REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 372 of 2009

GEORGE NDUNG'U KIMANI T/A

GEORGE N. KIMANI & CO. ADVOCATES …….....…..…. ADVOCATE

VERSUS

RONALD SCHAICH .....……..……..... CLIENT

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JUDGEMENT

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1.The application before me is a Notice of Motion dated 2nd November, 2011 brought under Section 51(2) of the Advocates Act by the firm of M/S George N. Kimani & Co. Advocates (hereinafter " the Advocate") against Ronald Schaich (hereinafter "the client"). It seeks judgment for the sum of Ksh.508,694/- together with the interest at the court rate of 14% per annum or other rate this court will deem appropriate. The grounds for the application are that the Advocates bill of costs dated 16th May, 2009 was fully taxed by the taxing master in the said sum of Kshs.508,694/- in favour of the advocate and that the amount is due and owing as per the certificate of costs issued on 10th November, 2010.

2.The application is supported by an Affidavit of George Ndung'u Kimani, Advocate, sworn on 2nd November, 2011. Annexed to the Affidavit is the said Certificate of Taxation. The Advocate depones that the Client instructed the Advocate to represent him in Nairobi **HCCC No. 57 of 2009 Ronald Schaich – vs- Mary Wambui Karlen.** That when the Advocate demanded professional fees and costs for services rendered the Client declined to pay. That on 18th May, 2009, a bill of costs was lodged and a certificate of taxation of Kshs.508,694/- issued. The advocate also contended that due to the outstanding amounts owed by the Client, extra costs have been incurred on their part due to litigation through the instant proceedings and as such party and party costs of Kshs.49,000/- per Schedule VI 1(a) should be awarded. Counsel for the Advocate submitted that there is no dispute as to the retainer, that in the submissions dated 16th August, 2010 before the taxing master, there was no dispute as to retainer and the Client had submitted that the fee payable was Kshs.90,667/- as instructions fees. Counsel therefore submitted that the certificate of taxation had not been altered, varied or set aside and that therefore the application should be allowed as prayed.

3.The Client opposed the application vide his Replying Affidavit sworn on 9th December, 2011. He contended that he did not issue the advocates with instructions to act on his behalf in the said Nairobi **HCCC No. 57 Of 2009 Ronald Schaich –Vs- Mary Wambui Karlen** and as such, there was an issue as to retainer which the court needed to determine first before the issue of Judgment can be dealt with. The client deponed that he had previously filed an application vide a Chamber Summons dated 20th October, 2010 to set aside the certificate of costs. That the application was still pending. The Client opined that

should the court enter Judgment as prayed by the Advocate, the same would be rendered ineffectual if the prayers sought in his said pending application challenging the taxation are granted. He therefore urged the Court to dismiss the application for lack of merit.

4. I have carefully considered the, affidavits on record, the rival submission by learned Counsel and the entire record. I have also carefully considered the cases cited by the parties. In my view, the main issue for determination is whether the Advocate has satisfied the conditions set out in Section 51 of the Advocates Act, under which the current application has been brought. That Section provides:-

"The certificate of the Taxing Officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court be final as to the amount of the costs thereby and the court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed an order that judgment be entered for the sum certified to be the costs." (Emphasis mine)

The section gives the court the jurisdiction to enter judgment for taxed costs where two conditions are satisfied. These are that there must be a certificate of costs which has not been set aside or varied by the court and secondly that there must be no dispute as to the retainer. If those two conditions are satisfied, then the court has no otherwise but to enter judgment for the sum certified to be due with costs.

5. In the case at hand, it is common ground that the first condition has been met by the Advocate. There is a Certificate of Costs that has not been set aside or varied by the court. The client contended that since his application challenging the certificate of costs was still pending, the first condition had not been met. With respect I do not agree. To my mind, the existence of an application to challenge the taxation is not enough. I say so for two reasons. Firstly, the taxation was on 13th October, 2010, the certificate of taxation was issued on 10th November, 2010 whilst the application purporting to challenge the certificate was filed on 25th October, 2010. He same has never been prosecuted. Was the Advocate to wait ad infinitum for the challenge to be effected? I think not. Secondly, when this application first came up to hearing on 13th December, 2011, there was no objection to its being heard. The parties agreed that the same be disposed off by way of written submissions. Thereafter nothing happened until 10th December, 2012 when the parties asked the court to write the ruling based on the written submissions. On the foregoing, my view is that it would be unjust to refuse the Advocate's application on the basis of the client's indolence.

6. I am not alone in this. In the case of **Kalonzo Musyoka and Paul M. Wambua (practicing as Musyoka Wambua & Company Advocates –vs- Rustam Hira (practicing as Rustam Hira Advocate) Misc. Appl. No.444 of 2004** H.P.G. Waweru J held as follows:

"It has been submitted that the client has taken steps to challenge the award on instruction fee. If that be the case, what the Client should have done was to seek a stay of further proceedings until the challenge of the taxation is disposed of. There is no such application before the court. In the circumstances, I find no reason to deny the Advocate judgment as sought."

Similarly, Njagi J. in **Macharia Njeru –Vs- Communications Commission of Kenya HCCC No. 1029 of 2002 (UR)** held that, the words of Section 51(2) of the Advocates Act were very clear that where a certificate of taxation had **neither been set aside nor altered by the court, and where there was no order of stay,** the certificate was final as to the amount of costs covered thereby and to allege a dispute at the summary judgment would amount to a contradiction of the express and mandatory statutory provisions. Be that as it may, I am aware that in the case of **Kerandi Manduku & Company -Vs- Gathecha Holdings Limited (2006) eKLR** Ochieng J. held that:-

"In the circumstances prevailing, I hold that the Respondent has demonstrated a desire to challenge the certificate of taxation. That desire has not materialized into a reference because the taxing officer has not yet provided the Respondent with his reasons for the decision he arrived at. To my mind, those circumstances, for now, dispel the presumption of finality as to the certificate of taxation, even though the certificate itself has not been varied or set aside by the Court. For that reason alone, I decline to

grant judgment in favour of the Applicant, as it may ultimately turn out that such action was premature."

7. My view is, in the face of the above divergent positions taken by courts of concurrent jurisdiction, the import of Section 51(2) of the Advocates Act as read together with Rule 11 of the Advocates Remuneration Order must be considered with regard to the facts of each individual case. I have already stated that the Client's Chamber summons was filed in this court on 25th October, 2010. The same is yet to be heard. It has been pending for more than two years since the same was filed. The Client has not provided any explanation as to the delay in its prosecution. In the same vein, it is important to note that the Advocate is entitled to his costs as awarded unless the same is set aside. I do not think that the law contemplated that taxation of costs and any ensuing challenge be a protracted process. That is why Rule 11 of the Advocates Remuneration Order has set out very tight timelines to be followed, which are coached in mandatory terms. These timelines in my view are in line with the contemplation of the law that the process should be expedited so that early finalization of litigation can be achieved and for the court system to embark on new business. In that premise, a party who fails to meet these timelines should be deemed to have lost the opportunity availed in law for challenging taxation unless the party demonstrates otherwise. To this end, I have already made a finding that the Client has failed to be vigilant in prosecuting his application. He has not offered any explanation for this delay. In any event, he has not sought a stay of the instant proceedings. Vigilance on the part of party wishing to challenge taxation must be exhibited before a court can stop a successful party from recovering his/her certified costs. I will therefore go with Hon. Waweru J and Njagi J and not Ho. Ochieng J in the above cases.

8. The other reason I decline the Client's contention, is failure on his part to follow the procedure set out in Rule 11 of the Advocates Remuneration Order. The client seems to have missed the vital steps of requesting for the reasons of the taxing master. He only applied for a certified copy of the ruling which is not a requirement under the aforesaid rule 11. He is supposed to have applied for reasons of the decision. This he did not do. Accordingly, my view is and I so hold that the mere existence of the Client's application dated 25th October, 2010 does not disentitle the advocate of Judgment. There are no orders emanating from the said application that serve to set aside, vary or stay the certificate of costs. Accordingly, I find that the first ground of Section 51(2) has been satisfied.

9. What of the second ground? The Client holds the opinion that there is a dispute as to retainer which needs to be determined before any judgment can be entered. He contended that he never issued instructions as to the institution of the aforementioned suit. However, the Advocate contends that the issue of retainer was never raised during the taxation, that before the taxing master, the Client had submitted that the Advcoates costs be assessed at Kshs.90,667/- and that the Client had personally signed an instruction note as well as the Verifying Affidavit commencing the subject suit that had led to these proceedings. In his view therefore, the Client is estopped from raising the issue of retainer at this stage.

10. What is a retainer? The Advocates Act Chapter 16, Laws of Kenya does not define what a retainer is. However, the definition has been explored in a number of cases. In the case of **Hezekia Ogao Abuya t/a Abuya & Co. Advocates -vs- Kunguru Food Complex Ltd NRD Misc. Appl. No. 400 of 2001 (UR),** Ringera J (as he then was) delivered himself at page 6 thereof as follows:

"..... I am persuaded that the word retainer as used in Section 52(2) of the Advocates Act is synonymous with "employment", "engagement" or "instruction." An Advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute." (Emphasis mine).

Further, in the case of **Ahmednasir Abdikadir & Co. Advocates –vs- Nattional Bank of Kenya Ltd (2007) eKLR** Osiemo J while considering the application of Section 51(2) of the Advocates Act observed at page 25:-

"Njagi J in the case of NYAKUNDI & COMPANY ADVOCATES (SUPRA) gave the definition and form of retainer from Halsbury's Laws of England, 4th edition, Re issue at paragraph 99, page 83 where it stated:-

'The act of authorizing or employing a solicitor to act on behalf of a client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment...'

Njagi, J pointed out that in the same work, it is further explained that a retainer need not be in writing, unless under the general law of contract, the terms of the retainer or the disability of a party to it make writing requisite. It is then further stated, the Judge added, at paragraph 103:

'Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case....." (Emphasis mine)

11. Those definitions commend themselves to me. 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. From the record before me, I note that there is a document referred to as "Clients Instruction Note" dated 20th January, 2009 which was duly attached to the Advocate's Submissions before the taxing officer dated and filed on 27th July, 2010. The instruction note clearly indicated that the client had appointed the Advocate to offer legal representation in a land case involving L.R No. 11821, Lower Kabete. The same also bears the names and signature of the client. Further, some of the documents filed and produced before the taxing officer was a Plaint dated 9th February, 2009 in HCCC NO. 57 of 2009 from which the current proceedings emanate. Attached to the said Plaint, is a Verifying Affidavit sworn by the Client on 9th February, 2009. In the Supporting Affidavit to his application dated 25th October, 2010 to set aside the taxation the Client swore as follows:-

"2.That in my considered view, the ruling delivered on 13th October, 2010 be (sic) should be set aside as to the fact that I did not instruct the Advocate herein to file any suit.

3.That when I was made aware of the filing of suit by the Applicant on my behalf, I made several payments on various dates totalling to Kshs.30,000/- and the same were receipted. Further, I made other payments on various dates totalling to Kshs.24,000/- which was to cover various disbursements as sought by the Applicant.

4.That the said Advocate did not prosecute the suit herein to its conclusion and I had to instruct another firm of Advocates to take over the conduct of the matter which is still ongoing."

12. From the foregoing, it is clear that the Client did not protest the filing of the Plaint, he only made some payments and gave instructions to another Advocate to prosecute the suit because the Advocate had not prosecuted the same. That would be ratification to what the Advocate had done. In any event, why was he signing the Verifying Affidavit if it was not for the filing of the suit? I note that the Verifying Affidavit has not been denied. I also note that the Client Instruction Note dated 20th January, 2009 has not been denied. In the foregoing, I am convinced and do hold that there was a retainer between the Client and the Advocate. To my mind, the issue of retainer was only raised as a means to prevaricate and delay the matter. Dispute of retainer, in my opinion, will arise where an Advocate proceeds to offer services without instructions or in excess of express instructions or claims fees from a stranger. In the instant case, the instruction note dated 20th January, 2009 signed by the Client coupled with the Verifying Affidavit of 9th February, 2009 as well as the contents of the Supporting Affidavit to the application dated 25th October, 2010 are but a clear indication that the Advocate had been mandated to conduct the matter on behalf of the Client.

13. In view of the foregoing, I am of the view that the conditions set under Section 51(2) of the Advocates Act have been satisfied by the Advocate. Accordingly, I enter judgment for the Advocate for Kshs.508,694/-. I note from the record, that the bill of costs was dated 16th May, 2009 and subsequently filed on 18th November, 2009. Interest is supposed to run from 30 days after service of the bill of costs on a Client. However, since there seems to be no Affidavit of Service on record on how and when the bill of costs was served upon the Client, I will go with the date of the Certificate as the date when the interest

should start accruing. Accordingly, I allow interest on the said sum of Kshs.508,694/-. These being costs, the rate applicable is 14% per annum from 10th November, 2010 until payment in full. I also award the costs of the application to the Advocate.

DATED and DELIVERED at Nairobi this 12th day of April, 2013.

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A. MABEYA
JUDGE