REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 286 of 2007

NJOUGORO AND COMPANY ADVOCATES……..PLAINTIFF

VERSUS

DUBAI BANK KENYA LIMITED ….....……DEFENDANT

RULING

The plaintiff herein Njongoro and company advocates application by way of notice of motion under section 5 (2) of the Advocates are and order so rule 1 CPR. It is against the Respondent Dubai Bank Kenya limited. It seeks 2 prayers:-

(1) That judgement be entered for the applicant against the respondent in the sum of Ksh. 592,070 being the sum of money taxed and certified by the principal deputy registrar as due and payable to the applicant together with interest thereon at 14% from the 17th October 2007 until payment in full.

(2) That cost of the application be provided for.

It is grounded in the grounds in the body of the application supporting affidavit annextures and are submissions court. The sum to set of the same are;-

(i). The respondent engaged the professional services of the applicant to draw up desentive to operate as first fixed charge over the assets of Kansalt Packers production limited to serve an order facilities for Ksh. 50,000,000.00

(ii). The applicants duly drive the said debenture and then founded it to the client for approval and then return the same to the applicant for registration.

(iii). The client never returned the document for registration where upon the applicant demanded payments of his professional fees for the work done. This was declined.

(iv). Failure to pay forced the applicant to file a court advocate's bill for taxation. The bill as well as notice for taxation were said but more was no appearance the part of the respondent. The same was taxed by the SPDR on 12/10/2007 ad a ruling inrespect of the same delivered on 23rd October 2007. The amount of cost was allowed at Ksh. 592,070.00 and the certificate of taxation was issued by the SPDR on 22nd day of November 2007 annex as annexture JMn3 to the supporting affidavit.

(v). That the respondent have attempted to resist payment of the said fees on the grounds that:-

(a) There was no retainer.

(b) No service were rendered

(c) There is no obligation to pay.

That there response to this is that there was and still exist to retainer evidenced by their letter of institution to them to draw up the said debenture which institution were carried out by the applicant and as such services were rendered. Since services were rendered their obligation to pay arises which obligation has not been fulfilled by the respondent.

(vi). Further to number v above, the applicant contents that the respondent is not justified in moving to block entry of judgement in their favour because they have not challenged the contents of his supporting affidavit especially annexure JMn 1which is a letter instituting him to draw up the said debenture. Secondly they did not move to discharge the bill for taxation in which the applicant set out the service rendered. In the absence of such challenge as set out above in number (v) the respondent are not justified imposing the entry of judgement into the applicant favour.

(vii). The applicants aware that the respondent has filed objections on 5.11.07 objecting to a few items in the side but they did not attend the taxation to oppose, the taxation on those items. After taxation and upon filing of the said reference they have not made any follow up to prosecute that reference.

(viii). In any case, even if it were to be taken that the respondent was a genuine grievance about the reference its existence does not operate as a stay to stay the entry of judgement.

Further even of such judgement was to be entered the respondent will not suffer in any manner by such entries. They have not depone that the applicant need not be in a position to refund the events objected to should the respondent succeed in their response.

The respondent on the other hand has opposed the application on the basis of replying affidavit sworn by one Rajab A. Karime on 6.02.08. The central theme on the same is that:-

1. They admit they write the letter annexed of 28th march 2006 to the applicant but there is no agreement pleading an obligation and the respondent to pay the applicant fees in the alternative that the statutory liability to pay the fees devolves on the company creating the debenture i.e. Kensalt Rackers production limited.

2. That by the reason of the matters aforesaid in number 1 above there is no retainer and no professional service were rendered hence the applicant application is in competent in this regard.

3. In the respondents counsel oral submission in court, counsel simply rectereted the deponement in the replying affidavit stressing that there is no agreement in writing upon obligation on the respondent to pay.

4. They rely on the advocates ruminations order schedule 1, scale 1 rule 3, sub rule 5 governing debentures. These provisions provide that rules agreed by the parties in counting the copy shall pay the costs of the pay granted shall as the costs of their advocates. In the circumstances of this case the grant is the debenture the company in whose favour the security was being created in this respect the responsibility to pay was with the beneficiary comply money Kensalt Packers production limited.

5. They still maintain that there was no retainer from then to the applicant as the definition provides both by the text and case law indicate clearly that retainer refers to an agreement which is now existent herein. And is such counsel has a right to follow the beneficiary bank as submitted or file a suit to recover the same.

6. To them failure to attend taxation was due to a genuine mistake and the resulting certificate is find

as regard question but not liability.

7. The court is asked to note that they have an agreeable reference.

In response to the respondent submission that the reading of the text from the Hilsbury laws of England enlisted shows clearly that the retainer need not be in writing and as long as the retainer is there the applicant is entitled to be the judgement sought.

(ii) that the section 48 and 49 provides apply where costs were not been agreed where as they have presented the application under section 51 (2) of the advocates Act.

On the law the court was referred to Halls bury laws of England forth Edition Reissne volume 44(i) butter worths London 1995. at page 83 paragraph 99 on the meaning of retainer, it is stated that Retainer is "*the act of authority or employing a solicitor to act on behalf of a client constitutes the solicitors retainer by that client. This giving of a retainer is equivalent to the making of a contract for the solicitor employment.……..*"

Page 84 paragraph 101 on the form of retainer, it is stated"-

"*A retainer need not be in writing in laws under the general laws of contract the terms of the retainer or the disability of a party to it make writing requisite for example where the retainer really amounts to a contracts of guarantee ……..*"

There is also a ruling in Misc application no 1259 of 2007 between Njongoro and company advocates versus Dubai Bank Kenya limited decided by war Same J on the 11th day of June 2008. at page 1 of the said ruling line 8 from the bottom the learned judge made the following observations:-

By a letter dated 17th July 2006 respondent instituted applicant in HCC no 348 of 2006 in which the respondent had been sued for recovery of Ksh. 22 million. The applicant accepted the respondent institution and filed all the necessary pleadings by acting in accordance with the said institution. By another letter dated 14th March 2007 the respondents withdraw the said institution. Upon withdrawal of the said institution the applicant submitted fee note to the respondent for settlement but it is alleged the respondent failed or neglected to settle the same upon which the applicant filed the advocate client bill of costs on 2nd August 2007. the Respondent appointed the firm of Kepleget and associate to represent them at the taxation which took place on 22nd November 2007 in a ruling delivered on 7th February 2008 the taxing officer taxed and declined costs payable to the applicant in the sum of Ksh.841,468.80. The applicant thereafter obtained a certificate of taxation dated 14th April 2008 which was served upon the respondent advocates and to date no payment has been made to the applicant.

The respondent filed a replying affidavit sworn by Mr. Rajab Karima who is the respondent credit manager who says that the orders sought in this application cannot issue since the respondent has taken substantial steps through filing of a reference seeking of review of the taxing officers ruling. He also says that he has been advised that the notice of motion herein is incompetent, and misconcerned and is currently defective in that applicant has failed to comply with the provisions of section 4 (1) and (9) of the Advocates Act to him filing of a suit. He also states that by allowing this application before the main reference is heard and determined then the respondent will suffer before its case is heard and determined"

At page 3 line 4 from the top the learned judge went on:-

" the issue that stand out in this dispute is whether the applicant has established a case to allow this court to enter judgement in favour of the applicant" at line 14 from the bottom the learned judge continued:-

" in my humble view the purpose of that section is that in clear cases where there is no dispute as to retainer and the bill of cost of the advocates has been taxed then the court has the power to enter judgement in favour of the Advocate (section 51 (20 of the Advocates Act) therefore think that the

applicant is entitled to the orders sought since there is no dispute as to retainer and secondly the pending application for reference by the respondent cannot be a basis to stop this court in proceeding to enter judgement in terms of the applicant.

In my humble view the objection by the respondent under rule 11 of the Advocates remuneration does not constitute stay. Even if the respondent succeeds in that Advocate will be required to refund the money within the shortest time possible"

The court was also revoked to the ruling in the case of Owino and Associates versus Brullo Kenya limited Nairobi Milimani Commercial court case number 1465 of 2002 decided by Nyamu J. on 14th day of March 2003. At page 3 of the ruling line 3 from the top the learned judge made the following observations:-

"*While agree with the counsel for the applicant that under section 51 (20 of certificate of the taxing master is final it is only final as to the amount of the costs. The wording of the substain is clear as to when judgement can be entered by the court. Judgement under this section can only be entered where there is proof of a retainer and the retainer is not disputed the subjection does not in my opinion entitle an afflicant to 9 judgement in any other situation. This is clear from the reading of section 45 which deals with retainer"*

At the same page 3line 9 from the bottom the learned judge set out the provision of section 45 (60 of the Advocates Act this:-

" section 45 (6) subject to this section the cost of an advocate in any case where an agreement has been made by virtue of this section " shall not be subject to taxation nor to section 48"

At page 4 of the ruling line 3 from top the learned judge went on:- "the applicants have not exhibited any retainer in the application and they do not fell under the subjection. It is quite clear that there is need to separate taxation from recovery of costs. Section 48 deals with the review of cost by Advocates and all other situation save the single situation exempted under section 51 (2) where there I an indisputed retainer' section 48 (30 provides:

"*not withstanding any other provisions of this act a bill of cost between advocate and client may be taxed not withstanding that no suit for recovery of costs has been filed*"

In condition the learned judge at page 6 of the ruling line 6 from the top concluded this:- " the end result is that dip hold objection 3 as raised by the respondent and stand that the application before me is incompetent in that action ought to have been commenced as provided in section 48 of the advocate Act since there is no indisputed retainer under section 45 (6) of the Act'

On the court assessment of the facts herein it is clear that there is no dispute that the issue in controversy herein relates to an Advocates taxed bill of court. The sum total to the applicant ascertain is that there is annexture JMn11 from the Respondents through their employer in the credit department instituting then to prepare a desentive of 50 million. It is their stand institutions were caned out by them. They advert the debenture and founded the same for approval by the respondent client before being frounded seek to them for registration. But along the lines institution were withdrawn before registration. Where upon the applicant filed in his fee note which was not honoured by the respondent, thus compelling the applicant to file his bill for taxation. It is on record that upon being served with the bill for taxation the respondent appointed counsel to act for them but they failed to turn up for taxation which was taxed exparte giving rise to the figure sought to be enforced herein as a judgement.

The court has been informed that the respondent was loaded objection to the said taxation. Though opinion is not filed on the record a copy has been annexed to the replying affidavit annexture R.K.I. a reading of the consent of the same reveals that the items objected to are items 1, 4, 5 and 8. The notice is dated 5th November 2007which is within the statutory 14 days within which to lodge such a complaint running from the date of the order which is 23/10/2007. After taxation the order was served in to the

respondent who declined to honour it filing the applicant to come to court for enforcement orders. According to the applicant he has demonstrated that there was retainer in writing in pursuance of that retainer he rendered services for which the respondent is obligated to pay.

The respondent obligation to payment is two fold namely

(i). A plea that there is no retainer

(ii). A plea that according to the relevant provisions of the law concerned namely the Advocate remuneration Act and rules made there under the applicant is required to follow the beneficiary of the debenture for payments of the fee and secondly that he should file a suit to recover the same. The applicant response to that is that there is retainer in writing and that the category of cases that fall under the summary procedure under section 57 920 of the Advocate Acts and not the section 48 procedure of the same Act where a suit is required to be filed.

The issue for determination by this court is a determination as to which version is to be upheld. In doing so, the court, has to rule on the issues of technicalities raised by either side, and if these are not sustained then the merits it has been deponed in paragraphs 7 of the respondents replying affidavit that the application is in competent, and the court lacks jurisdiction to act on it. The reasons for incompetence and lack of jurisdiction were not explained by counsel in his oral submissions. However, if these were meant to refer to mode of presentation by way of summary procedure, as opposed to the filing of the suit, then this is matter that goes to the merits of the application, and cannot be disposed off as appoint of technicality.

As for the opposition, there is reliance on the notice of objection to the said taxation, which is pending. As submitted by the applicants counsel this does not operate as stay of the proceedings, and so the applicant was entitled to move in the manner he did.

The second opposition came from the replying affidavit generally paragraph 1 thereof reads:-

" that I am the respondents credit manager and I am duly authorized by its Board of Directors to swear this affidavit on its behalf" The said authority is not annexed to that paragraph. From the appearance of its name, the Respondent is a body corporate. This court, has judicial notice of the fact, that being a body corporate, its authority would have been required to be by way of a resolution of the mentioned Board of Directors. In the absence of annexing the same, the said affidavit does not meet the requirements of order 1 rule 12(2) Civil Procedure Rules. This provides:-

"*O.1 rule 12(2), the authority shall be in writing, signed by the party giving it and shall be filed in the case".*

Failure to comply with the above means that the affidavit has been faulted. The faulting leads to the invalidation of the affidavit and the invalidation leads to the striking out of the replying affidavit. Once struck out, the position of the Respondents opposition to the applicants application changes from the order 50 rule 16(1) Civil Procedure Rules provisions procedures to those of Order 50 rule 16 (3) Civil Procedure Rules. These reads:-

"*O.50 rule 16(1) Any respondent who wishes to oppose any motion or other applications shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of the hearing*

(3) if a respondent fails to file a replying affidavit as a statement of grounds of opposition the application may be heard exparte".

In this Courts' opinion, sub rule 3 operates in forms where no replying affidavit has not been filed and also where one has been struck out. The affected respondent is however not left remediless. By the use of the word "may" the court is at liberty to allow such a respondent to address it on points of law. As

noted earlier on the opposition is based both on facts and law. Having disposed off the facts as points what remains to be disposed of is the legal aspect which is whether the applicants application falls under the section 51(2) or the section 48 procedures.

The court has been referred to a legal text of Halsburys Laws of England and two High Court authorities,' decisions of courts of concurrent jurisdiction. One is own all fours similar to the scenario herein with a coincidence that the parities are the same ones, before this court and they are litigating in the same capacity. The learned judge who was seized of this matter rejected a plea that objection had been filed against the order of taxation, because that in itself does not operate as stay. Secondly opted for the section 51(2) procedure as opposed to the Section 48 procedure where as the other one rejected the section 51(2) procedures and upheld the Section 48 procedure. Both these decisions are not binding on this court. This Court,is entitled to revisit the issue on its own, and arrive at its on findings on the matter.

This court has ruled on the issue in own rulings. In NAIROBI HCC MISC. APP.259 OF 2007 PETER O. NGOGE t/a NGONGE & ASSOCIATES VERSUS PROFESSOR WASHINGTON JALANGO OKUMU, AND MISC. APPL. CIVIL CASE NO. 260 OF 2007. The advocate presented a taxed bill of costs for enforcement as a judgment of the court. The client respondent objected, arguing that the circumstances displayed in both, applications fall under the Section 48 procedures and not the Section 51(2) of the Advocates Act procedures. Case law on the subject is discussed at page 5 of the said ruling. This court quoted with approval the decisions of Warsame J. in the case of RAGOT & CO. ADVOCATES VERSUS KENYA WHOLESALERS LTD KISUMU HCCC NO. 244/2002 in which the learned judge while considering a similar application set out the provisions of Section 51(2) of the Advocates Act in extensor. This is found at line 4 from the bottom and it reads:-

51 (2) (Cap.16) the certificate of the taxing officer by whom any bill has been taxed, unless it is set aside or altered by the court, be final as to the amount of costs covered thereby and the court may make such order in relation there to as it thinks fit including if a retainer is not disputed an order that judgment be entered for the sum certified to be due with costs".

At page 6 line 6 from the top, the Court,quoted with approval the definition of retainer from BLACKS LAW DICTIONARY, 6TH EDITION 1990 where retainer is defined as:-

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

At the same page 6 line 12 from the bottom, the Court, went on to lift another definition from the text of words and phrases legally defined 2nd edition volume 4 by J.B. Saunders. In it retainer is defined as:- "*the act of authorizing or employing a solicitor to act on behalf of client constitutes the solicitor being retained by that client consequently, the filing of a retainer is equivalent to the making of a contract for the solicitor's employment".*

At page 7 of the said ruling this court quoted with approval the decision of Onyancha J. in the case of MEREKA AND COMPANY ADVOCATES VERSUS UGANDA RAILWAYS CORPORATION MOMBASA HCC MISC. CIVIL APP. NO. 170/01(1998) by Onyancha J. In the learned judge's opinion, "*a certificate of taxation issued under Section 51(2) of the Advocates Act is a mere declaration of the amount of costs awarded in the said certificate, and where it is not set aside the court, determining the same under Section 48 of the advocates Act, will enter judgment for the advocate without much ado basing it on the sum certified as contained in the certificate of taxation or costs. Thus the certified sum, in the certificate of taxation of costs does not become amount of judgment, until it has become the basis of a suit under Section 48 aforesaid. The certificate of costs cannot give rise to a decree or order until it has been developed into a judgment as aforesaid under Section 48 of the Act. This procedure was set up possibly to safeguard the advocates/clients who under the Section 48 provisions has an opportunity to object to unreasonable claims by an advocate. The provision gives the client a chance to file a defence and thus challenge the advocate to justify his claim."*

At page 8 of the said ruling, the court,also cited the decision of Nyamu J. in the case of ORUKO AND ASSOCIATES VERSUS BROLLO KENYA LTD (SUPRA) already set out herein. Then at page 10 line 3 from the top the Court made the following observations:-

"*The authorities relied upon by both sides, reveal that there are two avenues through which Counsel, can access his/her entitlement as to costs. One is as provided for through the provisions of Section 45 – 48 of the Advocates Act Cap.16 Laws of Kenya, while the other one is provided for through Section 51 of the same Act.:*

At page 10 – 15, the Court examined in depth the Section 45 – 49 and 51 procedures, and then pages 15 – 16 further, case law on Section 51(2) procedures for comparison purposes was set out.

Then went on to observe as follows at page 20 line 11 from the bottom:-

" *from the foregoing construction of the relevant section 51 of the Advocates Act Rules 11 and 12 of the Advocates Remuneration Rules, as well as case law, it is clear that this court has two avenues through which it can resolve the dispute herein, namely enter summary judgment on the bills as presented and secondly to direct the Advocates to file a suit for the recovery of the same where circumstances so dictate. In the first instance direction for filing of suit arises where there are weighty issues to be determined between the advocate and the client as regards the bill presented, issues of retainer ship or extend of that retainer ship. In the second instance summary judgment will issue in favour of Counsel where there is no dispute as to retainer, the bill has been taxed the same has not been set aside nor is it being challenged. Nor is there clear demonstration of wanting to challenge the same but the intending challenger has been prevented from doing so by circumstances beyond his control.*

In another ruling delivered by this Court on the 11th day of July 2007 in the Nairobi HCCC Misc. Application No. 722 of 2007 **SOLOMON MUGO AND CO. ADVOCATES VERSUS RHODA CHELANGAT KANDIE AND 3 OTHERS,** the Court, was confronted with similar issues as regards presentation of an advocates bill of costs under Section 51(2) as opposed to Section 48 procedures. At page 5 of the ruling the court quoted Fred A. Ochieng J. in his decision in Misc. Application Number 2892 of l997 KALONZO MUSYOKA AND PAUL WAMBUA PRACTICING AS MUSYOKA AND WAMBUA ADVOCATES VERSUS RUSTAM HIRA & CO ADVOCATES decided on the 20th day of June 2008 at Milimani Commercial Court. At lien 2 from the bottom this Court went on to observe: "*The learned judge then went on to state that the word "retainer"* as used in Section 51(2) is synonymous with employment, engagement or instruction. At page 6 of the said own ruling, the observation and holding of Fred A. Ochieng are set out thus:-

"*An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client on any matter, the retainer cannot be said to be in dispute…… In my view sub section (1) of Section 48 above does not state that an Advocate costs must in all cases be recovered by way of plaint. Far from it. The sections imply lays down a condition precedent for the filing of a suit for recovery of costs. … In my view the court would be entitled to enter judgment, under Section 51(2) even where there is no suit filed, I so hold".*

At page 7 of the said own ruling there is quoted with approval a decision of the court of Appeal in the case of **SHARMA VERSUS UHURU HIGHWAY DEVELOPMENT LTD (2001) KLR 309,** where it was held inter alia that Section 48 of the Advocates Act only relates to proceedings for recovery of costs. Paragraph 13 of the Advocates (Remuneration) Order on the other hand does not deal with the recovery of costs but only with the taxation of costs, the resultant of which could be the basis of a suit for the recovery of costs. Section 48 does not forbid the taxation of costs before any action for the recovery of costs can be instituted and in any case, the taxation of costs under paragraph 12 does not by itself amount to a judgment. Paragraph 13 was not in conflict with Section 48 and 49 of the Advocates Act.

At page 10-11 the Court applied the test it has used in the **PETER NYONGE (SUPRA)** already set out herein as regards the mode of choosing which procedure to apply, whether the Section 51(2) or Section 45-49 procedures, and then at page 11 line 10 from the bottom it went on to state thus:-

"*The foregoing assessment also reveals that the yardstick for determining which way to go depends on the facts of each case.* This means that in order for this Court, to determine as to whether to apply the summary procedure for the recovery of the bills or to direct that a suit be filed to recover the same will be determined or dictated by the facts displayed in, both applications.

At page 13 line 6 from the top, this Court went on to conclude:-

"*Applying the reasoning in the said own cited case to the facts herein, the court finds that a part from saying that the applicant has followed a wrong procedure by seeking summary judgment, on the taxed bill, and he should therefore be directed to follow the Section 48 procedures, Counsel for the Respondent has not guided the Court as to what or which weighty issues needed to be thrashed out at a full hearing*".

Applying this lengthy reasoning to the facts herein, it is clear that the applicants stand is that he is entitled to invoke the Section 51(2) procedures because:-

(i) There can be no dispute as to retainer because annextures JMN1 is a letter of instructions.

(ii) There is evidence that services were rendered and as such he is entitled to payment for the same.

(iii) In pursuance of the realization of the said entitlement, he presented a bill for taxation which the Respondent had due notice of but it was taxed exparte because despite due notice to them they did not show up.

(iv) Indeed the Respondent has opted for the rules 11 and 12 of the Advocates Remuneration Order procedures, by objecting to certain items of the taxed bill, and asking the Deputy Registrar of this Court, to give reasons for allowing the amounts allowed against those items, but have not taken further steps to finalize it so that they move to the next step. Further that even if such intended objections are pending, those should not be a bar to this court, proceeding and giving him a judgment because:-

(a) Such proceedings do not operate as stay.

(b) Should such proceedings succeed, then all that this court, will do is to ask him to refund the amount disallowed.

(c) The respondents have not said that he will not be in a position to refund the same.

Against the applicants assertion is to be compared the respondent's assertions namely:

(a) They admit they wrote JMN1 but that does not amount to retainer as no professional services were rendered.

(b) That JMN1 does not contain an obligation to pay.

(c) By virtue of the advocate's remuneration order schedule 1, scale 1 rule 3 sub rule 5 the beneficiary of the debenture is the one to pay.

(d) That they have an arguable reference.

Starting with the assertion that they have an arguable reference, in the absence of the Deputy Registrar's reasoning for allowing the amounts allowed against the items objected, to on the one hand and the respondents reasons for objecting to the amounts allowed as against those items, on the other hand, as well as the applicants reasons as to why the amounts allowed by the taxing officer should not be disturbed, the court, is not in a position to assess the argue ability of the reference. In addition to the above, this court, is satisfied and in agreement with the observation made by Warsame J. in the sister application to this one, cited earlier on, that existence of such a reference does not operate as a stay. Further the court, is in agreement with the applicants Counsels contention that no prejudice will be

suffered by the Respondent, if money is paid over to him because, if the reference succeeds, he will be in a position to refund the same. This is a reasonable offer considering the fact that the Respondent has not stated that the applicant will not be in a position to pay.

The vest of the respondents' assertions namely non existence of retainer, none existence of an obligation to pay, non existence of rendering professional services, and fact that it was the mortgage who was obligated to meet the legal expenses, are all inter twined and are hinged on annexture JMN1, and so will be considered together. The said letter is on the headed paper of Dubai Bank, the respondent. It is dated 28th March 2006 it reads:-

Njongoro & Co. Advocates

Bruce House,

8th Floor

Kenyatta Avenue

Nairobi.

Attention Mr. Njongoro.

Dear Sir,

RE; KEMUSALT PACKERS LIMITED

The above named company has requested the Bank for an overdraft facility of Kshs 50 million (Kenya shillings Fifty Million only). Kindly proceed to prepare and register a debenture over the said company's assets as appears in the attached valuation report.

Kindly acknowledge receipt on the copy of this letter.

Yours faithfully.

Rajab A. Karume

Credit Department"

The Respondents admit to have originated the said letter but state that they are not willing to pay because, it does not contain an obligation to pay, secondly that the services were not rendered, and thirdly, that the beneficiary of the loan was the one to pay the legal charges. Construction and admissibility of this document as proof of any fact in issue, is governed by the provisions of section 35(1) of the evidence Act Cap.80 Laws of Kenya. It reads:-

S. 35(1) in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document,t and tending to establish that fact shall on production of the original document be admissible as evidence of that fact if the following conditions are satisfied, that is to say:-

(a) If the maker of the statement either –

(i) had personal knowledge of the matters dealt with by the statement…."

This provisions gives rise to the usual rule on production of documents that this court, has judicial notice of namely that of a document speaks for itself and no extraneous matters can be called into play to controvert it.

Applying this provision to JMN1, the court, makes a finding that there is no mention that it was subject to commitment of any obligation to pay or that the beneficiary of the debenture was the one to meet the legal charges.

Further when the content is construed in the light of the definition set out herein on retainer, it satisfies the ingredients in the definition of a retainer, namely an engagement of a solicitor (lawyer) by a client. The court, is therefore satisfied that JMN1 is an engagement of the applicant in his capacity as a lawyer, by the client/respondent, for specific professional services. The applicant has maintained that he rendered the services for which he was retained, by drawing up the debenture which he forwarded to the client respondent for approval and return for registration but which was not returned. This court, finds nothing on record to show that the applicant could imagine services not actually requested for.

Further to JMN1, there is the demand for payment from applicant to Counsel for the Respondent. It is dated 9th November 2007. It reads:-

"9th November, 2007

Kiplagat & Co. Advocates,

` *Kenya Re-Towers,*

Upper Hill,

NAIROBI.

Dear Sir,

RE: H.C. MISC. CIVIL APPLICATION NO. 286 OF 2007 NJONGORO & CO. ADVOCATES VERSUS DUBAI BANK KENYA LTD

We write in respect of the above matter and in particular refer to the Ruling delivered herein on 23rd October, 2007.

Kindly and urgently let us have your client's cheque for Kshs 592,070 being the taxed costs to enable us put this matter behind us.

Yours faithfully

Njongoro & Co. Advocates,

J.M. Njongoro"

There has been no denial by the respondents, that they did not receive JMN2. Upon receipt of the same, they never responded saying that they never retained the applicant, in his professional capacity, that he never rendered any professional services to them, or that if he rendered any services, then he should follow the beneficiary of the debenture.

It therefore follows that the party that retained the services of the applicant is the respondent and it is the party to meet the taxed costs.

Argument was urged by the respondent though not strenuously agitated, that the certificate, of costs, relied upon is final only, in so far as the amount involved is concerned, and after such establishment of the quantum the beneficiary should proceed to file suit to recover the same. Due consideration has been made on this argument by the court, and as per reasoning in the body of this ruling, there are no weighty matters as regards the client advocate relationships that can warrant this court, to direct the applicant to

file suit to recover his costs. The court is therefore satisfied that this is not a matter which falls under the Section 45 – 49 procedures of the Advocates Act. It is a simple and straight forward matter falling under the summary procedure under Section 51(2) of the same Advocates Act.

For the reasons given in the assessment, this court, finds merit in the applicants application dated 14th December, 2007 and filed on 18th December, 2007 and the same is allowed as prayed in prayer 1 thereof.

(2).The applicant twill also have costs of the application paid for by the Respondent in the usual manner

DATED, READ AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2008.

R.N. NAMBUYE

JUDGE