REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Application 625 of 2009

GICHUKI KING'ARA & CO. ADVOCATES ……. PLAINTIFF

VERSUS

MUGOYA CONSTRUCTION &
ENGINEERING LIMITED …… DEFENDANT

R U L I N G

This application initially sought four prayers, to wit, (a) that the same be heard *ex parte* in the first instance; (b) that pending the hearing and determination of the application, this Honourable Court be pleased to stay taxation of the Advocate/Client bill of taxation of costs herein dated 17th July, 2009; (c) that this Honourable Court be pleased to strike out the Advocate/Client bill of cots dated 17th July, 2009; and (d) that the costs of this application be provided for.

Before the application could be heard, the bill of costs was taxed, thereby rendering prayers (a) and (b) spent. Only prayer (c) and (d) came for hearing in this Court. The application is made under **Order VI Rule 13 (1) (b), (c)** and **(d)** of the **Civil Procedure Rules; Section 2** of the **Law of Contract Act;** and the inherent powers of the Court. It is supported by the annexed affidavit of James A.M. Isabirye, the Managing Director of the Client/Respondent, and is based on the grounds, (i) that the relationship of Advocate and Client is contractual and continues to subsist and has not yet been terminated; (ii) that the Applicant/Advocate in the suit in respect of which the present bill of costs has been lodged remains on record and has neither sought nor obtained leave of the Court to cease acting for the Client in terms of **Order III Rule 12** of the **Civil Procedure Rules;** (iii) that the Advocate cannot seek to undertake the taxation of the present bill of costs in respect of the services rendered in the suit while the contractual relationship of Advocate and Client continues to subsist and before the completion of the services contracted to be rendered in the suit; (iv) that the bill of costs is filed in breach of the contract between the Advocate and the Client for the provision of legal services; and (v) that the bill of costs is oppressive and is intended to compel the Client to pay for services not yet rendered and cannot be sustained in the circumstances.

To this application, the Respondents filed grounds of opposition stating that the application is a grave abuse of Court process and ought to be dismissed with costs; that the application is overtaken by events; that the orders sought cannot be granted in law in the circumstances; and that the said application cannot vary and/or review a consent recorded in Court by the parties.

At the hearing of the application, Mr. Ohaga for the Applicant argued that since the Respondent had not filed a replying affidavit, the facts of the matter had not been controverted. He argued that there was no evidence that the Applicant/Advocate had tendered an interim bill

for services rendered, and that at the time the bill of costs was lodged, the Applicant was still on record and had not sought leave under **Order III Rule 12** to cease acting for the Respondent. He thereupon submitted that there were no circumstances warranting the lodging of a bill for Kshs.18 million for taxation. He further submitted that this Court had jurisdiction to strike out the taxation proceedings at any stage provided that the grounds set out thereunder are satisfied, and notwithstanding that the bill has already been taxed.

Finally, Mr. Ohaga argued that the relationship between an Advocate and a Client is contractual, and that the common law of England relating to contract applies to Kenya under **Section 2 (1)** of the **Kenya Law of Contract Act.** He then cited some two English cases and submitted that the thread which runs through the authorities is that when an Advocate is retained, such a retainer constitutes an entire contract which enjoins him to finish the work for which he was retained, and that he cannot, in the absence of special circumstances, seek to terminate that contract and sue for his fees. He reiterated that this was oppressive to the Applicant/Client and urged the Court to strike out the bill.

Opposing the application, Mr. Kariuki for the Respondent relied on the grounds of opposition. He argued that the bill of costs was in respect of work undertaken by the Advocate since the commencement of **HCCC No. 671 of 2005,** and was a clear demonstration of the work done to date. It had not been demonstrated that any amount had been paid for the work done so far. Otherwise there was no intention on the part of the Advocate to cease acting, and this was amply demonstrated by the fixing of the matter for hearing. Mr. Kariuki conceded that a retainer lasts until the work is completed, but that an Advocate is at liberty to ask for his costs. However, he sought to distinguish the authorities referred to by Mr. Ohaga by submitting that in those cases, the Advocates who had acted in the respective matters had given notice of intention to terminate services which was not the case here. In the instant matter, all the Respondent was asking for was payment to date. Finally, Mr. Kariuki argued that the parties had agreed to submit themselves to taxation and to file written submissions, and therefore it was improper for the Applicant to come to Court and ask for the bill of costs to be struck out without giving a good reason or satisfying the requirements of **Order VI Rule 13.** He prayed that the application be dismissed with costs. Mr. Ohaga did not reply to his response.

After considering the pleadings and submissions of Counsel, the main issues for determination are whether the Respondent in this matter is entitled to his costs; and if so, at what stage; and the fate of this application. **Section 2 (1)** of the **Law of Contract Act (Cap. 23 of the Laws of Kenya)** states that –

> ***"Save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of sub section (2) of this Section and by the Acts of Parliament of the United Kingdom specified in the Schedule to this Act, to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya …"***

Under the common law of England, the nature and duration of a retainer are aptly explained in Paragraph 98, Volume 36, 3rd Edition of Halsbury's Laws of England thus –

> ***"The general rule is that a solicitor when retained by a client undertakes to finish the business for which he is retained. The retainer is, speaking generally, an entire contract, that is to say, a contract to do certain business, to finish that business, and to be remunerated at the completion of the business; the consequence is that remuneration cannot be recovered on a quantum merit where the solicitor withdraws without legal justification, nor, of course can costs be recovered in these circumstances … but the rule is not an absolute one and yields to special circumstances. Thus a retainer may expressly or by necessary implication fix the period for which it is to endure, or the nature of the business may justify an inference, in the absence of express agreement, that the parties did not intend the retainer to***

be a contract to finish the business …"

The above principles are deeply rooted in the English Common Law. In one of the earliest cases on record, **UNDERWOOD, SONE AND PIPER v. LEWIS [1894]2 QB 306,** Lord Esher is recorded as having said –

> ***"When a client employs a solicitor in a lawsuit, he does not employ him to take merely on step in the action and to wait for fresh instructions before taking another, and so on. The solicitor is employed to act on behalf of the client in the suit. A solicitor is a skilled person, and it would be of no use to employ him except for the purpose of taking all the steps necessary to bring the suit to an end. If that is the nature of his employment, his contract is an entire one to carry on the action to its conclusion.***
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> ***It was the view taken by judges in former days that in the case of an ordinary retainer of a solicitor in a lawsuit without any specific terms, the implication was that the contract was to carry on the litigation to its conclusion …" A retainer of a solicitor in a common law suit has always been held to be one entire contract, so that, unless some recognized exception to the rule arises, the solicitor cannot sue for his bill of costs until his obligation under the contract has been fully fulfilled …"***

In the same case, A. L. Smith L.J. is recorded to have said –

> ***"If there is one thing clearer than another from the authorities … it is that the contract of a solicitor with his client upon a retainer … is an entire contract, and it is his duty to go on with the action until the litigation is finished."***

On the facts of this case, the Respondents were retained to conduct a case against the National Social Security Fund Board of Trustees, and they have not offered anything to contradict the general rule that the retainer was an entire contract to do the business to the finish, and to be remunerated at the complete of that business. Learned Counsel for the Respondents is recorded as having told the Court in his submissions –

> ***"The bill of costs was for the work undertaken by the Advocates since the commencement of the suit. The bill is a clear demonstration of the work done to date. It has not been demonstrated that any amount has been paid for the work done so far.***
>
> ***There is no intention and there has been no intention for the Advocates to cease acting. This is adequately demonstrated by the fixing of the matter for hearing.***
>
> ***All the Advocates are asking for is to be paid for the work done. So there is no intention of terminating the retainer. The retainer lasts until the work is completed, but the Advocates are at liberty to ask for their costs."***

It is clear from this submission that it is not lost on the Respondents that the retainer lasts till all the work is done. It is equally clear that all they are asking for is payment for the work done. Since the retainer lasts till the work is done, then the Respondents should patiently do the work to its completion and then tax the bill of costs. Their claim to be paid for the work done to date contradicts the principle that the retainer is one entire contract to be remunerated after completion, and amounts to seeking payment on a quantum meruit basis. To allow the

taxation at this stage would result in allowing another taxation at or even before the conclusion of the business for which the Respondents were retained. This would create a bad precedent whereby an Advocate could tax his bill at will before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client.

For the above reasons, I find no reason advanced for the taxation to precede completion of the work assigned, and that the taxation herein was premature, and the Advocate/Client bill of costs dated 17th July, 2009 is hereby struck out with costs as prayed.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 29th day of April, 2010.

L. NJAGI
JUDGE