



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 555 OF 2016**

**MAJANJA LUSENO & CO. ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**DHIRAJLAL V. PATANI.....CLIENT/RESPONDENT**

**RULING**

1. The advocate/applicant (“the applicant”) filed the Bill of Costs dated 21<sup>st</sup> October, 2016 and which Bill of Costs was opposed by the client/respondent (“the respondent”) who swore the replying affidavit on 2<sup>nd</sup> December, 2016 to essentially dispute the legal fees sought in respect to the sale of the properties known as LR Nos. 209/2632 and 209/4355 Garden Chambers Building-Moktar Daddah Street, Nairobi (“the subject properties”). In rejoinder, **Steve Luseno** swore a further affidavit on 22<sup>nd</sup> June, 2021.
2. When the Bill of Costs came up before the Deputy Registrar, an issue arose on the existence of a retainer between the parties and hence the present ruling.
3. The issue was dispensed with through written submissions filed by the respondent and oral arguments by the respective parties’ advocates.
4. *Agwata Kwamboka* advocate for the applicant argues that clear instructions were given to the applicant by the respondent regarding the sale of the subject properties and that the applicant completed the relevant transactions.
5. The advocate further argues that there existed two (2) separate briefs between the parties herein: a court case and a conveyancing transaction brief.
6. For the foregoing reasons, the advocate submits that the objection to the retainer ought to be dismissed and the Bill of Costs should be remitted to the Deputy Registrar for taxation.
7. The respondent submits that once the existence of a retainer is challenged by a client, the onus is on the advocate to show its existence, as held in the case of **Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR**.
8. The respondent further submits that in the present instance, the applicant has not shown that it was retained by the respondent and therefore urges this court to strike out the Bill of Costs on that basis.
9. In addition to the foregoing, Mr. Wandago, learned advocate for the respondent contends that the applicant came on board at the tail end and at a point where the conveyancing transaction had been concluded and hence cannot claim instruction fees on the sale of the subject properties.
10. I have considered the rival submissions and the respective authorities cited.
11. Upon my perusal of the advocate-client Bill of Costs, I note that the instructions fees sought are in respect to the sale of the subject properties.
12. The record shows that the agreement for sale in respect to the subject properties was entered into in the year 2008.
13. Subsequently, a dispute arose out of the said transaction, vide High Court Civil Case No. 2250 of 2007. It is apparent from the record that

the advocate initially on record for the respondent was the firm of P.K. Njoroge & Company Advocates followed by the firm of Harrison Kinyanjui & Co. Advocates.

14. Going by the record, the applicant filed the Notice of Motion dated 6<sup>th</sup> May, 2009 and sought to come on record for the respondent in place of the firm of Harrison Kinyanjui & Co. Advocates. The said application was filed together with a notice of change of advocates of like date and filed on 23<sup>rd</sup> April, 2009. It remains unclear when exactly the said application was allowed.

15. Be that as it may, the record shows that the aforementioned suit was settled by consent of the parties on 30<sup>th</sup> September, 2009.

16. Upon my perusal of the record, I observed that subsequently, the respondent filed a suit against the applicant vide High Court Civil Case No. 508 of 2010 seeking various orders in respect to delivery of the sum of Kshs.2,066,135/.

17. Upon hearing the parties on the above suit, the court vide the judgment delivered on 10<sup>th</sup> March, 2016 reasoned that there was no agreement entered into on the fees to be charged between the applicant and the respondent pertaining to the subject properties. The aforesaid judgment was upheld by the Court of Appeal in its decision rendered on 20<sup>th</sup> September, 2019.

18. Having laid out the above, I now return to the gist of the matter before me; that is, whether there existed a retainer between the applicant and the respondent, at all material times.

19. The court in the case of **Nyachoti and Company Advocate v Giriama Ranching Company Limited [2021] eKLR** gave an apt definition of the term 'retainer' in the following manner:

***“In Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Ltd (2007)eKLR, Osiemo J. (as he then was), observed that:-***

***“Justice L. Njagi pointed out as follows in HCCC No. 416 of 2004, Nyakundi & Company Advocates- vs- Kenyatta National Hospital Board (unreported) and gave the definition and form of retainer from Halsbury’s Laws of England, 4th Edition, at paragraph 99, page 83 where it stated:***

***“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...”***

***Njagi J. pointed out that in the same work, it is further explained that a retainer need not be in writing, unless under the general law of contract, the terms of the retainer or the disability of a party to it makes writing requisite. It is then further stated, the Judge added, at paragraph 103:***

***“Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case...”***

20. The court, while borrowing from the case of **Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR** went on to differentiate between a retainer and a retainer agreement:

***“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.....”***

21. Upon my consideration of the above case and my perusal of the record, I observed that there existed an advocate-client relationship between the parties both in respect to High Court Civil Case No. 2250 of 2007 and the conveyancing transaction pertaining to the subject properties, which could therefore be termed as a retainer within the definition set out hereinabove.

22. The above is clearly elaborated under paragraphs 2 and 3 of the supporting affidavit sworn by the respondent to the Notice of Motion dated 6<sup>th</sup> May, 2009 mentioned hereinabove and where the respondent sought to have the applicant take over conduct of the suit and conveyancing as his advocates.

23. I would also like to point out that in the absence of any credible evidence, it remains unclear when; if ever; the sale of the subject properties was concluded, so as to support the averment of the respondent that by the time the applicant came on record, the said sale had been completed and hence the applicant could not claim legal fees on the same.

24. Consequently, I hereby make the following orders and declarations:

**a) A Retainer existed between the firm of Majanja Luseno & Co. Advocates and Dhirajlal V. Patani pursuant to the notice of change of advocates dated 6<sup>th</sup> May, 2009.**

b) **The Taxation of Bill of Costs to proceed strictly with regard to the legal services rendered by the advocate/applicant to the client/respondent from the date of retainer.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE ADVOCATE/APPLICANT**

..... **FOR THE CLIENT/RESPONDENT**