



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 478 OF 2014

MURIITHI KIRERIA & ASSOCIATES ADVOCATES.....APPLICANT

VERSUS

KENYA PLANTERS CO-OPERATIVE

UNION LIMITED.....RESPONDENT

RULING

Introduction

1. This action , which initially budded into and was destined to be a swift judgment application by the applicant ,ripened in the course of time into a contested application.
2. I am now asked to adjudicate on whether or not there existed a retainer as between theApplicant and the Respondent Union.

Background

3. The factual background to this cause is without complication.
4. Because of the nature of the proceedings, I shall use the appellations “ Advocate” and “Union” as denoting the Applicant/Advocate and the Respondent Union respectively in this cause.
5. The court proceedings which were on 30th September 2014 commenced as a miscellaneous cause for the purposes of and in the matter of taxation of an Advocate/Client Bill of Costs ended up emitting an array of applications.
6. First, an application on 21 September 2015 an application was filed by the Union to stay the taxation process pending a determination on whether there existed a retainer. The Bill of Costs was however later to be taxed on 6 October 2015 in the sum of Kshs. 11,140,925/=. This was quickly followed on 31 October 2015 by an application under Section 51 of the Advocates Act(Cap 16) seeking to have the court adopt the certified costs and to enter judgment for the advocate. Then on 11 April 2016 another application was filed by the Advocate seeking to cross-examine the officials and/or officers of the Union on the affidavits deposed in reply to the application dated 31st October 2015.
7. The application for judgment to be entered on the certified costs was summarily disposed of when on 11th February 2016 the court vacated the taxation proceedings and set aside the Certificate of Taxation issued on 26 October 2015. The court also directed that the issue as to retainer be determined in this cause

upon hearing the parties. The application for cross-examination of a deponent of an affidavit under Order 19 Rule 2 of the Civil Procedure Rules was later withdrawn on 7 December 2016 with the court's permission.

8. As it were, the Bill of Costs awaits taxation if the court affirms the existence of a retainer. The Bill of Costs must otherwise be struck out if the court finds that there was indeed no retainer.

The Union's case and submissions

9. The Union contends that there has never existed any Advocate/Client relationship between it and the Advocate. The Union asserts that it had by a resolution made on 7th August 2012 only retained a senior counsel Mr. Paul K. Muite to act generally for the union in active cases pending in court. By the same resolution, the union also resolved that in so much as the senior counsel could engage junior counsel(s) in matters involving the union, the legal fees payable to both the lead counsel and junior counsel would be agreed upon on "a brief by brief basis".

10. On behalf of the Union, Mr. Ongegu who appeared in Mr. O. Obar's stead urged that in the absence of a clear retainer the Advocate could not file an Advocate Client's Bill of Costs. In the instant case, the retainer was with Paul K. Muite S.C and the Union would have had no problem if the Senior Counsel was the one who had filed the Bill of Cost.

11. Counsel relied on the 8th edition of Black's Law Dictionary for the definition of 'retainer' effectively stating that retainer meant a client's authorization for a lawyer to act in a case "to advance the argument that there were no such instructions to the Advocate in the instant case and further that there was no act on behalf of the Union which could be deemed to have authorized the Advocate to act on its behalf and thus entitle him to file and tax the impugned Bill of Costs.

12. Mr. Ongegu also relied on the case of **Bugerere Coffee Growers Ltd –v- Sebaduka [1970] EA 147** for the proposition that where a retainer was disputed involving a company, the advocate needed to avail evidence in the form of a minute book or resolution by either the company or its directors authorizing his firm or the advocate to act for the company.

13. Mr. Ongegu urged the court to strike out the Bill of Costs as the Advocate had shown that a retainer existed.

The Advocate replies

14. For the Advocate, Mr. Gathemia submitted that the application had no merits. Counsel took the court back to history and, in particular, to the subject matter that ultimately led to Bill of Costs being filed. It was a dispute between the Union and the Kenya Commercial Bank Ltd wherein the bank had placed the Union under receivership. Counsel submitted that the Advocate had successfully applied and caused the court to lift the membership. This according to counsel, was a clear illustration that the Advocate had been retained.

15. Mr. Gatheru also submitted that the Union's resolution appointing the Senior Counsel authorized the appointment of a junior and the advocate was thus lawfully appointed.

16. Finally counsel contended that "a retainer" did not refer to a document but also included action taken by the advocate and where a party represented acquiesced to action taken by an advocate, a retainer was established. Counsel then urged the court to find that it was evident that the Union had acquiesced to the Advocates actions and that the Union was now seeking to rely on a technicality to deny the Advocate his dues.

17. Mr. Gathemia concluded that the Court should invoke Article 159 of the Constitution and not bend to any technicalities but allow the taxation to proceed.

Discussion and determination

18. As I understand it, the term retainer is used to describe a contract between an Advocate and client for the provision of legal services. There can therefore be no retainer unless the elements of a contract are present, principally consensus *ad idem* (agreement) between the parties. The existence of the agreement, consistent with principles of contractual creation, can be evidenced in writing or orally. Aside, I also bear in mind the observations of Scott L.J in **Groom –v- Crocker [1938] 2 All ER 394 413** where he stated that:-

“A solicitor, as a professional man, is employed by a client just as much as is a doctor or an architect or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment. The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client had in fact been established between them”(emphasis added).

19. Thus, besides a written retainer agreement or proven oral agreement, a retainer will be deemed to exist where the conduct of the parties point to a relationship of advocate and client. A written agreement need not exist. Thus in a case where the client did not sign and return the letter of engagement, a written retainer never came into existence but the court held that a personal retainer was agreed orally and implied by the client’s conduct in employing the attorney to carry out the work as requested: see **Fladgate LLP vs. Lee Harrison [2012] EWHC 67**.

20. The onus rests on the person who alleges the existence of a retainer to prove its existence where it is material to a claim. Thus an advocate must establish a retainer where he seeks remuneration and, likewise, it may have to be the client bearing the onus of proving the retainer where he or she wishes to make the advocate accountable for breaching a duty which the retainer would attract: see generally **Ohaga –v- Akiba Bank Ltd [2008] 1 EA 300** and also section 107 of the Evidence Act (Cap 80). Generally, proof of a retainer will be deemed upon the establishment of facts and circumstances sufficient to establish a tacit agreement to provide legal services.

21. Like in most civil cases, the proof is on a balance of probabilities and easily attainable where there is in existence a written agreement. However, where it is an oral agreement which is disputed or it is presumed conduct and the evidence consists of the advocates word against that of the client, all else being equal the court will side with the client. As was stated by Denning L.J in **Griffins vs. Evans [1953] 1 WLR 1424, 1428** “the word of the client is to be preferred to the word of the solicitor”.

22. In **Ohaga vs. Akiba Bank Ltd (supra)** the court was also clear that where there is no written agreement but only oral statements of the advocate contradicted by the client, “the court will treat the advocate as having acted without authority”. The client in my view will be favoured for the reason that it is good practice always to document retainers and the very special knowledge which an advocate is presumed to have places him at an advantage in relation to the client.

23. In the instant case, there is no dispute that the Advocate acted for the Union in the matter of High Court Civil Case No. 779 of 2009 (Kenya Planters Co-operative Union –v- Kenya Commercial Bank Ltd). It is also a common cause that originally the law firm of Gichuki Kin’gara & Co. Advocates acted for the Union in the said case. Then the Union appointed and instructed Mr. Paul K. Muite SC to take over the conduct of the brief from Mr. Gichuki Kin’gara. Mr. Paul K. Muite then appointed the Advocate to act for the Union in Mr. Muite’s stead. That was on 28 August 2012. Mr. P.K. Muite’s letter to the Advocate read as follows:

“Dear Counsel,

Re: HCCC No. 779 of 2008 NAIROBI...

Pursuant to my retention as the lead Counsel by the Interim Board of KPCU, I hereby instruct you to take up this case and file your Notice of Change of Advocates replacing M/s Gichuki

Kingara & Co. Advocates and proceed to act for the client independently alongside all the other matters we are handling for the same client.

Please thereafter let me have a brief on what the case is about, how far it has progressed and the way forward after evaluating the evidence and the law and carry it on with [sic] it to conclusion.

As per our earlier discussion with the client they will pay your fees directly.

Yours faithfully

P.K. Muite SC

In KPCU- Attention of William Gatei”

24. Two days later, the Advocate filed the Notice of Change of Advocates. He presumably was convinced that he had been retained. He proceeded to act. He appeared in court. He settled matters on behalf of the Union when the former counsel Mr. Kin’gara sought to tax his fees. He exchanged letters with the Senior Counsel. On the instructions of Senior Counsel, he billed the Union. He briefed the Union. He exchanged letters with other law firms acting for various parties in the matter. The Union then agreed to settle the matter out of court and the Advocate was informed by the Union and in writing. Meetings were held. The Advocate participated. Letters were exchanged. The Advocate was copied in. An out of court settlement was finally struck and the Advocate together with the counsel for the Defendant bank worked out a Settlement Deed. He participated in its approval and ultimately forwarded the engrossed Settlement Deed to the Union for execution and the Union executed. The Advocate then signed the consent letter and the matter was marked as settled. In the midst of all these the Advocate was paid Kshs. 690,000/= which the advocate in his letter of 24th March 2014 to the Union says was “to cater for disbursements”.

25. The Union says little or nothing about the above narrative. It is the Union’s contention that there was never any resolution passed by either the Union or the Union’s Board authorizing the Advocate to take over the conduct of HCCC. No. 779 of 2009 from the law firm of Gichuki Kingara & Co. Advocates on behalf of the Union.

26. It is quite true a corporate entity acts through its membership meetings or through its Board of Directors. This is exhibited in the ordinary or special or Board resolutions passed or ratified.

27. It is also true that in the instant case the Advocate was not formally appointed through a resolution by the Union. The Advocate was appointed by Senior Counsel who had express authority through a resolution of the Union to appoint junior counsel. Part of the resolution of 7 August 2012 read as follows, in excerpt:

“(ii) The Senior Counsel Paul K. Muite to be appointed by the interim Board of Directors KPCU Ltd and Notice of Change of Advocate from Mr. Kingara to Advocate P.K. Muite S.C.

1. That P.K. Muite S.C Advocates be and is hereby appointed and retained as head Counsel for KPCU in such matters/brief as KPCU Ltd may from time to time refer to.

2. The legal fees for the Head Counsel and junior counsel(s) shall be agreed on brief by brief basis between KPCU and lead counsel”.

28. The resolution certainly authorized P.K. Muite to appoint junior counsel and he appointed the Advocate to represent the Union. The Union also resolved that the Junior Counsel’s fees would have to be discussed first with the lead counsel, in this case Mr. P.K. Muite S.C.

29. The appointment and retainer of the Advocate by the Union was not in writing and it must be the conduct of the parties to determine whether there existed a retainer, even though the Advocate ought to be treated as the additional legal representative anticipated by the resolution which authorized appointment

of a junior counsel.

30. The Advocate relies on the documentation from the Notice of Change filed in court, through the correspondence exchanged to the executed Settlement Deed as evidence of retainer.

31. I would first wish to point out that the Union was certainly aware and conscious of the fact that P.K. Muite SC would not be the only Advocate.

32. Secondly, the Union was also aware that P.K. Muite SC had nominated the Advocate to act on the Union's behalf in the subject suit. The Union was also further aware that the Advocate was acting. This is evident in the fact of the Union's correspondence to the Advocate which was either replied to or acted upon by the Advocate. The Advocate placed himself on record and acted with full authority. He was even involved in the compromise negotiations which turned out to be acceptable to the Union. The Union was always aware of the Advocate's action and there is the fact that the Union was willing to pay for the services. First, the resolution was clear that any junior counsel appointed by the lead Counsel would be remunerated by the Union (and not the lead counsel). Secondly, in the instant case, the Union even paid the Advocate an amount of Kshs. 690,000/= which has not been, contested by both parties.

33. I hold the view that a retainer in the circumstances of this case ought to be implied. The documentary evidence shows that the Advocate placed himself on record as acting for the Union and the Union became aware of the action and continued to correspond and communicate with the Advocate. There was no evidence to the contrary, at all.

34. In my judgment as well, the particular case where the Advocate ended up getting engaged was in respect of cases with a high risk. It was a high quantum and high volume case. It involved even threatened receivership of the Union due to alleged insolvency. The interest and stake had to be high. This factor cannot be ignored. It would not be reasonable to state that the Union had no idea about the Advocate acting.

35. I return the verdict that a retainer existed between the Advocate and the Union. I have found no evidence to displace it.

36. Existence of a retainer entitles an Advocate to earn fees and be paid by the client for work done and I have found for the Advocate in this case. I consequently see no reason why the Advocate/Client Bill of Costs should not go through a detailed assessment by the Deputy Registrar.

37. The application by the Union to stay proceedings will be and is hereby dismissed.

38. The Union will however have their way pursuant to the Resolution through which the Advocate was appointed by senior counsel. An attempt to agree on the fees must first be made.

39. Consequently, the Advocates Bill of Costs filed on 30th September 2014 is to be taxed de novo in default of any agreement between the Union and the Advocate on any fees payable. Such negotiations on fees to involve the lead Counsel Mr. P.K. Muite SC and to be finalized within the next 30 days.

40. Orders accordingly.

Dated, signed and delivered at Nairobi this 10th day of March, 2017.

J. L.ONGUTO

JUDGE