REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. E067 OF 2021

GS LAW LLP ADVOCATES.....APPLICANT

VERSUS

WILBUR KHASILWA OTTICHILO.....RESPONDENT

RULING

1. What is for determination is the application, dated 16th June 2021, seeks stay of taxation of the Client-Advocate Bill of Costs, dated 31st May 2021, between the applicant and the respondent. The application is at the instance of the client, the respondent, and he invites the court to find that there existed no advocate client relationship between him and the applicant, with regard to Kakamega High Court Election Petiton No. 11 of 2017, to warrant the taxation sought. He would like the bill struck out.

2. The grounds on the face of the application are that the said bill presupposes that the respondent had instructed the firm of Messrs. GS Law LLP Advocates to represent him in the subject election petition, which he asserts was not the case. He avers that the same violates Order 51 rule 1 and Order 52 rule 3 of the Civil Procedure Rules, in that there is no application before the court for the taxation for costs can be validly undertaken. He further avers that there was no written agreement between him and Messrs. GS Law LLP Advocates to warrant the taxation sought, and that Geoffrey Sore, Advocates who had appeared for the respondent, alongside Mr. Khayega, Advocate, in the petition, did so in his official capacity, with facilitation from the County Government as employee, and not through Messrs. GS Law LLP Advocates, which is a personal private firm of Geoffrey Sore, and which had no prequalification with the County Government. He submits that the taxation was brought in bad faith, with intent to embarrass him.

3. The affidavit, in support of the application, was sworn by James Otari, on 16th June 2021. He avers to be the Chief of Staff in the Office of the respondent, who is the Governor of Vihiga County. He avers that the respondent had hired the applicant, upon election of the respondent as Governor, to advise him on legal matters. The applicant made an application for position of legal advisor, which was approved and regularized by the Vihiga County Public Service Board. He avers that, to his knowledge and understanding, one of the functions of the legal advisor in his official capacity was to represent the respondent in court. He states that the respondent faced an election petition, and the applicant came on record as his advocate, and was later joined by Mr. Khayega. In the documents that he had submitted, when he sought engagement as legal advisor, the applicant had disclosed that he was the founder and proprietor of Messrs. GS Law LLP Advocates. It is averred that the respondent would not have instructed a law firm to act for him, whose proprietor was his legal advisor, on Government payroll, as that would have put him in conflict of interest, and that he never did appoint him to act as his private counsel. He further avers that the coming into the matter of Mr. Khayega, was an arrangement that was exclusively between Mr. Sore and Mr. Khayega, and the same was not founded on an advocate client agreement between the two as suggested in the advocate client bill of costs. He avers that the Mr. Sore was no longer in employment as he had been relieved of his duties, prior to coming up with the advocate client bill. He asserts that the advocate client bill of costs was in abuse of process, given that it was not supported by any advocate client relationship.

4. Attached to that affidavit are several documents. A letter dated 27th August 2017, by Mr. Sore, applying to the respondent, for position of legal advisor. A letter dated 9th October 2017, by the Vihiga County Public Service Board, regularizing his appointment as such. A curriculum vita for Mr. Sore. A letter dated 29th May 2021, from Messrs. ABL Musiega & Co. Advocates, addressed to Messrs. Chimei & Co. Advocates, asking for details of instructions from Messrs. GS Law LLP Advocates, given to it by the respondent, an agreement for legal services between the respondent and Messrs. GS Law LLP Advocates, the relationship between Mr. Sore and Messrs. GS Law LLP Advocates, and a statement whether Messrs. GS Law LLP Advocates represented the respondent in personal capacity or in capacity as Governor.

5. The affidavit in reply to the application is by Victoria Githii, sworn on 21st June 2021. She avers to be a partner in the applicant firm. She raises issue with the fact that the affidavit sworn in support of the application was by a person who was not privy to the election petition the subject of the impugned bill for taxation. On the substance of the application, she avers that the applicant advocates were retained and instructed by the respondent, and that the respondent not only signed the pleading prepared by the applicant, he also attended courts personally on 10th November 2017 and testified. She avers that the applicant at various points engaged other advocates to appear in the

matter, such as Ms. Lumallas and Mr. Khayega. It is asserted that instructions need not be in writing, they can be inferred from conduct. It is asserted that the applicant was a limited liability partnership, with partners and associates, and that it was a separate legal entity from Mr. Sore, who was just one of its partners, and that the applicant was neither an employee of the County Government of Vihiga nor of the respondent. It is further asserted that an election petition was a personal matter involving the respondent, and the County Government of Vihiga could not possibly have been party to it, and the respondent could not defend the election petition using public resources.

6. Attached to that affidavit are several documents. There is a certificate of registration of the applicant as a limited liability partnership, dated 3rd May 2017; a notice of appointment of advocates by the applicant in the election petition, dated 15th September 2017; an affidavit in verification of response to petition, sworn by the respondent on 27th September 2017, drawn and filed by the applicant; written submissions on behalf of the respondent, drawn and filed by the applicant, dated 17th November 2017; and correspondence from Mr. Khayega asking for settlement of his fees. .

7. The application was urged orally before me on 24th June 2021, by Mr. Musiega for the respondent, and Mr. Malenya for the applicant advocates. It was Mr. Musiega's submission that there was no advocate-client relationship between the applicant and the respondent, as there was no retainership agreement between them. He submitted that the record of the proceedings in the election petition show that Mr. Sore appeared for the respondent in the matter, and was later joined by Mr. Khayega, as lead Advocate, on instructions of Mr. Sore, without a written retainer from the respondent. He submitted that Mr. Sore was the founder of the applicant, and the sole proprietor. He stated that Mr. Sore sought employment from the respondent in August 2017, and the Vihiga County Public Service Board approved that appointment in October 2017, and that he was employee since August 2017. He submitted that one of the responsibilities of Mr. Sore was to represent the respondent in civil matters whenever need arose. He submitted that the notice of appointment in the election petition was in September 2017, and by that time Mr. Sore was already in the employment of the County Government as legal advisor to the respondent, and he filed the notice as part of his duty to act for the respondent as his legal advisor. He chose to file the notice under the name of his law firm, which then raised serious issues with respect to conflict of interest. It was submitted that Mr. Sore, having been employed in public service, he became bound by Chapter 6 of the Constitution, the Leadership and Integrity Act, No. 19 0f 2012 and the Public Officer Ethics Act No. 4 of 2002. If he wanted to use his law firm to represent the respondent, then he ought to have gotten clear written instructions from the respondent. He argued that to allow taxation of a bill of costs based on that kind of relationship, which is not clear, would be to encourage officers in public service to abuse provisions that are binding on them. He cited the decisions in *Wilfred Konosi vs. Flamco Limited* [2017] eKLR,(*GBM Kariuki, Sichale & Kautai JJA*) for the proposition that taxation goes to jurisdiction, and it must be determined, and it must be determined first before any taxation is done, and that the relationship between an advocate and his client must be made clear. He sought to distinguish *Githuku & Githuku C0. Adv0cates vs. Enock Wamalwa Kibunguchy(2019) eKLR (Musyoka J)* on the basis that in that case there was a written retainer, and the quarrel was between the lead advocate and the advocate instructed. It was asserted that Mr. Sore acted as the legal advisor of the applicant. He was on the payroll of the County government of Vihiga, and what he did, with respect to the petition, was part of his duties. He urged that the taxation be struck out.

8. On his part, Mr. Malenya submitted that instructions to an advocate needed not be in writing, the same could be inferred by or from conduct of the parties. He submitted that there was a distinction between instructions to an advocate and a retainer. He argued that all the pleadings drawn and filed in favour of the respondent in the election petition were drawn and filed by the applicant, and were signed by the respondent. On the participation of Mr. Sore in the proceedings, he submitted that the applicant was a partnership, and it operated even in the absence of any of its partners. He submitted that an election petition was a personal matter, and that the County Government of Vihiga was not party to it, and that the respondent had instructed the applicant in a private capacity. He submitted that the appointment of Mr. Sore as a legal advisor to the respondent was regularized in October 2017, by which time the applicant had already been seized of the election petition. He asserted that there was no conflict of interest. He asserted that there was a distinction between the respondent as Governor and as a person, and that Mr. Sore had been appointed as legal advisor to the respondent as Governor, but not in his personal capacity.

9. After perusing through the filings, and after hearing the oral arguments by the parties, the issues that I have identified for determination are whether the respondent instructed the applicant to act for him in the election petition, and whether instructions to an advocate have to be in writing.

10. Let me start by looking at the relevant statutory law on these matters. The Advocates Act, Cap 16, Laws of Kenya, at section 45 (1) provides:

> "*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 or after or in the course of any contentious business in a civil court make an agreement fixing the amount of the advocate's instruction fees in respect thereof or his fees for appearing in court or both;*
>
> *(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, 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."*

11. Then section 46(c)(d) of the Advocates Act provides:

> "*Nothing in this Act shall give validity to—*
>
> *(a)* …

(b) …

(c) any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof; or

(d) any agreement by which an advocate agrees to accept, in respect of professional business, any fee or other consideration which shall be less than the remuneration prescribed by any order under section 44 respect of that business or more than twenty-five per centum of the general damages recovered less the party and party costs as taxed or agreed…"

12. Section 107 of the Evidence Act, Cap 80, Laws of Kenya, is also relevant, to the extent that it requires the person who alleges to prove that which he alleges. The applicant claims that it was retained by the respondent to act for him in the election petition. It asserts that that is to be implied from the fact that the respondent signed the pleadings drawn by it, and that the respondent personally attended the hearing on 10th November 2017. What I understand the applicant to be saying is that there were no written instructions or a retainer or agreement, between them, but the same could be inferred from conduct of both sides. The applicant drew pleadings, which the respondent signed, and which the applicant filed in court thereafter. When the applicant required the respondent to attend court to testify, the respondent obliged, he came to court and he did testify led by advocates from or instructed by the applicant. There was, therefore, according to the applicant, an advocate-client relationship between the applicant and the respondent.

13. What does the law say with respect to situations where a brief is not in writing? In *Mareka & Co. Advocates vs. Zakhem Construction (Kenya) Ltd* [2014] eKLR (Ougo J.), it was said that instructions need not be in writing but can be inferred from the conduct of the parties:

"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."

14. In *Ochieng Onyango Kibet and Ohaga Advocates vs. Akiba Bank Ltd* [2007] eKLR (Warsame J), similar views were expressed, that:

"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. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive; it may be wide. And nevertheless it can be implied from the conduct of the client/advocate relationship." the court submitted that instructions need not be in writing but can be inferred from the conduct of the parties.

15. The starting point, of course, ought to be whether or not there exist an advocate and client relationship, and where none existed, and before a bill for taxation between an advocate and his alleged client is taxed, the taxing officer ought to deal with the matter of the existence of that relationship, should the same arise as a preliminary issue, for taxation goes to jurisdiction, and that jurisdiction arises only where a relationship between advocate and client existed. That point was made in *Wilfred N Konosi t/a Konosi & Co. Advocates v Flamco Limited* [2017] eKLR (GBM Kariuki, Sichale & Kantai JJA), where, while dismissing an appeal that had risen from the finding of the High Court that there was no advocate client relationship, the Court of Appeal observed:

"Not a single letter by the appellant 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 and the learned Judge of the High Court was right to uphold the decision of the taxing officer."

16. *In th*e instant matter, the dispute is whether the applicant, GS Law LLP Advocates, had been instructed by the respondent to act in the election petition, to justify it being paid fees by the respondent, in default of which it taxes a bill against him. The applicant points at the pleadings filed in the election petition, to assert that it did draft papers on behalf of the respondent, who acquiesced to that action by signing the said papers, after which the same were lodged in court, and that it was on the basis of those filings that the respondent defended the petition, inclusive of attending court and adducing evidence. Its case appears to me to be that although the respondent did not expressly instruct the applicant to act for him, he acquiesced to their acting for him the moment he accepted to sign the papers that they drew on his behalf and to let them file them in court. The applicant appears to say that that could not have been possible without instructions of the respondent.

17. On his part, the respondent does not deny that documents were drafted and filed in court in the election petition, but says that that was done at the behest of Mr. Sore, the principal in GS Law LLP Advocates, who used that law firm without his consent of the respondent. The critical case by the respondent is that Mr. Sore was an employee of the County Government of Vihiga, where he was attached to the respondent as his legal advisor, and that being the case he could not involve his law firm in the litigation on behalf of the respondent. As an employee of the County Government, and legal advisor to the respondent, whatever he did with respect to the election petition was part of his official duties as legal advisor to the respondent, and that he could not possibly earn fees from that exercise, for as employee, his services were catered for through his monthly remuneration.

18. The applicant then seeks to separate Mr. Sore from itself, by arguing that although Mr. Sore was a partner in the applicant, the instructions were to the firm and not to him, and that the respondent had engaged the services of the firm, and not Mr. Sore, and by extension that the services were rendered by the other partner advocates and associates in the firm and not Mr. Sore, inclusive of instructing other advocates outside of the applicant, such as Mr. Khayega and Ms. Lumallas.

19. A number of issues arise from all these facts. Firstly, I find it difficult to divorce Mr. Sore from the applicant, at least in the manner suggested by Ms. Githii in her affidavit, and Mr. Malenya in his speech before me. I say so because the record of the proceedings before the election court, which is attached to the bill, because Mr. Sore was active in those proceedings from the very beginning to the end. Other than Mr. Khayega, who came in to lead him, and Ms. Lumallas who attended on one odd day, 19th October 2017, there is nothing to suggest that any other person from the applicant was involved in the prosecution of the respondent's defence at the petition. The record indicates that Mr. Sore first attended court on 3rd October 2017 for the respondent, where he highlighted submissions that had been filed in respect of a striking out application. He then attended court on 5th October 2017, when the advocate for the petitioner responded, after which Mr. Sore made a rejoinder. He was again in court on 17th October 2017, when a ruling was delivered, on the application in respect of which the submissions were being made. Mr. Sore attended court on 24th October 2017, when he conceded to some application. Mr. Khayega came into the scene on 9th November 2017, when he appeared with Mr. Sore. The two appeared jointly on 10th November 2017, when the matter was heard and concluded, and on 18th December 2017, when judgment was delivered. In aggregate, Mr. Sore attended court seven times, Mr. Khayega three times and Ms. Lumallas one time. No other advocate ever appeared in the matter for the respondent in the election petition. Mr. Sore attended all the sessions ever since he came on record, save for that one day when Ms. Lumallas was in attendance. So, Mr. Sore was the central figure in the election petition, and, to my mind, it would be inaccurate to suggest that it was the applicant seized of the matter, with little or minimal or no involvement of Mr. Sore in the conduct of the matter. To that extent, it would not be inaccurate to conclude that the applicant and Mr. Sore were one and the same thing, so far as the conduct of the respondent's defence in the election petition was concerned.

20. The question then that arise is whether the applicant or Mr. Sore or both are entitled to legal fees in the circumstances? Obviously Mr. Sore acted in the election petition. The record shows that he attended court and actively participated in the proceedings. It also shows that the pleadings and other filings that made possible that defence, were filed by him through his law firm, the applicant herein. Services were no doubt rendered. The respondent does not deny that. instead, he says that Mr. Sore acted for him in his official capacity as his legal advisor. He was facilitated by the County Government of Vihiga, and, therefore, he should not expect to be paid any legal fees, through the applicant. This is an incredible argument to be made by a public officer. The applicant argues that that cannot be the case, given that Mr. Sore was engaged by the County Government to advise the respondent on official matters, and he could only be remunerated by the County Government, by way of his regular emoluments, for such official engagements. An election petition, it argues, is not a matter that involves the County Government, but it is strictly a private or personal matter as between the candidates, and whatever Mr. Sore did, with respect to the election petition, was personal between him and the respondent, for it was not an official engagement for which he required facilitation by the County Government.

21. I would agree entirely with the applicant. An election petition is strictly a personal matter as between the parties to the petition, especially the persons who had participated as candidates in the election. It is not a dispute between the Government and the candidates who lost, but rather between the losers and the winner. The legal costs of fighting off an election ought not be passed to the State or Government, at whatever level, by the candidate who won the election. The fact that Mr. Sore had been appointed legal advisor to the respondent was, therefore, no justification for him to participate in any election petition facing the respondent, to defend the respondent at State expense. That the law does not allow. It was up to the respondent to defend himself in the election petition personally, using his own personal resources, both financial and human. Not a dime of public resources should have been spent, if at all, to fund his defence in the election petition. There was no role in the election petition for Mr. Sore as legal advisor to the respondent, he could only participate as an advocate in private practice duly instructed by the respondent.

22. Secondly, upon being employed by the Government, Mr. Sore could not engage in private practice of the law, for as long as he was a Government employee. That is to say, he could act as an advocate in private practice, while working for the County Government of Vihiga in whatever capacity, so long as he was in the payroll of that Government. His employment by the County Government of Vihiga made him a public officer. He could not, thereafter, act as an advocate in public service and at the same time as an advocate in private practice. He could not earn a salary from the State and legal fees from private practice at the same time. It would be against the tenets of Chapter 6 of the Constitution, the Leadership and Integrity Act and the Public Ethics Act. If he wished to earn the fees from conduct of the election petitions, he ought to have left his employment in public service, to enable him fully act for the respondent in the election petition; the alternative was to stick with public employment and let go of the brief. He could not hold on to both, for the consequences of doing so would be to lose out in the end.

23. In the end, I do find merit in the Motion, dated 16th June 2021, and I allow the same in terms of prayers 7 and 8 thereof. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE