



REPUBLIC OF KENYA



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**LJA Associates LLP v Great Rift Drilling Kenya (Miscellaneous Application E285 of 2019)
[2021] KEHC 95 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 95 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E285 OF 2019**

MW MUIGAI, J

SEPTEMBER 16, 2021

BETWEEN

LJA ASSOCIATES LLP APPLICANT

AND

GREAT RIFT DRILLING KENYA RESPONDENT

RULING

NOTICE OF MOTION

1. The Applicant filed a Notice of Motion Application dated 16th October 2020 for orders that; -
 1. Judgment be entered against the Client/Respondent for the sum of Kshs.2, 041, 271 in terms of the Certificate of Taxation dated 4th September 2020 with interest at Court's rates from 10th August 2019 until payment in full.
 2. The Applicant be at liberty to execute against the Respondent.
2. Which Application was supported by the sworn Affidavit of Brian Onyango and based on the grounds that; -
 - a. The Respondent herein instructed the Applicant to act for it in HCCC 358 of 2016: Bonafide Clearing & Forwarding Limited vs Great Rift Drilling (Kenya) Limited where the Plaintiff had sued the Respondent herein for the sum of Kshs.68, 544, 626 together with interest. Judgment was entered in the matter for Kshs.68, 544, 626 with interest together with the costs of the suit.
 - b. On 15th April 2019, the Applicant filed a Bill of Costs dated 8th April 2019 which was unopposed.



- c. On 7th November 2019, the Bill of Costs was taxed and a Certificate of Taxation dated 4th September 2020 issued by the Deputy Registrar Hon S. A. Opande in the sum of Kshs.2, 041, 271.
- d. Retainer to act for the Respondent is not disputed and the sum taxed remains unpaid to date.
- e. It is in the interest of justice that judgment is entered for the sum certified to be due together with interest and costs as prayed.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of David James Stewart Coulson dated 25th March 2021 and stated that; -
 - a. The Ruling and Orders of the Taxing Master of 7th November 2019 was unlawful and irregularly obtained as the Client/Respondent was neither served with the Bill of Costs nor the Taxation Notice as required under Section 48 of the Advocates Act.
 - b. The Client/Respondent only learnt of the taxation proceedings on 4th December 2020 when it was served with the present Application and was therefore denied the opportunity to be heard in the taxation of the said Bill of Costs.
 - c. The Client/Respondent is in the process of challenging the judgment and decree in the suit which this Bill of Costs emanates from.
 - d. The Applicant herein only filed a Notice of Appointment under protest in this matter and did not file a defence.
 - e. The retainer is disputed and therefore Section 51 of the Advocates Act has no application and cannot aid the Applicant herein.
 - f. It is in the interest of justice that the Application, the decision of the Taxing Master of 12th November 2019 and the Certificate of Costs dated 4th September 2020 are a nullity ab initio and they ought to be set aside and/or dismissed.

CLIENT/RESPONDENT'S GROUNDS OF OPPOSITION

4. The Client/Respondent filed Grounds of Opposition dated 10th December 2020 and raised the following grounds; -
 1. The present Motion is misconceived, scandalous, frivolous, vexatious and an abuse of the Court's process.
 2. There was no Advocate-Client relationship between the parties to arrant the Advocate/Applicant to file and tax Bill of Costs dated 9th July 2019 and as such the purported Certificate of Taxation is a nullity ab initio and is incapable of being made a judgment of the Court.
 3. The retainer is disputed and therefore Section 51 of the Advocates Act cannot aid the Applicant herein.
 4. The Respondent never instructed the Advocate/Applicant to act on its behalf.
 5. The present motion and the Certificate of Taxation in the sum of Kshs.2, 041, 271 are therefore irregular, null and void. The Notice of Motion dated 16th October 2020 should therefore be dismissed.



SUPPLEMENTARY AFFIDAVIT

5. The Advocate/Applicant filed a Supplementary Affidavit in support of the Notice of Motion dated 16th October 2020 and in response to the Grounds of Opposition dated 10th December 2020. The Affidavit dated 19th February 2021 was sworn by Dondo Joseph and stated as follows; -
1. On 14th November 2016 the Client/Respondent sent out an email to the Advocate/Applicant attaching a Demand Letter that was allegedly due to Bonfide Clearing & Forwarding Limited.
 2. The Client further informed the Advocate that the matter was due in Court on 15th November 2016 (the next day) for hearing of an Application for attachment before judgment. On the same day a representative was sent to peruse the Court file to ascertain the true position of the matter.
 3. Thereafter, the Advocate filed a Notice of Appointment under protest due to the short notice and attended Court the next day for hearing of the said Application.
 4. On 28th November 2016, the Advocate wrote to the Plaintiff's Advocate requesting for pleadings filed in HCCC No. 358 of 2016: Bonfide Clearing & Forwarding Company Limited vs Great Rift Drilling (Kenya) Limited.
 5. On 14th December 2016, the Advocate wrote to the Client on the day's court attendance and subsequent orders issued as to the attachment before judgment.
 6. On 5th January 2017, the Advocate requested for summons to enter Appearance from the Plaintiff's Advocate to enable the Applicant enter Appearance and file a Defense. On the same day the Advocate wrote to the Client requesting for a deposit on legal fees to enable the Advocate file a Defense and avert the possibility of default judgment and the Client replied requesting for a meeting which was then reserved for 10th January 2017.
 7. The Advocate, on 13th January, 2017, wrote to the Client requesting for documents in support of the Defense which the Client shared with the Advocate on 20th January 2017.
 8. On 15th February 2017, the Advocate received copies of the Summons to enter Appearance from the Plaintiff's Advocates via a letter of even date. Consequently, the Advocate wrote to the Client requesting for funds to enable the Applicant file a Defense which the Client then promised to pay.
 9. On 12th June 2017, the Advocate wrote to the Client suggesting that the Client engages another law firm if they are not able to put together the Applicant's funds. There being no response from the Client, the Advocate on 20th July 2017 communicated to the Client that they were ceasing to act on their behalf and would be proceeding to tax its Bill. Subsequently, the Party & Party Taxation was commenced by the Plaintiff was commenced after default judgment and the taxation Notices served upon the Advocate.
 10. Having defended the Client in the taxation, there was still no payment from the Client. The Advocate then proceeded to draw the Advocate-Client Bill of Costs which was served upon the Client and an Affidavit of Service filed as well.

APPLICANT'S SUBMISSIONS

6. The Applicant submitted that it received oral instructions from the Respondent to attend court for hearing of an Application for attachment before judgment which was due in court the next day. In addition, the Applicant stated that the courts have belabored that a retainer need not be in writing.



Instructions could be expressed or implied from the conduct of the Advocate and the Client. The Applicant relied on the case of *Stephen Aluoch K'opot t/a K'opot & Company Advocates v Cornel Rasanga Amoth* where the court stated; -

It is evident from the court records that the Advocate was actively involved in the proceedings. He appeared personally in court defending the election petition in the High Court and acted for him in the Court of Appeal. The respondent did not file any affidavit denying the Advocate's allegations hence these facts remained unchallenged. I therefore find that apart from oral instructions, the retainer can be implied from the fact that the Advocate acted on behalf of the Client in the proceedings. The Client having taken the benefit of such representation, cannot turn around and say that the Advocate did not have instructions particularly in such a weighty matter as an election petition.**

7. On whether the Bill of Costs was served upon the Client/Respondent, the Applicant submitted that the Bill of Costs was duly served upon the Respondent and was confirmed before the Deputy Registrar otherwise, the Taxing Officer would not have taxed the Bill without evidence of service. In the case of *Alfred Ochieng Opiyo versus Export Hydro Pump & Services (Africa) Limited [2018] eKLR* the court was of the view that; -

“There is an affidavit on record showing service on the client. With that affidavit, there is a presumption of service of the client. See the case of *Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 Other [2010] eKLR* where the court stated:

“There is a qualified presumption in favor of the process server recognized in *MB Automobile v Kampala Bus Service [1966] EA 480* at p 484 as having been the view taken by the Indian courts in construing similar legislation. On *Chitale and Annaji Rao: The Code of Civil Procedure Vol. II p 1670*, the learned commentators say:

“3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”

8. It was the Applicant's submission that the Taxing Master had unlimited jurisdiction to tax the Bill of Costs and it was not in the purview of the Taxing Master to determine the issue of retainer. Further, there has been no Application to set aside the Certificate of Taxation neither has it been varied. The issue of retainer was not raised at the time, the Court has jurisdiction to enter judgment.
9. The Applicant also placed reliance on the case of *Wilfred Nyaundi Konosi t/a Konosi & Advocates versus John Lokorio* where the court held that; -

“That once a certificate of costs is issued and has not been set aside or altered, no other action would be required from the court save to enter judgment upon application.”

CLIENT/RESPONDENT'S SUBMISSIONS

10. The Respondent submitted that the court lacks jurisdiction to convert the Certificate of Taxation into a judgment for reasons:
- a) there was no Advocate-Client relationship in existence; the Applicant did not provide a Retainer agreement; and



- b) without the Retainer agreement, the Advocate acted without authority.
11. The Respondent relied on the following cases. The case of *Ochieng' Onyango, Kibet & Obaga Advocates versus Akiba Bank Limited* the court held that; -

“The retainer is the foundation upon which the relationship of Advocate/client rests. Without a retainer the relationship cannot come into being. Retainer is the mode and method in which the Advocate accepts the offer of employment by the client. It can be express or by implication. The Advocates undertake to fulfill certain obligation and binds himself to protect, preserve and safeguard the interest of the client in a particular matter.

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.”

12. In *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* the Court of Appeal reiterated thus;

“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.”

13. The Taxing Master lacked jurisdiction to tax the Bill of Costs in the absence of a retainer and/or instructions are disputed. Therefore, the Certificate of Taxation was a *nullity ab-initio* and incapable of being made a judgment of the court. In the Court of Appeal case of *Omega Enterprises (Kenya) Limited versus Kenya Tourist Development Corporation Limited & 2 Others*,

“In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

DETERMINATION

14. The Court considered the pleadings and submissions filed by the parties the issue for determination is whether judgment should be entered in terms of the Certificate of Taxation dated 4th September 2020.
15. In addressing the issue for determination is whether there was an advocate-client relationship and whether a retainer need be in writing. 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.
16. What a retainer is and what it entails was defined in the case of *Njeru Nyaga & Co. Advocates Vs George Ngure Kariuki* where the court stated; -

“This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the *Advocates Act*, probably because of the



special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the *Advocates Act*, the innumerable previous courts' rendition on the phraseology...where the retainer is not disputed...provide the content of the term "retainer". "Retainer" in the wider sense entails the instructions by a client or a client's authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the BLACK'S LAW DICTIONARY, 9TH EDITION. The appropriate sense of the word "retainer" as used in the *Advocates Act* and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of NBI HC MISC APP NO 698 OF 2004 A.N. NDAMBIRI & CO ADVOCATES v MWEA RICE GROWERS MULTIPURPOSE CO-OP LIMITED, and OWINO OKEYO & CO ADVOCATES v FUELEX KENYA LIMITED [2005] eKLR, respectively. Let me quote what Waweru J said in the former case that;

My understanding of the term "retainer" as used in section 51(2) aforesaid [read...of the *Advocates Act*] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that "retainer" means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer."

17. The Court gleaned through the Advocate's bundle of documents marked JD1, JD7, JD9, JD10, JD11, JD13 & JD16 and JD22 which are filed online of the Court's e-filing System are correspondence/ email between Client to the Advocate and vice versa regarding instruction and progress of the Client's case Bonfide Clearing & Forwarding Company Limited vs Great Rift Drilling (Kenya) Limited. There are also correspondence/emails from the Advocate to the Client appraising him of the court attendances. The correspondence are an admission that there existed an Advocate-Client relationship. There is also Cause-List of the Cases listed on specific dates where the Advocate attended Court.
18. There also correspondence by the client's promise to pay the Advocate.
19. These communication confirm that the Advocate-Client relationship, the Advocate's participation in the conduct of the matter and legitimate expectation of payment.
20. It was the Respondent's argument that it was neither served with the Bill of Costs nor the Taxation Notice as required under Section 48 of the *Advocates Act*. There is an Affidavit of Service dated 19th August 2019 on record showing that the Respondent was served with the Bill of Costs dated 9th July 2019 and Taxation Notice dated 11th July 2019 and a Taxation date of 4th September 2019.
21. Paragraph 11 of the Advocates Remuneration Order provides that:

Where a party is aggrieved by the decision of a taxing officer, he is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to this Court.
22. The Applicant filed the Bill of Costs dated 8th April 2019 which was unopposed. There is nothing on record to show that retainer is disputed.
23. It is, therefore, the finding of this Court that there was a retainer between the Applicant and the Respondent and the failure to have a retainer in writing should not disentitle the Applicant from getting their legal fees. In addition, there is no reference filed by the Respondent challenging the taxation by the Deputy Registrar on the said Bill of Costs.



24. The Retainer issue was brought as an afterthought as no reference was filed challenging the taxation by the Deputy Registrar on 7th November 2019 as per the Certificate of Taxation dated 4th September 2020.

DISPOSITION

25. Accordingly, the Court enters judgment for the applicant as per the Certificate of Taxation dated 4th September 2020 and order that Decree do issue in terms thereof for execution for Ksh 2,041,271/- & Ksh 888,388/-.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MS NJERI H/B MR NDONDO FOR THE APPLICANT-PRESENT

MA MURIETHI FOR RESPONDENT-PRESENT

COURT ASSISTANT - TUPET

