REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

MISC APPLI NO. 330 OF 2005

OCHIENG' ONYANGO, KIBET & OHAGA ADVOCATES……APPLICANT

VERSUS

AKIBA BANK LIMITED …….……..RESPONDENT

RULING

The application for my decision is the Notice of Motion dated 7th June, 2005 under Section 51 of the Advocates Act, Rules 13A and 62A (3), Order 50 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The prayers sought in the application;

(1) That the Bill of Costs dated 27th April, 2005 and filed on 28th April, 2005 is invalid and a nullity.

(2) That the said Bill of Costs be struck out.

(3) That costs be provided to the Respondent.

The application is grounded upon the following grounds:-

(1) That as set out in the document supporting the bill of costs, no Advocate/client relationship existed or exists between the applicant and the Respondent.

(2) That at all material times, the Respondent's Advocates were Mohamed Madhani & Co. Advocates.

(3) That the applicant was at all material times, acting on the instructions of and holding brief for Mohamed Madhani & Co. Advocates.

(4) That Mohamed Madhani & co. Advocates is in law and practice liable to the applicant for their fees if at all.

(5) That the application has not complied with Rule 62A (3) of the Advocates Remuneration Order and thus fatally defective.

The argument of **Mr. Kipkorir** learned counsel for the Applicant is as follows: That the material facts and the documents in support of the bill of costs in the replying affidavit does not establish that

Advocate/client relationship existed between the bank and the law firm. At all material times, the law firm of **Mohamed Madhani & Co**. Advocates were the banker's lawyers. And if there are costs payable to the Respondent, the same is to be paid by the instructing law firm and not the bank. **Mr. Kipkorir** Advocate equated the situation pertaining in this matter to that that obtain in England i.e. Solicitors and Barristers.

It was the position of **Mr. Kipkorir** Advocate that at all times the client instructs the solicitor and the solicitor in turn instructs the Barrister for conducting the matter. In such circumstances, the fees of the Barrister is payable by the Solicitor and never by the client. He also contended that the client does not have a choice on the Barrister as the solicitor once instructed by the client has the freedom to choose the Barrister. Solicitor can choose other Solicitors to act for the client but it has to be with the express permission of the client.

He further contended that the situation in Kenya is different and distinct. In Kenya, an Advocate has a choice to ask another Advocate to lead him in a matter but he cannot make the client liable for costs incurred without the express instruction/permission of the client. According to **Mr. Kipkorir** Advocate the letter dated 11th October, 2002 is very clear and specific as to the kind of relationship that the parties intended. In that letter the firm of **Mohamed Madhani & Co.** Advocates were stating that they were the ones who instructed the Respondent and not the bank.

It was the position of **Mr. Kipkorir** Advocate that an Advocate/client relationship is grounded on retainer and in the absence of retainer, there is no relationship that exists. From the letters dated 11th October, 2002 and 18th October, 2002 the previous Advocates of the bank were saying, that they would incur all costs incurred by the Respondent firm. And where there is a dispute on retainer between Advocate/client, the burden of proof does not shift. **Mr. Kipkorir** Advocate submitted that the burden to prove retainer is on the Advocate throughout. And it is for the Advocate to show that they were retained by the client to do the matter. He stated that the substratum is that, where there is no retainer, there is no relationship. And if there is no evidence of retainer and there is contradiction between the Advocate/client, the court must treat that there was no retainer.

Lastly **Mr. Kipkorir** Advocate submitted that the bank instructed the firm of **Mohamed Madhani & Co**. Advocates. The said firm did not have express or implied instruction/authority to instruct the Respondent, therefore he urged me to allow the application with costs.

No! says **Mr. Ohaga** Advocate for the Respondent. He submitted that the Advocate for the Applicant has carefully selected the facts which suit the position taken by the Bank. And premised on those selected facts the Advocate distorted the true position that pertains in the matter.

Firstly **Mr. Ohaga** Advocate submitted that the application is not supported by an affidavit for the bank to say that it did not instruct the Respondent. And that all the factual circumstances argued on behalf of the bank have come from the Respondent through the replying affidavit. Neither is there is a supplementary affidavit to the replying affidavit. That means the facts as put forward by the Respondent are uncontroverted and are deemed to be unchallenged.

Secondly **Mr. Ohaga** Advocate urged me to give a careful consideration of all the correspondences in order to reach the true position of the dispute.

Thirdly he submitted the instructions from **Mohamed Madhani & Co.** Advocates were limited to arguing the application to set aside the order dismissing the suit. And the said firm confirmed to the bank that they were responsible for fees incurred but limited to the application. The position was changed by the bank through its letter dated 5th May, 2004, which instructed the Respondent to handle the entire case. And that letter was followed by another letter dated 24th May, 2004.

Fourthly **Mr. Ohaga** Advocate further submitted that through its letter dated 6th May, 2004, the Respondent have gone beyond setting aside the dismissal of the suit. But were preparing for the actual

trial of the suit. He stated that the application to set aside the dismissal was successful. And after assuming/taking the benefit of the success of the Respondent, the bank has now brought the present application in the utmost bad faith. This bank having taken the benefit of the labours of the Respondent Advocates, having confirmed instructions directly in writing, now says there was no retainer.

According to **Mr. Ohaga** Advocate retainer need not be express, it can be by implication and the bank is estopped by its conduct from denying the existence of a retainer. Indeed the circumstances of this matter demonstrates that the retainer in fact became express. He also contended that the principles relating to Barrister and Solicitor are irrelevant. He relied on **Codery on Solicitors**, on the heading ***retainer by implication*** , where the authors state:-

"A retainer may be implied where

(a) The client acquiesces in and adopts the proceedings.

(b) The client is estopped by his conduct from denying the right of the Solicitor to act or from denying the existence of the retainer.

(c) The client has by his conduct performed part of the contract.

(d) The client has consented to a consolidation order."

In conclusion **Mr. Ohaga** Advocate stated that the Applicant suppressed the relevant facts and only highlighted those which seem to support its position. In his estimation this court cannot be used as an instrument by clients to escape obligation to meet costs properly and lawfully incurred. He termed the application as an abuse of the court process and asked for its dismissal.

As was rightly put by **Mr. Kipkorir** Advocate the present application is on the validity of a retainer. And whether the Respondent was instructed by the bank to act on their behalf.

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

In **Black's Law dictionary 6th Edition 1990** retainer is defined as "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 is the foundation upon which the relationship of Advocate/client rests. Without a retainer the relationship cannot come into being. Retainer is the mode and method in which the Advocate accepts the offer of employment by the client. It can be express or by implication. The Advocates undertake to fulfill certain obligation and binds himself to protect, preserve and safeguard the interest of the client in a particular matter.

It is the position of the law that if there is no evidence of retainer except the oral statement of the Advocate which is contradicted by the client, the court will treat the Advocate as having acted without authority/permission. As was rightly pointed out by **Mr. Kipkorir** Advocate, the burden of proof to establish the retainer is always on the shoulder of the Advocates. That is the correct proposition of the law. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yardstick for such proof is not beyond reasonable doubt. In fact it is the normal the perimeter of balance of probability.

There is no dispute that the former Advocates of the bank in HCCC No.552/1998 were the firm of **Mohamed Madhani** Advocates. The suit came up for hearing on 27th February, 2002 and the same was dismissed for want of attendance by the said firm on behalf of the bank. The firm of **Mohamed**

Madhani Advocates then filed an application for reinstatement of the suit through an application dated 19th July, 2002. As agents of the bank, the said firm instructed the Respondent to present and argue the application.

The Respondent then filed a notice of change of Advocates dated 26th July, 2002. The bank then came to know of the existence of the Respondent and that they were handling the matter on behalf of the bank. In a letter dated 7th October, 2002 the bank wanted to know whether it was true that the Respondent were handling their matter. In the said letter the bank posed two questions to the Respondent:

"We would appreciate confirmation from you on the following matters;

(a) whether it is true that your firm came on record on behalf of the bank and if so, the source of your instructions to do so, and

(b) whether the application for re-instatement of the suit has been heard and if not whether a hearing date has been taken for it."

The Respondent replied to the above letter through a letter dated 11th October, 2002 and they stated in part:

"**We came on record on the 26th of July, 2002 for Akiba Bank Ltd upon the instructions of the firm of M/S Mohamed Madhani & co. Advocates, who were your previous Advocates on record….Our instructions were further limited to arguing the application to set aside the order dismissing the suit made on the 27th February, 2002 and was based on legal and technical reasons. But principally on the basis the Honourable court would be more sympathetic to a fresh counsel arguing the application to set aside the order of dismissal rather than the previous counsel on record."**

The position stated in the above letter was reinforced by a letter written by M/S Mohamed Madhani dated 18th October, 2002 to the applicant/bank. The letter was categorical as to the payment of fees and the instructions given to the Respondent. The letter stated;

(1) The instruction to the Respondent firm was limited to the prosecution of the application seeking to reinstate the suit and

(2) All costs and fees incurred by the Respondent firm will be paid by M/S Mohamed Madhani & Co. Advocates

(3) That the firm of Mohamed Madhani would normalize the representation upon the suit being reinstated.

The instructions given by **M/S Mohamed Madhani & Co.** Advocates was sanctioned and even exceeded by the bank through a letter dated 5th May, 2004 addressed by the legal officer of the bank to **M/S Mohamed Madhani & co.** Advocates. It is important to reproduce the essential part of the letter which states;

"This is to inform you that the bank has decided that since they were already on record (M/S Ochieng Onyango Kibet & Ohaga Advocates)should proceed with conduct of the case until it is finalized."

The parties then exchanged several and various correspondence until some time in the year 2004. The smooth relationship between the Applicant and Respondent, ended when the Respondent asked for settlement of their fees incurred in the prosecution of the matter. The Respondent was then directed to recover its fees from the firm of **Mohamed Madhani & Co.** Advocates. It was also the position of the bank that it did not request the said firm to instruct a suitable firm or any firm to have the suit reinstated or otherwise. When the firm of **Mohamed Madhani & Co**. Advocates were dragged into the dispute they resorted to a shield given to them under the letter dated 5th May, 2004 which specifically took away the

full instruction of the matter and gave it to the Respondent. The defence of **M/S Mohamed Madhani & Co.** Advocates is that the bank took away the whole brief from them. And they have no legal and fiduciary duty to attend to the fees of the Respondent.

The Respondent were thus instructed by the bank to hand over the matter to **M/S Kipkorir, Titoo & Kiara** Advocate to conduct the matter on behalf of the bank. Admittedly aggrieved, the Respondent filed a bill of costs on 28th April, 2005 after avenues to settle the dispute with the client failed. The Respondent is aggrieved because the client took the benefit of their labour without payment of the consequential fees. The Respondent must be concerned by the intolerant disloyalty of the bank to get the benefit of their labour without having the courtesy to pay for it. The abrupt abandon and the manner in which the bank jilted without reward is what prompted this dispute.

In order to resolve this love, which has gone sour, it is important to appreciate whether the Respondent was instructed and/or employed by the Applicant. There is no dispute that the previous Advocates of the bank were **M/S Mohamed Madhani & co.** Advocates. As they were on record the suit of the bank was dismissed. Faced with enormous task of reinstating the suit, the firm of **Mohamed Madhani & Co**. Advocates thought of engaging the services of the Respondent. The Respondent were equal to the task and I believe the court was sympathetic to their new plea. The suit was reinstated. However the bank got word of the new development and addressed several letters directly to the Respondent. The Respondent informed the bank that their participation and brief was limited to arguing the application for reinstatement, which they succeeded.

Section 120 of Cap 80 states;

> "**When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing."**

It is clear that the former Advocates instructed and/or delegated its duty to the Respondent but limited for the purposes of setting aside the suit. Initially the Respondent was not retained by the bank and therefore cannot recover costs unless the act was ratified and/or sanctioned by the bank subsequently. The Respondent was initially instructed for a particular purpose. And the payment of fees incurred for the purpose was to be borne by **M/S Mohamed Madhani & co**. Advocates. The said firm were categorical that the bank were not liable for any fees in the performance of the purpose the Respondent was engaged.

I think the firm of **Mohamed Madhani & co.** Advocates were alive to the applicable danger that it may not be able to attend to or resolve/remedy the dismissal of the suit, therefore they thought it was reasonable to hand over that burden to the Respondent. And in order for them to conduct the application without any liability to the bank. The bank was not under any legal obligation to pay fees of the Respondent if it did not exceed the instructions given by its former Advocates. The former Advocates were bound to shoulder the fees of the Respondent. The arrangement between the Respondent and **M/S Mohamed Madhani & co.** Advocates was for the Respondent to conduct the application for setting aside the dismissal of the suit. It was suggested by **Mr. Ohaga** Advocate that the bank adopted the action by its former Advocates.

It is to be observed, however, there is no such thing in law as adopting or sanctioning anything except where there is ratifying of an act professedly done on one's behalf in such a sense as to make you liable for it. It appears when the bank came to know the Respondent was acting on its behalf, it agreed to treat the representation as more formal. The act of authorizing an Advocate to act on behalf of a client constitutes the Advocate's retainer by the client. It is not the law that an Advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an Advocate in a matter can be implied or discerned from the conduct of the client.

In my view retainer is no more than an authority given to an Advocate to act in a particular matter and manner. It may be restrictive, it may be wide. And nevertheless it can be implied from the conduct of the

client/Advocate relationship. The bank recognized the Respondent was brought on board and on their behalf to salvage a delicate situation, which the earlier Advocate thought may not succeed. That is a recognition that the agent acted for them in their best interest. The act by **M/S Mohamed Madhani & co.** Advocates to appoint the Respondent to act on behalf of the bank though initially without authority becomes the act of the principal when the bank subsequently ratified that decision.

Mr. Kipkorir Advocate submitted that the bank instructed **M/S Mohamed Madhani & Co.** Advocates. And that the said firm did not have express or implied instruction to instruct the Respondent, therefore no retainer between the bank and Respondent. My simple and straightforward answer is that it is true the bank did not initially instruct the Respondent but the contents of the letter dated 5th May, 2004 was very clear and precise. In that letter the bank made unilateral or bilateral decision without **M/S Mohamed Madhani & co.** Advocates to appoint the Respondent to act on their behalf until the finalization of the matter. I doubt whether the said letter left any room for interpretation. In that letter the bank decided the Respondent would be their Advocates in the matter.

While I agree that an Advocate/client relationship is grounded on a retainer, I do not agree with **Mr. Kipkorir** Advocate that there was no retainer in this matter. I think a man is strictly and wholly bound by his contract. And in the absence of an express limitation of his liability, he must take the consequences of being unable to perform obligations in changed circumstances. The position here is that there was a significant, fundamental and/or radical change in the original arrangement put in place by **M/S Mohamed Madhani** Advocates.

I think there is no weakness which has been exploited by the Respondent in some legally and morally culpable manner. I do not think the decision of the bank to retain the Respondent was made in great haste. The relationship continued for a period of over two years before the representation of the Respondent was ratified. I appreciate it is seldom in any negotiation that the bargaining powers of the parties are absolutely equal but I think the situation that obtains in this matter is different from such a scenario. The letter dated 5th May, 2004 must have been on the strength of an independent advice. It was not the former Advocates who were advising the bank to continue with the Respondent but its own legal officer. There is no evidence to show the said officer had no authority and/or permission to write that letter and any other subsequent letters to the Respondent. There is no unfair advantage gained by the Respondent in the decision made by the bank and communicated by its legal officer. It was an intelligent and prudent decision to safeguard the interest of the bank. I think it is undesirable for this court to rewrite the contract and intention of the parties.

In **Nurdin Bandali vs Lom Bank [1963] E.A. Page 304** Newbold J. A. held

> "**The precise limits of an equitable estoppel are however by no means clear. It is clear however that before it can arise one party may have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it be acted upon and the other party in the belief of the truth of the representation acted upon it."**

It is not part of the duty of this court to come to the aid and assistance of a litigant who primarily through his choice and implication benefited from the labour of an Advocate. It is not now open to say that the Respondent acted on no authority of the bank for work done at request and command. I think it is unfortunate that the bank wants to bite the hand that gave it substantial benefits. The bank in giving instructions made an unequivocal and clear representation that the Respondents were its Advocates. The attitude of the bank is in my opinion clearly an afterthought may be formed in the light of subsequent events which have no bearing upon what actually transpired between the parties when the relation was good and vibrant.

The bank in this case is estopped by its conduct from denying the right of the Respondent to seek payment of its fees. Here, we have a situation where the bank acquiesces in and adopts to the action of the former Advocates. The bank first agreed to the representation of the Respondent to prosecute the application. But afterwards express its determination and/or decision to continue with the Respondent to

go to the bottom of the case. The Respondent gave the chances of success of the case in a legal opinion sought and given to the bank.

The Bank cannot in my view take advantage of the work done by the Respondent and not pay for it. The bank knew of the action of the Respondent coming on record on its behalf and assented, adopted, ratified and recognized their continued representation of its interest. As the bank availed itself of the benefit of the Respondent's services and work, it must pay for it. The services were not given gratuitously and the contract to pay for it was express. And with the full knowledge of the bank. I am satisfied that the parties have expressed all they needed and wanted to say and it would not make business efficacy to read and apply terms that did not occur in the parties mind, at the time of negotiation and signature.

Initially there was a contract between **M/S Mohamed Madhani & Co.** Advocates and the Respondent to prosecute a particular application. The costs incurred in that application was to be borne by **M/S Mohamed Madhani & Co.** Advocates. That agreement or undertaking was substituted with a substantive instruction to the Respondent to prosecute and handle the whole matter to its conclusion or finalization. I think there has been a novation of initial brief given to the Respondent by the former Advocates. The novation replaced the earlier engagement entered into between the Respondent and the previous Advocates of the bank. It is my view that the submission by **Mr. Kipkorir** Advocate that any legal costs payable to the Respondent ought to be paid by **M/S Mohamed Madhani & co**. Advocates is wholly unhelpful to the applicant's case.

It was also the submission of **Mr. Kipkorir** Advocate that at all material times, the law firm of **Mohamed Madhani & Co.** Advocates were the bank's lawyers. That is not the true position in view of the various documentary evidence exhibited by the Respondent. I must pronounce that the argument in this regard is unsupported by any evidence whatsoever. Sadly it is also my firm decision that the issues of Barrister and Solicitor as related by **Mr. Kipkorir** Advocate have no application or relevance to the present matter. It is my view that the matter was handled by the Respondent with full instruction from the bank. It means the Respondent was instructed, employed and/or engaged by the bank. Such instruction and/or employment brings a legal obligation, which is payment of legal fees incurred. It is not true as alleged by the bank in their letter dated 4th May, 2005 that the firm of Mohamed Madhani undertook to pay all or any costs and fees incurred by the Respondent. The firm of **Mohamed Madhani & co.** Advocates ceased to be agents of the bank when the bank in its letter dated 5th May, 2004 decided to retain and employ the Respondent directly. There was no option available to the said firm after the bank made a decision to deal directly with the Respondent. The advise and opinion given by **Mr. Fred Ngari** that the bank is not liable for costs is wholly wrong. Such an opinion is hollow and unsupported by the evidence available to the parties and to this court.

I am persuaded that the position taken by the bank has no support of the law and factual position. On the facts which I have outlined, I am satisfied the Respondent was duly and properly instructed and employed by the bank. It means the services of an Advocate is not for free. He who engages an Advocate must be ready and willing to bear the consequences of his own action. The consequences that arises from such engagement is the payment of fees. That duty cannot be shifted to innocent parties. For now the Respondent has satisfied this court that it was retained by the Respondent. The bill of costs dated 27th April, 2005 arises from a responsibility which is on the shoulders of the Applicant. This court was not there when the bank made a firm and conclusive decision to employ the services of the Respondent. It means this court cannot offer any assistance from that marriage contracted at arms length. I would therefore have little hesitation in dismissing this application.

Order: The application dated 7th June, 2005 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 8th day of March, 2007.

M. A. WARSAME

JUDGE