



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISC APPLICATION NO. 470 OF 2012**

**KITTONY MAINA KARANJA ADVOCATES.....RESPONDENT**

**VERSUS**

**ROYAL IMPORTERS AND EXPORTERS LTD..... APPLICANT**

**RULING**

1. **ROYAL IMPORTERS AND EXPORTERS LIMITED**, the client, have presented a **Notice of Motion** application dated **17th September 2018**. By that application the client seek an order that it did not instruct **KITTONY MAINA KARANJA ADVOCATES**, the advocates, and that therefore the advocate is not entitled to the costs sought by the advocate/client bill of costs which is yet to be taxed. In the alternative the client seek the declaration that there was no billable proceedings which the advocate represented the client. It is clear that my determination in this Ruling does not involve consideration of the quantum of the advocates' bill of costs. My determination is limited to find whether there was an advocate/client relationship between the parties before me and whether the advocate did any work that can be billed. My determination is not to find out what, if any, is the quantum of the costs the advocates are entitled to.

2. Some background is important. The client was at the material time the registered owner of the property LR NO. 209/12971/2, hereinafter referred to as the property. The advocate acted for Ecobank in the drawing and registration of the charge over the property, amongst other security documents, for Ecobank. The property was security for financial facility afforded by Ecobank to the client. The property, amongst other properties, was earmarked for compulsory acquisition, by the Kenya Government. That compulsory acquisition was under section 6(2) of the Land Acquisition Act and accordingly the Kenya Government was due to compensate the registered owners of the properties. The advocates' argument in this matter is that the client instructed them to represent it and liaise between the Kenya Urban Rural Authority and the Land Commission in respect to the compensation to be paid for the property that was being acquired. The client's argument is that Ecobank being interested in the outcome of the compensation, because of its existing charge over the property, it instructed the advocates to represent where the decision on compensation was undertaken. Therefore the client stated that as of necessity the advocates liaised with it, the client, as the chargor but that such Liaison did not amount to the client instructing the advocate. The following paragraphs of the client's affidavit in support of the application bring out what the client's stand is. That is:

***“THAT the instructions executed were for the benefit of Ecobank having issued instructions to the Applicant (the advocates).....***

***THAT the Respondent (the client) retained a values who prepared a report on the basis of which the claim for compensation was delivered to the commissioner of Lands in terms of provisions of the law.”***

3. The first issue for determination is did the client retain the advocates in regard to the compensation for the land. The Court of Appeal in the case **Zakhem Construction (Kenya) Ltd v Mereka & Company Advocates [2017] eKLR** cited with approval a High court decision as follows:

***“Warsame, J. (as he then was) expressed a similar view, with which we agree, in Ochieng Onyango Kibet & Ohaga Advocates vs. Akiba Bank Limited (above) where he stated 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.”*

4. Bearing that decision in mind was there any written authority for the advocates to act or is there any inference of authority from the parties conduct. In this case one finds that it is a case of one party saying it was instructed (that is the advocates) while the other says that it was not instructed (the client). There is however an email that the client wrote to the advocates where the clear implication is that the advocates were acting for the client. That email is dated 16th September 2011. The email was addressed to Mr Karanja advocate who practices under the name of Kittony Maina Karanja advocates. The client stated in that email thus:

***“Please do not follow-up this matter from your end anymore as we are following it ourselves and also have discussed the same with the bank”***

5. Although that email was attached to the replying affidavit of the advocates the client did not respond to it nor did they deny its authenticity. The client’s argument is that the advocates were instructed by Ecobank. Looking at the email however it clearly shows that the client was modifying the instructions it had given to the advocates by saying: **“..do not follow-up on this matter from your end anymore..have discussed it with the bank”**. If indeed the advocates were only representing Ecobank, as the client would want this court to accept, there would not have been an occasion when the client would instruct the advocates to not follow up the compensation anymore. The client could only instruct the advocates not to follow the compensation if they were the instructing client. They could not do so otherwise. I therefore reject the arguments of the client and do find and hold that they instructed the advocate to follow the process of the compensation. The client therefore retained the advocates as was discussed in the case **Zakhem Construction (Kenya) Ltd v Mereka & Company Advocates** (Supra) thus:

*“In **Kinluc Holdings Ltd vs. Mint Holdings Ltd & another** (above), this Court adopted the definition assigned to the word “retainer” in the 3rd edition of **Halsbury’s Laws of England** at paragraph 84 as meaning:*

***“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment, and the rights and liabilities of the parties under the contract will depend on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract.”***

6. The client did not elaborate on what it meant by stating that the work the subject of the bill of costs was not billable. The Advocates (Remuneration ) Order, paragraph 18 provides for remuneration of advocates for non-contentious matters. The compensation to the client for the compulsory acquisition of the property was non-contentious and is therefore covered under that paragraph of the Advocate’s (Remuneration) Order. There is no basis for the client to argue that the work undertaken by the advocates is not billable.

7. It follows, from the above discussion that the Notice of motion dated **17th September 2013** is **without merit** and **dismissed with costs**.

8. This matter is fixed before the Deputy Registrar on **28<sup>th</sup> July, 2020** for taxation.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> day of MAY, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **6<sup>th</sup> day of May, 2020**.

**MARY KASANGO**

**JUDGE**