



Wahome & Akedi Advocates v Migwi & 2 others (Sued as Interim Administrators of the Estate of George Irungu Karanja - Deceased) (Miscellaneous Application E248 of 2023) [2024] KEHC 8011 (KLR) (Family) (21 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E248 OF 2023
PM NYAUNDI, J
JUNE 21, 2024**

BETWEEN

WAHOME & AKEDI ADVOCATES APPLICANT

AND

ANNE WANJIKU MIGWI 1ST RESPONDENT

JAMES KANYOTU 2ND RESPONDENT

ROSE NYAWIRA KARIUKI 3RD RESPONDENT

**SUED AS INTERIM ADMINISTRATORS OF THE ESTATE OF GEORGE
IRUNGU KARANJA - DECEASED**

RULING

1. Before this court is a Chamber Summons dated 9th November 2023 filed by the Applicant. It is brought under Section 45 of the *Advocates Act*, Chapter 16 of the Laws of Kenya and Section 1A and 1B of the *Civil Procedure Act* seeking the following orders;
 - i. Spent.
 - ii. Spent.
 - iii. That judgment be entered in favour of the applicant to receive 10% of the value of the assets distributed and pending assets to the Respondents from the estate of James Kanyotu (deceased) in Succession Cause 1239 of 2008.
 - iv. That Respondents bear the costs of this application.



2. The Summons were based on the grounds that;
 - a. That the Respondents retained the Applicant to offer legal services in their claim against beneficiaries from the Estate of James Kanyotu (deceased) in Succession Cause 1239 of 2008 (hereinafter “the Estate”).
 - b. That at all material times, the Applicant had been on record for the 1st, 2nd and 3rd Respondents including for the late George Irungu prior to his demise. After the death of George Irungu in 2015, the Applicant continued being on record for the estate of George Irungu pending the issuance of the 1st and 2nd Respondents.
 - c. That throughout the entire period, it was agreed between the Applicant and the Respondents that the Applicant would be paid 10% of the total value of assets received by the Respondents from the Estate of James Kanyotu in Succession No.1239 of 2008.
 - d. That on 19th December 2017, the Applicant and the Respondents held a meeting where the arrangement was formally recognized in writing by entering into a remuneration agreement for payment of legal fees. It was agreed that the Applicant was authorized to deduct 10% of the assets received by the Respondents from the Estate.
 - e. That the Applicant is entitled to enforce the remuneration agreement by dint of Section 45 of the Advocated Act Cap 16.
 - f. That the Respondents have since filed a malicious complaint at the Advocates Disciplinary Tribunal against Ms. Wangeci Akedi and Alice Muthoni Wahome with regards to sums of money received on their behalf which they claim the applicant wrongfully retained as fees.
 - g. That the Disciplinary Committee is scheduled to hold a plea taking session on 14th November 2023 in Disciplinary Tribunal Cause No. 348 of 2023 and Disciplinary Tribunal Cause No. 349 of 2023.
 - h. That unless the proceedings of the disciplinary tribunal are stayed, the Applicant risks being subjected to a disciplinary process that does not appreciate the full picture of the dispute as this court is the better forum than the disciplinary proceedings and may result in conflicting outcomes over the same subject matter.
 - i. That it is in the interest of justice that the orders sought be granted.
3. The Respondents opposed the Summons. They deny entering into any agreement with the Applicant or signing the remuneration agreement dated 19th December 2017. They argue that the advocates did not exercise due care and diligence in tracing their share of the estate; the properties issued to them have no titles. That they appended signatures on a document they later learnt was a consent adopted in court which has prejudiced them as they can no longer claim their share. According to them, if the applicant is paid 10% of the estate, this amounts to double payment and is unprofessional.
4. The Court directed that the summons be canvassed by way of written submissions. The Applicants submissions are dated 24th January 2024. The Respondents did not file any submissions.
5. The Applicant submitted that the following issues should be determined by this court;
 - i. Whether a retainer existed between the advocates and the Respondents.
 - ii. Whether a valid remuneration agreement existed between the applicant and the 2st and 2nd Respondent.



- iii. Whether a valid remuneration agreement existed between the applicant and the 3rd respondent.
 - iv. What orders are justified in the circumstances.
6. On the first issue, counsel submitted that a retainer existed between them and the Respondents which was separate and distinct from the estate of James Kanyotu. The applicant submitted that Section 45 of the *Advocates Act* provides that for a remuneration agreement to be valid and binding, it shall be in writing and signed by the client. Counsel submitted that the retainer agreement in this case was put down in terms of a letter and the same ought to be interpreted as an agreement. Counsel sought to rely on the decisions in *Joshua Rodney Marimba vs Kenya Revenue Authority* [2019] eKLR, *Nyamogo & Nyamogo Advocates v Kenya Pipeline Company Limited* [2006] eKLR and the Court of Appeal decision in *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR. Also, that the minutes of meetings presented in court should translate to a retainer agreement between the applicant and the Respondents.
 7. On the third issue, it was submitted that the letter dated 30th August 2022 signed by the 3rd Respondent's advocate confirms the terms of the retainer agreement between the applicant and the 3rd respondent. The 3rd Respondent was aware of the letters which amounts to an agreement. They urged the court to allow the summons as prayed.

Analysis and Determination

8. I have considered summons, the supporting affidavit, the response and submissions before me.
9. The issues which arise for determination are;
 - i. Whether this court is competent to issue the orders sought.
 - ii. Whether there exists a valid retainer agreement between the applicant and the respondents.
10. The Respondents argue that this court cannot issue the orders sought until the matter at the Disciplinary Tribunal has been determined.
11. A complainant may pursue a claim for professional misconduct against an advocate while seeking other reliefs from the court in parallel proceedings. This was held in the decision in *Republic v Advocates Disciplinary Committee and 2 Others ex. P Mpuko Nahason Mwititi* NBI JR No. 459 of 2014 [2015] eKLR where the court stated that:

“53. It is therefore clear both on the law and on authorities that breach of professional undertaking amounts to a professional misconduct. Since an advocate has a professional duty and or obligation to honour his undertaking, the failure to do so in my view amounts to a “disgraceful or dishonourable conduct incompatible with the status of an advocate” under section 60(1) of the *Advocates Act* hence constitutes a professional misconduct in which event the Tribunal is empowered to investigate the same. The mere fact that a party who has suffered a loss as a result therefore is entitled to invoke the Court's jurisdiction under Order 52 rule 7 of the Civil Procedure Rules does not in my view bar a complaint being lodged with the Tribunal on the same issue. As this Court held in *R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013*, “...the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a



complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain.”

12. The complaint before the Committee deals with professional misconduct. The Committee cannot grant the orders sought in this application. The current application is therefore properly before the Court.

Whether there exists a valid retainer agreement between the applicant and the respondents

13. The term ‘retainer agreement’ is anchored in the *Advocates Act* and in particular section 45 thereof. It provides inter alia:

45. Agreements with respect to remuneration

- (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-

- a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
- b. before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;

- c.

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”

14. The Court in the case of *Kakuta Maimai Hamise v Peris Pesu Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency* [2017] eKLR reiterating this provision observed as follows:

28. The issue of validity of agreements between advocates and clients with respect to remuneration was dealt with by Ochieng, J in *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2)* [2006] 1 EA 5 in which the learned Judge held that reading of section 45(1) of the *Advocates Act* reveals that the agreements in respect of remuneration would be valid and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorized in that behalf. The Court proceeded to hold that an agreement that provides for fees, which was less than the fees provided for in the Remuneration Order was illegal.”

15. Expounding on retainer agreements the Court in the case of *Sheetal Kapila v Narriman Khan Brunlehner* [2021] eKLR quoting the case of *Omulele & Tollo Advocates vs Mount Holdings Ltd* CA 75 of 2015 with approval restated that:

“A retainer means the instruction, employment or engagement of an advocate by his client. On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted



while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship...”

16. As with any other agreement, the onus of proving the existence of the retainer agreement lies with he that wishes to enforce it. This is in line with the ordinary rules of contracts and evidence. (See Kenya National Capital Corporation Limited v. Albert Mario Cordeiro & Another [2014] eKLR and Section 107 of the Evidence Act Cap 80). Under the proviso to Section 45 (5) of the Act, an advocate who is a party to a retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. Infact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee. Consequently, it behooves such advocate to ensure that the retainer agreement once made, is reduced into writing.
17. The same onus of proof applies to a retainer. Where a client disowns a 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.
18. In this case, the Applicant has produced several correspondences between them and the respondents on the issue of fees. The respondents on the other hand in their affidavits averred that they were given a document to sign which they later learnt was a consent which was later adopted as an order of the court. Further, they denied signing any retainer agreement. They also don't agree that the applicant is entitled to 10% of the Estate.
19. I have perused the minutes relied on by the advocate and especially the letter dated 19th December 2017 marked as WA-1. It states that;

“it has been agreed that advocates fees shall be 10% of the subject matter of the estate or of any value of cash received”
20. The Applicant states that these minutes of the meeting held on 19th December 2017 is what forms the basis of the retainer agreement and although unsigned must be read alongside correspondences dated 23rd October 2018 and 6th June 2021.
21. The document dated 19th December 2017 on its own is of no probative value, as it does not comply with universally accepted form for minutes. It does not disclose the agenda, persons present at the meeting and any signatures to confirm that those present at the meeting were in agreement on the issues.
22. Correspondence from Ms. Lucy Njiru & Company Advocates on record clearly refers to agreement on fees and gives context and meaning to the document dated 19th December 2017.
23. The letter dated 30th August 2022 connotes the following as the terms of the retainer agreement that the Advocate would be entitled to ‘fees for search of Estate properties for your firm and Judge Judy Thongori shall be paid out of the Estate (1) -(5) above and ‘that for every payment made, you would deduct 10% of your fees before effecting payment to our client’.
24. In the circumstances I find that there was an agreement on fees and enter judgment for the Applicant to receive from the respondents 10% of the value of the Estate that is transmitted to the respondents.
25. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF JUNE, 2024.

P M NYAUNDI



JUDGE

In the presence of:

Fardosa Court Assistant

