



**Koki Mbulu & Co Advocates v Shah & 2 others (Environment and Land Miscellaneous Application 52 of 2017) [2023] KEELC 16221 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16221 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 52 OF 2017  
JO MBOYA, J  
MARCH 9, 2023**

**BETWEEN**

**KOKI MBULU & CO ADVOCATES ..... OBJECTOR**

**AND**

**JITESH SHAH ..... 1<sup>ST</sup> RESPONDENT**

**OSHWAL EDUCATION & RELIEF BOARD ..... 2<sup>ND</sup> RESPONDENT**

**OSHWAL UNIVERSITY TRUST ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction And Background**

1. The applicant herein, ( who is an advocate of the High Court of Kenya) filed and lodged a bill of cost dated the February 4, 2016, *vide* Misc application No 16 of 2016 and in respect of which, the applicant sought to tax advocate- client bill of costs as against the respondents herein.
2. Following the lodgment and filing of the said advocate/client bill of costs, ( details in terms of the preceding paragraph), the advocate for the respondents herein filed and lodged a preliminary objection dated the August 1, 2016 and in respect of which the respondents raised two sets of issues *inter-alia*, whether there existed retainer between the applicant and the respondents; and secondly whether the deputy registrar/taxing master was seized of the requisite jurisdiction to determine the question of retainer.
3. It is imperative to note and observe that the named preliminary objection was duly canvassed and ventilated before the deputy registrar who thereafter disposed of the preliminary objection *vide* ruling rendered on the September 22, 2016. For clarity, the learned Deputy Registrar proceeded to and dismissed the preliminary objection.



4. Subsequently, the learned deputy registrar set down the advocate/client bill of costs for taxation. in this regard, the advocate/client bill of costs indeed came up for taxation, culminating into the delivery of yet another ruling rendered on the March 15, 2017.
5. For coherence, *vide* ruling rendered on the March 15, 2017, the learned Deputy Registrar stated that there was a question of retainer and that the question of retainer required to be determined by the judge before the advocate/ client bill of costs could be taxed. consequently and in the premises, the learned deputy registrar declined to proceed with the scheduled taxation and instead referred the question of retainership to be determined by the judge.
6. It is the said ruling rendered on the March 15, 2017; and in respect of which the learned Deputy Registrar referred the question of retainer to be determined by the judge, which has provoked the filing of the current reference.
7. At this juncture, it is important to take cognizance of the reliefs sought at the foot of the reference. For completeness, the reliefs at the foot of the reference are reproduced as hereunder;
  - i. That the honourable be pleased to set aside the decision of the taxing master officer rendered on the March 15, 2017.
  - ii. That this honourable court does affirm that there was retainer.
  - iii. That costs of this application be provided for.
8. On the other hand, it is appropriate to also state that the Reference herein ultimately came up for directions before Hon Justice S. O Okongo, judge, whereupon the honourable judge directed that the reference be canvassed *vide* viva voce evidence.
9. Furthermore, the learned judge proceeded and directed that the parties were at liberty to file further/ supplementary affidavits. In this regard, it is worthy to state and underscore that the reference is supported by various affidavits filed on behalf of the applicant *inter-alia*, the original supporting affidavit sworn on the March 29, 2017.
10. On the other hand, the 1<sup>st</sup> and 3<sup>rd</sup> respondent have also filed two sets of replying affidavits, namely, the replying affidavit sworn by Jitesh Shah on the October 6, 2017 and the further replying affidavit sworn on the August 23, 2021.
11. On the part of the 2<sup>nd</sup> respondent, the reference has been opposed *vide* replying affidavit sworn by Bharat Velji Shah, on the September 28, 2017; and further replying affidavit sworn on the September 6, 2021, respectively.
12. Furthermore, the parties herein thereafter adopted their respective affidavits, which were duly constituted as the evidence in chief and thereafter same were cross examined on the contents of their respective affidavits and the various annexures which were attached thereto.
13. Additionally, the advocate for the respective parties thereafter agreed to file and exchange written submissions. In this regard, the honourable court proceeded to and set timelines for the filing and exchange of the written submissions.
14. For completeness, the applicant herein filed two sets of written submissions, *inter-alia*, the original submissions dated the November 14, 2022; and the rejoinder submissions filed on the December 5, 2022.



15. On the other hand, the 1<sup>st</sup> and 3<sup>rd</sup> respondents filed elaborate and extensive written submissions dated the December 16, 2022, whereas the 2<sup>nd</sup> respondent filed written submissions dated the November 17, 2022.
16. Suffice it to point out that the various sets of written submissions, which have been alluded to in the preceding paragraphs, forms part and parcel of the record of the honourable court.

### **Submissions By The Parties**

#### **A. Applicant's submissions:**

17. The applicant herein filed two sets of written submissions dated the November 14, 2022 and the December 5, 2022, respectively and in respect of which learned counsel/ applicant has raised, highlighted and amplified three salient issues for consideration and determination by the honourable court.
18. Firstly, the applicant herein has contended that the learned Deputy Registrar was in error in finding and holding that same was not seized of the requisite jurisdiction to determine and adjudicate upon a dispute pertaining to and concerning the existence or otherwise of a retainer.
19. In addition, the applicant submitted that the Deputy Registrar was seized and possessed of the requisite jurisdiction to determine the question of retainer and hence the refusal by the learned Deputy Registrar to determine the question of retainer was an error and a grave misdirection.
20. In any event, the applicant added that *vide* ruling rendered on the September 22, 2016, the learned Deputy Registrar had found and held that same was seized of the requisite jurisdiction to determine the question of retainer.
21. In view of the foregoing, the applicant herein invited the court to find and hold that the subsequent ruling rendered on the March 15, 2017 and which was at variance with the previous ruling, was therefore erroneous and mistaken.
22. To anchor the submissions that the learned Deputy Registrar was seized of the requisite jurisdiction to determine and adjudicate upon the question of retainer, learned counsel for the applicant has cited and relied on the decision in the case of *Wilfred N Konosi T/a Konosi & Co Advocate v Flamco Ltd* (2017)eKLR, wherein the Court of Appeal found and held that the dispute as to retainer falls within the jurisdiction of the taxing officer; and hence the taxing officer is obligated to deal with and determine such a dispute.
23. Secondly, the applicant herein has submitted that the 1<sup>st</sup> respondent indeed instructed, engaged and therefore retained her in her capacity as an advocate, to offer and render legal opinion pertaining to and concerning a transaction in respect of which the 2<sup>nd</sup> respondent was purchasing LR No 10897/4 from a company known as Albizzia Downs Estate Ltd.
24. Furthermore, the applicant has further submitted that the instructions culminating into the engagement and retainer were communicated *vide* assorted email correspondences authored and disseminated by the 1<sup>st</sup> respondent, albeit for and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
25. At any rate, the applicant has further submitted that upon receipt of the various email communication/ correspondence, same undertook and prepared an elaborate legal opinion, which was thereafter escalated to the 1<sup>st</sup> respondent for onward transmission to and deliberations by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



26. Other than the foregoing, the applicant further contended that the email communications/ correspondence were generated by the 1<sup>st</sup> respondent, but same were disseminated from the domain of the 2<sup>nd</sup> respondent; and thus the usage of the domain of the 2<sup>nd</sup> respondent denotes that the 1<sup>st</sup> respondent indeed had the requisite authority of the said 2<sup>nd</sup> respondent.
27. Additionally, the applicant also submitted that subsequent to the email correspondence, the 1<sup>st</sup> respondent herein also caused and or arranged a meeting which was attended by the applicant, as well as the representatives of both the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. For clarity, it was also stated that the 1<sup>st</sup> respondent was also in attendance at the named meeting.
28. Besides, the applicant also submitted that other than attending the designated meeting, the representatives of the 2<sup>nd</sup> respondent also shared with herself assorted transactional documents, which the applicant was called upon to peruse and thereafter provide a legal opinion as pertains to and in respect of the sale transaction touching on LR No 10897/4.
29. Based on the foregoing submissions, the applicant has therefore contended that there existed a retainer between herself and the respondents herein and it is the said retainership that informed the various actions and/or activities that were undertaken by the applicant.
30. In any event, the applicant has submitted that a retainer can exist *vide* oral instructions and same can also be inferred from the conduct of the concerned parties. In this regard, the applicant clarified that it is not mandatory that all retainership must be reduced into writing.
31. In support of the foregoing submissions, the applicant herein invited the honourable court to take cognizance of the holding of the Court of Appeal in the case of *Omulele & Tolo Advocates v Mount Holdings Ltd* 92016)eKLR, *Ochieng, Onyango, Kibet & Ohaga v Akiba Bank Ltd* (2007)eKLR, *Abmednasir Abdikadir & Co Advocates v National Bank of Kenya Ltd* 92007)eKLR and *Muriithi Kireria & Associates Advocates v Kenya Planters Co-operative Union Ltd* (2017)eKLR.
32. Thirdly, the applicant submitted that having previously found and held that same had the requisite jurisdiction to entertain and determine the question of retainership, it was not open for the learned Deputy Registrar to later on make an about-turn; and to render a contradictory ruling, wherein same impugns and impeaches her earlier decision/ruling.
33. In the premises, the applicant contended that the subsequent ruling rendered by the deputy registrar was therefore erroneous and a nullity; insofar the deputy registrar could not sit on an appeal in respect of her own ruling/ decision.
34. Premised on the foregoing submissions, the applicant herein has therefore invited the honourable court to find and hold that the impugned ruling and decision of the learned Deputy Registrar rendered on the March 15, 2017, was erroneous and thus ought to be vacated and/or rescinded.

**b. 1<sup>st</sup> and 3<sup>rd</sup> respondents' submissions:**

35. On behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents, learned counsel adopted and relied on the written submissions dated the December 16, 2022 and in respect of which same has highlighted and amplified three issues for consideration and determination by the honourable court.
36. First and foremost, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has submitted that no retainer existed between the applicant and the 1<sup>st</sup> and 3<sup>rd</sup> respondents. For clarity, learned counsel has added that if there was any retainer, same ought and should have been reduced into writing, which is not the case herein.



37. In the absence of a written retainer, counsel submitted that it is therefore difficult to discern the foundation and basis upon which the applicant herein now seeks to tax an advocate/ client bill of costs.
38. To this end, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has invited the honourable court to an excerpt in *Halsbury Law of England* Vol 66 (2020), paragraph 17, wherein the learned authors opined that it is the duty of a solicitor to obtain a written authority from his/her client before commencing a suit or executing such other instructions by and at the instance of a client.
39. Furthermore, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents also submitted that in the absence of a written retainer, then it is incumbent upon the advocate, in this case, the applicant to place before the honourable court sufficient material and evidence to prove and establish that indeed a retainer existed.
40. Notwithstanding the foregoing, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has submitted that the applicant herein has failed to place before the court any credible material or evidence to confirm and authenticate that same was ever retained by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.
41. As a result of the foregoing, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has therefore submitted that no retainer ever existed between the applicant and the 1<sup>st</sup> and 3<sup>rd</sup> respondents. In this regard, counsel has urged the court to find and hold that the impugned advocate/ client bill of costs was therefore mounted in vacuum.
42. In support of the submissions that retainer ought to be reduced into writing and/or proved by placing sufficient evidence before the court, counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondent has invited the honourable court to take cognizance of the holding in the case of *Omulele & Tolo Advocates v Mounts Holdings Ltd* (2016)eKLR and *Ochieng, Onyango, Kibet & Ohaga Advocates v Akiba Bank Ltd* (2007)eKLR.
43. Secondly, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has also submitted that the request for the advice was on a friendly basis, at the instance of the 1<sup>st</sup> respondent. In this regard, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has submitted that to the extent that what was requested for was a friendly legal advice, the 1<sup>st</sup> respondent did not anticipate that such friendly legal advice would culminate into an exorbitant and colossal fee note.
44. At any rate, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has also submitted that having sought for a friendly legal advice, there was a legitimate expectation on the part of the 1<sup>st</sup> respondent that the applicant herein would not raise any fee note; and if at all such a fee note would ensue, that the applicant would inform same of her desire to raise and bill for the legal advice.
45. In a nutshell, learned counsel has therefore invoked and relied on the doctrine of legitimate expectation, which is stated to have accrued on the part of the 1<sup>st</sup> respondent.
46. Thirdly, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has also submitted that to the extent that what was sought for was a friendly advice, which was thereafter offered by the applicant, then the applicant is estopped from raising a fee note and seeking to tax advocate/ client bill of costs.
47. Simply put, learned counsel has contended that the applicant herein is barred and prohibited by the doctrine of estoppel from seeking to extract professional fees from the named respondents.
48. Finally, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has also submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent are charitable institutions; and hence could not instruct the applicant formally without a written agreement and without funds having been raised in advance from donors in order to settle such agreed fees.



49. In view of the foregoing, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents has implored the court to find and hold that there was no retainer as between the applicant, on one hand and the 1<sup>st</sup> and the 3<sup>rd</sup> respondents, to warrant the lodgment and taxation of the advocate client bill of cost.

### c. 2<sup>nd</sup> respondent's submissions

50. Vide written submissions dated the November 17, 2022, learned counsel for the 2<sup>nd</sup> respondent has raised and highlighted two salient issues for consideration and determination by the court.
51. Firstly, learned counsel for the 2<sup>nd</sup> respondent has submitted that the 2<sup>nd</sup> respondent is a corporate body or entity that can only issue instructions in writing and not otherwise.
52. In addition, learned counsel contended that as pertains to the subject matter, no written instructions were ever issued to and in favor of the applicant herein to undertake any assignment for and on behalf of the 2<sup>nd</sup> respondent or better still, to render a legal opinion as pertains to the transaction in respect of the purchase of LR No 10897/4, which the 2<sup>nd</sup> respondent was purchasing.
53. Furthermore, learned counsel added that the 2<sup>nd</sup> respondent is a body, comprising of various trustees; and therefore instructions for undertaking any legal work could only arise and/or be issued under a resolution of the board of trustees, which was not the case.
54. To underscore the foregoing submissions and in particular, that there was need to procure and obtain a resolution of the board of trustees, before purporting to act on behalf of the 2<sup>nd</sup> respondent, learned counsel has cited and quoted the case of *Di'lorenzo Ltd v Hassan Bulle & Co Advocates* (2020)eKLR and *County Council of Bureti v Kennedy Nyamokeri T/a Nyamokeri & Co Advocates* (2006)eKLR.
55. Secondly, learned counsel has submitted that the 2<sup>nd</sup> respondent has a policy for procurement of various goods and services, including legal services and in this regard, learned counsel has submitted that if the 2<sup>nd</sup> respondent had wanted to procure and retain the services of the applicant, then the 2<sup>nd</sup> respondent would have complied with her procurement procedures which was not the case.
56. Additionally, learned counsel for the 2<sup>nd</sup> respondent has also submitted that the 1<sup>st</sup> respondent herein did not have her authority or mandate to represent her in any dealings and/or transactions with the applicant. Consequently, it has been stated that in the absence of the requisite authority, the actions and representations by the 1<sup>st</sup> respondent cannot be deemed to be binding on the 2<sup>nd</sup> respondent.
57. Consequently and in view of the foregoing, learned counsel for the 2<sup>nd</sup> respondent has submitted that the 2<sup>nd</sup> respondent did not retain the applicant to undertake any engagement or render any legal opinion on her behalf.

### Issues For Determination

58. Having reviewed the chamber summons application dated the March 29, 2017 (read reference), together with the supporting affidavit attached thereto and having taken into account the various replying/further replying affidavits filed in opposition thereto; and having similarly taken into account the elaborate oral testimonies tendered by the respective witnesses and finally having considered the various written submissions filed by the parties, the following issues do arise and are thus worthy of determination;
- i. Whether the ruling rendered on the March 15, 2017 was tantamount to sitting on appeal on the previous ruling rendered by the same deputy registrar on the September 22, 2016.



- ii. Whether the deputy registrar is seized and possessed of the requisite jurisdiction to determine the existence or otherwise of a retainer in advocate client dispute.
- iii. Whether there was any retainer between the applicant and the respondents herein, either as stated or at all?

## **Analysis And Determination**

### **Issue number 1**

**Whether the Ruling rendered on the March 15, 2017 was tantamount to sitting on appeal on the previous ruling rendered by the same Deputy Registrar on the September 22, 2016.**

### **Issue Number 2**

**Whether the deputy registrar is seized and possessed of the requisite jurisdiction to determine the existence or otherwise of a retainer in advocate- client dispute.**

59. It is common ground that upon the filing and lodgment of the advocate client bill of costs by and at the instance of the applicant herein, the respondents instructed their counsel to file a notice of preliminary objection wherein same challenged the jurisdiction of the deputy registrar to tax the impugned bill of costs, as well as to determine the question of retainer.
60. Following the lodgment of the preliminary objection, the learned deputy registrar indeed entertain submissions pertaining to and concerning the twin- issues raised and canvassed at the foot of the preliminary objection.
61. Subsequently, the learned deputy registrar rendered a ruling and in respect of which same found and held *inter-alia*, as hereunder;

‘From the foregoing, it is clear that the taxing officer has jurisdiction, albeit exercising it through the delegated jurisdiction of the trial court and that the issue of retainer is not and issue of pure law and it then follows that the preliminary objection before the court today must fail’.
62. My understanding of the ratio decidendi espoused and underscored by the learned deputy registrar is to the effect that same came to the conclusion that the question of retainer was within the jurisdiction and mandate of the taxing master/deputy registrar.
63. Other than the foregoing, the learned deputy registrar proceeded and underscored that even though same is conferred and vested with the requisite jurisdiction to determine retainership, the issue of retainer is not a pure point of law, which can be canvassed and ventilated on the basis of a preliminary objection.
64. Put differently, the learned Deputy Registrar was explicit to the extent that same held that a question of retainer could be determined by herself, save that the determination of whether or not there existed retainer, requires adduction of evidence and interrogation thereof before a determination can be reached or arrived at.
65. Furthermore, having made the foregoing decision, the learned Deputy Registrar thereafter scheduled the impugned advocate/client bill of costs for taxation. For clarity, this was done after the preliminary objection questioning her jurisdiction had been dismissed.



66. Notwithstanding the foregoing decision, which in my humble view was correct and legally sound, the learned deputy registrar thereafter rendered another ruling on the March 15, 2017, which is the subject of the current reference.
67. Suffice it to state that *vide* the latter ruling, the same learned deputy registrar who had hitherto found and held that she had jurisdiction to determine the question of retainer now beat an about-turn; and held that the question of retainer fell within the jurisdiction of the judge and not otherwise.
68. Consequently and in the premise, the learned deputy registrar repented from her previous finding and holding and thereafter held that she could not proceed to tax the advocate/ client bill, until the question of retainer is determined by the judge.
69. From the foregoing, two things do arise: firstly, it is not lost on this court that after the learned deputy registrar had rendered the ruling dated the September 22, 2016, there was no objection to her decision; and similarly no reference was taken on her decision.
70. To the extent that no reference was ever taken and/or mounted against her ruling rendered on September 22, 2016; it was not open for the learned Deputy Registrar to revert back and have a second bit on the question of jurisdiction to determine retainer.
71. Secondly, having pronounced herself on the question of jurisdiction, which had not been legitimately challenged *vide* reference, the learned deputy registrar was thereafter *functus officio*.
72. In short, it was not open for the learned deputy registrar to come back on the same question; and to make a contradictory finding in the same cause. simply put, the pronouncement by the learned deputy registrar, at the foot of the second ruling amounted to a second bite on the cherry.
73. To underscore the import, tenor and scope of the doctrine of *functus officio*, it is appropriate to reiterate the holding of the Court of Appeal in the case of *Telkom K Ltd v John Ochanda (suing for and on behalf of 996 former employees of Telkom K Ltd)* (2014) eKLR, where the Court of Appeal observed as hereunder;

“The Supreme Court in *Raila Odinga v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 in which the learned author stated;

...“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey*



*Evening Post Ltd v Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

74. Premised on the foregoing, I come to the conclusion that having hitherto found and held that same was seized and possessed of the requisite jurisdiction to determine the question as pertains retainer, it was not open for the learned deputy registrar to revert back and make a decision which was contradictory to and at variance with the initial decision.
75. Nevertheless and for good measure, I find and hold that the initial decision rendered on the September 22, 2016; and wherein the learned deputy registrar found that she had jurisdiction to determine retainership, was correct and legally sound.
76. In this respect, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Wilfred N Konosi T/A Konosi & Co Advocate v Flamco Ltd* (2017)eKLR, where the Court of Appeal stated and observed as hereunder;

“The issue whether an advocate-client relationship exists in taxation of a bill of costs between an advocate and his/her client is core. The jurisdiction is conferred on the taxing officer by law. It is derived from the *Advocates Act* and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn v Roitei* [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The *Advocates Act* and the Advocates Remuneration Order confer on the taxing officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered.

The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the taxing officer would be bereft of jurisdiction to tax a bill.

77. In a nutshell, my answer to issue number one is too fold: firstly; it was erroneous for the learned deputy registrar to render a subsequent ruling which was contradictory to and at variance with her previous ruling where she had pronounced herself on the question of Jurisdiction to determine retainership.
78. Secondly, where a dispute arises pertaining to retainership in advocate/ client bill of costs, the deputy registrar or better still, the taxing master is statutorily conferred and vested with the requisite jurisdiction to determine the said issue.



**Issue Number 3:**

**Whether there was any retainer between the applicant and the respondents herein, either as stated or at all?**

79. The applicant herein tendered and produced before the honourable court assorted email correspondence which were exchanged between herself and the 1<sup>st</sup> respondent. For clarity, the email correspondence forms the crux of the provision and ultimate dissemination of the legal opinion, which is at the center of the current dispute.
80. Given the important role that was played by the various email correspondence, it is important to reproduce a sample thereof. In this regard, it suffices to reproduce the email correspondence dated the October 26, 2015, which was evidently sent to the applicant by and on behalf of the 3<sup>rd</sup> respondent herein.
81. For ease of reference, the email correspondence is reproduced as hereunder;

(335 unread) -kokimbulu-Yahoo M.jil

oshwal University Trust <oshwal.university@oerb.org>

10/26/15 at 3:01 pm

o kokimbulu@yahoo.com

CC kokimbulu@gmail.com

I am writing to you in a different capacity ,and just to give you a gist of the history so that you can help us make a decision or know what will be the step we ought to take:

1. We are sponsored by the Oshwal Education and Relief Board (OERB) which is a non-profit charitable institution and has 5 academies in Kenya plus also conducts various other charitable activities, amongst them is as a founding trustee of the Karura Forest Trust
2. The Oshwal University Trust is also created by the OERB, and I am one of the 5 founding trustees with a mandate to create a university.
3. As part of the process, we have to own 50 acres of land and hence mid 2013 the OERB entered to an agreement with a group known to the community that had 300 acres to give us 100 acres, of which 50 acres will be given to the trust/university
4. The land is about 3km West of Thika town on the road to Nakuru, and within Kiambu county.
5. We paid the deposit in August 2013 and thereafter there was delay in getting the transfer due to the hanging issues between the Land Commission and the Commissioner of Lands as per attached letters. We have paid the balance however against a Bank Guarantee raised by the vendors as they pleaded to get the money to avoid incurring Bank interest.
6. As you see our recent letter from Walker Kontos, the Title is defective and in seeking the redress with the vendors we have limited options.



Can I get your urgent advise on the same as we have a management meeting on wednesday evening on the same.

L remain,

Yours truly and sincerely

For and on behalf of

Oshwal University Trust.

82. From the contents of the foregoing email correspondence, three things become evident and apparent.
83. Firstly, the author of the email correspondence is intimating to the applicant that same is one of the Five Founder Trustees of the 2<sup>nd</sup> respondent with a mandate to create a university. In this regard, the author thereof which is the 1<sup>st</sup> respondent signifies that same has a mandate and authority on behalf of the 2<sup>nd</sup> respondent.
84. Secondly, it is also evident that the author thereof is indeed writing for and on behalf of the 3<sup>rd</sup> respondent. Consequently, the connotation that emanates from the foot of the email correspondence under reference is that same is being made with the authority and mandate of the 3<sup>rd</sup> respondent.
85. Thirdly, from the face of the email correspondence it is apparent that the email address and the domain from which same is disseminated is the domain of the 2<sup>nd</sup> respondent. Clearly, the usage of the domain of the 2<sup>nd</sup> respondent denotes that the user thereof, no doubt has the authority to act on behalf of the said 2<sup>nd</sup> respondent.
86. Notwithstanding the foregoing, it is also not lost on the court that the legal opinion which was being sought for touches on and concerns a transaction which was involving the 2<sup>nd</sup> respondent. Consequently, there is no gainsaying that the beneficiary of the legal opinion was none other than the 2<sup>nd</sup> respondent who was purchasing the named property.
87. Furthermore, there is also the email correspondence dated the October 29, 2015 which was also dispatched from the same domain of the 2<sup>nd</sup> respondent. For clarity, the instant email correspondence was generated by the 1<sup>st</sup> respondent in his capacity as the chairman, board of trustees of the 3<sup>rd</sup> respondent.
88. Additionally, same was variously copied to the chairman, secretary, treasurer and assistant secretary of the 2<sup>nd</sup> respondent, respectively.
89. From the latter email correspondence, there is no doubt that the 1<sup>st</sup> respondent in his capacity as the chairperson of the 3<sup>rd</sup> respondent and with the blessings of the Trustees of the 2<sup>nd</sup> respondent has implored the applicant herein to study and examine a plethora of documents and thereafter to offer an opinion pertaining to the impugned transaction.
90. Besides, the author of the email correspondence has also intimated to the applicant that same shall be obliged to copy the legal opinion, once same is ready, to the various persons, whose details are shown at the foot of the named email correspondence.
91. In my humble view, the instructions to the applicant to undertake the named assignment and to generate a legal opinion pertaining to and concerning the transaction in respect of the purchase of the named property was actually disseminated to the applicant by the 1<sup>st</sup> respondent, albeit in his capacity as the chairperson of the board of trustees of 3<sup>rd</sup> respondent; and with the concurrence of the trustees of the 2<sup>nd</sup> respondent.



92. In the circumstances and given the nature of representations that were made by the 1<sup>st</sup> respondent, ( whose details are contained at the foot of the numerous email correspondence), it is safe to find and hold that the 1<sup>st</sup> respondent herein duly retained the applicant for and on behalf of not only himself, but also on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
93. To this end, it is appropriate to take cognizance of and to reiterate the tenor, import and implication of the provisions of section 2 of the *Advocates Act*, chapter 16, Laws of Kenya.
94. For clarity, the provisions of section 2 of the *Advocates Act* (supra) provide as hereunder:
- “client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;”
95. Furthermore, the contents of the email correspondence of October 29, 2015, is explicit and devoid of ambiguity.
96. In a nutshell, the totality of the email correspondence which were exchanged between the applicant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, respectively, denote and effectively confirm the existence of a retainership.
97. Additionally, the respondents herein were calling upon and indeed relying on the legal expertise of the applicant to unravel a legal quagmires and stalemate, that threatened to negate the purchase, acquisition and ultimate transfer of LR No. 10897/4 in favor of the 2<sup>nd</sup> respondent.
98. In view of the foregoing, I come to the conclusion that even though there was no written retainer, the totality of the email correspondence that were exchanged between the applicant, on one hand and the respondents on the other hand; coupled with the dissemination of the legal opinion, which was (sic) praised by the 1<sup>st</sup> respondent to be detailed and elaborate, evidences retainer.
99. Other than the foregoing, it is also worthy to remember that the applicant was also invited to attend a meeting involving the 1<sup>st</sup> respondent and members of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
100. Clearly, the invitation to and the attendance at the scheduled meeting was in pursuance of the retainer that existed between the applicant and the respondents.
101. In a nutshell, I find and hold that there was retainer. in any event, a retainer can be deduced or inferred from the conduct of the parties.
102. To this extent, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Omulele & Tolo Advocates v Mount Holdings Ltd* (2016)eKLR, where the court held as hereunder;
- “ According to the *Black’s Law Dictionary*, (supra) a retainer is defined as:
- “1. A client’s authorization for a lawyer to act in a case.
  2. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.
  3. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.



4. An advance payment of fees for work that the lawyer will perform in the future- also termed retaining fee. “

In *Halsbury's Laws of England*, (supra) at page 13 para 763; the concept is also defined thus:-

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment.....”

From the above definition, 'retainer' covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client (see *Halsbury's Laws of England*, (supra) at page 14 para 765).

103. Furthermore, the Court of Appeal proceeded and stated as hereunder;

The same onus of proof applies to a retainer. As said earlier, where a client disowns an oral retainer or even the existence of a retainer relationship, it is for the advocate who claims under that retainer to prove to court that such a relationship indeed existed, otherwise the court will deem that he acted without instructions.

104. Premised on the ratio decidendi enunciated and espoused in the foregoing decision, there is no gainsaying that retainer can be inferred from the relationship and/or conduct between the advocate and the named client.
105. Nevertheless, the burden of proving that indeed there does exist retainer is on the shoulders of the advocate. However, it must be remembered that the standard of proof is on a balance of probability and not otherwise.

#### **Final Disposition:**

106. Having reviewed and analyzed the three named issues, which were highlighted in the body of the ruling, I come to the conclusion that the reference, which was filed and mounted by the applicant herein is meritorious and ought to be allowed.
107. Consequently and in the premises, the chamber summons application dated the March 29, 2017, be and is hereby allowed on the following terms;
  - i. The ruling of the learned deputy registrar dated and delivered on the March 15, 2017; be and is hereby set aside and/or rescinded.
  - ii. A retainer be and is hereby found to have existed between the applicant and the respondents in accordance with the provisions of section 2 of the *Advocates Act*, chapter 16 Laws of Kenya.
  - iii. The advocate/client bill of cost dated the February 4, 2016 be and is hereby remitted to the deputy registrar/taxing officer of this honourable court other than Hon S Mwayuli, for purposes of taxation in accordance with the obtaining *Advocates Remuneration Order 2014*.
  - iv. Costs of the reference herein be and are hereby awarded to the applicant and the same to be agreed upon; and in default, to be taxed by the taxing officer of the court.
108. It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MARCH 2023.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Benson Court Assistant

Ms Koki Mbulu - the Applicant

Mr. Otieno h/b for Mr. Greg Karungo for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr Muriithi h/b for Ms. Njeri Mucheru for the 2<sup>nd</sup> Respondent

