



**Mwendwa Mwinzi & Associates Advocates v Muraya (Environment and Land Miscellaneous Application E060 of 2022) [2024] KEELC 1122 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1122 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E060 OF 2022**  
**CA OCHIENG, J**  
**MARCH 4, 2024**  
**IN THE MATTER OF THE ADVOCATES**  
**(REMUNERATION) (AMENDMENT) ORDER, 2014**  
**AND**  
**IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS**

**BETWEEN**

**MWENDWA MWINZI & ASSOCIATES ADVOCATES ..... ADVOCATE**

**AND**

**GEOFFREY MACHARIA MURAYA ..... CLIENT**

**RULING**

1. What is before court for determination is the Client/Applicant's Notice of Motion Application dated the 20<sup>th</sup> January, 2023 where he seeks for the following Orders:-
  1. That this Honourable Court be pleased to strike out the Applicant's Advocate - Client Bill of Costs dated the 15<sup>th</sup> day of December, 2022.
  2. That the costs of this Application be met by the Applicant to the Bill.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Geoffrey Muraya where he deposes that they were engaged in an Advocate - Client relationship with the Respondent wherein he had sought for the Advocate's services to defend him in Machakos CMC ELC NO. 21 of 2019: Nelson Nzioki Kimeu & Anor V Geoffrey Macharia Muraya & 2 Others. Further, that he had informed his Counsel that valuation for land parcel number Donyo Sabuk/Komarock Block 1/12377 was Kshs. 30,400,000 pursuant to a valuation report but the Government Valuer surrendered a value of Kshs. 18,000,000 which was within the jurisdiction of the Chief Magistrate's court. He avers



that the trial court in its Ruling delivered on 21<sup>st</sup> November, 2020, held that it had jurisdiction to handle the matter. He claims the Advocate/Respondent without his instructions instituted an Appeal being ELC Appeal No. 16 of 2020 against the aforementioned Ruling. He denies being informed of the progress of the Appeal. He insists that he did not execute any instructions note and/or retainer as to the prosecution of the Appeal. He explains that it is only upon perusal of the Court file through his Advocates' that he learnt that the Appeal was dismissed vide a Judgment delivered on 9<sup>th</sup> March, 2022. He reiterates that in the absence of the instructions to the Advocate (now Respondent) to file and prosecute an appeal, the said Advocate – Client Bill of Costs ought to be struck out with costs. He argues that if the Advocate – Client Bill of Costs dated the 15<sup>th</sup> December, 2022 is not struck out, he shall be condemned to pay costs for services he had not issued any instructions on.

3. The Advocate opposed the instant Application by filing a Replying Affidavit sworn by Shadrack Mwendwa Mwinzi where he confirms that the firm of Mwendwa Mwinzi & Associates presented to the Deputy Registrar an Advocate – Client Bill of Costs dated the 15<sup>th</sup> December, 2022 which had emanated from Machakos ELC Appeal No. 16 of 2020 – Geoffrey Macharia Muraya v Nelson Nzioki Kimeu & Abigail Ndanu Kyalo. He explains that the Appeal emanated from a dispute from Machakos Chief Magistrate's Environment & Land Case No. 21 of 2019 – Nelson Nzioki Kimeu & Another v Geoffrey Macharia Muraya & 2 others which was in relation to land parcel number Donyo Sabuk/Koma Rock Block 1/12377 registered in the name of the Client/Applicant. He contends that the fulcrum of the Appeal revolved around the failure of the trial Magistrate to consider the Valuation Report dated the 7<sup>th</sup> May, 2019. He insists that, he had been providing regular updates to the Client/Applicant through phone call after receiving his WhatsApp message where he was advised to lodge an Appeal. Further, that after lodging the Memorandum of Appeal on 8<sup>th</sup> December, 2020, he met the Client/Applicant at the Makadara Chief Magistrate's Court on 10<sup>th</sup> December, 2020 at the hearing of his Criminal Case No. 5343 of 2013 – R v Geoffrey Macharia Muraya. He states that on 26<sup>th</sup> April, 2021, the Client/Applicant sought for an update of his case and he sent him a letter via WhatsApp dated the 26<sup>th</sup> April, 2021 updating him of the attendance in court on 13<sup>th</sup> April, 2021. Further, on 4<sup>th</sup> October, 2021, he attended Court before Justice Nyukuri and on the same day wrote a letter to the Client/Applicant which was delivered via WhatsApp at 7:21p.m, which he responded to, on 5<sup>th</sup> October, 2021. He claims on the 28<sup>th</sup> January, 2022, he was served with a witness statement for Dr. Ing. Christopher Muthini Mbatha for Machakos ELC No. 21 of 2019 which he immediately forwarded to the Applicant via WhatsApp. He provided several highlights and dates when they met with the Client/Applicant as well as when he updated him. Further, he confirmed the Client/Applicant even issued him with a Cheque of Kshs. 50,000. He reaffirmed that he had acted for the Client/Applicant in several suits.
4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivalling submissions, the following are the issues for determination:-Whether there existed an Advocate/Client relationship between the Applicant and Respondent. Whether the Bill of Costs dated the 15<sup>th</sup> December, 2022 should be struck off.
6. The Applicant/Client in his submissions reiterated his averments as per the Supporting Affidavit and insisted that there was no Advocate – Client relationship as there were no instructions to Appeal as the said relationship ended when judgement was delivered. Further, that the Advocate/Respondent



initiated the Appeal without legal authority and subjecting him to pay costs is detrimental to the cause of justice. To support his averments, he relied on the following decisions:

Maina Njuguna & Associates v Chege Gichuru t/a Exodus Transporters (2017) eKLR; GS Law LLP Advocates v Wilbur Khasilwa Ottichilo (2021) eKLR; East African Safari Air Limited v Anthony Ambaka Kegode & Another (2006) eKLR and Danish Mercantile v Beaumont (1951) 1Ch. 680.

7. The Advocate/Respondent in its submissions relied on the averments in his Replying Affidavit and insisted that the Applicant had issued them with instructions to act for him in respect to the Appeal. They argued that in this instance, the Applicant had not terminated their instructions and the matter had not been settled completely since the suit was referred to the Chief Magistrate's Court for directions and a mention dated was scheduled on the 2<sup>nd</sup> December, 2020. They further submitted that a retainer can be inferred. They reiterated that the Applicant was provided with regular updates from them, on the progress of the Appeal but he deliberately failed to disclose the nature and form of the said updates. To buttress their averments, they relied on the following decisions:

Nyachoti & Company Advocates v Giriama Ranching Company Limited (2021) eKLR; Mareka & Company Advocates v Zakhem Construction (Kenya) Ltd (2014) eKLR; Ochieng Onyango Kibet & Ohaga Advocates v Akiba Bank Ltd (2007) eKLR; P. M. Wamae & Co. Advocates v Ntoitha M'Mithiaru (2016) eKLR and Kenya Orient Insurance Limited v Oraro & Co. Advocates (2015) eKLR.

8. As to whether there existed an Advocate/Client relationship between the Applicant and Respondent and if the Bill of Costs dated the 15<sup>th</sup> December, 2022 should be struck off.
9. The Applicant/Client has sought for the Bill of Costs dated the 15<sup>th</sup> December, 2022 to be struck off claiming he never instructed the Advocate/Respondent to lodge the aforementioned Appeal on his behalf. The Advocate/Respondent insists there was a relationship between them, and even if the Client had not given written instruction, the same could be inferred. Looking at the annexures herein, I note there was communication between the Client/Applicant and the Advocate/Respondent. I wish to highlight some of the correspondence between them, which I believe are pertinent. I note on 26<sup>th</sup> April, 2021 the Client/Applicant sought to know the status of the Machakos Matter and vide a letter dated the 26<sup>th</sup> April, 2021 which has not been disputed, he was given an update on the Appeal. Further, there are various messages between them and one key one is the WhatsApp dated the 31<sup>st</sup> January, 2022 where the Client stated as follows:-

Wouldn't it be wise to wait for the appeal judgment before we are heard in the lower court.”

10. Further, on 9<sup>th</sup> March he was informed the Appeal was dismissed and on 16<sup>th</sup> March the client sent a message as follows:-

Hi, Ukitoka Kithimani mapema uniambie. Ninaenda Thika kuona mgonjwa na tunaweza kutana along Thika Rd. Nataka Kukuandikia cheque.”

11. I note thereafter, the Client/Applicant issued the Advocate/Respondent, a Cheque dated the 16<sup>th</sup> March, 2022 for Kshs. 50,000 which he has not disputed.
12. From the correspondence I have highlighted, I opine that there was indeed a relationship between the Client and Advocate.



13. The question we need to ponder is whether the Advocate – Client relationship was terminated. First and foremost, it is clear the Appeal emanated from a Ruling. Secondly, the lower court matter was still pending despite the Appeal. Thirdly, the Client still sought updates of the matter and even issued a Cheque in payment, after he was informed the Appeal was dismissed. I note in all the communication, he never informed the Advocate that their relationship had been terminated.
14. A client is defined at Section 2 of the [Advocates Act](#) as follows:-

"to include any person who, as a principal or on behalf of another or a trustee or personal representative or in any other capacity has power, express and implied to retain or employ an Advocate and any person who is or may be liable to pay an Advocate any costs."
15. In the case of Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] eKLR, Warsame J (as he then was) while dealing with an issue of retainer observed that:-

"He also contended that the principles relating to Barrister and Solicitor are irrelevant. He relied on Codery on Solicitors, on the heading retainer by implication, where the authors state:-

"A retainer may be implied where(a)The client acquiesces in and adopts the proceedings.(b) The client is estopped by his conduct from denying the right of the Solicitor to act or from denying the existence of the retainer.(c)The client has by his conduct performed part of the contract.(d) The client has consented to a consolidation order."

... The act of authorizing an Advocate to act on behalf of a client constitutes the Advocate's retainer by the client. It is not the law that an Advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an Advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an Advocate to act in a particular matter and manner. It may be restrictive, it may be wide. And nevertheless it can be implied from the conduct of the client/Advocate relationship."
16. In *Mereka & Co. Advocates vs. Zakhem Construction (Kenya) Ltd* [2014] eKLR, Ougo J, it was held that:-

" It is trite law that a retainer need not only be in writing but can be implied from the parties conduct on this am guided by the case of *Ohaga vs. Akiba Bank Limited* [2008] 1 EA 300, where it was held that, "a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order."
17. See also the case of *Gs Law Llp Advocates v Wilbur Khasilwa Ottichilo* [2021] eKLR.
18. The Applicant has relied on the case of *Maina Njuguna & Associates v Chege Gichuru t/a Exodus Transporters* [2017] eKLR but I beg to distinguish that case with the circumstances, at hand. I note in this instance, the matter in the Lower Court was still pending as the Appeal was lodged against a Ruling, which is different from the cited case where Judgment had been entered. It is trite that contracts



can be express or implied. Noting that an Advocate Client relationship is contractual, I opine that by the actions of the Applicant herein, he continued to benefit from the services of the Respondent.

19. Based on the facts before Court while associating myself with the decisions cited, I find that there indeed existed an implied Advocate Client relationship between the Applicant and Respondent which he cannot escape from. It is my considered view that even if there was no express instructions to act for the client on appeal, the moment the client acquiesced and started seeking updates, making payment and advising the Advocate to await for the outcome of the Appeal, it was clear the relationship continued.
20. In the circumstances, I find that the Bill of Costs dated the 15<sup>th</sup> December, 2022 that was presented before the Taxing Officer was proper and will decline to strike it out.
21. In the foregoing, I do find not merit in the Notice of Motion Application dated the 20<sup>th</sup> January, 2023 and will dismiss it with costs to the Advocate/Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4<sup>TH</sup> DAY OF MARCH, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of;

Kamba for Respondent

Munyao for Applicant

Court Assistant – Ashley

