



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISC. CIVIL APPLICATION NO. 58 OF 2015

BETWEEN

BRUCE ODENY & COMPANY ADVOCATES.....ADVOCATES/APPLICANT

AND

WALTER EDWIN OMINDE OGUTU.....CLIENT/ RESPONDENT

RULING

1. The application before the court is the Notice of Motion dated 8th December 2015 made under **section 51** of the *Advocates Act (Chapter 16 of the Laws of Kenya)* and **Rule 13(1)** of the *Advocates Remuneration Order* seeking judgment for the sum of Kshs. 335,944/- being taxed costs certified the Deputy Registrar by the certificate dated 23rd September 2015 and issued on 5th October 2015.

2. **Section 51(2)** of the *Advocates Act* stipulates as follows: -

The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs.

3. This section gives the Court discretion to enter judgment where a suit has not been filed for recovery of costs due to an Advocate. This discretion is only exercisable the where Certificate of the Taxing Officer has been issued and has not been successfully challenged and there is no dispute as to the retainer.

4. The respondent opposed the application on the ground that there was no retainer. In his affidavit sworn on 29th August 2016, the respondent states that he did not instruct the applicant (“the Advocates”) to represent him in the matter leading to the taxation. He further deponed that the advocate did not act file a record of appeal and or set down the appeal for hearing hence the court issued a notice for dismissal whereupon he instructed *Mogusu and Associates Advocates* who proceeded to file the appeal and set it down for hearing. He also deponed that the taxed costs did not take into account that there have been more than three advocates on record.

5. A retainer is the basis of a relationship between the advocate and client. Such a relationship may be oral or in writing, express or implied. In *Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited* [2008] 1 EA 380, the court held that;

[I]t is not the law that an advocate must obtain a written authority from 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 maybe wide. And nevertheless, it can be implied from the conduct of the Client/Advocate “relationship”.

6. The court further held that;

It is the position of the law that if there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission... the burden of proof to establish the retainer is always on the shoulders of the advocates. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yard stick for such proof is not beyond reasonable doubt. In fact it is in the normal parameters of balance of probability.

7. To discharge its burden of proof, Mr Bruce Odeny swore an affidavit of 9th September 2016 in which he set out the basis of his instructions. He explained that he was instructed to take over **HCCA No. 105 of 2008 Walter Edwin Ominde Ochieng v Daniel Otieno Aoyi** from the firm of *K’Opot and Company Advocates* by filing a Notice of Change dated 23rd May 2011. He also prepared and filed an application for stay of execution of the decree issued by the subordinate court against the respondent which was supported by the respondent’s affidavit. The application was argued and on 29th February 2012, Chemitei J., granted a stay on condition that the respondent deposit the title in court and one-third of the decretal sum to be paid to the judgment creditor. In compliance with the order, the respondent wrote to the advocates a letter dated 2nd March 2012 in which he stated, “Please find attached above original title deed and a copy for your retention. Kindly deposit the title in court to comply with the court order.” Since the respondent was unable to comply with the payment condition, the Advocates filed an application for extension of time dated 7th May 2012. Following the grant of the order extending time for compliance, the Advocates engaged in correspondence with their counterpart and forwarded cheques on behalf of the respondent complying with the terms. Following compliance with the orders of stay, the record of appeal was filed on 6th June 2012. The Advocates were finally replaced on record by the firm of *Mogusu and Company Advocates* who filed a notice of change of advocates.

8. Whether there was retainer is a question of fact. Based on the supplementary affidavit of Mr Bruce Odeny, I find that there was sufficient evidence to demonstrate that the respondent instructed the Advocates to act on his behalf. The respondent participated in the proceedings by swearing affidavits to support of applications prepared by the Advocates. He forwarded a title document and cheques to comply with court orders. He cannot turn around and argue that the Advocates, who acted to protect his interests, did not have instructions. Furthermore, the respondent did not file any counter or further affidavit to contradict the averments made by Mr Odeny.

9. The respondent has complained that the Advocates did not file a record of appeal or set down the appeal for hearing. This issue and the fact that he had previously engaged other firms would go to the quantum of costs. Such an objection cannot be taken at this stage in the absence of a reference contesting the taxed costs as the Certificate of Taxation (wrongly titled Certificate of Costs) is conclusive as to the quantum of costs. It is also noteworthy that the full instruction fee on the appeal was due the moment the respondent instructed the Advocates to act for him in the appeal, irrespective of whether the record of appeal was filed.

10. Having found that the Advocates were duly instructed, I enter judgment for the Advocates against the respondent for the sum of Kshs. 335,944/- together with interest at 14% p.a from 23rd September 2015 until payment in full. The costs of this application are assessed at Kshs. 5,000/- to be paid by the respondent.

DATED and DELIVERED at KISUMU this 20th day of January 2017.

D.S. MAJANJA

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the applicants.

Mr Nyamweya instructed by Mogusu and Company Advocates for the respondent.