



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISCELLANEOUS APPLICATION NO. 12 OF 2015**

**MULU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**YUMBYA KALEVE .....RESPONDENT**

**RULING**

1. The Applicant herein has filed an Application dated 8<sup>th</sup> December, 2017 brought pursuant to Rule 12 of the Advocates Remuneration Order seeking for the reliefs namely:-

***(a) That the court do find that there was a retainer of an Advocate Civil Appeal No. 4 of 2014 by the Respondent YUMBYA KALEVE instructing the Applicant – MULU & COMPANY ADVOCATES***

***(b) That the costs be provided for.***

2. The Application is supported by the name annexed affidavit of Francis Mulu sworn on even date and further on the following grounds namely:-

***(a) That the Applicants were instructed to the suit and recover damages following an accident on 30/10/2012 involving the Respondent and motor vehicle registration number KBJ 709 R.***

***(b) That at no point were instructions ever withdrawn by the Respondent.***

***(c) That a complaint was lodged with the Law Society of Kenya and a Bill of Costs dated 16/03/2013 filed to determine the costs awardable to the Applicant.***

***(d) That in a ruling delivered on 23/3/2017 the Taxing officer/Deputy Registrar held that she did not have the requisite jurisdiction to tax the Applicant's Bill of costs dated 16/3/2015 as retainer of Advocate was disputed.***

***(e) That the matter was to be referred to the Judge to determine retainership.***

3. The Respondent upon being served with the Application neither filed a replying affidavit nor grounds of opposition.

4. The Applicant's case is that they had been instructed by the Respondent to file suit being **Mutomo Law Courts Civil Suit No.14 of 2013** and to recover damages following a road Traffic accident involving the Respondent and motor vehicle registration number KBJ 709 R. It was also the Applicant's case that they duly prosecuted the matters until it was concluded and that they kept the Respondent abreast of the progress by way of letters, telephone calls and office visits. The Applicant went on to state that as soon as the judgement was delivered, the Defendant in that matter lodged an appeal being **Machakos High Court Civil Appeal No. 4 of 2014** and which the Applicants upon being served defended the Respondent's interests in the pursuit of recovery of the damages awarded and in which they duly informed the Respondent thereof and who did not withdraw instructions. It was also the Applicant's case that the Respondent duly received and acknowledged the sums awarded in full and final settlement after the requisite deductions had been made and the Applicant was later surprised to be notified about a complaint lodged by Respondent to the Law Society of Kenya against the Applicant. The Applicant upon receiving the complaint aforesaid duly filed its Bill of Costs but which could not be taxed by the Deputy Registrar as the Respondent herein denied retaining the Applicant to act for them in this appeal. It was the contention of the Applicant that they had instructions to file suit and receive damages which instructions included the Appeal and in any case the said instructions were not withdrawn by the Respondent. The Applicant now maintains that there was retainership and therefore the Bill of Costs should be referred to the Deputy Registrar for Taxation.

5. I have considered the Applicant's Application together with the Affidavit and annexures in support thereof. It is not in dispute that the Respondent herein had instructed the Applicant to file suit vide **Mutomo civil Case No. 14 of 2013** for recovery of damages following a road traffic accident involving the Respondent and Motor vehicle Registration No. KBJ 709 R which matter was eventually concluded and damages awarded in favour of the Respondent. It is also not in dispute that an appeal was lodged by the Defendant in that primary suit and which culminated in the **Machakos High Court and Appeal No. 4 of 2014**. It is not in dispute that the Applicant filed its Bill of Costs which was opposed by the Respondent on the ground that the Applicant did not have instructions in the **Civil Appeal No.4 of 2014** and which forced the Deputy Registrar to refer his matter to this court for determination pursuant to Rule 12 of the advocates Remuneration Order. The only issue for determination herein is whether there was a retainer of the Applicant by the Respondent in **Machakos High Court Civil Appeal No.4 of 2014**.

6. To start with, it is noted that the Respondent has taken issue with the Applicant regarding the aspect of costs more specifically those arising from the **Civil Appeal Case Number 4 of 2014** on the ground that the same are excessive and ought not be saddled upon the Respondent who had not instructed the Applicant to handle the Appeal in the first place. Indeed the Respondent has already lodged, a complainant with the Law Society of Kenya arguing that no instructions had been given to the Applicant to participate in the Civil Appeal Case and that the Law Society of Kenya had directed that the Bill of Costs be filed by the Applicant so that the issues if any will then come to the fore.

The Applicant vide the Affidavit in support sworn on the 8/12/2017 has averred that defending the appeal was part of the instructions to recover damages following the accident and that the Respondent was duly informed and who did not at any time withdraw instructions from the Applicant. The Applicant annexed a copy of the Appeal and letter informing the Respondent about the issue of the appeal and how the Applicant intended to tackle it.

I have looked at the averments by the Applicant in its affidavit as well as the annexures. It is quite clear that the Respondent had indeed instructed the Applicant to file suit and pursue for damages. As soon as an appeal was served upon the Applicant they were under obligation pursuant to the earlier instructions from Respondent to defend the matter in the appeal since the sole goal or aim of the Respondent was the recovery of damages. It could have been a dereliction of duty on the part of the Applicant not to take up the Appeal matter once they were served. The Applicant duly informed the Respondent about the progress of the Civil Appeal and at no time did the Respondent withdraw instructions from the Applicant in the Civil Appeal. In fact the Respondent finally obtained the decretal sums in the end. The Respondent's grouse appears to be that the Applicant has taken up much of the monies in form of costs and that is why a complaint was lodged with the Law Society of Kenya. The Respondent had been duly alerted of the Civil Appeal by the Applicant and no contrary instructions were issued to the Applicant. In any event the fact that the Respondent later received the decretal sums is a clear indication that the Applicant had successfully defended Respondent in the Appeal. The Respondent had benefitted from the efforts of the Applicant and therefore he cannot now turn around and deny that there were no instructions to defend him in the Civil Appeal. In any event the Respondent did not at any time indicate to the Applicant that he had instructed another counsel even after being notified by the Applicant of the progress of the appeal. I am convinced that the Respondent's beef with the Applicant is on the issue of costs which can be addressed during the taxation of the Bill of Costs by the Deputy Registrar. In this regard the Bill of Costs is hereby referred for taxation.

7. In view of the foregoing observations, it is the finding of this court that there was a retainer of an Advocate in **Machakos High Court Civil Appeal No. 4 of 2014** by the Respondent **Yumbya Kaleve** instructing the Applicant herein Mulu & Co. Advocates. The Application dated 8/12/2017 is allowed as prayed.

It is so ordered.

**Dated and Delivered at Machakos this 17<sup>th</sup> day of August, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Langalanga for Mburu - for the Applicant

No appearance - for the Respondent

Josephine - Court Assistant