



OK Law Advocates LLP v Incourage Insurance Agency Limited (Miscellaneous Application E083 of 2023) [2024] KEHC 15736 (KLR) (Judicial Review) (14 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW**

MISCELLANEOUS APPLICATION E083 OF 2023

J NGAAH, J

DECEMBER 14, 2024

BETWEEN

OK LAW ADVOCATES LLP APPLICANT

AND

INCOURAGE INSURANCE AGENCY LIMITED RESPONDENT

RULING

1. On 31 July 2023, the firm of M/s. OK Law Advocates LLP, the applicant in the instant application, filed for taxation an advocate-client bill of costs against the respondent. It would appear from the record, that the taxing officer was prepared to proceed and tax the bill after the applicant initiated the move to have the bill taxed but for the instant application.
2. By an application, by way of a summons dated 9 October 2023, the respondent sought to have the taxation proceedings stayed and that the dispute (apparently on fees payable to the applicant for legal services rendered) between the applicant firm and the respondent referred to an arbitrator. To be precise, the respondent has sought orders that:
 - “ 1. These proceedings be stayed and the dispute between the parties be referred to arbitration.
 2. The costs of this Application be awarded to the Respondent.”
3. The application is expressed to be brought under Article 159(1)(c) of the *Constitution*; Sections 6 and 10 of the *Arbitration Act*, 1995; Rule 2 of the *Arbitration Rules, 1997*; Order 2, rule 15(1)(d) of the Civil Procedure Rules; and, Section 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21. It is supported by the affidavit of Mr. Kunihiro Kawano sworn on 9 October 2023.



4. Mr. Kawano, has sworn that he is the founder and Chief Executive Officer of the respondent. By a retainer agreement dated 14 October 2022, between the respondent and the applicant, the latter agreed to provide legal services to the former. According to Clause 16 of the retainer agreement, parties to the agreement agreed to subject their disputes in relation to the agreement to arbitration. The clause reads as follows:

“If any dispute should arise between us out of or in connection with this Letter (or its construction, operation or termination) or the arrangements between us relating to the provision of legal services, which the parties have been unable to settle amicably, then that dispute or difference shall at be referred to and finally resolved by arbitration in Nairobi by a sole arbitrator pursuant to the Kenyan *Arbitration Act*. Any exercise of this dispute resolution method shall be initiated by way of a written notice specifying the dispute or difference and the redress sought.”

5. Contrary to this arbitration clause, the applicant commenced the instant proceedings for taxation of its advocate-client bill of costs. It is the applicant’s position that it is only fair, equitable, and just that the dispute be referred to arbitration in accordance with the arbitration agreement and Section 6 of the *Arbitration Act*, 1995.

6. Mr. Yonah Ougo filed a replying affidavit opposing the application. He has sworn that he is an advocate of this Honourable Court and that he is a partner in the applicant firm of advocates. Mr. Ougo has denied that a retainer agreement exists between the applicant and the respondent. However, there exists a retainer agreement between the applicant and a company called Amoebax Limited which is a distinct and separate legal entity.

7. Amoebax Limited, according to Mr. Ougo, is not the company that instructed the applicant to institute the proceedings in this Honourable Court in Milimani High Court Judicial Review Application No E013 of 2023 which, apparently, gave rise to the applicant’s advocate-client bill of costs. But even if the respondent was a bona fide party to the retainer agreement, the intention of the applicant and Amoebax Limited was to create an agreement for retainer services governing pre-litigation matters only; the retainer did not cover court matters and litigation.

8. As far as clause 16 of the retainer agreement is concerned, Mr Ougo has sworn that parties to the retainer agreement only agreed to refer disputes between the applicant and Amoebax Limited to arbitration with respect to the agreement’s construction, operation or termination within the scope of work under clause 2.0 thereof. The scope of work under this clause provided as follows:

- “i) Drafting, review and updating of the Client’s contracts and related sub contracts;
- ii) Handling employment and labour matters’ correspondence on behalf of the client (Amoebax) and providing legal advice pre-litigation;
- iii) Providing legal advisory relating to any risks revealed through the review process;
- iv) Providing email and/or telephone correspondence and updates on the matters;
- v) Representation in any arising settlement negotiations pre-litigation;
- vi) Drafting any arising settlement agreements pre-litigation; and



vii) General care and conduct of various legal matters.”

9. In the same clause, it was provided that if it became necessary, in the course of the engagement, to change the scope of work to include matters that the client thought appropriate, parties agreed that such changes may be subject to an agreement of both parties and include an appropriate adjustment of the legal fees. However, significant variations in the scope of work would be the subject of a separate agreement and engagement letter.
10. In response to Mr. Ougo’s affidavit, Mr. Kawano filed what ought to have been a further affidavit but which he has captioned as “replying affidavit” and, as far as the question of the respondent being a separate legal entity from Amoebax Limited is concerned, he has sworn that “the retainer agreement was prepared by the applicant and addressed to “Amoebax Ltd” with the stated address of “705, 7th Floor, Malik Heights, Ngong Road, Nairobi”.
11. He has further sworn that at the time that the applicant prepared and shared the retainer agreement on 4 October 2022, the respondent was operating under its former name “Amoebax Insurance Agency Limited with its registered address being “705, 7th Floor, Malik Heights, Ngong Road, Nairobi”. The applicant is said to have been mistaken in addressing the retainer agreement to Amoebax Ltd instead of Amoebax Insurance Agency Limited.
12. To demonstrate that the applicant was mistaken, Mr. Kawano has sworn that on 18 November 2022, the applicant addressed its invoice of “deposit for retainer services” to “Amoebax Insurance Agency Limited” and not to Amoebax Limited. As a matter of fact, Amoebax Insurance Agency Limited, and not to Amoebax Limited, settled the invoice. Again, the physical address in the retainer of the agreement was that of Amoebax Insurance Agency Limited.
13. At any rate, it has been sworn, the applicant has not provided any legal services to Amoebax Limited under the retainer agreement and neither has the applicant billed Amoebax Limited for legal services related to a retainer agreement. Amoebax Limited has also not made any payments to the applicant under the retainer agreement. The change of the name of the respondent, according to the applicant, does not change, its corporate identity.
14. As far as the scope of the work is concerned, Mr Kawano has sworn that the suit filed by the applicant, which gave rise to the current dispute on fees, was a judicial review application seeking orders compelling the relevant authorities to issue the respondent with an insurance agency license for the year 2023. According to him, the applicant failed to properly advise the respondent on the licence application procedure thus failing to properly discharge its obligation to provide ‘general care and conduct of various legal matters’ as set out in clause 2 (vii) of the retainer agreement. Thus, the dispute between the applicant and the respondent is properly covered in the arbitration clause.
15. Further, the arbitration clause is said to be broad enough to apply to any kinds of dispute that may arise in relation to ‘construction, operation or termination’ of ‘this Letter’ which is the retainer agreement, ‘or the arrangements between respondent and applicant relating to the provision of legal services’. To be precise it provides:

“If any dispute should arise between us out of or in connection with this Letter (or its construction, operation or termination) or the arrangements between us relating to the provision of legal services, which the parties have been unable to settle amicably, then that dispute or difference shall at be referred to and finally resolved by arbitration in Nairobi by a sole arbitrator pursuant to the Kenyan *Arbitration Act*. Any exercise of this dispute



resolution method shall be initiated by way of a written notice specifying the dispute or difference and the redress sought.”

16. According to the respondent, the subject matter of the instant dispute between the applicant and respondent relates to the ‘construction, operation or termination’ of the retainer agreement ‘or the arrangements relating to provision of legal services’ between the applicant and the respondent.
17. It is also the respondent’s position that under section 17 of the *Arbitration Act*, 1995 an arbitral tribunal or arbitrator has the competence to rule on its jurisdiction. Thus, an arbitral tribunal would be the correct forum to hear and determine the applicant’s argument suggesting that the subject matter of the dispute is outside the scope of the retainer agreement.
18. Before considering the respective parties’ submissions, the documents exhibited on their affidavits establish certain facts that may very well determine the fate of this application. To begin with, there is the retainer agreement which is by way of a letter dated 14 October 2022. In parts, pertinent to this application, the agreement reads as follows:

“Amoebax Ltd

705, 7th Floor, Malik Heights

Ngong road

NAIROBI

Attention: Mr. Kunihiko KawaNo CEO

Dear Sir,

RE: PROVISION OF RETAINER LEGAL SERVICES TO AMOEBAX LTD

We refer to the above matter and the communication between Mr. Kunihiko Kawano on your port and Mr. Yonah Ougo on our part.

The purpose of this letter is to set out the terms upon which we propose to provide retainer services to Amoebax Ltd (the “client”).

2. 0 Background and Scope of Work

The Client wishes to instruct us to provide retainer services with respect to various legal matters.

The scope of work undertaken shall comprise the following:

- i) Drafting, review and updating of the client’s contracts related sub-contracts;
- ii) Handling employment & labor matters’ correspondence on behalf of the client and providing legal advice pre-litigation;
- iii) providing legal advisory relating to any risks revealed through the review process; and
- iv) providing email and/or telephone correspondence and updates on the matters;
- v) Representation in any arising settlement negotiations prelitigation;
- vi) Drafting any arising settlement agreement pre litigation; and
- vii) general conduct of various legal matters.



Should it become necessary in the course of engagement to change the scope of work above to include matters that the client thinks appropriate, parties have agreed that such changes may be subject to the agreement of both parties and include an appropriate adjustment of the legal fees. However, significant variations in the scope of work will be the subject of a separate agreement and engagement letter.

16. Dispute resolution

If any dispute should arise between us out of or in connection with this Letter (or its construction, operation or termination) or the arrangements between us relating to the provision of legal services, which the parties have been unable to settle amicably, then that dispute or difference shall at be referred to and finally resolved by arbitration in Nairobi by a sole arbitrator pursuant to the Kenyan *Arbitration Act*. Any exercise of this dispute resolution method shall be initiated by way of a written notice specifying the dispute or difference and the redress sought.

Yours faithfully.

For: OK Law Advocates LLP

Yonah Ougo

Acceptance

I have read this letter and agree with its contents.

Name Mr. Kunihikpo Kawano

Designation:CEO

Date:-

Signed:

(For and on behalf of Amoebax Ltd)” (Emphasis added).

19. There is no evidence that the letter was signed by either of the parties but nothing much turns on this omission because it is apparent from the pleadings and affidavits filed by the parties that they both proceeded on the understanding that this letter was a binding agreement between them.

20. As far as parties to the agreement are concerned, it is apparent from this letter that the client was Amoebax Limited. In his affidavit Mr. Kawano has said that the letter was erroneously addressed to Amoebax Limited and, instead, it should have been addressed to Amoebax Insurance Agency Limited. To quote him, he swore as follows:

“The Applicant made a mistake by addressing the Retainer Agreement to Amoebax LTD instead of Amoebax Insurance Agency Limited. This mistake was rectified by the Applicant four (4) days later on 18 November 2022 when the Applicant sent an invoice requesting a “deposit for retainer services” to “Amoebax Insurance Agency Limited” being the correct and intended counterparty to the Retainer Agreement.”

21. But it is apparent from the agreement that it was not just in the addressee’s name that Amoebax Limited has been referred to. The subject of the agreement has been described as “Provision of Retainer Legal



Services to Amoebax Ltd.” Again, in the body of the letter, it is clear stated that the client is Amoebax Limited. The letter reads:

“ The purpose of this letter is to set out the terms upon which we propose to provide retainer services to Amoebax Ltd (the “client”).

22. It follows that there is no ambiguity as to who the client in the retainer agreement is. Accordingly, if both parties agree that the agreement that bound them and which, no doubt, is sought to be enforced in the instant application is between Amoebax Limited and the applicant, the respondent’s contention that the client in that agreement is Amoebax Insurance Agency Limited is simply contrary to the evidence on which the respondent itself relies. Needless to say, Amoebax Limited and Amoebax Insurance Agency Limited are two separate and distinct legal entities and one could not be assumed for the other in a retainer agreement such as the one entered into between the applicant and Amoebax Limited, or in any other agreement for that matter. Simply put, Amoebax Insurance Agency Limited was not privy to the agreement between Amoebax Limited and the applicant.
23. For the avoidance of doubt, amongst the documents Mr. Kawano exhibited to his affidavit are certificates of incorporation demonstrating that the two companies exist and have been separately incorporated and, therefore, one cannot be assumed to have the party in a contract signed by the other.
24. One other thing I have noticed is that Amoebax Limited has not denied entering into a contract with the applicant. The only affidavits on record sworn in denial of the agreement between the applicant and Amoebax Limited have been sworn by Mr. Kunihiko Kawano who has described himself in both affidavits as the “respondent’s CEO & Founder”. No affidavit has been sworn on behalf of Amoebax Limited discounting the fact that it was party to the retainer agreement with the applicant.
25. Mr. Kawano has proceeded on the presumption that the client in the retainer is Amoebax Insurance Agency Limited which changed its name to In courage Insurance Limited Agency Limited. According to a copy of the certificate of change of name from the Registrar of Companies, the change of name was effected on 4 November 2022.
26. But the evidence before court is that Amoebax Insurance Agency Limited never entered into any contract with the applicant either prior to or after change of its name. Mr. Kawano’s presumption is, therefore, fallacious and is not supported by the evidence presented before the court.
27. Having reached this conclusion, there is no reason why I should delve into the question of the scope of legal services that the applicant was bound to render under the retainer agreement and whether, in the event of a dispute over payment for these services, the parties should resort to an arbitrator. For the reasons I have given, there is simply no retainer agreement between the applicant and the respondent in which an arbitration clause compelling parties to refer any dispute from the agreement to an arbitrator. Thus, the applicant was entitled to file its bill of costs for taxation for the services rendered to the respondent in this Honourable Court’s Judicial Review Application No No E013 of 2023.
28. In the final analysis, I find no merits in the applicant’s application and it is hereby dismissed with costs. I direct the taxing officer to proceed forthwith and tax the advocate-client bill of costs on record. It is so ordered.

SIGNED, DATED AND UPLOADED ON CTS ON 14 DECEMBER 2024

NGAAH JAIRUS

JUDGE

