



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISCELLANEOUS CAUSE NO 446 OF 2013**

**MBUGUA & MBUGUA ADVOCATES.....CLAIMANT/RESPONDENT**

**VERSUS**

**KENINDIA ASSURANCE CO.LTD.....RESPONDENT/APPLICANT**

**RULING**

The applicant, Kenindia Assurance Co. Ltd through a Notice of Motion dated 17/11/2014 is seeking for orders that it never retained the claimant advocate to act for it in HCCC No. 443 of 1996. The applicant's claim is that it did not instruct the respondent herein, Mbugua & Mbugua advocates. The applicant stated that the firm of V.R.D Patel was initially on record for them as the defendants in HCCC No. 443 of 1996.

The application is opposed. The respondent filed a replying affidavit sworn by Joseph Njoroge Mbugua, the managing Partner of Mbugua & Mbugua Advocates. He avers that they filed the advocate/client Bill of cost dated 16<sup>th</sup> April 2013 seeking its professional fees arising from their legal representation of the applicant's insured in the HCCC No. 443 of 1996-Bomco Construction Company Limited vs Issak & Issak Mohammed. The claimant advocate claims that they were instructed by the applicant through Mr V.R.D Patel Advocate. In the instruction letter dated 26<sup>th</sup> September 2000 Mr V.R.D Patel described and held himself as a lawful agent of the applicant who had the authority to issue instructions on behalf of the applicant as it did to the claimant advocate to take over the conduct of the defendant's case in the High Court Civil Case No. 443of 1996.

The respondent further deposed that at the material time, Mr V.R.D Patel was employed by the applicant as an in house counsel in its Legal Department and did not have a separate distinct office which he practiced. The respondent/claimant believes that the advocate was the clients' officer having full authority to instruct the advocate on behalf of the client as he did. The respondent also stated that at the time of the instruction to represent the applicant's insured in the material case, the respondent was one of the advocates on the client's panel of external legal service providers.

That during the pendency of HCCC No. 443 of 1996 there was exchange of correspondence between the advocates and the applicant that necessarily implied and confirmed that the latter had retained the firm of Mbugua & Mbugua advocates to act on behalf of its insured in the said case. That the applicant had in the past paid to the respondent its professional fees in other matters whereby instructions were similarly received through V.R.D. Patel Advocate.

The application was prosecuted by way of written submissions. The applicant submitted that it did not instruct the respondent. It stated that the same is confirmed by the instruction letter which was written by

V.R.D Patel advocates not the applicant. According to the applicant the letter instructed the respondent to hold brief in that instant case.

The applicant further submitted that according to the Black's Law Dictionary a retainer is defined as a client authorization for lawyer to act in a case hence where there is no retainer it is presumed that in law that advocate acted without authority. The applicant relied on the case of **Ohaga and Akiba Bank (2008) 1 E.A.**

The respondent submitted that the decision of the taxing officer was patently wrong and amounted to a misapprehension of the provisions of Paragraph 12 of the Advocates (Remuneration) Order. The respondent stated that the prescribed procedure of a case stated contemplates that facts of the dispute in question have been ascertained, undisputed or otherwise agreed to by the parties and the only issue to be determined is a legal issue. They further stated that the issue of consent raised by the provisions of Paragraph 12 of the Advocates (Remuneration) order is not just an agreement by the parties to have a dispute referred by taxing officer to the Court but rather an agreement as to the facts of the dispute in question.

The respondent submitted that the jurisdiction of this court on reference under Paragraph 12 of the Advocates (Remuneration) Order is strictly limited to determination of a question of law and does not extend to ascertaining facts of a dispute arising out of the taxation of a bill of costs. They stated that a dispute as to retainer is not a dispute contemplated by the provisions of paragraph 12 of the advocates (remuneration) order. They argued that a dispute as to retainer is a factual question that calls for production and consideration of evidence. The respondent referred to the case of **Lumumba, Mumma and Kaluma Vs Sachin Shaha (2013) eKLR**. The respondent further submitted that the Taxing Officer exceeded her jurisdiction under paragraph 12 of the Advocates (Remuneration) Order in referring the dispute as to the respondent's retainer for the opinion of the Court.

On whether a dispute as to retainer can be a bar to taxation of a bill of costs, the respondent submitted that a dispute as to retainer is not a bar to taxation. The respondent referred to section 51(2) of the advocates Act stating that taxation can proceed and certificate of taxation issued by a taxing officer even where an advocate's retainer is disputed. The respondent also cited the case of **Khan & Katiku Advocates vs Central Electrical International Ltd (2005) eKLR**. The respondent submitted that the Taxing Officer misdirected herself in holding that taxation of the bill of costs dated 19<sup>th</sup> April 2013 could not be carried on when there was a dispute as to retainer.

On whether the taxing officer had jurisdiction to determine a dispute as to retainer, the respondent submitted that according to paragraph 13A of the Advocates(remuneration ) Order the taxing officer has a wide discretion with respect to taxation of items of a bill of costs and the instruction fee is one of the items in a bill of costs. In addition, it was contended that a dispute as to retainer is a challenge to the item on instruction fees and by extension, all the other items of a bill of costs. It is thus a dispute that touches on the core business of a taxing officer.

The respondent submitted that the applicant retained the respondent to act on its behalf in HCCC No. 443 of 1996. Bomco Construction Company Limited vs Issak & Issak Mohammed. The instructions were given by Mr. V.R.D Patel who was an in house counsel within the legal department with full authority to instruct the respondent on behalf of the applicant. The respondent also stated that this was not the first time that such an allegation has been presented by the applicant. The respondent cited the case of **Mbugua & Mbugua Advocates vs Kenindia Assurance Co ltd (2009) eKLR** where the court held that an agent of Kenindia did on behalf of the Sony Sugar Company appoint the advocate on their behalf.

I have considered the application together with the supporting affidavit and the written submissions filed by counsels. In my view the following are the issues for determination:

Whether the court has jurisdiction to determine the dispute as to the retainer under paragraph 12 of the advocates (Remuneration) order?

Whether in the circumstances of this case there was a retainer.

What orders should this court make?

On the first issue, it is the respondent's contention that the court's jurisdiction is limited to determination of a question of law and does not extend to ascertaining facts of dispute arising out of the taxation of a bill of costs. It is the respondent's position that a dispute as to the retainer is not such dispute contemplated by the provisions of paragraph 12 of the Advocate Remuneration Order. The paragraph provides:

"12.(1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.

(2) The procedure for such reference shall follow that of a case stated but shall be to a judge in chambers."

A reading of the above provisions of the law clearly show that the taxing officer has the discretion to refer any matters in dispute arising out of the taxation of a bill of costs to this court for its opinion. According to the taxing officer, the issue of retainer arose and in her ruling dated 17/10/2013 she held that she could not proceed to tax the bill when the issue of retainer is disputed. In my view the dispute as to the retainer can be referred to this Court. In **Khan & Katiku Advocate v Central Electrical International Ltd (supra) Waweru J**, when dealing with an objection raised on the bill of costs held that:

"But in my view that power and discretion must relate to the core business of the taxing officer and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation. It is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a situation may arise such as the present one, where the advocate's instructions are only partly disputed. Here it is contended by the Client that the Advocates had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate's instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds."

Also in *Mugambi & Co Advocates v John Okal Ogwayo & another* [2013] eKLR it was held *inter alia* that:

"The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See **paragraphs 2, 10 and 13** of the remuneration order.

**12.** Where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer that issue ought first to be determined by the Court. "**Court**" is defined in **section 2** of the **Advocates Act, Cap 16** as the High Court. "Court" is thus not the taxing officer or a deputy registrar of the court."

**I have no good reason not to adopt the reasoning of the court on the law in the above two decisions and hold that** the issue which was referred to this court is a dispute on retainer which is within the jurisdiction of this court.

On the second issue of whether there was retainer in this case, TUNOI, SHAH & OWUOR J.J.A in CIVIL APPEAL NO. 264 OF 1997 BETWEEN KINLUC HOLDINGS LTD VS MINT HOLDINGS LTD AND MACHARIA NJERU stated as follows concerning what retainer is:

"It is common ground that the meaning of retainer as set out in Halsbury's Law of England, Third Edition, paragraph 84, is correct. The learned authors set out the following.

"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."

It is the applicant's contention that it did not instruct the respondent herein and if the respondent acted on behalf of the applicant then the firm was holding brief for V.R.D Patel Advocates. The respondent, to prove that there was a retainer produced a letter dated 26<sup>th</sup> September 2000 signed by V.R .D Patel which reads ".....I act for Kenindia Assurance Company and through them for both the defendants in the above case.

*Please write to the plaintiff advocates immediately that you have taken over the above case on behalf of both the defendants and that they should with you.....your reasonable charges would be paid by our clients' insurance company.*" The respondent also received a letter from the applicants on 13/2/2001 informing them of changes in their legal and recoveries department. One of the changes communicated was the completion of the term of Mr V.R.D Patel who was their consultant.

It is trite law that a retainer need not only be in writing but can be implied from the parties conduct. I agree with the decision in **GEORGE NDUNGU KIMANI T/A GEORGE N. KIMANI & CO. ADVOCATES V RONALD SCHAICH [2013] eKLR**

"A retainer is but an instruction, express or otherwise by a client to an advocate to represent the client or to offer particular legal services to a client in a particular matter or generally. As Njagi J correctly put it, such instruction must not necessarily be in writing. A retainer may be inferred from the conduct of the parties."

In my view the letter dated 26/9/2000 contains the instructions for the respondent herein to represent the applicant in HCCC No. 443 of 1996. Bomco Construction Company Limited vs Issak & Issak Mohammed. Although the letter was written by the V.R.D Patel, It has not been denied that Mr Patel was in the employment of the applicant. It is infact conceded that he was their legal consultant whose term came to an end as at 13/2/2001 when the applicant wrote to the respondent advocate, communicating some changes. There is no evidence that the respondent advocate was merely asked to hold brief for Mr. Patel. In the instructions letter, Mr Patel was categorical that he was relinquishing instructions to the respondent to take over the conduct of the matter and file notice of change of advocates and asked the respondent to write to the plaintiff's advocates on record to that effect. The said letter was copied to the applicant. This court has not seen any protest note written by the applicant declining to accept that VRD Patel was not authorized to give such instructions to the respondent advocate in the said matter, upon receipt of that letter which also asked the applicant to submit documents from their file to the advocate to enable the advocates protect their interests.

In my view Mr Patel gave instructions on behalf of the applicant as its Advocate/legal consultant therefore his decision is binding on the applicant. The retainer can also be inferred in this case from the conduct of parties here. The respondent produced letters dated 26/8/2000 and 27/9/2000 showing dialogue on instruction fees. In that regard, in my view the applicant cannot be heard to say that it did not instruct the respondent to act on their behalf in HCCC no. 443 of 1996 Bomco Construction Company Limited vs Issak & Issak Mohammed.

I hold the view that there was a retainer in this case and the respondent is therefore entitled to his instruction fees and disbursements that remain unsettled by the client, and that an advocate who has

rendered services for the client as instructed, should be remunerated and not impoverished. In the premise, I direct the taxing officer to tax the advocate client bill of costs as filed on 17<sup>th</sup> April, 2013 in accordance with the laid down principles for taxation of advocate client bills of costs.

The Taxing officer has special jurisdiction to tax bills of costs as was correctly stated in **Thomas James Arthur vs. Nyeri Electricity Undertaking (1961) EA 492** that:

“1) Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters which taxing masters are particularly fitted to deal with and the Court will intervene only in exceptional circumstances.

2.....”

In the end, the applicant’s application is dismissed.

The respondent shall have costs of the application dated 17/11/2014.

**Dated, Signed and Delivered in open court at NAIROBI this 26<sup>th</sup> day of June, 2015.**

**R.E.ABURILI**

**JUDGE**