

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 463 of 2004

NDERITU & PARTNERS ADVOCATES.....ADVOCATES/APPLICANT

VERSUS

MAMUKA VALUERS (MANAGEMENT) LTD.....CLIENT/RESPONDENT

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization. The delay is regretted.

In this application (by notice of motion dated 3rd May, 2005) the Advocate seeks judgment against the Client for taxed costs under section 51(2) of the Advocates Act, Cap 16. Under that subsection a certificate of taxation by the taxing officer who has taxed a bill of costs shall 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 a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs. The Client opposes the application upon the main ground that though it instructed the Advocate to act in the matter, it did so as the agent of somebody else, **KENYA TAE KWONDO ASSOCIATION**. The Client further contends that though, as instructing agents, it is the party chargeable with the bill of costs, it is not the party liable to pay the costs as the principal was disclosed from the very outset.

I have read the supporting affidavit, the grounds of opposition and the replying affidavit. I have also considered the submissions of the learned counsels appearing, including the cases cited by them. The issue here is whether or not the retainer is in dispute. The Client has admitted that he duly instructed the Advocate in writing to act in the matters concerned, though the instructions were given on behalf of someone else. The Client has also conceded in paragraph 5 of the replying affidavit that it is the party chargeable with the Advocate's bill of costs. In my view, being the party chargeable with the bill of costs, it is also the party liable to pay it. It can always claim a reimbursement from its principal. As far as the Advocate is concerned, he must look to the Client for payment of his costs as it is the Client who instructed him to act in the matter. The Advocate cannot look to the principal for payment of his costs as he was not instructed by the principal.

Is the retainer disputed? I prefer the definition of the term "retainer" (as used in section 51(2) of the Advocates Act) adopted by Ringera, J. (as he then was) in the case of **HEZEKIAH OGAO ABUYA (t/a ABUYA & COMPANY ADVOCATES) -VS- KUGURU FOOD COMPLEX LTD., HCMISC. APPL. NO. 400 OF 2001** (Milimani) (Unreported). That definition is that the term is synonymous with "employment", "engagement" or "instruction". The term, as used in section 51(2) of the Advocates Act, does not mean an agreement with respect to remuneration as provided for in section 45(1) of the Act. I respectfully agree, as held by Ringera, J., that

"an advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute".

In the instant case there is no dispute that the Client duly instructed the Advocate in writing to act in the matters giving rise to the taxed costs. It matters not that the instructions were given on behalf of someone else. The retainer cannot be in dispute. Once again, I will state that the Client can always get a

reimbursement from his principal of the costs due to the Advocate.

In the circumstances, as the certificate of taxation has not been set aside or altered by court, and as there is no dispute with regard to the retainer, it is not necessary for the Advocate to file suit by plaint for recovery of his duly taxed costs. I will therefore allow the application by notice of motion dated 3rd May, 2005 and enter judgment for the Advocate against the Client for the sum of KShs.86,044/20 plus interest at 9% per annum from the 7th February, 2004 until payment in full. The Advocate shall also have the costs of the application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF FEBRUARY, 2006.