REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 284 OF 2019

J. MBUGUA MBURU & ASSOCIATES ADVOCATES.....APPLICANT

-VERSUS-

CITY STAR SHUTTLE LTD.....RESPONDENT

RULING

1. By a Motion on Notice dated 18th February, 2020, the firm of J. Mbugua Mburu & Associates, the applicant herein seeks an order that the court do find that a retainer existed between the Applicant firm and the Respondent, **City Star Shuttle Ltd.** Also sought was the usual relief for provision for costs.

2. The Motion was supported by an affidavit sworn by **Mbugua Mburu**, an Advocate in the Applicant firm.

3. According to him, on 28th February 2019, while attending court at Mavoko Law Courts, he was approached by one **Simon Parit** who introduced himself as route manager for the Respondent. The said person informed the deponent of the difficulties they were facing with the County Government of Machakos and their intention to institute legal proceedings against the County Government. The deponent, however, insisted on meeting a director of the company and a meeting was scheduled for 1st Mach 2019 at Mlolongo Township at noon. On the said date, the deponent met **Mr. Samuel Njoroge Kamau** at Tee-Tot Hotel at Mlolongo in the company of **Simon Parit** and **Meshack Mwanzia Kyengo** and it was agreed that **Meshack** and **Simon** would avail the requisite documents and a deposit of Kshs. 80,000/= the following week so that the applicant could commence to draft the pleadings.

4. It was averred that on 4th March 2019, **Simon Parit** and **Meshack Mwanzia** visited the Applicant's offices then located at **Kantaria House, 2nd Floor, Muindi Mbingu Street** with the documents and the latter informed the deponent that he was the one to sign the pleadings on behalf of the Respondent. On 7th March, 2019**, Meshack Mwanzia** told the deponent that he had sent **Simon Parit** to collect the pleadings for his signature and the documents were sent over and at the same time, he sent Kshs. 80,000/=, the agreed deposit. The said documents were returned to the deponent on 8th March 2019 when the deponent immediately filed the Petition.

5. According to the deponent, he gave regular updates on the progress of the matter via phone calls and text messages to **Simon Parit, Meshack Mwanzia** and **Samuel Kamau** and that on 13/3/2019 **Simon Parit** was in court when the matter came up for directions.

6. It was therefore his position that from the conduct of the Respondents and circumstances of the matter, there was a retainer between the parties. He stated that it is **Simon Parit** who collected the pleadings for signature on the express instructions of **Meshack Mwanzia Kyengo** and the said pleadings were returned signed.

7. It was further averred that after filing the instant Bill of Costs and serving the Respondents, the deponent was approached by **Mr. Mwangi Mburu Advocate** seeking an out of court settlement and pursuant thereto a lengthy conversation, ensued regarding the issue of retainer and upon receiving an explanation from the deponent how he received the instruction, **Mr. Mwangi Mburu** also sought his indulgence in not prosecuting the Bill of Costs so that they could reach an amicable settlement.

8. However, on 16th July 2019, the deponent was served with Demand Letter in which **Mr. Mwangi Mburu** demanded that the Applicant issues an unqualified apology to the Respondents for embarrassing them, a refund of the deposit paid, withdrawal of Petition 9 of 2019 at the Applicant's costs and a withdrawal of Miscellaneous Application No. 284 of 2019 at the Applicant's costs.

9. According to the deponent, he was understandably stoked, irked and irritated by the dis-ingenuity, duplicity and outright malice by the Respondents and its Advocate and his response was captured in his email email of 16th July 2019. Though the deponent admitted that here was a bit of huff and puff on his part based on the fact that he was angry, he insisted that this cannot therefore be the basis to term his averments on signing of pleadings false. He averred that part of the documents used in Petition 9 of 2019 were deposit receipts that were paid

by **Simon Merianke Parit** on behalf of the Respondents' fleet of motor vehicles that had been impounded hence it is evident that he was an agent of **City Star Shuttle Ltd**.

10. It was noted that the Respondents didn't avail any affidavit sworn by **Samuel Njoroge Kamau** or **Simon Parit** dispelling any of the averments in the Supporting Affidavit and that the Respondents acknowledged paying a deposit of Kshs. 80,000/=.

11. The Applicant maintained that from the totality of the foregoing, it is clear that he was retained by the Respondents to institute and prosecute Petition 9 of 2019**.**

12. In response to the Application, the Respondent filed an affidavit sworn by **Meshack Mwanzia Kyengo**, the Operations Manager of the Respondent in which he denied knowledge of the contents of the grounds set out on the face of the application and the affidavit, save that he admitted having electronically wired Kshs 80,000/- to the Applicant on the 5th March 2019. He however denied that the marks appearing on the deponent section of the affidavits in support of **Petition No. 9 of 2019, City Star Shuttle Limited -v- County Government of Machakos** were not appended/executed by himself. It was the deponent's case that from the supporting affidavit, the Applicant was not aware of the person/s who appended their marks on the alleged documents.

13. The deponent disclosed that the Respondent's counsel relayed to him information that on the 16th July 2020, the Applicant on his own volition wrote an email to the Respondent's advocates in response to a demand notice stating, "*I do have recordings of the conversations, text messages and cctv footage of your "clients" signing the court documents***".** To the deponent, it is indeed shameful, that the Applicant alleges that he gave regular updates of the matter via phone calls and text messages but falls short of producing the alleged correspondence and cctv footage.

14. The deponent asserted that if the Applicant received instructions and gave regular updates, the same was from and to one "Simon Parit", who remains a faceless person and without nexus to the Respondent.

15. In light of the foregoing, it was deposed that neither conduct nor circumstances can persuade the Court that a retainer existed between the Applicant and the Respondent and that in any event an agreement becomes vitiated and/or defeated by acts of fraud, misrepresentation and illegality.

16. It was disclosed that the Respondent's advocates reached out to the Applicant with an opportunity to assist the Applicant salvage the situation without acrimony but regrettably the Applicant reverted with insolence as demonstrated in the Applicant's reply to the notice. In view of the aforesaid, the Respondent and the deponent have now filed a complaint with the Law Society of Kenya over the conduct of the Applicant. Based on legal advice, the deponent deposed that the Applicant cannot avail himself to two separate court processes over the same cause of action.

Determination

17. I have considered the foregoing as well as the submissions filed by the parties which I do not wish to regurgitate here.

18. The general rule is that it is not the business of the courts to tell litigants which advocates should or should not act for them in a particular matter as each party to a litigation has the right to choose his or her own advocate and unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel. See **William Audi Ododa & Another vs. John Yier & Another Civil Application No. Nai. 360 of 2004; Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others Civil Application No. Nai. 136 of 2005; Geveran Trading Co. Ltd vs. Skjevesland [2003] 1 ALL ER 1.**

19. It is however clear that advocates can only act in a matter where they have been instructed either expressly or by implication. Where there is a general retainer given to an advocate by a client, it does not fall in the mouth of the client to argue that there were no instructions given to the advocate in respect of a particular matter falling within the series in which there was a general retainer unless it is shown that there were express instructions given to the advocate not to act in that particular matter. In that event the onus of proving lack of instruction would be on the person alleging the same. It is also trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore axiomatic that an incorporated body has of necessity to act through agents who are usually its Board of Directors by way of resolutions passed thereby. Where for example it is proved to the satisfaction of the Court that legal proceedings were commenced by or on behalf of an incorporation by an advocate contrary to or in the absence of the instructions of an incorporation it is trite in this jurisdiction that such proceedings are liable to be struck out with costs being borne by the advocate concerned. This was the position in **Tavuli Clearing & Forwarding Limited vs. Charles Kalujjee Lwanga Nairobi (Milimani) HCCC No. 585 of 2004.**

20. It follows that if the applicant had no instructions to commence legal proceedings on behalf of the Respondent, not only would the firm not be entitled to seek costs but it would be liable to pay the costs of such proceedings. It is however to be noted that an action commenced without authority is capable of being ratified. As was held by **Hewett, J** in **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000:**

> **"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect…As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."**

21. The procedure for determining disputes relating to retainer in his country is rather blurred. That the Taxation Officer has no jurisdiction to determine issues of retainer was appreciated by **Azangalala, J** (as he then was) in **City Finance Bank Limited vs. Samuel Maina Karanja T/A Maina Karanja & Co. Advocates Nairobi (Milimani) HCCC No. 132 of 2004** in which the learned Judge expressed himself as follows:

> **"In my view the Advocates Remuneration Order is a complete code in itself if instructions are admitted to have been given where the dispute is between the client and his or her advocate. However, where it is alleged that an Advocate acted without instructions, different principles apply and the Advocates Remuneration Order is not adequate in the circumstances. The Plaintiff in the present case alleges that it never instructed the Defendant to provide certain services. If it turns out to be true then the dispute goes beyond the Advocates Remuneration Order."**

22. The same Judge expressed himself in **Hassan Ahmed Hafidh vs. Mohamed & Lethome Advocates Nairobi (Milimani) HCCC No. 642 of 2004** inter alia as follows:

> **"I have not traced any written instructions emanating from the Plaintiff in respect of the transactions that did not involve him. "Instructions may or may not have been given orally. This controversy cannot be determined definitely now. That will be the function of the trial Judge. For now however, it may very well be possible that the Respondents included in the Bill of Costs pending taxation services for which no instructions may have been given. These allegations cannot be determined by the Taxing Officer during the Taxation of the Respondent's Bill of Costs...In my view the interest of justice lean in favour of granting a stay of execution. The reason is that taxation determines the quantum payable. It does not address the issue of whether or not any fees has been earned. Taxation can therefore wait."**

23. The procedure in such matters was explained by this Court in **Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited Nairobi High Court (Commercial Division) Miscellaneous Application No. 343 of 2011** in which I expressed myself as follows:

> **"In my considered view, it would be sensible, to apply and obtain leave. It is at that stage that the issue of retainership would be disposed of so that after the taxation of the costs, judgement would thereby entered on the issuance of the certificate of costs without having to determine whether or not there is a retainer. It would save judicial time by having the issue of the retainer determined early in the taxation proceedings instead of running the risk of having to go through the elaborate process of taxation only for the process to come to nought on the ground of lack of a retainer at the end. However, as current state of the law seems to have no quarrel with taxation without leave, I wish to say no more on the issue…In my view, where an advocates costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer. That issue, as already stated, would be appropriately dealt with if the leave was sought. However, there is no bar to the same being raised before the taxing master in which case the taxation may be adjourned pending the determination of the issue before a Judge."**

24. The matter before me is the determination whether there was a relationship of Advocate/Client between the Applicant and Respondent with respect to **Petition No. 9 of 2019, City Star Shuttle Limited -v- County Government of Machakos**. The word "client" is defined in section 2 of the ***Advocates Act*** to include:

> ***any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.***

25. As regards the onus of proof where retainer is disputed, in **Ochieng, Onyango, Kibet & Ohaga Advocates vs. Adopt A Light Ltd (Misc. App. No. 729 of 2006)**, the court held that:

> **"The burden of establishing the existence of a retainer is always and primarily on the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service… The participation and/or instruction of an Advocate can either (be) expressed or implied. And it need not be in writing even where the instruction is expressly given."**

26. The same view was adopted by **Lesiit, J** in **Alex S. Masika & Co Advocates vs. Syner-Med Pharmaceuticals Kenya Limited Nairobi (Milimani) HCCC No. 959 of 2006** where the learned Judge expressed herself as hereunder:

> **"The act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by a client. A retainer need not be in writing. 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… There is evidence that the client instructed the advocate to act for it because during the hearing of the application/appeal, the client was present as the advocate made representation on its behalf before the Board and during those proceedings the client did not object to the advocates appearing for it. Therefore the client instructed the advocate to act for it and the retainer can be inferred from the conduct of the parties since the retainer need not be in writing."**

27. The above position was a restatement of the holding of the Court of Appeal in **Omulele & Tollo Advocates –vs- Mount Holdings Limited (2016) eKLR** that:-

> **"…retainer covers a broad spectrum. It encompasses the instructions given to an Advocate as well as the fees payable thereunder. A retainer need not be written; it can be oral and can even be inferred from the conduct of the parties."**

28. Retainer is defined in ***Halsbury's Laws of England***, 4th Edition as:-

> **"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."**

29. In the supporting affidavit, the Applicant has explained the circumstances that led to the establishment of the retainer relationship between the Applicant and the Respondent. The deponent of the replying affidavit, **Meshack Mwanzia Kyengo**, the Operations Manager of the Respondent, however denied having signed the affidavit in support of the petition. However, **Mbugua Mburu**, a partner in the Applicant's firm averred that on 1st Mach 2019 there was a meeting between him and one **Mr. Samuel Njoroge Kamau** in the company of **Simon Parit** and **Meshack Mwanzia Kyengo** where it was agreed that **Meshack** and **Simon** would avail the requisite documents and a deposit of Kshs. 80,000/= the following week so that the applicant could commence to draft the pleadings. On 4th March 2019, **Simon Parit** and **Meshack Mwanzia** visited the Applicant's offices with the documents and the latter informed the deponent that he was the one to sign the pleadings on behalf of the Respondent. On 7th March, 2019**, Meshack Mwanzia** told the deponent that he had sent **Simon Parit** to collect the pleadings for his signature and the documents were sent over and at the same time, he sent Kshs. 80,000/=, the agreed deposit. The said documents were returned to the deponent on 8th March 2019 when the deponent immediately filed the Petition. According to the deponent, he gave regular updates on the progress of the matter via phone calls and text messages to **Simon Parit, Meshack Mwanzia** and **Samuel Kamau** and that on 13th March, 2019 **Simon Parit** was in court when the matter came up for directions.

30. Apart from the issue of the signature, all the other facts have not been denied by the Respondent. The said **Samuel Kamau** has not even sworn an affidavit denying that he was in the said meeting. To compound the matter further, the said **Meshack Mwanzia**, admitted the fact that payment was made. He however did not explain the purpose for which the said payment was made.

31. Whereas under section 107 of the ***Evidence Act***, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. In this case, the Applicant has deposed to all the facts that gave rise to his retainer and that there were meetings that took place where the said retainer was discussed and as a result money was paid to him. On the other hand, while not expressly denying that the said meetings took place and that payment was made, the Respondent still contended that there was no retainer. In my view, if the Respondent wishes to believe that the said meetings and payment were aimed at something other than the retainer, the evidential burden would shit to the Respondent since it is the Respondent who wishes the Court to believe the facts other than those asserted by the Applicant.

32. I have considered the material placed before me and the inescapable conclusion I come to is that the Respondent duly retained the legal services of the Applicant to represent it in **Petition No. 9 of 2019, City Star Shuttle Limited -v- County Government of Machakos**.

33. Before I pen off, I wish to remind counsel that as officers of the Court they should avoid the temptation to jump into the arena of litigation. Advocates ought to remember that clients only retain their services and are not their employer. Therefore, they are not servants of the client and ought not to be the mouthpiece through which virulent averments are spewed out against each other. In other words, advocate must take care not to turn the fact of retainer into a launch pad from which scurrilous and unnecessary but undignified missiles are unleashed either against themselves, the Court or even the other parties. As was held by the Court in **Wamwere vs. Attorney General [1991] KLR 107**, as officers of the court, advocates are expected to conduct themselves properly and with some degree of decorum in court.

34. Advocates have a duty to protect the dignity of the Court and whereas they owe a duty to protect the interest of the client with as much vigour and force as the case deserves, such vigour and forcefulness ought not to be transmuted into a condescending attitude or an unnecessary aggression towards the other parties, their counsel or the Court. Their duty is to assist the Court in arriving at fair and correct decisions by assisting their clients in bringing out the facts and the law with clarity and not necessarily to win the case at all costs. A was held in **Malindi Air Service Limited & Another vs. Halima Abdinoor Hassan Civil Application No. Nai. 103 of 1999:**

> **"Advocates are honourable people...They are officers of the Court. Their duty first lies to the Court and then to their clients."**

35. When advocates take upon themselves to step into the shoes of their clients and fight their clients' battles, they then are nolonger acting as counsel but as litigants. Advocates must clearly identify the demarcation between themselves and their clients and they ought not either by action or inaction knowingly blur that boundary. In this case certain statements both in the affidavits and submissions clearly show that counsel were not alive to the need to avoid the temptation to enter the arena of litigation.

36. In conclusion I allow the application dated 18th February, 2020 and find that a retainer existed between the Applicant, **J. Mbugua Mburu & Associates**, and the Respondent, **City Star Shuttle Ltd.**

37. The costs of this application are awarded to the Applicant.

38. Orders accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Baragua for Mr Mwangi Mburu for the Respondent

Mr Mbugua Mburu for the Applicant

CA Susan