REPUBLIC OF KENYA

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALITY DIVISION

MISC CIV APPLI 382 OF 2004

OWINO OKEYO & COMPANY ADVOCATES…….APPLICANT

VERSUS

FUELEX KENYA LIMITED……RESPONDENT

R U L I N G

This is an application brought pursuant to the provisions of Section 51(2) of the Advocates Act, as read together with Order 50 rule 1 of the Civil Procedure Rules. It is the plea of the applicant that judgement be entered in its favour, in accordance with the taxed costs.

The Bill of Costs was taxed on 20th May 2005, and a Certificate of Taxation issued thereafter on 14th June 2005. It is common ground that the said Certificate of Taxation had neither been set aside nor varied.

Following the taxation, at which the Advocate/Client Bill was taxed in the sum of Kshs. 403,822.50, the applicant sent a demand for payment, to the respondent. However, the respondent had not yet paid the said taxed costs. It was for that reason that the applicant has moved this court, so that judgement may be entered in its favour. Furthermore, the applicant asks the court to award it interest at the rate of 9% per annum.

When faced with the application, the respondent opposed it. However, the facts are not disputed, and therefore the respondent did not file any Replying Affidavit. All that it did was to file Grounds of Opposition.

It is the respondent's contention that the court could only grant judgement if there was a retainer, which was not disputed. And, as far as the respondent is concerned, he who avers that he has a retainer must prove it. It is only then that he can then be entitled to judgement.

In this case, the respondent submits that the applicant did not adduce any evidence to prove retainer, as no such evidence had been placed before the court. It is further contended that the court could only give judgement if the respondent to a taxation did not dispute the retainer. But, in order to decide whether or not to dispute such retainer, the respondent says that the said issue would have to be first pleaded by the person seeking to have his Bill of Costs taxed.

In MILIMANI MISC. APPLICATION NO. 1465 OF 2002, ORUKO & ASSOCIATES v. BROLLO KENYA LIMITED (unreported), Nyamu J. held as follows:-

"The wording of the sub-section is clear as to when judgement can be entered by the court. Judgement

under this section can only be entered where there is proof of a retainer and the retainer is not disputed.

The sub-section does not in my opinion entitle an Applicant to a judgement in any other situation. This is clear from the reading of S. 45 which deals with retainer."

The court went on to hold that the Applicant was not entitled to judgement as he had not exhibited any retainer in the application. It further expressed the view that if an Applicant did not exhibit a retainer, which was then not disputed by the respondent, such an Applicant would be obliged to sue for the recovery of his costs, in accordance with Section 48 of the Advocates Act.

In MISC APPl. No. 698 OF 2004 A.N. NDAMBIRI & CO. ADVOCATES V. MWEA RICE CROWERS MULTIPURPOSE CO-OPERATIVE LIMITED, Waweru J. expressed the view that a "retainer" need not be exhibited. This is how he went about the issue:-

"My understanding of the term "retainer" as used in Section 51(2) aforesaid is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that "retainer" means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to the retainer."

In that case, the respondent had not filed any replying affidavit, and the court held that by the wording of one of the grounds of opposition, the respondent had indeed confirmed that the advocate had instructions to act in the matter. To my mind it is clear that if a party entered into an agreement "as to the fees to be paid," there would be no room for arguments, hence no need for the advocate to tax his bill. But, one must also appreciate that a client may instruct an advocate to act for him, but not agree either on the fee to be paid or even on the format to be used in calculating the fee that was payable. It is in those scenarios that it would become necessary for the advocate to tax his bill. However, in such a scenario, there would be no dispute about the fact that the client had given instructions to the advocate. The only dispute would relate to the fee payable in respect of the instructions. In my understanding of the provisions of Section 51 (2) of the Advocates Act, it enables an advocate to get judgement for the taxed costs, without having to sue for it, provided that his client did not dispute the fact that the advocate had been instructed (or retained) in the first instance.

Section 51 (2) of the Advocates Act reads as follows:-

"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 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."

That section has many parts to it. First, it attests to the finality of a certificate of taxation which had not been set aside or altered by the court. Secondly, it confirms that the sum so certified is deemed to be due. And, finally, it states that the advocate was entitled to judgement in the taxed costs, provided only that the retainer was not disputed. BLACK'S LAW DICTIONARY, 6th Edition, 1990 defines the word retainer as follows:-

"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."

In a nutshell, the act by a client, of engaging an advocate is known as a retainer. In that regard, I have not come across any rule or regulation which makes it mandatory for the client to give his instructions in writing. Indeed, the reality is that some clients may be illiterate, but that would not stop them from hiring advocates. Secondly, advocates may be given instructions over the telephone or at meetings with the client. In such situations, there would not necessarily be a written note of instructions. To my mind, therefore, the non-existence of written instructions would not negate the fact that the advocate had been duly retained.

Accordingly, with due respect to my brother, the Hon. Nyamu J. I think that by insisting on having the retainer "exhibited", he introduced a requirement which was not stipulated by law. I would therefore go along with the decision of the Hon. Waweru J. in MISC. APP. NO. 698 OF 2004 A. N. NDAMBIRI & CO. ADVOCATES V. MWEA RICE GROWERS MULTI-PURPOSE CO-OPERATIVE LTD, that, since a retainer need not be in writing, there was no obligation for the advocate to exhibit it when applying for judgement under Section 51 (2) of the Advocates Act. However, that does not exonerate the advocate if the client should deny having instructed him. In MISC APPL. NO. 400 OF 2001 HEZEKIAH OGAO ABUYA t/a ABUYA & CO. ADVOCATES v KUGURU FOOD COMPLEX LTD, Ringera J. (as he then was) held as follows:-

"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." I wholly subscribe to that line of reasoning. And, applying it to this matter, I hold that in its Bill of Costs the applicant herein had expressly asserted that it had been duly instructed "to sue on behalf of the respondents where they were claiming the sum of Kshs. 9,881,000/=."

By so doing, the applicant made a clear statement, asserting that the respondent had given it instructions. Having been served with the Bill of Costs, the respondent participated in the taxation thereof, without challenging the applicant's assertion that it had been duly instructed.

And even when this application was served upon the respondent, it did not file a Replying Affidavit to challenge the assertion by the applicant regarding the retainer. In the circumstances, I hold that there is no dispute as to the applicant's retainer by the respondent. Accordingly, the applicant is entitled to, and is hereby granted judgement against the respondent for the sum of Kshs. 403,822.50. Furthermore, by virtue of the provisions of Regulation 7 of the Advocates (Remuneration) Order, I award interest to the applicants, at the rate of 9% from 15th July 2005. Finally, the applicant shall have the costs of this application.

Dated and Delivered at Nairobi this 13th day of October 2005.

FRED A. OCHIENG

JUDGE