acknowledged receipt and entered appearance in the matter. It is contended that Machakos HC Civil Suit No.76 of 2003 was a part of several other cases one of which was the suit subject matter of the present taxation. Machakos HCCC No. 9 of 2008: *B2 Yatta Ranching Co-operative Society Ltd v County Government of Kitui & 11 others* which later came to be known as Machakos ELC 109 of 2018 after the numerous cases filed were consolidated. That Pursuant to the consolidation of the cases, the Applicants filed a Memorandum of Appearance and Notice of Appointment of Advocates dated 6th August 2019.
8. The Applicant denied that the firm of Katunga Mbuvi & Co. Advocates represented the Respondent in Court and neither did they file any pleadings. The Applicant deposed that they only came to learn about the said firm when they wrote to them requesting for an update of the case and copies of pleadings and the Applicant responded stating their inability to honour the request.
9. The Applicant annexed correspondence and pleadings filed, including a replying Affidavit sworn by one Francis Mulu, the then Respondent's Assistant Director of Lands. They also deposed that they attended Court and various meetings held at the Border Police Unit headquarters between representatives of the border police unit, Kitui County Government, office of the Attorney General, B2 Yatta Ranching Co-operative Society Ltd and the Commandant Border Police Unit.
10. Subsequently, on 15th June 2021, they were served with a Notice of Change of Advocates by the firm of M/S Kimanthi & Associates indicating that the Respondent had appointed them to act in their place. They aver that that the firm of Katunga Mbuvi & Co. Advocates have never featured anywhere as advocates on record for the Respondent.
11. The Applicant deposes that the allegations that the Applicant acted without instructions are inaccurate and laced with bad faith to deny the Applicant its due and just remuneration for services rendered.

The Applicant's Written Submissions

12. Counsel for the Applicant filed written submissions stating that there existed an Advocate/Client relationship between them and the Respondents which was governed by the *Advocates Act*. They reiterated the position taken in their supporting and further affidavit on representation they accorded the Respondent.



13. They submit that it is a glaring fact evidenced by supporting letters and legal documents that the Applicant had done the bulk of the work in the suit. They relied on the holding in the case of *Ochieng Onyango and Kibet & Obaga Advocates v Akiba Bank Limited* cited in *Mereka & Company Advocates v Zakhem Construction Kenya* [2014] eKLR: where the court held that it is not the law that an advocate must obtain a written authority from a client before he commences a matter but authority of an advocate in a matter can be implied or discerned from the conduct of the client. They also relied on the holding in the case of *Nyanchoi & Company Advocates v Giriama Ranching Company Limited* [2021] eKLR.
14. The Applicant submitted that their continuous attendance in ELC 109/2018 with the Respondents' full knowledge is sufficient to establish a Client/Advocate relationship and that they also had a contract agreement in the form of contract required as per the *Public Procurement and Disposal Act* (PPDA).
15. Further to this, they relied on the reasoning of Kalpana Rawa, J (as she then was) criticizing the bidding of the services of an advocate in procurement by advertising as being a breach of the *Advocates Act*, the *Advocates Remuneration Order* as well as the *Advocates(Practice)Rules* in the case of *Thiong'o Njiri & 81 others v the Municipal Council of Kiambu & Another*[2011] eKLR counsel submitted that the Applicant is not bound by the Public Procurement and Disposal Act and urged the Court to refer the matter to the Deputy Registrar for directions on the taxation of the Bill of Costs.

The Respondent's Written Submissions

16. Counsel for the Respondent filed written submissions reiterating the contents of their Replying Affidavit and Grounds of opposition stating that there is no evidence that the suits referred to by the Applicant were ever consolidated or that the Applicant was ever engaged as their Advocates in Machakos ELC 109 of 2018: *B2 Yatta Ranching Co-operative Society Ltd v the County Government of Kitui*.
17. Quoting from Article 227 of the *Constitution* and Section 2 of the *Public Procurement and Asset Disposal Act*, the Respondent submitted that a public entity such as the county government should procure goods and services in accordance with the public procurement laws. They submit that they could only have given instructions upon procuring the services of an advocate in terms of the *Public Procurement and Asset Disposal Act* as read with Section 131(1) of the *County Government Act* and Section 121 of the *Public Finance Management Act*.
18. The Respondent relied on the holding in the case of *Mugoye & Associates Advocates v Kiambu County Assembly Speaker* (2018) eKLR and submitted that previous conduct of the parties cannot override clear provisions of the *Constitution* and that it was upon the Applicant to ensure that they had the necessary contractual documents before they offered legal services to the client. They insisted that they had instructed Katunga Mbuvi & Co. Advocates. They therefore urged the court to find that there was no procurement process; pre-qualification, no contract or letter of instruction and therefore no Advocate/Client relationship.

Analysis and Determination

19. The present Advocate-Client Bill of Costs dated 27th April 2022 seeks payment of Ksh. 376,830,019/= for legal services stated to have been rendered by the law firm of Oloo & Oloo Advocates to the Respondent County Government of Kitui in Machakos ELC 109 OF 2018. The bill of costs was referred to this court on the ground that the Respondent denied existence of an Advocate-Client relationship between the parties.



20. Section 13 of the [Advocates \(Remuneration\) Order](#) provides for taxation of cost as between advocate and client on application of either party and states;

“The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.”

21. “Client” is defined under the [Advocates Act](#); “includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;”

22. The Respondent herein denies that it retained or employed the Advocate/Applicant and thus claims that there is no Advocate-client relationship. In [Kinluc Holdings Ltd v Mint Holdings Ltd & another](#) [1998] eKLR the Court of Appeal adopted the definition assigned to the word “retainer” in the 3rd edition of [Halsbury’s Laws of England](#) at paragraph 84 as meaning:

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment, and the rights and liabilities of the parties under the contract will depend on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract.”

23. The Applicant relies on the finding of Warsame, J. (as he then was) in [Ochieng Onyango Kibet & Ohaga Advocates v Akiba Bank Limited](#) [2007] eKLR expressed a similar view and stated that:

“The act of authorizing an advocate to act on behalf of a client constitutes the advocate’s retainer by the client. It is not the law that an advocate must obtain a written authority from the 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.”

24. Retainer is therefore no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive; it may be wide. And nevertheless it can be implied from the conduct of the client/advocate. Determination of whether or not there exists an Advocate-Client relationship is a jurisdictional issue that must be determined at the earliest. This was so found in the case of [Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited](#) [2017] eKLR where the Court of Appeal stated;

“As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.”



25. As proof of the existence of an Advocate-Client relationship, the Applicant attached pleadings filed in Machakos ELC 109 of 2018 including a replying Affidavit sworn by one Francis Mulu, the then Respondent's Assistant Director of Lands. They stated that by a letter dated 1st February 2018 the firm received instructions from the Respondent to act on its behalf in Machakos HC Civil Suit No.76 of 2003. They acknowledged receipt and entered appearance in the matter. It is contended that Machakos HC Civil Suit No.76 of 2003 was a part of several other cases one of which was the suit subject matter of the present taxation being Machakos HCCC No. 9 of 2008 *B2: Yatta Ranching Co-operative Society Ltd v County Government of Kitui & 11 others* which later came to be known as Machakos ELC 109 of 2018 after the numerous cases filed were consolidated. The Applicant stated that pursuant to consolidation of the cases, the Applicants filed a Memorandum of Appearance and Notice of Appointment of Advocates dated 6th August 2019.
26. The Applicant also annexed correspondence from the Respondent to themselves and further deposed that they attended Court on behalf of the Respondent and various meetings held at the Border Police Unit headquarters between representatives of the border police unit, Kitui County Government, Office of the Attorney General, B2 Yatta Ranching Co-operative Society Ltd and the Commandant Border Police Unit.
27. Further, the Applicant denied that the firm of Katunga Mbuvi & Co. Advocates ever represented the Respondent in Court and they did not file a memorandum of appearance or pleadings. The Applicant deposed that they only came to learn about the firm when they wrote to them requesting for an update of the case and copies of pleadings and they responded stating their inability to honour the request.
28. The Court has perused all the documents filed by the Applicant in support of the claim that there existed an Advocate-Client relationship and noted that there is no document that shows direct instructions passing from the Respondent to the Applicant in relation to the suit Machakos ELC 109 of 2018. The applicant has further not shown that the suit ELC 76 of 2003 was related to the case 9 of 2018 or 109 of 2018 as stated in supporting affidavits. Looking at the documents filed for cases ELC 76 of 2003 and 109 of 2018 the parties in the two suits are different. The only letter of instructions from the Respondent to the Applicant is the letter dated 1st February 2018 and it relates to ELC 76 of 2003. The said letter was specific to the said suit and indeed the Applicant subsequently raised an invoice dated 6th February 2018 requesting for a deposit of legal fees.
29. In the Courts view none of the letters attached to the Applicants affidavits deal with instructions to act in ELC 109 of 2018. There is also no proof that the two suits or any others were consolidated with the present suit for the Court to presume that the instructions given to the Applicant in ELC 76 of 2003 would serve as instructions in ELC 109 of 2018.
30. The Applicant stated that they had done the bulk of the work in the suit for the benefit of the Respondent. They relied on the cases of *Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited* and *Mereka & Company Advocates v Zakhem Construction Kenya*[2014] eKLR: for the submission that it is not the law that an advocate must obtain a written authority from a client before he commences a matter but authority of an advocate in a matter can be implied or discerned from the conduct of the client
31. The Respondent denied the existence of an Advocate-client relationship with the Applicant on the ground of being a public entity and any payments it makes are public funds which must be expended in accordance with the *Constitution*, the County Government Act and *Public Finance Management Act*. The Respondent further stated that it could only give instructions in writing and upon procuring the services in terms of the *Public Procurement and Asset Disposal Act* (PPAD Act) as read together



- with Section 131(1) of the [County Government Act](#), on public finance expenditure and Section 121 of the [Public Management Act](#).
32. That pursuant to sections 134 and 135 of the [Public Procurement and Asset Disposal Act](#), there must be an agreement/contract following a procurement procedure for there to be a contractual relationship.
33. The Respondent relies on Article 227(1) which provides for procurement of public goods and services as follows: -
- “(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”.
 - (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
34. It is not in contention that the Respondent is a public entity and that Article 227 of the [Constitution](#) applies to it. A public entity is defined under The [Public Procurement and Asset Disposal Act](#) (No. 33 of 2015) (PPAD Act) to include “a county government or any organ or department of a county government;” The PPAD is the act of parliament that prescribes a framework for policies on procurement. It is described as;
- “An Act of Parliament to give effect to Article 227 of the [Constitution](#); to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.”
35. In that regard, the Act defines “procurement” to mean “the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system.”
36. The Act further defines “procuring entity” as a public entity making a procurement or asset disposal to which this Act applies; and “procurement contract” as an agreement concluded between the procuring entity and a contractor (or contractors) resulting from a tendering proceeding.
37. Section 121 of [Public Finance Management Act](#) states with regard to procurement for county government entities that “all procurement of goods and services and disposal of assets required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the [Constitution](#) and the [Public Procurement and Disposal Act](#) (Cap. 412C).” while Section 131 (1) [County Government Act](#) while dealing with financial provision states that; The funds and financial management of county governments are to be provided under the law relating to public finance.
38. With regard to preparation of contracts with public entities Section 134 of [PPAD Act](#) states that the accounting officer is the person responsible for preparation of contracts after following the relevant tendering process. Section 135 provides for creation of procurement contracts including what is to be incorporated in the agreement and the persons to sign the contracts and states;
1. The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the



accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

2. An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.
 3. The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.
 4. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.
 5. An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.
39. From the foregoing Section 135 *PPAD Act*, it is clear that for a legally binding contract retaining the services of an advocate to exist between themselves and a public entity such as the Respondent, there must be a written contract signed by the parties. The contract is required to be with the person submitting a successful tender and to whom an award has been made.
40. Further, Section 72 of the *Act* places the responsibility for complying with Act and regulations on contractors, suppliers and consultants on the procuring entity alone. This was stated in the case of *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR which though it dealt with the *Public Procurement and Disposal Act*, 2005, the dicta therein applies equally to this case as the provisions are similar to the current legislation with the law placing the responsibility of compliance with the Act on the contractor, supplier or consultant intending to supply goods or services to a public entity. Tuiyott J., had this to say;

“It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason, a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.”

41. The case of *Mugoye & Associates Advocates v Kiambu County Assembly Speaker* [2018] eKLR Mwita J. relied on by the Respondent dealt with a similar situation to the one in this case where the Advocate offered legal services to a public entity. The Court stated;

“The client as a public entity is required to procure for goods and services in compliance with the *Constitution* and *PPAD Act*. There is no evidence that there was any compliance with the law in so far as procurement of legal services from the advocates is concerned. There is not even a contract signed between the advocates and the client conferring the advocate –client relationship that could enable the advocates offer legal services. The advocates seem to have taken the risk of offering their professional services premised on a false belief that they would



be paid as it may have happened in an earlier case. It must clear on those willing to offer goods or services that this is a new constitutional architecture and legal regime where procurement of goods and services is a constitutional requirement and must be done in accordance with the guidelines contained in the *Public Procurement and Asset Disposal Act*. Section 53(1) of *PPAD Act* is clear that all procurement by state organs and public entities are subject to the rules and principles of this Act, while subsection (8) states that accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.”

42. In the present case the Court agrees with the observations of Mwita J in the Mugoye case (supra) that the Applicant/advocates seem to have taken the risk of offering their professional services premised on a false belief that they would be paid as it may have happened in the earlier case in ELC 76 OF 2003. The Judge further stated that;

“...I must state here that conduct cannot override clear provisions of the *Constitution* and the law with regard to expenditure of public resources. It was upon the Advocates to ensure that they had the necessary contractual documents before they offered legal services to the client. If the Advocates had previously acted and their fee was paid without following the law, the omission cannot be construed as a certificate to use public resources without following the *Constitution* and the law.”

43. As a final observation, the Court noted that the Applicant/Advocate attached to their submissions a document named Form of Contract dated 31st January, 2019 and marked it as MO-13. The said document was not annexed to the affidavits filed by any of the parties and the court finds filing of the same unprocedural and improper. The Respondent was not given an opportunity to consider it and respond and the same ought not to form part of the record. The said document is hereby struck out.
44. Considering the Constitutional provisions cited above, the law and the foregoing authorities, the Court finds that the Applicant/Advocate failed to show that they were retained or employed by the Respondent to offer legal services in Machakos ELC 109 of 2018: *B2 Yatta Ranching Co-operative Society Limited v County Government of Kitui and 11 others*. The Court finds no evidence that there was an Advocate –Client relationship between the firm of Oloo & Oloo Advocates and the County Government of Kitui in the said suit. The Court is satisfied that the objection by the Respondent is well founded and must succeed with the result that the Advocate – Client Bill of Cost dated 27th April 2022 is hereby struck out. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF MAY, 2023.

L. G. KIMANI

ENVIRONMENT & LAND COURT JUDGE - KITUI

Ruling read in open Court and virtually in the presence of;

C/A Musyoki

M/s Bwire for the Applicant

N/A for Respondents

