



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Misc Civ Case 244 Of 2002

RAGOT & COMPANY ADVOCATES PLAINTIFF

VERSUS

WEST KENYA WHOLESALERS LTD. DEFENDANT

RULING

In the notice of motion dated 26th July 2005, under Section 51(2) of the Advocates Act Cap 16, the applicant seeks for **Orders:**

1. That the assessment and/or taxation of the applicant's costs herein at KSh.2,500,000/= on 21.05.2003 be adopted as the judgment and decree of the Honourable Court. The application is based on the grounds that:

- 1) The applicant's costs in this matter was taxed by consent on 21.05.2003 and a certificate issued.**
- 2) There is no dispute of the fact that the applicant was retained by the respondent in his capacity as an Advocate to represent the respondent in Kisumu HCCC No. 80/1999, West Kenya wholesalers Limited Versus National Bank of Kenya Limited and did represent it.**
- 3) The value of the services so rendered have been determined on the above taxation.**
- 4) The applicant is entitled to the orders sought.**

Mr. Ragot Advocate submitted that under Section 51(2) this

Court is entitled to enter judgment of the fact that the Advocate having been retained for the respondent is not disputed. And in the replying affidavit of the respondent it admits having instructed the respondent and made part payment of the fees. He stated that the only complaint they have is that they feel that the figure entered by consent of KSh.2,500,000/= was too high. And that complaint is fully addressed by Section 51 (2) of the Advocates Act. According to Mr. Ragot Advocate, the only circumstances where an Advocate is required to file a separate suit according to Section 48 and 49 of the Advocates Act is where the fact of retainer is disputed. And in this case the only thing disputed is the amount and not the retainer.

The application was opposed by Mr. Kasamani Advocate on behalf of the respondent. He stated that no judgment can be entered without the applicant filing a suit after obtaining a certificate. A certificate may be final as to the fees payable but it does not become a judgment. And that is why under Section 49 of the Advocate Act, a suit must be filed to obtain the judgment.

It was the submission of Mr. Kasamani Advocate that under Section 51 (2) an application for judgment can only be made to the Deputy Registrar during the taxation. And it does not extend jurisdiction to the High Court to give a judgment on a certificate, hence this application is in the wrong Court. Mr. Kasamani Advocate further submitted that the consent is disputed and there is an application to set aside that consent. There is no consent between Mr. Wanga Advocate and Ragot Advocate but the consent was between Mr. Ragot and Odunga Advocate. There were no instructions to Mr. Odunga Advocate to record a consent on the costs. And where a dispute exists as to the sum payable, a certificate cannot be made a judgment, hence the applicant must file a plaint. No account has been given for the fees paid by the respondent and the application is a shortcut to the process of the Court. Lastly Mr. Kasamani Advocate submitted that this Court has no jurisdiction to entertain the application.

The application is under Section 51(2) 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 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 judgment be entered for the sum certified to be due with costs."

Mr. Ragot Advocate contends that there is proof of a retainer and the costs was agreed by consent of the parties, therefore the Court is empowered to enter judgment for him. The first point which is central to my determination is the issue of retainer. If there is no dispute that the Advocate had been duly instructed to act for the client (respondent) in the matter giving rise to the taxation and where the Advocate has obtained a certificate, can the Court grant judgment on the strength of the certificate.

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 agreement between the client and attorney sets forth the nature of services to be performed, costs, expenses and related matters."

And in words and phrases legally defined 2nd edition volume 4 by J. B. Saunders, retainer is defined as:

"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor being retained by that client, consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment."

The position of the law is that an Advocate would be deemed to have been instructed or retained, when there is no dispute to the retainer by the respondent. The retainer cannot be said to be on dispute, when there is partial payment of fees and when there is a subsequent agreement for the remaining fees. This matter involves uncontroverted professional fees duly agreed between the Advocate and the client. The issue of retainer has not been objected to and there is no evidence to show that the consent agreement was set aside by the respondent. An attempt to set aside a consent is not a conclusive evidence to reject or object to the application. The intention to set aside the consent agreement was mooted way back in the year 2003 but no genuine attempt was made to conclusively determine the matter.

The applicant contended that a certificate of the taxing master was final and they were thus entitled to judgment under Section 51 (2) of the Advocate Act, However Mr. Kasamani Advocate submitted that judgment can only be made by the Deputy Registrar. According to Section 51 (2) the Court may make such order in relation thereto as it thinks fit. And according to Section 2 of the Civil Procedure Act, a Court is defined as:

"Means the High Court or a subordinate Court acting in the exercise of its Civil Jurisdiction."

It must be noted the Deputy Registrar in the exercise of taxation powers, it does so as subordinate to the High Court. The powers of taxation exercised by the deputy registrar is not done as an exercise of its

original Civil jurisdiction but as delegated, conferred and/or empowered as Administrative acts on behalf of the High Court. It is my decision that under Section 51(2) of the Advocates Act a certificate of the taxing master when acquired is final as to the amount and when there is undisputed retainer, Section 48(2) and 49 of the Advocates Act cannot apply. The only circumstances where an Advocate is required to file a separate suit according to Section 48 and 49 of the Advocates Act is where the fact of retainer is disputed. The certificate obtained by Mr. Ragot Advocate is final as to the amount since his services was secured by the respondent. I am satisfied that Mr. Ragot Advocate was employed engaged, retained and/or instructed by the respondent and as a result of that instructions his Advocate fees was mutually agreed at Ksh.2,500,000/=, which must be paid to him for being hired to do certain job on behalf of the respondent. The respondent did not in time question the authenticity of the consent entered into between him and Mr. Ragot. It is true that the consent was entered into between Mr. Odunga Advocate and Ragot, However it is clear from the records that Mr. Odunga was acting on behalf of the respondent on the strength of a brief given to him by Mr. Wanga Advocate, who then acting for the respondent. It appears the respondent is in the habit of running away from its Advocates when certain acts are performed on its behalf.

In Oruko and Associates VS. Brollo Kenya Ltd. HCCC No. 1465/02 Nyamu J held:

"While I agree with the counsel for the applicant that under Section 51(2) a certificate of the taxing master is final, it is only final as to the amount of the costs. The wording of the sub-section is clear as to when judgment can be entered by the Court. Judgment under this section can only be entered where there is a proof of a retainer and the retainer is not disputed."

The applicant has in my view brought himself within the purview of Section 51 (2) by proof of retainer and the respondent having failed to exhibit any lack of proof of retainer, it must shoulder the costs as agreed with the applicant. The documents filed clearly shows that the applicant was duly instructed by the respondent and it goes without saying such service must be remunerated for commensurate costs payable within the circumstances of the service rendered. It is quite clear that the objections raised by the respondent is an attempt to defeat the costs due to the applicant.

In the premises I enter judgment for the applicant as against the respondent for the sum of KSh.2,500,000/= plus costs as prayed in the application dated 26.7.2005.

Dated and Delivered this 24th January, 2006.

M. Warsame

JUDGE

24.01.2006

Warsame J.

Mr. Ragot for the applicant.

Mr. Kasamani for the respondent.

Olivia Court Clerk.

Court:

Ruling read in open Court in the presence of both Advocates for the parties.

M. Warsame

Judge

Mr. Kasamani:

May you grant leave to appeal.

Court:

Leave to appeal is granted.

M. Warsame

Judge