



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISC CASE 959 OF 2006

ALEX S. MASIKA & CO.

ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

SYNER-MED PHARMACEUTICALS KENYA LIMITED.....CLIENT/RESPONDENT

-

R U L I N G

The application is dated 31st October, 2006 brought by the Applicant/Client against the Advocates under **Section 51** of the Advocate's Act, **Order L Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. It seeks three prayers:

1. That the Advocate Alex S. Masika do deliver up a document in proof of retainer.
2. That in default of (1) above the Advocates Bill herein be struck out with costs.
3. That costs of this application be borne by the Advocate.

The ground for the application is cited on the face of the application as:

1. The Respondent has never instructed the Advocate to act for them in any business.

The application is also supported by an affidavit of **T.S. VISHWANATHAN** sworn on 21st October, 2006, which I have considered.

The application is opposed. The Advocate **Alex S. Masika**, has sworn a replying affidavit dated 8th February, 2007 with annexures thereto.

The application was set down for hearing by the Advocate with the bill and a hearing notice served on the clients' advocates **Eboso & Wandago Advocate**. They received the hearing notice and an affidavit of service has been filed to that effect. There was however no appearance for the client with the application at the time of hearing. The Court heard submissions by the Counsel for the Advocate, **Mr. Simiyu**.

Mr. Simiyu urged the Court that the issue in dispute was whether the Advocate was retained by the Client to act for it before the Procurements Complaints and Appeals Board. **Mr. Simiyu** referred the court to paragraph 4 of the replying affidavit and exhibit "ASMI", a copy of the Boards ruling. At page 1 of the ruling it is clear that the Appellant was the client in the instant case. At page 2 of the said ruling, the list of those in attendance is given. Under title "**Present by Invitation for Appeal No. 29/2006**" the first name given is the client and the second name listed is **Alex S. Masika**, Advocate. Counsel also referred the Court to pages 10 and 11 of the same ruling. At page 10, the ruling is delivered in the following terms:

“THE APPEAL

The appeal was lodged by Syner-Med Pharmaceuticals Kenya Limited on 31st May, 2006 against the procuring entity's award of 17th May 2006. The Applicant was represented by Mr. Alex S. Masika Advocate.

Counsel also referred this Court to various annexures to the replying affidavit which were correspondences between the Advocate and the Client over fees and a post dated cheque in the Advocate's name paid by the Client's sister company. **Mr. Simiyu** urged the Court to find that the various documents were sufficient proof of retainer. Counsel relied on **Halsbury's Laws of England, 4th Edition** page 103 which stipulates as follows:

***“Meaning of ‘retainer’.* The act of authorizing or employing a solicitor to act on behalf of client constitutes the solicitor's retainer by that client**

A retainer need not be in writing

***Implied retainer.* 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.”**

Counsel has also relied on the case of **D.N. Njogu & Co. Advocates vs. Kenya National Capital Corporation Milimani Misc. Application No. 21 of 2005** where **Ochieng, J.** referred to a Court of Appeal decision thus:

“In the case of Uhuru Highway Development Limited vs. Central Bank of Kenya (2) [2002] 2 E.A. 654 at page 658, the Court of Appeal held as follows: -

“Whether the plaintiffs were the counsel's client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course required.”

Mr. Simiyu urged the court to dismiss the Client/Respondent's application with costs for lack of

merit.

As already stated, the Client herein, filed this application requiring an order of the Court directed at the Advocate to prove his retainer. The Client has not prosecuted the application. Nevertheless it was within the Client's rights to challenge the Advocates Bill of Costs as he did.

I allowed the Advocate to answer the application, which he has done fully. I have considered the replying affidavit filed herein and the annexures thereto. Having done so I am satisfied that the Advocate has sufficiently demonstrated that even though there was no written agreement between the Advocate and the Client, with the latter instructing the former to act for it, there was proof that the Advocate did act for the Client in an application before the Procurement Board.

Mr. Simiyu has relied on **Halsbury's Laws of England** for the proposition that retainer need not be in writing and that retainer could be implied from the conduct of the parties. The issue is whether the Court can imply retainer from the conduct of the parties.

I see evidence that the Client instructed the Advocate to act for it because during the hearing of the application/appeal, the Client was present as the Advocate made representation on its behalf before the Board. The very title of the proceedings of the day read "**Present by Invitation for Appeal No. 29/06**".

I find that the Advocate has sufficiently established that it acted for the Client before the Procurement Board and that during those proceedings, the Client did not object to the Advocates appearing for it.

The Application was not substantiated but more importantly, the Advocate has put to rest the Client's challenge as to retainer. I do find that the client instructed the Advocate to act for it and that the retainer can be referred from the conduct of the parties. I find that the retainer need not to be in writing. The application is therefore dismissed with costs to the Advocate.

Dated at Nairobi this 12th day of March, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Simiyu, Counsel for the Advocate

N/A for client

LESIIT, J.

JUDGE

