



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
Miscellaneous Civil Application 9 of 2008
IN THE MATTER OF OBAGA & COMPANY ADVOCATES

AND

IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

OBAGA & COMPANY ADVOCATES THE ADVOCATE

VERSUS

KIPKEBE LIMITED THE CLIENT

RULING

On 19th February, 2009 the advocates for the parties herein were before this court's deputy registrar for taxation of Advocate/Client Bill of Costs. A dispute arose as to whether there had been a retainer between the advocate and the client. It was agreed by consent that the issue of retainership be referred to this court for its determination. The consent was to apply to three other taxation matters being Misc. Civil Application Nos. 3 of 2008, 193 and 194 of 2007.

On 3rd March, 2009 the advocate filed an application by way of Chamber Summons under **Rule 12** of the **Advocates Act**. She sought an order that parties do

file their supporting affidavits or any documents as would enable the court to make an informed determination on the case stated herein as to the issue of retainer.

The advocate set out the following facts in support of the “**case stated.**”

- 1. “That sometime in 1997 and subsequent dates thereof, the Advocate was expressly instructed by the firm of Timamy & Co. Advocates to act for the client in several matters leave that (sic) the suits and appeals thereof be in the name of Timamy & Co. Advocates.**
- 2. That thereafter and on various and subsequent dates thereof the client did expressly and orally instruct the Advocates to act for them.**
- 3. That the advocate did render professional services as instructed.**
- 4. The advocate’s fees were initially to be paid by the said firm of advocates.**
- 5. That however, sometime in the year 2005 the client had differences with the firm of Timamy & Co. Advocates.**
- 6. That thereafter on or about the 18th July 2005, 2nd & 16th August 2005 and subsequent dates thereof the client expressly and orally instructed the Advocates to act for them in their own name i.e. Obaga & Co. Advocates in various suits, appeals and other matters and/or proceedings pending in court and the advocate did file Notices of Change of Advocates where necessary.**
- 7. That the advocate continued to render professional services diligently to the client as instructed.**
- 8. That, the client expressly agreed and undertook to pay costs/fees already incurred by the Advocate while acting for them when Timamy & Co. Advocates were on record.**
- 9. That thereafter the advocate did raise various fees notes to the client for services rendered.**
- 10. That the client did make part payments of the Fee notes.**
- 11. That thereafter the advocate did raise further fee notes in the name of the client and the client did in some cases specifically request for Fee Notes from the advocate.**
- 12. That the client made some further part payments but in almost all the**

cases the client failed to settle Fee Notes raised by the advocate.

13. That thereafter the advocate filed her Advocate/Client Bill of costs in this Honourable Court.

14. At no time was retainer disputed.

15. That issue of retainer was raised for the first time when the Advocate filed her Advocate/Client Bill of costs in *Kisii High Court Misc. Application No. 3 of 2008.*”

The questions of law that this court was urged to determine are as follows:

- “1. Is dispute as to retainer valid and/or proper?**
- 2. Whether the Advocates were retained by the Client.**
- 3. Can retainer be said to be disputed where Notice of Change of Advocates has been filed and/or the advocate is on record and the advocate has represented the client in contentious proceedings in court with their full knowledge and participation?**
- 4. Issue of instruction fee on the facts stated herein.**
- 5. Whether an agreement and/or undertaking by a principal client to pay advocates fees is binding?**
- 6. Whether the Respondent/Client can dispute retainer where there is part payment.**
- 7. Whether the Respondent/Client can dispute retainer where the client has specifically requested for Fee Notes.”**

Both parties filed lengthy affidavits and written submissions. They also cited several authorities. I will only highlight those which I deem appropriate for purposes of determining the aforesaid issues.

Kipkebe Limited owns large Tea estates in Sotik. The company was sued by a number of people in various cases filed before the Chief Magistrate’s Court at Kisii. There were also a few matters that were before the High Court. In all those cases, nearly 25, the Company instructed M/s Timamy & Co. Advocates who are

based at Mombasa. The firm entered appearance and filed defences in all the matters. Because it was not easy for M/s Timamy & Co. Advocates to conduct the defence cases from Mombasa, the firm would instruct M/s Obaga & Co. Advocates who are based at Kisii to hold their brief. This was with approval of the client.

Upon finalization of a matter, Obaga & Company would forward their fee note to M/s Timamy & Company, their principal, who would in turn do their fee note to their client and thereafter settle their agent's fee note, either in full or partially. This arrangement went on smoothly for quite some time until 20th July, 2005 when Timamy & Company wrote to Obaga & Company as hereunder:

**“RE: KIPKEBE MATTERS HANDLED BY
YOURSELVES ON OUR BEHALF:**

The above matter refers.

As you are aware, we instructed you to attend court and prosecute certain matters on our behalf.

This is to notify you that we seized from acting for our mutual client as at 30-6-05.

Accordingly, kindly send us your fee notes for work done upto 30/6/05 on the following cases, which should reach us on or before 29-7-05. You may now proceed to deal directly with the client.”

A total of 27 matters where Obaga & Company were holding brief for their principal were listed.

On 5th September, 2005 Obaga & Company responded to the aforesaid letter and forwarded their fee notes in 13 matters. The said fee notes were forwarded to Kipkebe Limited for settlement. Timamy & Co. requested the client to directly pay Obaga & Co. for the work done and the company settled some of the fees notes.

By a letter dated 2nd August, 2005, addressed to Obaga & Co. Advocates by the Group Legal Officer, Sasini Tea and Coffee Ltd., which I believe is the Holding Company, the Legal Officer confirmed that Sasini would be giving instructions directly to Obaga & Co; instead of going through Timamy & Company. The group Legal Officer further stated:

“To ensure there is smooth taking over of the files by our company we had requested that Timamy & Company Advocates settle your fees upto July 2005 but of course the instructing client is and always has been Sasini.”

Thereafter Obaga & Co. began to file notices of change of Advocates in the matters that had not been finalized.

On 16th August, 2005 the Group Legal Officer, after a meeting with Rose Obaga Advocate, wrote to Obaga & Co. and stated, *inter alia*,

“We have agreed with Timamy & Company Advocates, to finalize all your fees up to the time we are taking over directly to avoid a vacuum and the progress of the matters pending in court.”

It is therefore clear that after June 2005, Obaga & Co. Advocates acted for Kipkebe Limited, raised several fees notes and some have so far been settled. But around July, 2007, there arose a dispute between Kipkebe Limited and the said advocates. The advocates had forwarded to the Company proposed bills of costs in HCCA NO. 25 of 2003, HCCC No. 120 of 2000, HCC Misc. Applic. No. 19 of 2003, HCC Misc. No. 66 of 2002 and HCCA No. 76 of 1997.

M/s Oguttu Mboya & Company were instructed by Kipkebe Limited to deal with the

same. They wrote to their counter parts and requested for itemized bills. On 3rd October, 2007 Obaga & Company forwarded to Oguttu Mboya & Company itemized bills of costs as requested.

The parties did not resolve their differences and as a result Obaga & Company filed their bills of costs for taxation.

From the material on record, I now proceed to determine the questions that were framed by the advocates as hereunder:

1. **whether M/s Obaga & Co. were retained by Kipkebe Limited.**

The issue of retainer was the subject of questions 1, 2 and 3.

Black's Law Dictionary, 6th Edition, 1990 defines

“retainer” 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.”

A retainer can be oral or in writing. When it is not in written form, existence of the same can be challenged by a client. This leads me to the definition of a

“client.” Section 2 of the **Advocates Act** defines a client to include **“any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any**

costs.”

Prior to 20th July, 2005, the firm of Timamy & Company was instructed by Kipkebe Limited in various matters. Timamy then instructed Obaga & Company to hold brief for them. That cannot be disputed.

Where an advocate is holding brief for another, the former cannot say that he/she has been retained by the client and cannot therefore claim instruction fees from the client, see **Rule 8** of the **Advocate (Practice) Rules**. The advocate instructed to hold brief has to agree with the principal on the reasonable fees payable and once the agent has undertaken the brief as given, a fee note is raised and forwarded to the principal, that is, the advocate on record.

That was the way in which Obaga & Company operated with Timamy & Company. The latter would either pay their agent directly even before the client settled their fees, or forward the agent’s fee note to the client to settle but as part of the fees which Timamy & Co. were entitled to. Even if it is Obaga & Company who attended the client, their Legal Officers, witnesses and eventually argued the matters in court, as long as they were doing that in the name of Timamy & Co., they cannot claim to have been instructed by Kipkebe Limited. After all, that mode of working had expressly been agreed upon between Kipkebe Limited, Timamy and Co. Obaga & Co. and Nyatundo & Company Advocates, another firm of Advocates which was also holding brief for Timamy & Company. See the letter dated 20th November, 2002 by Timamy & Co. annexed to Rose Obaga’s affidavit. That kind of arrangement went on for years and Obaga & Co. are estopped from arguing that they had been retained by Kipkebe Ltd. Regarding the matters in dispute, to the extent

that the services were rendered before 20th July, 2005.

A letter dated 5th December, 2005 by Timamy & Co. that was annexed to Rose Obaga's affidavit further clarifies the above issue. It was addressed to Sasini Tea & Coffee Ltd. and part of it read as follows:

“We refer to the above matters and enclose herewith our original receipt being settlement of the balance of our fees and disbursements. In the meantime, we note with a lot of consternation that although we had advised you to settle the fee notes raised by the Advocates who were acting on our behalf before July, 2005 you have not done so. They have now demanded that the sum be settled forthwith. In this regard, do let us have your confirmation that you have sent the cheques to the respective Advocates. Kindly ensure to do so within seven (7) day from the date hereof so as to avoid any unpleasant consequences.”

The above letter was copied to Kipkebe Ltd. and Obaga & Co. among others.

In respect of the 27 matters that were listed by Timamy & Co. in their letter of 20th July, 2005 where they asked Obaga & Co. to forward to them their fee notes, there cannot be any dispute that there existed no retainer between the advocate and the client as at that date. Kipkebe Ltd. can only be liable to pay fees to Obaga & Co. if the former gave any further instructions to the latter. That is the only instance in which it may be said that a retainer arose. And I believe in such matters Obaga & Co. filed notices of change of Advocates. Where a notice of change of Advocates has been filed, retainer cannot be disputed and the client would be liable to pay any taxed bill of costs.

Instruction fees.

Where Obaga & Co. were holding brief for Timamy & Co. and filed a notice of change of Advocates after the latter ceased acting, no instruction fees is payable to them. Instruction fees is charged only once and is not affected or determined by the stage a suit has reached, see **JORETH LTD. –VS- KIGANO & ANOTHER** [2002] 1 E.A. 92

But where the advocates were given the initial instructions, such fees is payable.

Undertaking by a Principal to pay Advocate's fees – is it binding?

If Kipkebe Ltd. expressly undertook to pay Obaga & Co. their fees for and on behalf of Timamy & Co. that undertaking is binding. However, I did not see evidence of any express undertaking by Kipkebe to pay any fees to Obaga & Co. for and on behalf of Timamy & Co. To the contrary, there is evidence that Timamy & Co. were to finalize all the fees payable to their agent upto the time when Timamy ceased acting; see annexure “**R.O. 6**” dated 16th August 2005.

Was there part Payment of the disputed fees?

There is no evidence that Kipkebe Ltd. made any part payments in respect of fee notes tendered for work done for the period prior to when Timamy & Co. ceased acting.

The cheque for Kshs. 208,485.40 that was paid on 23rd June, 2006 was on account of fees payable to Timamy & Co. for work done by Obaga & Co. who had sent their fee notes to their principal . The Principal in turn instructed the client to pay directly to Obaga & Co. That is why the hand written note that accompanied the cheque

indicated that Mr. Mabeya of Timamy & Co. had drastically reduced some 14 bills to Kshs. 208,485.40. There are other payments made by the client to the advocate but those are for instructions given to the advocate after 20th July, 2005.

**Whether the client can dispute retainer
after requesting for fee Notes.**

The fee notes requested for vide the client's letters dated 16th February, 2008, 15th July, 2006 and 10th July, 2008 (annexture R.O.8) appear to me to be for work done by the Advocates after Timamy & Co. ceased acting.

Conclusion.

From the foregoing, it is clear to me that there was no retainer between Obaga & Co. and Kipkebe Limited prior to 20th July, 2005. Over the said period, Obaga & Co. Advocates were merely holding briefly for Timamy & Company Advocates, an arrangement which had been discussed and agreed upon by the three parties. Some fees that were paid to Obaga & Co. by the client were at the request of Timamy & Co. Advocates. Retainer of the advocate was only after 20th July, 2005. If Obaga & Co. have any outstanding fees payable for work done prior to the said date they should direct their claim to Timamy & Co. and not Kipkebe Limited. But the advocates are entitled to their fees from the client for any work done after 30th June, 2005, even if the initial instructions had been given to Timamy & Co.

In view of the consent that had been recorded by counsel, this ruling will guide the determination of all the bills of costs between the Advocate and the client herein which are yet to be taxed but will not apply to any taxation of such bills which may

have been finalized without any dispute as to retainer having been raised.

**DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF
DECEMBER, 2009.**

**D. MUSINGA
JUDGE.**

3/12/2009

Before D. Musinga, J.

Mobisa – cc

Ms Obaga for the Advocate

Mr. Oguttu for the client

Court: Ruling delivered in open court on 3rd December, 2009.

**D. MUSINGA
JUDGE.**