



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.88 OF 2015

B.O.G. NAMBALE SECONDARY SCHOOL.....1ST APPELLANT

NAMBALE SECONDARY SCHOOL.....2ND APPELLANT

-VERSUS-

MAURICE OLABA ETYANG.....RESPONDENT

RULING

1. This matter was referred to this court by the Deputy Registrar for determination of retainer. This followed preliminary objection raised by the Appellant in respect to bill of costs filed by the respondent. Both parties filed submissions in respect of the preliminary objection and the bill of costs.
2. Grounds of the preliminary objection is that the firm of **Ochweri Ngamate & Co. Advocates** have not been retained by CIC Insurance Ltd and therefore did not act for and on behalf of the said insurance company. That no orders as to costs have been issued against the applicant to warrant taxation of party and party costs.
3. That it is the respondents contention that it did not instruct the firm of M/s Onchweri Ngamate & Co Advocates either expressly or impliedly and as such were acting on instructions of 1st and 2nd appellants directly and not CIC Insurance LTD and party and party bill of costs should therefore be addressed to the two appellants
4. Respondents/applicant submitted that the preliminary objection is misconceived; reason being that CIC Insurance are not parties to this proceedings and no dispute has been raised as to whether Maurice Olaba Etyang and BOG Nambale Secondary School instructed the firm of Onchweri Ngamate & Co. Advocates; that no one has contended that he will have CIC liable; and therefore the issue of retainer does not arise as what is before court is party and party costs not advocates client bill of costs where a client is disputing instructing an advocate.
5. Respondent further submitted that the meaning of retainer is defined in **Kinluc Holdings Ltd Vs Mint Holdings Ltd and Macharia Ncheru Civil Appeal No.264 of 1999**.

“Meaning of retainer: 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. By the giving and acceptance of the retainer the solicitor acquires his authority to act for and bind the client and the client becomes bound both personally as between himself and his solicitor and as between himself and third parties with whom the solicitor deals within the limits of his authority on behalf of his client.”

6. The respondent further submitted that the appeal herein was withdrawn after being defended strenuously by the respondent and the respondent is therefore entitled to costs.

7. ANALYSIS AND DETERMINATION

8. I first wish to look at the meaning of the word retainer. The **Black’s Law dictionary** define retainer as follows

“1.A client’s authorization for a lawyer to act in a case.

2. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a

specified matter.

3. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.

4. An advance payment of fees for work that the lawyer will perform in the future- also termed retaining fee. “

9. From the above definition, ‘retainer’ is not limited to instructions given to an Advocate but also include fees payable to the Advocate/solicitor. It is however important to note that the presence of a retainer is what in turn gives rise to the retainer agreement.

10. Section 45 of the Advocates Acts provide for Agreements with respect to remuneration 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) ...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.”

11. Whether fee is arrived through assessment by taxing master or retainer agreement the key element is **authorization** from the client to act. Without authorization from client, the Advocate is not entitled to fee from a party the advocate/solicitor allege to have represented. Retainer creates a relationship between client and Advocate with binding obligations.

12. On perusal of preliminary objection filed and the court record, I note that the objection to taxation of bill against CIC insurance. The respondent filed a bill of costs against the two appellants. This followed Ruling delivered by Justice Mulwa on 9th February 2016. In the ruling the Honorable Judge struck out the appeal with costs to the applicant who is the respondent herein.

13. The argument therefore that no order of costs was made is not correct. The respondent rightfully filed the bill of costs against the appellants. The bill filed is party and party costs; the issue of retainer does not arise. The respondent is seeking costs from the appellants whose appeal was struck out. There is no taxation against CIC. The issue of retainer does not arise herein in respect to the respondent. Retainer relationship arise between Advocate and Client not between parties to a dispute in court.

14. From the foregoing I find that, the preliminary objection is without merit and I decline to strike out bill of costs filed.

15. FINAL ORDERS

1. Preliminary objection is dismissed
2. Remit the file back to the deputy registrar for assessment of costs.
3. Cost of the preliminary objection to the Respondent.

Judgment Dated, signed and delivered at Nakuru this 23rd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared/ Schola Court Assistant

Mawenzi holding brief for Ngure Counsel for Appellant

N/A Counsel for Respondent