



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 52 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATE/CLIENT BILL OF COST

ARISING FROM THE LEGAL SERVICES IN MALINDI HIGH

COURT JUDICIAL REVIEW MISCELLANEOUS PETITION NO. 13 OF 2008 (NAIROBI JR MISC PETITION 292/2008)

BETWEEN

KITHI AND COMPANY ADVOCATES.....ADVOCATES/APPLICANTS

VERSUS

ELECTORAL COMMISSION OF KENYA

(NOW INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION OF KENYA).....CLIENT/RESPONDENT

Coram: R. Nyakundi, J

E. K. Mutua for Respondent

Kithi for the applicant – present

RULING

There are two applications for determination before this court. The first Application is by the Respondent brought by way of Notice of motion together with annexures dated 11th September 2020 premised upon grounds and averments set out in the Supporting Affidavit of Michael Goa, the Director Legal and public affairs of the Respondent.

The application sought inter-alia;

- (a) Arrest the delivery of ruling in respect of the bill of Costs by the taxing officer**
- (b) Determination of the issue of retainer between ECK and the applicant**
- (c) Jurisdiction of the taxing officer**

In the supporting affidavit, it is indicated that the Applicant **Kithi & Company Advocates** filed a Bill of Cost dated **16th August 2019**. It is further indicated that the said Bill of cost was served upon the Respondent on **17th august 2020** together with an order issued on **11th August 2020**. The said order was issued in absence of the respondent required that parties do file written submissions in respect of the Bill of cost within 21 days and ruling would be delivered on 16th August 2020. It is the Respondent's contention that the said Bill of Cost was never served upon them before and that they had not participated in any proceedings relating to it.

The respondent avers that the Bill of cost is incompetent and ought to be struck out because the firm of **Kithi & Company Advocates** was never appointed nor did it act for Electoral commission of Kenya a predecessor of the respondent in **Nairobi JR Misc. 292 of 2008 (formerly Malindi JR Misc. petition No. 13 of 2008)** That it was practically impossible to instruct the firm of **Kithi & Co Advocates** in respect of the above matters as the firm of Kithi had not been registered at the time of filing them. It is further indicated that as per the Respondent's records, the firm of **Mwakisha Mrima Kithi** was the firm instructed to act for ECK. Further, **George Kithi Advocate** appeared in the said matter either as an employee or a partner but not in his capacity as a sole proprietor of the firm of **M/s Kithi & Company Advocates**. It is on the above grounds that the Respondent invites this court to find that the Bill of costs is incompetent and ought to be struck out.

The second application by the Applicant was brought by way of Notice of motion together with annexures and a draft amended Bill dated 1st December 2020 and premised upon grounds set out and the Supporting affidavit of George Kithi. The application seeks to amend the Bill of Costs. It is indicated that it was inadvertently indicated that the firm of Kithi and company advocates was acting for the Respondent in place of **Madzayo Mrima & Co Advocates**. Further, vide the retainer agreement dated 24th August 2011, the firm of **Madzayo Mrima & Company** advocates had given instructions to the firm of **Kithi & Co. Advocates** to pursue costs due. In a nutshell, the Applicant seeks in the interest of justice to have the bill of costs amended to have the right parties to the bill included.

Issues for determination

- **Whether there was a retainer agreement between the Applicant and ECK**
- **Whether the taxing officer has jurisdiction to tax the bill of costs**
- **Whether the Applicant should be granted leave to amend the bill of cost**

Analysis and determination

Whether there was on a retainer agreement between the Applicant and ECK

The Respondent alleges that at no particular point in time did they appoint the firm of **Kithi and Company advocates**. The applicant does not rebut this position but instead states that that it the firm of **Kithi & Company advocates** was instructed by the firm of **Madzayo Mrima & Company** advocates to file the bill of costs on their behalf against the Respondent. I have perused the evidence on record and do agree with the respondent and do agree that it was practically impossible for the firm of **Kithi & Company advocates** to be instructed as the same was not in existence at the time of filing of the petition. Furthermore, the Applicant does not contest this. It is my finding therefore that it a retainer relationship between the parties has not been established.

The subject matter of the application arises out of the bill of Costs presented to the taxing master by the Firm of **Kithi & Co Advocates** in respect of services rendered to **I.E.B.C in JR Petition No. 13 of 2008 and 292 of 2008**. The bill was to enable the Law firm recover professional legal costs in the a fore mentioned suits:

The respondent - client herein I.E.B.C in their replying affidavit objected to any such application by **Kithi & Co Advocates** lodging the bill of costs supposedly to recover costs arising out of professional legal services rewarded in their capacity as advocates for I.E.B.C. The issue of retainer and lack of instructions was issued by the respondent seeking leave of the court to strike out the filed bill of costs pending before the taxing master at Malindi High Court.

The value of retainer in the Kenyan context is that it circumscribes the obligations of the advocate to provide professional legal services to his or her client with a substantial legitimate expectation that he would be compensated for the services rendered. The term client is defined under Section 2 of the Advocates Act as:

“Any person who, as a principal or on behalf of another or a trustee or personal representative, or any other capacity has power express or implied to retain or employ and retain it as about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs what exactly, does the justification for retainer entails in Black’s Law Dictionary 6th Edition 1990, the word retainer Has been stated to attach the following meaning:

In the practice of Law, when a client hires an attorney to represent him the client is said to have retained the attorney. The act of employment is called the retainer. The retainer agreement between the client and attorney sets forth the nature of services to be performed, costs, expenses and related matters”

In addition, words and phrases legally defined 2nd Edition Vol 4 by **JB Sanderes** effectively stated that:

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes solicitor’s retainer by that client. Consequently, the grounding of a retainer is equitable to the making of a contract for the solicitor’s employment. Essentially, the right to choose and be represented by an advocate on one’s preference is anchored under Article 50 (2) (G) of the Constitution. It entitles the individual who has a claim to be enforced by courts jurisdiction to retain a solicitor or an advocate to act on his or her own behalf in such initiated or pending proceedings. From this view point, on the other hand the right to legal representation also applies to non-contentious matters. Therefore, call the advocate and or solicitor has to show is evidence of retainer or an agreement setting out the terms of the contract of representation.

The court in **Batchelor V Pattison & Mackerzy (1876) 3R14, 1918** was alive to this role of an advocate which runs deep into the

administration of justice when it detailed the following words:

“An Advocate in understanding the course of a course in this court enters into no contract with his client but takes on himself an office in the performance of which he owes a duty, but also to the court, to the members of his own profession and to the public. From this, it follows that it is not at liberty to decline, except in view special circumstances to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes into court to take the retainer of the party who first applies to him it follows also, that he cannot demand or recover by action any remuneration for his services, without retainer or agreements. There is a contract of employment between him, or her and his or her client by virtue of which the client, for certain settled rates of remuneration is entitled to require from the agent the exercise of care, diligence and professional skill and experience. The general role may fairly be stated to be that the agent must follow the instructions of his or her client. However, with the qualifications that the agent of course cannot be assed to follow the client’s instructions beyond what is Lawful and proper. In this respect the purpose of general retainer is to evaluate the client has ..an advocate in that particular case or matter which the retainer relates’.

This line of reasoning goes to demonstrate that in the involving course of things an advocate is entitled to costs or legal fees arising out of a litigation when he or she discharges the burden of the retainer.

Applying those principles, the following questions arise in the present case first did I.E.B.C inform the firm of **Kithi & Co Advocates** in matters referred as **JR 292 of 2008** formerly marked **JR No. 13 of 2008**. Secondly, if not so did the Law Firm have any reasonable cause to discharge any professional legal services.

Thirdly, are there exceptional circumstances, brought to the attention of the court where justice so requires for the firm of **Kithi & Co Advocates** admittedly to set and file the bill of costs against the respondent, I. E. B.C. As far as the affidavit evidence and other materials filed by the aforesaid Law firm is concerned none of it cited contain a statement of the retainer with the supposed client, I.E.B. C respondent to this proceeding.

As alluded to the retainer for good reason, subject to any relevant provision contained in the Advocates remuneration order entitles an advocate to be paid legal fees, disbursements and costs for work done to the client. That is the basis in which an advocate may then elect to claim the fees due if any under the agreement or a quantum meruit by having the bill of costs taxed by the taxing master. In the pending bills of costs, the firm of **Kithi & Co Advocates** claimed legal fees, costs and disbursement in respect of transactions which may have been undertaken without instructions from the respondent.

I am satisfied without regret that by operations of Law and in the circumstances of this appropriate case **Kithi & Co Advocates** lacks locus stands to file the bill of costs before the taxing master for taxation against the respondent. A significant drawback is that **Kithis’ & Co Advocate** bill of costs in this consolidated applications is in violation of the principles upon which the costs on election petitions are to be taxed. The particularity of the cost arises on the same principles that there has to be retainer between an advocate and client in a suit to give rise to costs payable.

Whether the taxing officer has jurisdiction to tax the bill of costs

The issue of jurisdiction raises a preliminary objection which ought to be dispensed. In the celebrated authority on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in **Mukisa Biscuit Manufacturing CO. Ltd v West End Distributors Ltd. (1969) EA 696**, where **Law J. A. and Newbold P. (both with whom Duffus V-P agreed)**, respectively at **700 and 701**, held as follows:

Law, JA:

“So as far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold,P:

“A preliminary Objection is in the nature of what used to be a demurree. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or is what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop”

Having found that there was no retainer agreement between the parties herein, I find that the Applicant has no *locus standi*.

In the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited**, Justice Nyarangi explained the importance of jurisdiction in the following terms:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

It is my finding that the taxing officer has no jurisdiction to tax the bill of costs

In the circumstances the applicant Law firm **Kithi & Co Advocates** would not be entitled to have a ruling on the bill of costs. In respect thereof fixed before the **Deputy Registrar Malindi High Court**, clearly the preliminary objection provides legal safeguards against adjudication of the bill of costs given for lack of retainer by the respondent to the respective Law firm. I have nothing further to say except to condemn the applicant in **Misc. Civil Case No. 52 and 53 2019** to pay costs to the respondent. The same to be taxed if not agreed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2021.

.....

R. NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective emails of the advocates in the matter

(infor@kithiandcompany.co.ke and lawsuits@africaonline.co.ke, info@ekmutua.com)