



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**Misc Appli 511 of 2004**

**MENYEE & KIRIMA ADVOCATES.....APPLICANTS**

**VERSUS**

**KENYA COMMERCIAL BANK.....RESPONDENTS**

**R U L I N G**

This is a matter between an advocate and a former client over the advocate's costs. The Advocate, **M/S MEENYE & KIRIMA**, has applied by notice of motion dated 24th November, 2004 for two main orders; one, for judgment for taxed costs under section 51(2) of the Advocates Act, Cap. 16 in the sum of Kshs.3,440,000/00 and, two, for liberty to execute such judgment without further or other proceedings. To the supporting affidavit sworn by one of the partners in the firm of advocates is annexed a certificate of taxation dated 18th November, 2004. It is stated therein that taxation was by consent.

The Client, **KENYA COMMERCIAL BANK LIMITED**, has opposed the application. In the replying affidavit sworn by its senior legal manager it is deponed that the amount of deposit towards the advocate's fees is disputed in that the same has not been properly taken into account, and cannot be taken into account unless the accounts between the parties have been taken. It is further deponed that the Advocate has retained a sum in excess of Kshs.2.5 million received for and on behalf of the Client, which the Advocate has stated he has appropriated in settlement of his fees "**due and to be due**" from the Client. It is also deponed in the replying affidavit that the Client has a claim against the Advocate in excess of the amount claimed herein arising out of the advocate/client relationship between them in regard to a security-realization transaction where the Advocate had instructions to act for the Client and subsequently retained the amounts received for and on behalf of the Client and converted the same to his own use. It is stated that the said claim by the Client is the subject-matter of HCCC No. 195 of 2002 between the same parties.

In a supplementary affidavit the Advocate has denied retaining a sum in excess of Kshs.2.5 million belonging to the Client. He however admits receiving for and on behalf of the Client a total of Kshs.2,349,000/00. He has further deponed that his various advocate/client bills of costs have subsequently been taxed in the total sum of Kshs.952,902/43 and that if this sum is taken from the aforesaid sum of Kshs.2,349,000/00 the only sum that the Client would be entitled to claim from the Advocate is Kshs.1,396,097/57. The Advocate further depones that although the Client is not entitled to set off this sum against the Advocate's taxed costs herein the Advocate is quite prepared to allow that set-off, which would still leave a balance of Kshs.2,043,902/43 due and payable by the Client to the Advocate in respect to the taxed costs herein.

In the oral submissions the position taken by the learned counsel for the Advocate is that taxation was by consent and there is no dispute as to retainer. Therefore the issue raised by the Client regarding monies received for and on behalf of the Client by the Advocate and retained by him cannot constitute a valid objection to the application. For the Client it was submitted that summary judgment could not be sought in a miscellaneous cause, and that therefore the application is incompetent. It was further submitted that no retainer as defined in section 45 of the Advocates Act is proved, and that therefore the court will not have jurisdiction to enter judgment as prayed. Substantive suit must therefore be filed by the Advocate.

I have considered the submissions of the learned counsels. Subsection (2) of section 51 of the Advocates Act gives the court the discretion to make such order in relation to a certificate of taxation that has not been set aside or altered by the Court as it thinks fit. Such order would be judgment for the sum

certified to be due in the certificate of taxation with costs, where retainer is not disputed. But in my view this subsection does not enjoin the court to enter judgment in **all** cases where the retainer is not disputed. I respectfully agree with the learned counsel for the Advocate that in the present case there is no dispute as to retainer. The term “**retainer**” as used in the aforesaid subsection, in my view, must mean instructions to act in the matter, and there is no allegation here that the Advocate did not have instructions to act for the Client. “**Retainer**” in this case cannot necessarily mean written agreement with regard to fees. Where there is such agreement there would be no taxation. See subsection (6) of section 45 of the Advocates Act.

Having said that, however, it is clear that the Client herein has raised serious issues with regard to accounts as between it and the Advocate. The Advocate has admitted that he has retained money belonging to the Client. The Client asserts that it is entitled to raise a set-off on account of this money. In my view the Client is so entitled, and it can do so only in a substantive suit commenced by plaintiff. Where it appears to the court that issues have been raised that ought to be investigated and ventilated in a proper trial, then the Court ought to refuse to enter judgment under subsection (2) of section 51 of the Advocates Act, even if there is no dispute as to retainer. The present is such case.

For the above reasons I will refuse this application with costs to the Client. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JULY, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 22ND DAY OF JULY, 2005.**