



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Miscellaneous Civil Cause 982 of 2010**

**S.K. OPIYO & COMPANY ADVOCATES..... RESPONDENT**

**VERSUS**

- 1. MITS ELECTRICAL COMPANY LIMITED..... 1<sup>ST</sup> APPLICANT**
- 2. SATYA GANDHI .....2<sup>ND</sup> APPLICANT**
- 3. PREIYA GANDHI..... 3<sup>RD</sup> APPLICANT**

**RULING**

Before me are two applications, a Notice of Motion by the Advocate dated 21<sup>st</sup> September, 2011 and a Chamber Summons dated 16<sup>th</sup> November, 2011 by the clients. The motion seeks judgment on a Certificate of Costs dated 4<sup>th</sup> August, 2011 whilst the summons seeks enlargement of time within which to object to the decision of the taxing officer made on 27<sup>th</sup> May, 2011. The summons has also sought an alternative prayer to set aside the decision of the taxing master dated 27<sup>th</sup> May, 2011 and for the Bill of costs to be referred back for fresh taxation before a different taxing master.

The background to these applications is that by a letter dated 11<sup>th</sup> September, 2008 the clients instructed the Advocate to act on their behalf in **Milimani HCCC No. 766 of 2003 between Barclays Bank of Kenya Ltd and the Applicants**. It would seem that the Advocate did file a Notice of Change of Advocates on 12<sup>th</sup> September, 2008 and acted for the clients in that suit. The client and Advocate later fell out with each other whereby the Advocate filed a Bill of Costs dated 19<sup>th</sup> October, 2010 which was taxed at Kshs.1,146,570/- on 27<sup>th</sup> May, 2011 and a certificate of costs for the said sum was issued on 4<sup>th</sup> August 2011. The Notice of Motion seeks judgment to be entered against the clients for the said sum of Kshs.1,146,570/- on the basis of that certificate of costs whilst the clients are seeking enlargement of time to object to the aforesaid taxation.

Both applications were consolidated and argued before me on 29<sup>th</sup> February, 2012. I propose to first consider the Advocate's Chamber Summons dated 16<sup>th</sup> November, 2011. That summons as I have already stated seeks enlargement of time to object to the decision of the taxing officer of 27<sup>th</sup> May, 2011 or in the alternative an order to set aside the said decision. In support of the summons, it was contended for the

clients that when the counsels for the parties hi-lighted their submissions before the taxing master on 21<sup>st</sup> March, 2011, the ruling was set for 3<sup>rd</sup> May, 2011, when the same was not delivered, that no notice of ruling was given to the clients to give them a chance to object to the decision within time in terms of paragraph 11(i) of the Advocates Remuneration Order.

It was further contended for the Clients that their advocates learnt of the decision of the taxing officer in October, 2011 after being served with the Advocate's Motion dated 21<sup>st</sup> September, 2011, that the taxing master erred in failing to tax the bill on its merit and in awarding the Advocate professional fees of Kshs.1,000,283.00 which was excessive in the circumstances, that the delay in filing the summons was not inordinate and was excusable, that the Advocate would suffer no prejudice if the application was allowed as he could be compensated by costs. Relying on the cases of **Lucy Wambui Maina & 2 others –vs- Peter Sundra CA No NAI 330 of 2004, Mwangi –vs- Kenya Airways (2003) KLR 486 and Murai –vs- Wainaina, Mr. Masinde**, learned Counsel for the clients submitted that what was important was to do substantive justice to the parties, that mistakes are excusable and the Court should excuse mistakes for wider interests of justice. That it would be proper if the bill of costs was taxed afresh on merit, that notwithstanding the absence of reasons from the taxing officer, the reference can still be entertained and counsel relied on the case of **Kipkorir, Titoo and Kiara Advocates –vs- DPFB CA No. 220 of 2004** for that proposition. Counsel therefore urged the court to allow the summons.

The Advocate filed a Replying Affidavit sworn by Mr. Samuel Kandere on 28<sup>th</sup> November, 2011 and written submissions dated 29<sup>th</sup> February, 2012. The Advocate contended that the clients were not candid as to the circumstances leading to the filing of their summons, that the deponent did not have authority to swear the Affidavit in support of the summons on behalf of the other clients, that the client's Advocates were informed of the ruling of 27<sup>th</sup> May, 2011 on 13<sup>th</sup> July, 2011 yet the clients had not explained the delay between that date and the date of the filing of the application, that the clients had not adduced any sufficient evidence as to why the court should interfere with the taxing officers discretion.

It was further contended by the Advocate that there was no basis for the clients to be given sufficient notice by the taxing officer for the delivery of the ruling that, it was not proper for them to complain about the taxation yet they had not obtained the reasons for the decision impugned, that the clients had come to court with unclean hands and inequitable delay and they were therefore undeserving of the courts discretion.

Mr. Kandere submitted that the advocate was entitled to his fees for services rendered between 19<sup>th</sup> September, 2008 and 10<sup>th</sup> October, 2010, that the client's Supporting Affidavit should be disregarded for containing falsehoods, that there was no error in principle to entitle the court to set aside the decision of the taxing officer, that the summons was incompetent since the taxing officer had not yet given her reasons for the decision, that the decision on the instructions fees was proper and the Advocate relied on the cases of **Joreth Limited –vs- Kigano & Associates CA No. 66 of 1999 (UR)** and **Mamicho & Co Advocates –vs- Motrex Knitwear Mills Ltd HCCC No. 426 of 2004 (UR)** for the proposition that instruction fees for an advocate is payable notwithstanding the stage at which instructions are given. Counsel for the Advocate urged the Court to dismiss the application.

Having carefully considered the Affidavits on record, the written submissions, oral hi-lights of counsel and the authorities relied on, this court's view is as follows:-

It is clear that under paragraph 11(4), of the Advocates Act, this court has the discretion to extend the time within which an objection under paragraph 11 (1) and (2) is to be made. But like all other discretions, the same must be exercised judiciously. To my mind, the principles under which a court is to exercise the discretion to extend the time limited by law or order of court are well known. These are, the length of the delay, the reasons for the delay, the merits of the proceedings to be taken and the prejudice occasioned to the adversary as a result of the delay.

Order 21 Rule 1 of the Civil Procedure Rules provides:-

***“(1) In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice which shall be given to the parties or their advocate.”***

In my view, this rule that requires that notice of judgment be given to the parties applies likewise to rulings. Accordingly, it was wrong for the taxing officer to have delivered the ruling of 27<sup>th</sup> May, 2011 on a date different from the one fixed without giving all the parties the requisite notices. I therefore reject the Advocate's contention that it was not necessary for the taxing officer to give the clients any sufficient notice for the delivery of the ruling.

Having found as such, what is the length of the delay? The ruling was delivered on 27<sup>th</sup> May, 2011. The application for extension was filed on 16<sup>th</sup> November, 2011. However, since the ruling was delivered without notice, it is imperative to ascertain when the clients came to know of its delivery. In paragraph 6 of their Affidavit in support of the application they have sworn:-

***“6. That I have been informed by the Applicant’s advocates on record which information I verily believe to be true, that they learnt of the decision of the taxing officer in or around October, 2011 after being served with the Respondent’s notice of motion application dated 21<sup>st</sup> September, 2011. Since they were all along waiting for the taxing officer’s notice of when the ruling was to be delivered.”***

In his Replying Affidavit, the Advocate stated that the client’s Advocates were advised of the ruling vide a letter dated 13<sup>th</sup> July, 2011 and that the Advocate’s notice of motion dated 21<sup>st</sup> September, 2011 was served upon the clients advocates on 28<sup>th</sup> September, 2011. He produced as exhibit “SKO1” a copy of the said letter dated 13/7/11 which had a signature of receipt on 19<sup>th</sup> July, 2011 and a copy of the said motion and a hearing notice dated 23/9/2011 which were shown to have been received on 28<sup>th</sup> September, 2011 by the client’s advocates.

These facts were not controverted by the clients or denied by their Advocates. Considering that the clients were not specific as to actual date in October, 2011, that their advocates allegedly came to know of the delivery of the ruling of 27/5/2011, I accept the statement of the advocates. He was categorical that the letter of 13<sup>th</sup> July, 2011 notified the client’s advocates of the delivery of the ruling of 27<sup>th</sup> May, 2011 on 19<sup>th</sup> July, 2011.

In view thereof, since the letter of 13<sup>th</sup> July, 2011 was received on 19<sup>th</sup> July, 2011, time of delay would start to run 14 days after 19<sup>th</sup> July, 2011 to 16<sup>th</sup> November, 2011. That is a delay of 104 days (3<sup>rd</sup> August – 15<sup>th</sup> November, 2011)

In my view, a delay of 104 days is inordinate. The clients did not explain that period. Instead, they swore that they only discovered the delivery of the ruling in October, 2011 which I think was misleading in view of what I have already found regarding the letter of 13<sup>th</sup> July, 2011. To me that does not reflect well on the bona fides of the clients. They deliberately sought to mislead the court. I am not satisfied that any credible or any explanation at all has been given for that delay.

The next issue to consider is the merits of the intended references. I have looked at the summons. The clients decided to make the prayer for the setting aside of the bill of costs in the alternative. In my view, that prayer should have been prayed for as a consequence of the granting of prayer No. 1. Even if I granted prayer No. 1, I will not procedurally be right to consider prayer No. 2 and 3 of the summons. I cannot amend the summons suo motto. The clients should have prayed for the amendments of the summons to strike out the word “ALTERNATIVELY” and make the prayers consecutively. Further, I cannot deal with prayer Nos. 3 and 4 without first extending the time within which to object to the decision of 27<sup>th</sup> May, 2011. If I therefore allow the extension, the summons would have been spent and if the clients file a reference they may be caught up with a plea of Res Judicata ( see the case of **Pop-In (K) Ltd & 2 others –vs- Habib Bank AG Zurich (1990) KLR 609**).

That notwithstanding, I have not seen in the said summons the grounds upon which the client intend to challenge the decision of the taxing officer. Although I agree with the clients that even though lack and/or absence of the reasons for the decision would not defeat the filing of a reference, it was imperative that they set out the grounds on which they intended to challenge the decision of the taxing officer. The only two grounds I can see are that the taxing officer erred in failing to tax the bill on its merit, that it was wrong to have taxed the bill for a global sum of Kshs.1,000,283/- and finally that it was wrong to award the advocate professional fees of Kshs.1,000,283/- which was excessive in the circumstances.

On the authority of the Court of Appeal decision of **Arthur –vs- Nyeri Electricity Undertaking (1961) EA 497**, the decision of the taxing officer can only be interfered with if it is shown that the taxing officer erred in principle in assessing the costs. The three grounds set out above were never alleged to be errors in principle. I have on my part perused the record and have confirmed that the bill of costs was taxed on merit since both parties appeared before the taxing officer and made representations. As to the amount, the Advocate claimed Kshs.3,707,856/- whilst the clients submitted for Kshs.426,825/35 on instructions fees only. It has not been shown that in the circumstances of this case and the taxation, the figure of Kshs.1,000,283/- was manifestly excessive. Accordingly, I am doubtful if the reference even if it was lodged would be meritorious.

Finally, on prejudice, the advocate has complained that, whilst his services were rendered up to October,

2010, he has not been paid his costs, that the delay has kept him away from his costs for unnecessarily long. This was never denied by the clients. In my view, having waited from 19<sup>th</sup> July, 2011 until after the Advocate had filed and served his motion to enforce the certificate of costs in order to file the present summons, it is prejudicial in that the Advocate had waited for over two (2) month for the clients to challenge the certificate which was not forthcoming, only for such challenge to be lodged after he had spent time and expense in lodging the motion of 23<sup>rd</sup> September, 2011.

Accordingly, I am of the view that the summons is unmeritorious and should be as it is hereby dismissed with costs.

That brings me to the Advocate's motion dated 21<sup>st</sup> September, 2011. The motion is supported by the Affidavit of Samuel Kandere sworn on 21<sup>st</sup> September, 2011 and the written submissions filed on 29<sup>th</sup> February, 2012. It was contended for the advocate that the bill of costs dated 19<sup>th</sup> October, 2010 was taxed on 27<sup>th</sup> May, 2011 and allowed in the sum of Kshs.1,146,570/- that a certificate of costs was issued on 4<sup>th</sup>

August, 2011 and that the same had not been set aside or varied.

Mr. Kandere, learned Counsel for the Advocate submitted that the allegations of the clients that there was no retainer between him and the clients is not true, he referred the court to the client's letter dated 11<sup>th</sup> September, 2008 as the basis of the retainer. He relied on the cases of **Ahmednasir Abdikadir & Company Advocates –vs- National Bank of Kenya Ltd HCCC No. 532 of 2004 (UR)** and **Hezekia Abuya & Company –vs- Kunguru Food Complex Ltd Misc Application No. 400 of 2001 (UR)** on the proposition that the retainer need not be a detailed agreement in writing. He urged the court to allow the application.

The clients filed Grounds of Opposition dated 1<sup>st</sup> December, 2011 and written submissions filed on 27<sup>th</sup> February, 2011. It was contended on behalf of the clients that the application was fatally defective, that the orders cannot be granted in the present cause as the Advocate should have filed suit, that the order taxing the bill of costs does not contain any reasons for the findings or award of costs and finally that the application was an abuse of the court process.

Mr. Masinde for the clients submitted that a fresh suit should have been filed before judgment could be applied for, that there was a dispute as to retainer and that for a retainer to be proved, the advocate must prove that there was an agreed consideration, that fees must be paid in advance, that such agreement must specify the fees payable. He relied on the cases of **Kiarie Kariuki –vs Wanjiku Kihara, Mombasa Misc. No. 43 of 1997 (UR)** **Waweru Gatonye & Co –vs- Mereka & Co Nbi HC Misc No. 463 of 2003 (UR)** and **Oruko & Associates –vs- Brollo Kenya Ltd Nbi HC Misc No. 1465 of 2002 (UR)**.

Counsel urged the court to dismiss the application.

The single issue in my view that arises in this application is whether there was a retainer to entitle the advocate to seek to recover the costs through the certificate of costs or he should have filed suit under Section 48 of the Advocates Act.

The clients do not deny that they instructed the Advocate to act on their behalf in the **Milimani HCCC No. 766 of 2003 Barclays Bank of Kenya Ltd –vs- Mits Electrical Company Ltd and 2 others**. No affidavit was sworn to deny that fact. What is before me is the submission of Counsel that there was no retainer, that for there to be a retainer there should be an agreement between the advocate and client as to the fees payable which should be the consideration. That such fees must be agreed in advance.

Under Section 51 (2) of the Advocates Act, judgment can be entered for the costs of an advocate on a certificate of costs that has not been varied or set aside if retainer is not disputed.

What is a retainer? The Advocates Act Chapter 16, Laws of Kenya does not define what a retainer is. The term retainer was however considered in the case of **Hezekia Ogao Abuya t/a Abuya & Co Advocates –vs- Kunguru Food Complex Ltd NRB Misc Appl. No. 400 of 2001 (UR)** where an Advocate who had been instructed by a client in a conveyance matter had his advocate/client bill of costs taxed and a judgment under Section 51(2) entered in his favour. In an application by the client to set aside the said Judgment, inter alia, on the ground that there was no retainer, Ringera J (as he then was) delivered himself at page 6 therefor:-

***“In this case such defence is predicated on the client's understanding of the word retainer. In that regard, I note that in BLACK'S LAW DICTIONARY, 6<sup>th</sup> Edition, 1990, the word retainer is explained as follows:-***

***“In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This act of employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses, and related matters.”***

***In STROUDS JUDICIAL DICTIONARY of words and phrases, 1986, Vol.4 at page 2283, it is posited that to retain is “to keep in pay”, “to hire”. And in WORDS AND PHRASES legally defined, 2<sup>nd</sup> Edition, Vol.4 by J.B Saunders (ed) it is posited that:-***

***“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitors retainer by that client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment...”***

***Then in THE OXFORD ADVANCED LEARNER’S DICTIONARY of current English, the word retain is defined in one usage as “to secure the services of somebody especially a lawyer, by paying for them in advance.” Having considered those definitions I am persuaded that the word retainer as used in Section 51(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 supplied)”***

***In Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Ltd (2007) e KLR Osiemo J (as he then was) 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 Law of England, 4<sup>th</sup> 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 constitutes the solicitor’s retainer by that 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.....”***

I agree with the holdings in the said cases. That, a retainer is but instructions 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 held by Njagi J, such instruction must not necessarily be in writing. A retainer may be inferred from the conduct of the parties.

On record, is a list of Documents filed in Court on 1<sup>st</sup> December, 2010. In the bundle that is attached to the list of documents are two documents I consider crucial in this matter. Firstly, there is a letter by the clients dated 11<sup>th</sup> September, 2008 to the Advocates. That letter reads in part:-

***“We instruct you to appoint your firm as the advocates and file Notice of change of advocates to be served upon Ochieng Ohaga Kibet & Co Advocates immediately while we prepare to send you the files by next week. In case the matter comes up for hearing we trust that you will request for an adjournment due to new counsel.”***

The letter is signed by the 2<sup>nd</sup> and 3<sup>rd</sup> clients as well as on behalf of the 1<sup>st</sup> client. The second document is a document entitled:-

***“MITS ELECTRICAL CO. LTD SCHEDULE OF LEGAL FEES TO S.K OPIYO ADVOCATES AS AT 27<sup>TH</sup> JULY 2009.”***

The second document sets out the various matters in which the Advocate was acting for the clients and the total sum of fess already paid to him. That document goes to prove that these parties are not strangers to each other. The same buttresses the letter dated 11<sup>th</sup> September, 2008 wherein there were express instructions to the Advocate to act for the clients in the matter in question. That letter has not been denied. I am persuaded to hold as I do that there was a retainer between the clients and the Advocate. That the issue is being raised only to prevaricate and delay the matter.

My opinion is that the intention of Parliament in legislating Section 51(2) of the Advocate’s Act was to enable quick settlement of matters relating to costs between Advocate and client without necessarily clogging the judicial process by the filing of suits where a retainer is not disputed. Dispute of retainer in

my view will arise where an Advocate will proceed to offer services without instructions or in excess of express instructions or will be claiming fees from a stranger. In the instant case, the letter of 11<sup>th</sup> September, 2008 signed by all the clients is unequivocal as to its intention, that the advocate was to take over the conduct of the matter on behalf of the clients. Will the filing a suit change the effect of that letter? In my view, no.

Accordingly, I disagree with Mr. Masinde, learned Counsel for the clients that a retainer presupposes an agreement where the amount of fees payable is either agreed in advance or is paid in advance. That submission is what is contemplated in Section 48 of the Advocates Act and not Section 51 (2) of that Act.

Accordingly, I am satisfied that the advocates motion is meritorious and I accordingly enter judgment for the advocate for Kshs.1,146,570/-. I have noted from the Affidavit of service of Bashir Mumbaha sworn of 19<sup>th</sup> November, 2010 that the Bill of Costs dated 19<sup>th</sup> October, 2010 was served upon the clients on 9<sup>th</sup> November, 2010. Accordingly, I allow interest on the said sum of Kshs.1,146,570/- at the rate of 14% p.a. from 10<sup>th</sup> December, 2010 until payment in full. I also award the costs of the application to the Advocates.

DATED and delivered in Nairobi this 23<sup>rd</sup> day of March, 2012.

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**A. MABEYA**

**JUDGE**