



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

Misc Civ Appli 651 of 2004

OWINO OKEYO & COMPANY ADVOCATES APPLICANT

VERSUS

MIKE MAINA 1ST RESPONDENT

MUTHITHI INVESTMENTS CO. LTD 2ND RESPONDENT

RULING

In this Application, brought under Section 51 (2) of the Advocates Act, the Applicant/Advocates pray that Judgment be entered in their favour for Kshs.153,182.50 being their taxed costs, as per the Certificate of Taxation annexed to the Supporting affidavit.

The taxation is not in dispute. It has neither been set aside or varied. However, the Respondent has refused to pay the bill, giving rise to this application.

The Respondent has filed no replying affidavit. Its only ground of objection is that the Applicant is not entitled to Judgment under Section 51 (2) of the Advocates Act because they have not exhibited a “retainer” as required under the said section. They rely on the case of ***Onuko & Associates vs Brollo Kenya Ltd (Milimani Misc. Application No. 1465 of 2002 – Nyamu, J)*** for that proposition. In that case, my brother Nyamu, J expressed himself as follows:

“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 proof of a retainer and the retainer is not disputed. The sub-section does not in my opinion entitle an Applicant to a judgment in any other situation. This is clear from the reading of Section 45 which deals with retainer”.

He then went on to say that:

“It does not in my judgment confer on a party a right to enforce the 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 with much respect to my brother Nyamu, J that I have to humbly disagree with that decision. In my view there is no requirement under Section 51 (2) of the Advocates Act that a retainer need be “in writing”, and that the same must be “exhibited” before an advocate is entitled to Judgment. Let us see what Section 51 (2) actually says:

“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 judgment be entered for the sum certified to be due with costs”.

In my view, the Section 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 Judgment. 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. So, what do we mean by a “retainer”, and is it something that can be “exhibited”? 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.”

Simply put, a retainer is to “retain” an advocate for services. It is instructions given to an Advocate to act for a client. Those instructions can be written or oral. It is not necessarily something you can “exhibit”.

Section 15 (2) aforesaid allows the client – the Respondent in this case – to “dispute” the retainer, meaning to challenge the very instructions he is alleged to have given. And the onus to do so is on the client/Respondent. That onus cannot possibly shift on the Applicant. The Respondent here has not discharged that onus, and has not disputed the retainer.

Accordingly, I find that the Applicant has complied with the requirements of Section 15 (1) and is entitled to the Orders sought, including the order relating to interest of 9% under Regulation 7 of the Advocates (Remuneration) Order.

I, therefore, allow the application dated 12th July, 2005 and enter Judgment for the Applicant against the Respondent for Kshs.153,182.50 together with interest at 9% per annum from 1st September, 2001 until full payment.

Dated and delivered at Nairobi this 7th day of December, 2005.

ALNASHIR VISRAM

JUDGE