



**Kenya County Government Workers Union v Otieno, Yogo,
Ojuro & Company Advocates (Miscellaneous Civil Application
E153 of 2023) [2025] KEHC 2577 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E153 OF 2023**

AC BETT, J

MARCH 5, 2025

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION CLIENT

AND

OTIENO, YOGO, OJURO & COMPANY ADVOCATES RESPONDENT

RULING

1. The Respondent (hereafter referred to as “the Advocate”) is a law firm in the name and style of Otieno, Yogo, Ojuro & Co. Advocates who filed an advocates-clients bill of costs in a bid to recover fees for legal services rendered in Kakamega Criminal Case No. 203 of 2017 between Republic v. David Kivisi Bagada, Anne Mbakaya and Maurice Kweyu.
2. The Applicant is a Trade Union registered in the Republic of Kenya that draws its membership from the employees of the County Governments.

The Dispute

3. The Advocate filed an Advocate-Client Bill of costs on 17th October 2023.
4. In response to the Bill of costs, the Applicant through the firm of Mathenge Mwiti Advocates filed a Notice of Motion application dated 16th February 2023 seeking to arrest the ruling on taxation and urging the court to reopen the taxation for purposes of allowing the Client the opportunity to file a substantive response to the bill. The Applicant deponed through its advocates that the Applicant/Client had never instructed the Advocate and so it disputed the existence of an Advocate-Client relationship.



5. Upon hearing the parties' advocates, the Taxing Officer delivered a ruling on 8th April 2024 in which he arrested the ruling on taxation and re-opened the taxation to allow the Applicant/Client to file its response to the said Bill of costs.
6. Pursuant to the order re-opening the Bill of costs, the Applicant filed a notice of preliminary objection in which it denied ever instructing the Advocate to act for the Accused persons in Kakamega Criminal Case No. 203 of 2017. It contended therefore that there did not exist an Advocate-Client relationship due to lack of retainer agreement and so the Taxing Officer lacked the jurisdiction to tax the Advocates-Clients Bill of costs.
7. Upon considering the preliminary objection, the Taxing Officer dismissed the same and directed that the Bill of costs be fixed for taxation.
8. Aggrieved by the decision, the Applicant filed a reference to this court on the grounds that the ruling of the Taxing Officer on the Applicant's preliminary objection was based on errors of principle and ought to be reviewed and set aside. Before the reference could be heard and determined, the Taxing Officer proceeded to tax the bill of costs at Ksh. 50,170/= the same being inclusive of 16% VAT.
9. The parties filed submissions in respect to the reference. According to the Applicant the only issue for determination is whether the Taxing Officer made an error of principle in dismissing its preliminary objection.
10. The Applicant submits that the Taxing Officer erred in failing to take into account a relevant factor which is that the Applicant Trade Union is only mandated to represent or issue instructions for the representation of its members in civil and employment and labour relations matters and not in criminal matters.
11. The Applicant further submits that the Taxing Officer erred in making an implication and inference of the existence of an Advocate-Client relationship between the Respondent and the Applicant.
12. The Applicant contends that the documents relied upon by the Respondent to prove that he had instructions does not bear the date or signature of the receiver but only bears the date and signature of the Respondent sender and could not suffice to confirm retainer of the Respondent or an Advocate-Client relationship.
13. The Applicant further submits that there is no letter of instructions produced by the Respondent nor other evidence to proof that there existed an Advocate-Client relationship.
14. On its part, the Respondent submits that it did receive instructions to act for the Applicant's members in Kakamega Criminal Case No. 203 of 2017 and at no point did the Accused persons or the Applicant object to the representation. The Respondent relies on the cases of *Mereka & Co. Advocates v. Zakhem Construction Kenya Ltd* [2014] eKLR and *Ochieng Onyango Kibet and Ohaga Advocates v. Akiba Bank Ltd* [2007] eKLR.
15. The Respondent posits that it is not a must that instructions be in writing as the same can be implied by the conduct of the Client.

Analysis and Determination

16. Based on the reference and the parties' submissions, I find the issue for determination being whether the Taxing Officer erred in principle in holding that there did exist an Advocate-Client relationship between the parties.



17. It is not in dispute that the Respondents represented the Accused persons in Kakamega CM Criminal Case No. 203 of 2017 and secured their acquittal. What is in dispute is whether the representation was at the behest of the Applicant union.
18. It is well settled that instructions need not be in writing in order to create an Advocate-Client relationship but can be inferred by conduct of the parties. This was the holding in *Mereka & Co. Advocates v. Zakhem Construction (Kenya) Ltd (Supra)* where the court held as follows:-
- “...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.”
19. Similarly, in the case of *Ochieng Onyango Kibet and Ohaga Advocates v. Akiba Bank Ltd (Supra)* where the court held as follows:-
- “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.”
20. The issue of an Advocate-Client relationship goes to the jurisdiction of the court for taxation is founded on the existence of an Advocate-Client relationship. Jurisdiction can only arise once it is established that there exists an Advocate/Client relationship. Where the Taxing Officer finds no such relationship, he has no option but to strike out the bill of costs.
21. In the case of *Wilfred N. Konosi & Co. Advocates v. Flamco limited [2017] eKLR*, the Court of Appeal held as follows:-
- “Not a single letter by the appellant to the respondent was exhibited to demonstrate that the relationship of advocate-client obtained. The onus reposed on the appellant. It was not discharged. In the absence of proof that there existed advocate-client relationship, the Taxing Officer was justified in striking out the Bill of Costs as she did and the learned Judge of the High Court was right to uphold the decision of the Taxing Officer.”
22. In the present scenario, the Respondent represented three individuals, namely David Kivisi Bagada, Anne Mbakaya and Maurice Kweyu in a criminal case. There is nothing in the charge sheet that connects the Accused persons to the Respondent. The only document that was adduced by the Respondent is support of its averment that they were on a retainer from the Respondent to act for the Accused persons is a letter dated 28th June 2017, a consignment note and a charge sheet. None of the documents emanated from the Applicant. There is no communication whatsoever from the Applicant to the Respondent regarding the subject criminal case. In the premises, the issue as to whether there was retainer, rests on the Applicant’s word against the Advocate’s words.
23. It is trite that he who alleges must prove. The Respondent’s claim can be distinguished from the cases relied upon by the Respondent because the Advocates were dealing directly with the Clients in those cases.



24. In *Omulele and Tollo Advocates v. Mount Holdings Ltd* [2016] KECA (KLR), the court held that:-

“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.”

25. In the present case, for the Respondent to prove the existence of an Advocate-Client relationship in a situation where it represented third parties and not the Applicant directly, the Respondent needed to prove, on a balance of probabilities that it had been authorized by the Applicant to represent the named third parties in the criminal case in which the Applicant was not joined as a party. It was therefore incumbent upon the Advocate to produce some form of evidence to show that it received communication from the Applicant in regard to the subject criminal case.

26. In the case of *Ochieng Onyango and Kibet Ohaga Advocates v. Akiba Bank Limited* (supra), the court stated that:-

“It is the position of the law that if there is no evidence of retainer except the oral statement of the Advocate which is contradicted by the client, the court will treat the Advocate as having acted without authority/permission. As was rightly pointed out by Mr. Kipkorir Advocate, the burden of proof to establish the retainer is always on the shoulder of the Advocates. That is the correct proposition of the law. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yardstick for such proof is not beyond reasonable doubt. In fact it is the normal the perimeter of balance of probability.”

27. In the case of *Makumi Mwangi & Company Associates v. Chege* [2023] KEHC 27252 (KLR), the Advocate sought to have an Advocate-Client relationship or retainer inferred on the basis of an email communication between the parties. The Court held as follows:-

“38. This court is unpersuaded that the Advocate was instructed by the client, never filed appearance, outsourced the brief to Mbugua Atudo Advocates but no evidence is provided, then the client was never a party to the litigation but rather her relative.

39. This court is of the view that whereas circumstances may arise where a retainer relationship may be inferred in the absence of a formal instruction, retainer-note or a memorandum of agreement however the Advocates must demonstrate cogent reason as to why no formalisation of the same was ever undertaken as a basis of inviting the court into the inference creation.

40. I find that, the Applicant-Advocate has failed to demonstrate the role and place of Tiras Mburu Chege, and why they did not pursue the taxation on him, this was the principal litigant represented and that the onus lay on the Applicant to demonstrate the same.”

28. I have perused the documents produced by the Advocate and find that it failed to adduce any evidence to support its claim that there existed an Advocate-Client relationship between him and the Applicant. The unilateral self-authored documents did not establish a nexus between the Applicant and the parties the Advocate represented nor the criminal case itself.



29. The burden of proving retainer was on the Advocate and since he failed to discharge the burden, I find in favour of the Applicant. In doing so, I am guided by the words of Lord Denning in *Griffins v. Evans* [1953] 1 WLR 1424 when he said:-

“On the question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last 100 years or more that the word of the client is to be preferred to the word of the solicitor, or any rate more weight is to be given to it ... The reason is plain. It is because the client is ignorant and the solicitor is, or should be learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.”

30. The Advocate was dealing with a Trade Union. He was not representing the Trade Union directly. He was acting for Accused persons in a criminal case that has not been demonstrated to be directly linked with the Trade Union. Wisdom should have dictated that the Advocate seeks written instructions before taking up the brief. Such instructions would be in conformity with Rule 69 of the LSK Code of Standards of Professional Practice and Ethical Conduct (June 2016) which provides that:-

“It is good professional practice for Advocates to always encourage clients to issue written instructions before the Advocate’s engagement commences. The written instructions may take the form of either a letter of instructions issued by the client to the Advocate or a memorandum of agreement between the Advocate and the client. In the case of the memorandum of agreement the memorandum should be signed by both the client and the Advocate. The letter or agreement should clearly define the nature and scope of the engagement and the understanding between the parties as regards fees, either clearly stating the amount of fees to be charged or the basis on which fees will be charged.”

31. In the end, I find that the Taxing Officer erred in principle in dismissing the Applicant’s preliminary objection and inferring that there existed an Advocate-Client relationship between the Respondent and the Applicant.

32. I find the reference has merit and I thus allow it with costs. The ruling dated July 20, 2024 is set aside. In lieu thereof, the preliminary objection is allowed and the Bill of costs dated September 29, 2023 struck out. Consequently, the ruling on the Bill of costs dated August 28, 2024 is also set aside.

33. The Applicant shall have the costs of the reference and the costs of the taxation.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Oginga for the Applicant

No appearance for the Respondent

Court Assistant: Polycap

