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

MISC. APPLICATION 729 OF 2006

OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES……..……APPLICANT

VERSUS

ADOPT A LIGHT LIMITED……..……..…….....……..…….RESPONDENT

RULING

The firm of Ochieng, Onyango, Kibet and Ohaga Advocates allegedly acted for the respondent M/S Adopt A Light Limited in some matter involving the Municipal Council of Mombasa, where the respondent was awarded a tender to collect revenue in the tune of Kshs.525,852,000/=. After the award, the applicant herein represented the respondent before an appeals board, so that the tender could not be quashed but maintained as earlier awarded to the respondent. It is clear that the tender was awarded to the respondent but it had been challenged by one of the aggrieved parties, hence the appeal to the tender appeals' board for hearing and determination. And that where the services of the applicant herein was allegedly given at the instruction of the respondent.

The applicant has now filed a Notice of Motion dated 4th June 2007, which seeks judgement for the taxed costs in the sum of Kshs.2,346,975/80 together with interest thereon at 12% per annum. The application is brought under Section 51(2) of the Advocates Act Cap 16 Laws of Kenya. The case of the applicant is that Section 51(2) of the Advocates Act gives this court discretion to make such order in relation to a certificate which has not been set aside or altered as it thinks fit including in a case where the retainer is not disputed. It is clear a reference was filed challenging the decision of the taxing officer which was dismissed on 31st May, 2007, the certificate therefore remains unaltered.

It is also the case of the applicant that retainer does not need to be in writing or to be exhibited. And that in any event the respondent is estopped from alleging that the retainer is disputed since the affidavit of Esther Passaris sworn on 11th September 2006 and filed on 12th September 2006 confirms that the applicants were retained by the respondent. It is further contended that retainer is a question of fact and if any dispute is to be entertained it must be premised on an affidavit. The respondent has not filed a replying affidavit and since there is no claim to be adjusted between the parties, the application has to be allowed , was contended by the applicant's Advocate.

The reply of the respondent is as follows: That there is no jurisdiction under Section 51(2) of the Advocates Act or Section 3A of the Civil Procedure Act to grant the orders sought in this application. That judgement can only be entered in a case where the retainer is not disputed. And where the applicant has not exhibited a retainer, the application cannot fall within the provisions of section 51(2) of the

Advocates Act.

Mr. Ongoya Advocate for the respondent was of the view that since the respondent is preferring an appeal against the decision of 31st May, 2007, the logical thing would be not to grant judgement until the question of the amount of costs actually due to the applicant is determined under appeal. And that the question to be determined on an appeal is the question whether the costs awarded to the applicant is inordinately high. And even this court were to find that there is no dispute as to retainer, it is important that question on appeal be determined first before judgement can be entered.

The present application is under section 51(2) of the Advocates Act which states;

"the certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court be final as to the amount of the costs covered thereby and the court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs".

It is clear that under Section 51(2) a certificate of the taxing master is final only as to the amount of costs as contained in the final certificate issued to the Advocate by the taxing master. **Mr. Ongoya** Advocate for the respondent says that judgement can only be entered on the certificate of costs when there is proof of a retainer and/or where the retainer is not disputed. And that a certificate of costs does not confer on a party a right to enforce recovery of costs other than in the single situation set out in section 51(2) of the Advocates Act. And since the applicant had not exhibited any retainer in the application, the present application did not fall within the provisions of section 51(2) of the Advocates Act.

Mr. Ongoya Advocate also contended that there is need to separate taxation from recovery of costs, therefore the applicant should have invoked the provisions of section 48 of the Advocates Act. The respondent relied on High Court, Milimani Commercial Courts Misc. Application No.1465/02 Oruko & Associates vs Brollo Kenya Ltd, where Nyamu J held;

"Section 51 deals with situations where it is necessary to have an order for taxation of an Advocates bill or for the delivery of such bill as any deeds, documents and papers. The marginal note clearly states "General provisions as to taxation". It does not in my judgement confer on a party a right to enforce recovery of costs other than in the single situation set out in the section. The applicants have not exhibited any retainer in the application and they do not fall under the subsection. It is quite clear that there is need to separate taxation from recovery of costs by Advocates in all other situations save the single situation exempted under Section 51(20 where there is undisputed retainer".

In my understanding and a plain reading of Section 51(2) shows that an Advocate need not file a suit to recover his/her costs where retainer is not disputed or where retainer is disputed but has been proved to the satisfaction of the court.

The taxation is not in dispute. The issuance of certificate of taxation is also not in doubt. The attempt to set aside or vary the certificate of taxation was not successful.

The question here is whether retainer is disputed to say that the application does not fall within the provisions of Section 51(2) of the Advocates Act. It is clear that the respondent's defence is based on the fact that no evidence of retainer is exhibited to the present application. I reckon that an Advocate/client relationship is grounded on retainer and in the absence of retainer, one can say the relationship is on shaky grounds. The burden of establishing the existence of a retainer is always and primarily on the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service.

It is important to look at the affidavit sworn by one Esther Muthoni Passaris, who is the Managing director of the respondent on 11th September 2006 in support of the reference challenging the award by the taxing master. In paragraph 4, the deponent states;

"On behalf of the respondent, I consulted Mr. John Ohaga, a partner in the applicant who informed me that it was too late to file papers in the appeal".

And in paragraph 5, she depones;

"Mr. John Ohaga went ahead and appeared before the Board on 16th March 2006 and raised a preliminary objection which was overruled. The application was then heard and a decision given on 21st March 2006. The two decisions on the preliminary objection and determining the entire matter are at pages 16 – 40 of the exhibit".

The deponent also states she did not agree any fees with the applicant and in any case the fees payable would not exceed Kshs.250,000/= since no paper/documents were filed by the present application before the Public Procurement Complaints, Review and Appeals Board. In the circumstances of the respondent's position on whether the applicant was retained, can this court sustain the submission made by Mr. Ongoya that it is mandatory for the Advocates to exhibit proof of retainer. I think not. Let me say that it is not the law that an Advocate must obtain a written instructions from a client to enable him to participate on behalf of the client in a particular dispute. The participation and/or instruction of an Advocate can either express or implied. And it need not to be in writing even where the instruction is expressly given.

There is no doubt that the applicant was instructed by the respondent and in furtherance of that instructions offered some services to the respondent. I am therefore in agreement with the applicant that there is no requirement under section 51(2) of the Advocates Act that a retainer ought to be in writing and that it must be exhibited in an application like the present one before the Advocate can be entitled to judgement. The only hurdle under Section 51(2) of the Advocates Act is whether there is proof of retainer by the Advocate and whether retainer is disputed.

In the case before court, retainer is not disputed by the respondent, therefore the applicant has comfortably passed the pre-requisite test imposed by the statute in order to grant judgement in favour of an Advocate. I am in agreement with the sentiments expressed by Visram J in Misc. Civil application No.651/2004 Nairobi, in Owino Okeyo & co. Advocates vs Mike Maina when he said;

"In my view the section (read section 51(2) is applicable where there is no dispute about the retainer. In that situation, it makes it expedient and less costly for the Advocate to obtain a quick judgement. And that, I believe is the purpose of that section. That in clear cut situations where there is no dispute about the retainer and the bill of costs has been taxed, it would be highly unjust to require the Advocate to file suit for the recovery of his fees".

The respondent filed a reference and the challenge was not about whether it retained the applicant but that the award is inordinately high and that there was no justification for the sum awarded to the applicants by the taxing master. I therefore think and hold that section 48(1) of the Advocates Act has no relevance and/or application to the circumstances that prevails in this matter. Mr. Ongoya Advocate says that there is need to separate taxation from recovery of costs and that section 48 should be invoked when an Advocate is recovering his costs. I agree that there is need to separate taxation from recovery but it is important to note that both section 48(1) and 51(2) of the Advocates Act deal with instances where an Advocate can recover his costs. Section 51(2) of the Act provides an alternative route to section 48(1) in order to obtain quick judgement where the costs have been taxed and where the retainer is not disputed.

Section 51(2) of the Advocates Act gives an Advocate the opportunity to benefit from the discretionary powers of the court where he has satisfied the requirement and precedent conditions set out in that section. In my view an Advocate who has passed the hurdle provided under Section 51(2) is automatically entitled to judgement. In this case the certificate of costs obtained by the applicant is final since the respondent was unsuccessful in its challenge to set aside or vary the amount contained in the said certificate. Secondly there is no dispute as to retainer, therefore in my judgement, the applicant has fulfilled the conditions set out under section 51(2) of the Advocates Act, hence it is incumbent upon this court to do the necessary.

In my view where an Advocate has fulfilled the conditions set out under Section 51(2) of the Advocates Act, the court has no discretion but an obligation to enter judgement as prayed. It is therefore my judgement that this court has no discretion since the applicant has brought itself within the clear and express provisions of the said section. In the premises I am persuaded to enter judgement as prayed in the application.

The other issue raised by Mr. Ongoya Advocate that the entering of judgement has to await until the question of the amount of costs actually payable to the applicant is determined under the appeal is also without any merit. I agree that the question to be determined on an appeal is whether the costs awarded to the applicant is inordinately high or not but that is not a factor or consideration under section 51(2) of the Advocates Act. The applicant having fulfilled the precedent conditions for the grant of judgement under Section 51(2) of the Advocates Act cannot and should not await the outcome of an appeal to be determined by the Court of Appeal.

In conclusion, I enter judgement for the applicant against the respondent as prayed in the application dated 4th June 2007 plus costs.

Dated and delivered at Nairobi this 22nd day of November 2007.

M. A. WARSAME

JUDGE

Mr. Ongoya: Can I have a typed copy of the ruling.

Court: Let a typed copy be supplied to both Advocates at their own costs.

M. A. WARSAME

JUDGE

22.11.07