REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APPLICATION NO. 50 OF 2014

M S SHARIFF & CO ADVOCATES.....ADVOCATE/ APPLICANT

VERSUS

OMARI MBWANA ZONGA.....CLIENT / RESPONDENT

R U L I N G

1. Pursuant to the provisions of section 51(2), Advocates Act, the advocate / client seeks judgment to be entered for her against the client on the basis of certificate of costs issued on the 18th September 2014 in the sum of Kshs. 259,800 plus costs and interests. The application was premised on the straight forward ground that costs had been taxed, a certificate of costs had issued and became final but the client had not settled the certificate hence the need for entry of judgment. The application was supported by a very brief affidavit of the advocate whose gist was that she offered to the applicant in Kwale RMCCR No, 366 of 2010, Republic vs Rukia Ali. It was said in the affidavit that the accused was a voter of the client as the member of Parliament for Lunga Lunga constituency. When payment for fees wasn't forthcoming the advocate lodged a bill of costs which was taxed but the client still failed to effect settlement.

2. The client resisted the application the replying affidavit sworn on the 11th October 2019 in which the respondent totally denied having been the Member of Parliament as alleged. He also denied having instructed the advocate in the cited case and that he was never served with any bill of costs nor demand to pay the taxed cost. He reiterated not being liable for the payment of the costs.

3. The application was by consent directed to be canvassed by way of written submissions pursuant to which directions, the advocate filed submissions dated 26.5.2020 on the 27.5.2020 while the respondent had done so 09.12.2019.

4. In those submissions, the advocate invokes the definition of a client given under section 2 of the act to include a person who has the express or implied power to employ or retain or is about to retain an advocate or any other person who may be liable to pay the advocate any costs. It was the submitted that I take into account the affidavit sworn by the client's former driver, file in a different file to the effect that the client had introduced him to the advocate for purposes of referring constituents in need of legal services and that it was the client to pay the costs. A lot was then said on the relationship of the parties, that a retainer file was opened and that the client was thus stopped from denying liability. In those submissions, the advocate now runs away from the depositions in the affidavit and introduces new facts that he was the MP for Msambweni not Lunga Lunga. It was lastly asserted that as at the date of writing the submissions, the client had not served a notice of appointment of advocates and that their representation in the matter was thus null and void.

5. For the client the submissions offered were to the effect that there was no evidence of instructions and no written agreement in accordance with section 45(1) of the Advocates Act. It was then added that a judgment can only be entered pursuant to section 51(2) where retainer is not disputed unlike here where there is a contention as to retainer. It was urged that in the absence of evidence on retainer the application was only fit for dismissal.

6. I have had the benefit of reading the file in line with the only two affidavits filed and I do remind myself and the parties that a court only determine issues raised by parties by pleadings and supported by evidence and that submissions are the appreciation of the facts by the person making them but never evidence nor pleadings. Accordingly, I must reiterate that the advocate is bound by her assertion that he offered legal services in the Kwale criminal case on the request of the client who was the MP for Lunga Lunga. I have gone back to history and I am reminded that at that time the MP for that constituency was one Mwashetani, Khatib Abdallah. Based on that single fact, it cannot pass as fair and just to find that the client gave instruction to the advocate in a capacity he was not. Either the advocate was mistaken or the client is right that he never gave such instruction. That to be is an arguable dispute as to retainer which then displaces the right of the advocate to seek and obtain judgment under section 51 of the Act.

7. The advocate has invoked the definition of a client under the act which is indeed very wide and all encompassing. However, where the person benefitting from the services is not the person obligated to pay, then it necessary that an agreement be made. That agreement need not necessarily be in strict compliance with section 45 of the Act if there is part performance, say by payment of a portion of the fees.it also need not be in strict compliance with the provision if it does not fix the amount of remuneration of the advocate, but even then, when the person obligated disputes liability, the boundaries of section 51 gets outstripped and the matter must be tried by a suit for recovery of fees under section 48 of the Act.

8. Having found that the retainer is disputed, I decline to enter judgment and direct that the advocate may pursue the recovery of taxed cost by a suit to have the question of retainer determined by evidence.

9. I have avoided commenting on the question of service raised by the client on the basis that there has not been challenged the proceedings leading to the taxation of costs.

10. In conclusion, the Notice of motion dated 8th May 2019 lacks merits and it is dismissed with costs which will abide the outcome of the recovery suit.

Dated, signed and delivered at Mombasa this 25th day of September 2020

P. J. O. OTIENO

JUDGE