



## REPUBLIC OF KENYA

### IN THE HIGH COURT

#### AT NAIROBI

#### CONSTITUTIONAL & HUMAN RIGHTS DIVISION

#### MISC APPLICATION NO 7 OF 2017

**GITONGA MUREITHI & CO. ADVOCATES.....PETITIONER**

**VERSUS**

**CENTRE FOR MULTIPARTY DEMOCRACY....RESPONDENT**

#### RULING

1. On 26<sup>th</sup> of April 2017, the firm of *Gitonga Mureithi & Co. Advocates*, the Advocates, filed their client-Advocates' Bill of costs dated 24<sup>th</sup> April 2017 against *centre for Multiparty Democracy*, the client, for professional work done on behalf of the client in petition No. 182 of 2015.
2. Upon being served with the Bill of costs, the client filed grounds of opposition dated 15<sup>th</sup> May 2017 and filed in Court on 16<sup>th</sup> May 2017 objecting to the Bill of costs on grounds that it never instructed the advocates to act on its behalf in that Petition thus raising the question of retainer. When the Bill of costs came up for taxation before the taxing officer, the question of retainer arose and as a result, the taxing officer referred the matter to this Court to resolve the issue of retainer because she had no jurisdiction to deal with the issue.
3. In their grounds of objection, the client contended that they never instructed the firm of *Gitonga Mureithi & Co. Advocates* to act for them in *Petition No 182 of 2015*; that as the client, they are strangers to the Advocates' claim since their instructions were to the firm of *S. Musalia Mwenesi Advocate* to act for them in the said petition and that the client is not responsible for the Bill of Costs by the firms of *Gitonga Mureithi & Co, Advocates*. The client made reference to the affidavit by *Dr. Carey Francis Onyango* in which the deponent stated that they instructed the firm of *S. Musalia Mwenesi advocate* to act for them and not *Gitonga Mureithi & Co. advocates*.
4. In response to the grounds of opposition and affidavit by *Dr. Onyango*, *Stephen Gitonga* of *Gitonga Mureithi & Co. Advocates* filed an affidavit sworn on 17<sup>th</sup> May 2017 and filed in Court on the same day, deposing that his firm was instructed by the client to act in Petition No 182 of 2015 on behalf of the client; that pursuant to those instructions, his firm filed a notice of appointment dated 11<sup>th</sup> May 2015; prepared and filed a replying affidavit by the client's executive director, *Njeri Kabeberi* sworn on 11<sup>th</sup> May 2015, and also prepared and filed written submissions of even date, a fact that is acknowledged in the judgment that his firm acted for the client in that petition to the very end.
5. *Mr. Gitonga* deposed, therefore, that the issue of representation and instructions is beyond dispute based on the facts on record. He attached copies of the Notice of appointment, affidavit, submissions filed in that petition and the judgment of the Court to demonstrate that indeed the firm acted for the client.
6. During the hearing of the objection, *Mr. Anyango*, learned counsel for the client, submitted that instructions were given to the *S Musalia Mwenesi Advocate* and that correspondences were exchanged between the client and the said firm a confirmation that it was *S Musalia Mwenesi* advocate who were to act in petition No 182 of 2015.
7. It was submitted that after conclusion of the Petition, *S Musalia Mwenesi advocate* submitted their fee note of for Ksh499,500/- which was settled through a cheque dated 31<sup>st</sup> August 2015 in full and final settlement of the legal fees. Learned counsel submitted, that the client was aware that the firm of *Gitonga Mureithi & co advocates* was working together with that of *S Musalia Mwenesi Advocate* and for that reason, the client instructed *S Musalia Mwenesi advocate* to pay the firm of *Gitonga Mureithi & co Advocates* part of the money. According to the fee note from *S Musalia Mwenesi advocates* the amount for drafting the opinion was Kshs. 50, 000/=
8. *Mr. Anyango* went on to submit that there is no denial that *Messrs Gitonga Mureithi & Co. Advocates* acted in petition No 182 of 2015 but contended that the client discharged its obligation once the legal fee was settled and therefore, urged that the objection be upheld and the Bill of costs be struck out.

9. **Mr. Gitonga**, learned counsel for the advocates, submitted that the letters attached to **Dr. Francis Onyango's** affidavit relate to the period after the hearing of the petition while others were after delivery of the judgment on 26<sup>th</sup> June 2015, hence they could not constitute instructions to **S Musalia Mwenesi Mureithi advocate** to act for the client in that petition. Learned counsel submitted that pleadings filed in the petition were done by his firm and further that the judgment shows that it was his firm that was on record for the client. He also referred to the replying affidavit by **Njeri Kabeberi** and submissions filed in that petition and which were drawn and filed by their firm to show that indeed it was his firm that acted for the client and is entitled to demand legal fees.

10. **Mr. Gitonga** contended that there was no way instructions could have been given to **S Musalia Mwenesi advocate** to act for the client after responses and submissions had been filed and the case heard. He termed the objection a grave injustice to his firm and argued that the client had decided to pay fees to a third party when it was his firm that did the work. He submitted that **Mr. Mwenesi** joined him on the morning of the hearing and that was all. He prayed that the objection be dismissed.

11. Flowing from the contestation herein above, the question that presents itself for determination is whether or not the firm of **Gitonga Murithi & co advocates** had instructions to act for the client and, depending on the answer to that question, whether their advocates-client Bill of costs is properly before Court for taxation. **Mr. Gitonga** contends that his firm was instructed to act for the client and indeed filed a notice of appointment and drafted and filed an affidavit together with submissions.

12. Despite this fact, legal fee was paid to **S Musalia Mwenesi advocate** and not **Gitonga Mureithi & co advocates** that were on record and the client has justified this arguing that they did instruct **S Musalia Mwenesi Advocates** and not **Gitonga Mureithi & co advocates**. According to the client, they discharged their obligation once the legal fee was settled.

13. I have perused the record herein and in particular, copies of the notice of appointment of advocates dated 11<sup>th</sup> May 2015 and filed on 12<sup>th</sup> May 2015 by the firm of **Gitonga Mureithi & Co. Advocates**, as well as submissions by the same firm of advocates dated the same date 11<sup>th</sup> May 2015 and filed on 12<sup>th</sup> May 2015 on behalf of the client who was the 2<sup>nd</sup> interested party in petition No. 182 of 2015. Also drawn and filed by the same firm of advocates was an affidavit by **Njeri Kabeberi**, the executive director of the client, the 2<sup>nd</sup> interested party in that Petition, also drawn by the firm of **Gitonga Mureithi & Co. Advocates** on behalf of the client. The affidavit was sworn on the same day 11<sup>th</sup> May 2015 and filed on 12<sup>th</sup> May 2015.

14. Also on record is a copy of the judgment delivered on 26<sup>th</sup> June 2015. The judgment clearly identifies **Mr. Mwenesi** and **Mr. Gitonga** as instructed by the firm of **Gitonga Mureithi & Co. Advocates** for the 2<sup>nd</sup> interested party – the client herein. All these signify one fact, that even though **Mr. Mwenesi** and **Mr. Gitonga** attended Court, both were instructed by the firm of **Gitonga Mureithi & co advocates**.

15. It is therefore undeniable, at least from the record, that it was the firm of **Gitonga Murithi & co advocates** that was on record for the interested party in that petition and who is the client herein. The fact that the affidavit in response to the petition was sworn by the Executive Director of the client after it had been drawn by the firm of **Gitonga Mureithi & Co. Advocates**, as well as the submissions also drawn and filed together with that affidavit, and bearing in mind the fact that the Court record shows the same firm as having instructed **Mr. Mwenesi advocate** and **Mr. Gitonga advocate** to appear in that petition, leaves no doubt that it was the firm of **Gitonga Mureithi & co advocates** that was acting to the 2<sup>nd</sup> interested party and the client herein and not **S Musalia Mwenesi Advocate**.

16. I also note that **Mr. Anyango** conceded during the hearing of this objection, that they are not disputing the fact that **Mr. Gitonga of Gitonga Mureithi & co advocates** acted in petition No. 182 of 2015. Their contention was, however, that instructions were to **S Musalia Mwenesi advocate** and to whom the legal fees was paid because it was him who had instructions to act in that petition. **Mr. Anyango** relied on the affidavit by **Dr. Francis Onyango** sworn on 15<sup>th</sup> May 2017 wherein he contended that the client instructed the firm of **S Musalia Mwenesi advocate** to act for them in that petition. The affidavit contains letters exchanged between **S Musalia Mwenesi advocate** and the client.

17. A scrutiny of the letters attached to **Dr. Onyango's** affidavit shows that they were written after the petition had been heard. None of the letters instructs **S Musalia Mwenesi advocate** to Act in that petition or take over the conduct of the matter from the firm of **Gitonga Mureithi & Co. Advocates**. There is also no notice of change of Advocates filed to signify that indeed there was change of instructions in that petition. The letter of 12<sup>th</sup> June 2015 from **S Musalia Mwenesi advocate** to the client, merely reports that **Mr. Mwenesi** attended Court accompanied by **Mr. Gitonga** confirming that indeed **Mr. Gitonga** was acting in the matter.

18. **Mr. Mwenesi** went ahead and submitted his fee note which was settled. In the letter of 27<sup>th</sup> August 2015 the author, **Njeri Kabeberi** advised **Mr. Musalia Mwenesi** to extend part of the fees to **Mr. Gitonga** who **"drafted the written opinion"**. This was despite the fact that it was the firm of **Gitonga Mureithi & co Advocates** that drew and filed her affidavit in that petition.

19. To my mind, only the firm of Advocates of **Gitonga Mureithi & co advocates** was on record for the client in that petition and indeed drafted and filed pleadings including submissions and affidavit sworn on behalf of the client. Even though **Mr. Anyango**, learned counsel for the client argued that no instructions were given to the firm of **Gitonga Mureithi & co advocates**, the fact that the said firm drafted and filed all the pleadings which are not disputed and **Mr. Gitonga** attended Court though in the company of **Mr. Mwenesi**, is evidence of implied instructions, and for that reason, I am satisfied that the firm of **Gitonga Mureithi & Co. Advocates** was the firm on record, a fact that is also acknowledged in the judgment.

20. It must be appreciated that there is no law requiring that instructions by a private entity to an advocate must be in writing. Instructions or retainer may be express or implied from the conduct of the parties in a particular case. In the case of **Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Ltd** [2007] eKLR, the court held that **"a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order."**

21. In this particular case, there is no denial that the firm of *Gitonga Mureithi & co Advocates* was on record and indeed acted for the client. The client even accepts that the firm drafted the opinion and participated in drafting and filing pleadings including an affidavit by the client's executive director a fact that has not been challenged. There cannot be any other inference to be drawn from such conduct than that there were instructions to the Advocates to act in that petition.

22. Even if *Mr. Mwenesi* attended Court during the hearing of the petition or any other time, he did so as one instructed by the firm of *Gitonga Mureithi & co Advocates* which was on record and not *S Musalia Mwenesi Advocate* who did not file any documents in that matter. Any suggestion that *Gitonga Mureith & Co. Advocates* had no instructions to act in the petition is not supported by the evidence on record and is, therefore, unsustainable.

23. If the client chose to pay *S Musalia Mwenesi Advocate*, they took a risk and paid an advocate who was not on record and cannot use that excuse to deny the advocate on record their professional fees for work done on behalf of the client. In this regard I am in agreement with the holding in the case of *Machira & Company Advocates v Arthur K. Magugu & another* (HCC Misc. App. No. 358 of 2001.) that **"a client who chooses to withdraw instructions from his advocate without any payment, undertaking or any other appropriate arrangement regarding the advocate's fees must be prepared to pay to the advocate such sum as may be found due and payable upon taxation of advocate/client bill of costs."** (emphasis)

24. For the above reasons, it is my finding that the firm of *Gitonga Mureithi & co Advocates* had instructions to act for the client and that the client's contention to the contrary is without basis. Consequently, the objection to the Advocates' – client Bill of costs dated 24<sup>th</sup> April 2017 lacks merit and is dismissed with costs.

**Dated, Signed and Delivered at Nairobi this 15<sup>th</sup> Day of August 2018**

**E C MWITA**

**JUDGE**