

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APPLICATION NO. 52 OF 2014

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

VERSUS

OMARI MBWANA ZONGA.....CLIENT / RESPONDENT

RULING

1. By a Notice of motion dated 8.5.2019, brought 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. 133,825.00 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 legal services one Ali Rashid Kirua at the request and on account of the client leading to his release from police station and cessation of police harassment. 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 04.12.2019.

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 then 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. The advocate reiterates that the client being the MP for Msambweni, referred one Rukia Ali, a constituent, to be afforded legal services in Kwale Cr case No. 366 of 2010. 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 of law can 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 ignore the alleged facts of long standing advocate –client relationship and what could have been filed in an affidavit in a matter other than this. I must look at the dispute to be whether the client instructed the advocate to represent on his account one Rukia Ali in Kwale Cr. Case No 366 of 2010. In other words, I must be convinced that there was a contract for the provision of legal services which obligated the client to pay the advocates costs. That is what I understand the definition under section 2 to command.

7. The advocate has invoked the definition of a client under the act which definition is indeed very wide and all encompassing. However, where the person benefitting from the services of an advocate 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, for example, if there be 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 However even in those instances, 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 2020 lacks merits and it is dismissed with costs to abide the outcome of the recovery suit.

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

P. J. O. OTIENO

JUDGE