



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 322 OF 2015

BETWEEN

STEPHEN ALUOCH K'OPOT

T/A

**K'OPOT & COMPANY ADVOCATES
ADVOCATE/APPLICANT**

AND

**CORNEL RASANGA AMOTH CLIENT/
RESPONDENT**

RULING

1. K'opot and Company Advocates ("the Advocate") filed an Originating Motion dated 11th November 2015 under **sections 51(2)** of the *Advocates Act (Chapter 16 of the Laws of Kenya)* and **Rules 7, 13, 13A, 72 and 73** of the *Advocates Remuneration Order* seeking the following orders:

1. The Advocate-Client Bill of Costs filed in these proceedings be committed in the first instance before the Deputy Registrar for taxation and a certificate of costs be issued thereupon.

2. That the matter be placed before the judge thereafter for the following orders:

a) That the judgment be entered on the certificate of costs so signed by the Deputy Registrar in favour of the applicant

b) That interest be charged on the sum found to be due and certified by the Deputy Registrar at the rate of 9% per annum from 17th November 2014 to the date of judgment and the said interest be deemed to be part of the decretal amount and thereafter the provision of Section 26(2) of the Civil Procedure Act shall apply in so far as payment of further interest is concerned.

2. The following advocate/client bills of costs against Cornel Rasanga Amoth ("the Client") were annexed to the originating summons;

i. Bill in respect of services rendered in *Kisumu High Court Election Petition No. 2 of 2013* drawn under Schedule VI of the *Advocates Remuneration Order* ("Bill 1").

ii. Bill in respect of services rendered in *Kisumu Court of Appeal Civil Appeal No. 25 of 2013*

drawn pursuant to **Rule 111(3)** of the *Court of Appeal Rules, 2010* and under **Schedule VI** of the *Advocates Remuneration Order* (“Bill 2”).

iii. Bill in respect of services rendered in *Kisumu Court of Appeal Civil Appeal No. 32 of 2013* drawn pursuant to **Rule 111(3)** of the *Court of Appeal Rules* and under **Schedule VI** of the *Advocates Remuneration Order* (“Bill 3”).

iv. Bill in respect of services rendered to the respondent on an advocate-client basis for campaign management, advice of post-election transition and assumption of office drawn under **Schedule V Paragraph 4** and **7** of the *Advocates Remuneration Order* (“Bill 4”).

3. The application was placed before the Deputy Registrar who, as the taxing officer, directed that the issues raised in the application ought to be determined before the High Court and it is for this reason that this matter is before me for determination.

4. The Advocate’s case was that the Client approached him to join the firm of *Ochieng and Onyango Advocates* as lead counsel in the *Kisumu High Court Election Petition No. 2 of 2013* in which William Odhiambo Oduol was challenging the validity of his election as Governor of Siaya County after the 2013 general elections. He joined the team representing the Client after pleadings and witness affidavits had been filed but he none the less took part in the entire trial from pre-trial conference to examination and cross-examination of all witnesses on the dates set out in the bill of costs. He also took part in all interlocutory applications and also led the firm of *Ochieng and Ochieng Advocates* in preparing interlocutory and final submissions. He also took part in two Civil Appeals; *KISUMU CA Civil Appeal No. 25 of 2013* and *KISUMU CA Civil Appeal No. 32 of 2013* where he acted as lead counsel. The Advocates annexed the High Court and Court of Appeal proceedings to the supporting affidavit to show that he participated in these matters.

5. The Advocate contends that after the High Court nullified the election on 23rd August 2013 and directed that a fresh gubernatorial by-election be held, the Client approached and requested him to take up the position of his campaign manager over the period of 170 days. As evidence of his involvement in the campaign, the Advocate annexed a letter dated 23rd August 2013 written to the Manager of his firm explaining that he would be away from his chambers while managing the Client’s re-election campaign in Siaya.

6. The Client did not file a replying affidavit but instead filed written submissions dated 19th February 2016. His case is that the facts and documents in support of the bill of costs in the supporting affidavit do not establish the existence of an advocate/client relationship. He submitted that the Advocate did not annex any document to show that he had been contracted by the Client to act as his campaign manager and that if he was in fact appointed, the services rendered were political in nature and did not constitute a chargeable service under the *Advocates Remuneration Order*.

7. The Client further submitted that it is a mandatory requirement, under **section 45(1)** of the *Advocates Act*, that an agreement between advocate and client be in writing and signed by the client or his duly authorised agent. He argued that the Advocate had not produced such an agreement to show that he had been retained by the Client to act as his campaign manager.

8. On the issue of being lead counsel, the Client maintained that he retained the firm of *Ochieng and Ochieng Advocates* and it was them who chose to seek the assistance of the Advocate. As such if any fees were due to the Advocate, then the same ought to be paid by the instructing law firm and not the Client. The respondent submitted that this was the case even if this arrangement was at the Client’s request. As authority for this proposition, the Advocate cited **Paragraph 5** of the *Law Society of Kenya Digest on Professional Conduct and Etiquette* which states as follows:

Where one advocate acts for the client of another at the latter’s request, the two advocates may conclude an agency or other agreement to provide for the remuneration of the advocate who does the work. In the absence of such an agreement, the advocate who carries out the work is entitled to

treat the other advocate as being in the same position as a lay client and charge him accordingly.

9. The issues for determination are whether there was a retainer agreement between the Advocate and Client for the provision of legal services and whether the services rendered by the Advocate are legal services chargeable under the **Advocates Remuneration Order**.

10. A retainer is the basis of a relationship between the advocate and client. Such a relationship may be oral or in writing, express or implied. It is not necessary that retainer be in writing. The purpose of **section 45(1)** of the **Advocates Act** is to regulate remuneration agreements between advocates and clients. It does not limit the nature of agreement that may be entered into between advocate and client for the provision of legal services. In **Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited [2008] 1 EA 380**, the court held that;

[I]t is not the law that an advocate must obtain a written authority from client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it maybe wide. And nevertheless, it can be implied from the conduct of the Client/Advocate "relationship".

11. The court further held that;

It is the position of the law that if there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission... the burden of proof to establish the retainer is always on the shoulders of the advocates. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yard stick for such proof is not beyond reasonable doubt. In fact it is in the normal parameters of balance of probability.

12. Where a retainer is denied, the burden falls on the Advocate to prove the retainer on the balance of probabilities. The Advocate filed a supporting and further affidavit detailing his involvement in the matters after he had been requested by the Client to act on his behalf. It is evident from the court records that the Advocate was actively involved in the proceedings. He appeared personally in court defending the election petition in the High Court and acted for him in the Court of Appeal. The respondent did not file any affidavit denying the Advocate's allegations hence these facts remained unchallenged. I therefore find that apart from oral instructions, the retainer can be implied from the fact that the Advocate acted on behalf of the Client in the proceedings. The Client having taken the benefit of such representation, cannot turn around and say that the Advocate did not have instructions particularly in such a weighty matter as an election petition.

13. Counsel for the Client referred relied on the **Law Society of Kenya Digest on Professional Conduct and Etiquette** to argue that since the Advocate was lead counsel, he ought to look to instructing firm for his fees. I hold that the rules of professional etiquette have their place in regulating legal practice but ultimately in a case such this, the nature of the relationship between the Advocate and Client must be determined by the terms of the retainer whether express or implied.

14. Mr K'opot deponed that he was approached by the Client and asked to act as lead counsel. He accordingly took up the instructions and acted for the Client by preparing for trial and doing all the things that are itemised in the bill of costs. As I stated elsewhere, his averments on this issue were not contested. I therefore find and hold that the Advocate was duly instructed by the Client and as such he is fully liable to pay fees. Moreover, nothing would have been easier than for the Client to procure an affidavit from the firm he instructed to confirm that the instructions to engage the Advocate emanated from the firm and not the Client.

15. I have considered the case of **Ochieng, Onyango, Kibet and Ohaga Advocates v Akiba Bank Limited (Supra)** cited by counsel for the Client to support his submission that where an advocate has a choice to ask another Advocate to lead him in a matter, he cannot make the client liable for costs incurred without

the express instruction or permission of the client. The case though, makes the same point I have made; that the relationship between the advocate and client depends on the facts and circumstances. In that case the advocate on record had initially instructed the firm of advocates to lead it for purposes of arguing an application to reinstate the dismissed suit. The instructing advocates undertook to pay its fees for the application. In due course, the advocates came on record, gave the bank a legal opinion on chances of success of the case, corresponded with the bank continued to prosecute the case. The court held that in the circumstances the bank was liable for fees based on its subsequent conduct.

16. I also find and hold that even though the Advocate acted for the Client in another capacity as a campaign manager does not detract or take away from the Advocate's duties in court for which he was specifically instructed and which were undertaken in his capacity *qua* advocate. The nature of services rendered and itemised in Bills Nos. 1, 2 and 3 are distinct, identifiable and are chargeable since they involve contentious matters under Part III of the **Advocates Remuneration Order**. I therefore reject the argument that the Advocate is not entitled to fees on the ground that he was performing other political assignments

17. I not turn to Bill No. 4 where the Advocate has claimed fees for services rendered for, inter alia, "*Instructions on time engaged basis being 170 days of 8 hrs @Kshs. 3,750/- for every 15 minutes to instructions to suspend office work and pitch camp in Siaya County to head your campaign team, providing strategic and logistical advice, taking charge and management of campaign teams*"

18. The purpose of the **Advocates Act** and **Advocates Remuneration Order** is to regulate the professional business of Advocates. **Section 44(1)** of the **Advocates Remuneration Order** states that:

The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious. [Emphasis mine]

19. The **Advocates Remuneration Order** made pursuant to **section 44(1)** of the **Advocates Act** elaborates the matters that are considered contentious and non-contentious. It is clear that contentious matters are where an advocate represents the client in courts, tribunals and like bodies. Part II of the **Advocates Remuneration Order** deals with non-contentious matters. The matters for which the advocate is remunerated for under this head include conveyancing and matters such as sales, purchases and securities in respect of immovable property, leases and agreements to lease land, company formation, incorporation and registration, trademarks, business in relation to administration of estates, uncompleted transactions and other business in relations to gifts inter vivos, settlements, deeds, trusts and other instruments, patents, designs and utility models. It is therefore clear that matters of the nature set out in Bill No. 4 do not fall within the rubric of non-contentious business. It follows them **Schedule V** or any other schedule of the **Advocates Remuneration Act**, which simply provide for the mode of charging, cannot apply to such business set out by the Advocate in Bill No. 4.

20. An Advocate has a choice do any form of work for which he may charge and collect fees. However, he cannot take the benefit of the **Advocates Act** and the **Advocates Remuneration Order** unless the nature of professional business is defined and is the subject of regulation thereunder. Management of political campaigns and related matters are not the kind of professional business contemplated under the statutory regime regulating fees. I therefore find that Bill No. 4 cannot be subjected to taxation before the Deputy Registrar.

21. Although I have dealt with substantive issues raised by the parties in order to deal with the dispute between the parties with finality, I wish to address a technical issue that was not raised by the parties. In prayer (1) of the Originating Summons, the Advocate prayed for an order that the Bills, "*be committed in the first instance before the Deputy Registrar for taxation and a certificate of costs be issued thereupon.*" The originating summons was unnecessary as the **Rule 70** of the **Advocates Remuneration Order** provides for the manner of filing bills of costs for taxation as follows:

Every bill of costs of taxation shall be lodged with the registrar and shall be endorsed with the name and address of the advocate by whom it is lodged, and also the name and address of the advocate (if any) for whom he is agent, and the name and address of any advocate or other person entitled to receive notice of the taxation. Every such bill shall be accompanied by one carbon or other true copy thereof for each name endorsed thereon of any advocate or other person entitled to receive such notice.

22. An advocate does not require leave or permission to lodge a bill of costs for taxation. The Advocate ought to have lodged each bill separately for taxation rather than file and originating summons. Further, prayer (2) cannot be granted as it is only after each bill is taxed and a Certificate of Costs issued that the advocate may apply for judgment for the sum so certified under **section 51(2)** of the **Advocates Act**.

23. As I have found that the Advocates was duly instructed to represent the Client, I direct the Advocate to file separate bills for services rendered in each of the following cases; **Kisumu High Court Election Petition No. 2 of 2013, Kisumu Court of Appeal Civil Appeal No. 25 of 2013 and Kisumu Court of Appeal Civil Appeal No. 32 of 2013** for taxation before the Deputy Registrar.

24. There shall be no order as to costs.

DATED and DELIVERED at KISUMU this 25th day of May 2017.

D.S. MAJANJA

JUDGE

Mr K'opot instructed by K'Opot & Company Advocates for the Advocates/applicant.

Ms Olang'o instructed by Wasuna & Company Advocates for the Client/respondent.