REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 392 OF 2015

ODERA OBAR & CO. ADVOCATES…….....……APPLICANT

VERSUS

U DESIGN…….....….1ST RESPONDENT

AMAZON CONSULTANTS LIMITED…….....2ND RESPONDENT

PROFESSIONAL C0NSULTANTS LIMITED…..3RD RESPONDENT

RULING

1. The issue for determination is as regards retainer. There is no dispute about the fact that the Law Firm of **ODERA OBAR & Co. ADVOCATES** was instructed by the three respondents, namely;

i) U DESIGN;

ii) AMAZON CONSULTANTS LIMITED; and

iii) PROFESSIONAL CONSULTANTS LIMITED.

2. The real question is whether the respondents instructed the Law Firm jointly or if each of them gave separate instructions to the Law Firm.

3. The applicant pointed out that each of the clients paid a separate and distinct deposit. That act, submitted that applicant, was testimony to the fact that each client had given instructions to the applicant, requiring it to deal with their separate matters.

4. According to the applicant, the client's respective instructions were based upon the work that each of the clients had done on the Project.

5. The applicant filed one suit. By reference to the Bill of Costs lodged herein, the court notes that the claim was for the recovery of Kshs. 10,772,943.20.

6. The defendant filed a Defence and a Counter-claim against the respondents herein. The sum claimed by the defendant, in the said Counter-claim was Kshs. 359,000,000/-.

7. In answer to the Defence and Counter-claim, the Law Firm acting for the respondents herein filed a

Reply to Defence and Defence to Counter-claim.

8. It is the applicant's position that it did not require separate instructions from the plaintiffs before it could file a Reply to the Defence and the Defence to the Counter-claim. That submission is founded upon the fact that if no defence was filed to answer to the Counter-claim, the court would have proceeded to enter judgement against the respondents.

9. On the other hand, the respondents insist that there was a clear agreement between them and the applicant, that the applicant would act for the respondents jointly.

10. And on the Counter-claim, the respondents submitted that they did not give any instructions to the applicant.

11. The court was told that by the time the applicant filed the Reply to Defence and Defence to the Counter-claim, there was already a judgement which the court had entered against the defendant.

12. In the light of the said judgement, the respondents submitted that all pleadings filed after the date when the court granted judgement, were null and void.

13. Mr. Odera, the learned advocate for the applicant, submitted that the judgement was entered on 17th March 2015, which was after the applicant had filed the Defence to the Counter-claim.

14. The applicant also reiterated that each of the respondents did give separate instructions to the applicant.

15. The first issue that I wish to address is that which relates to the scope of work which the respondents had given to their lawyer. That issue arises because the applicant insists that once the defendant served a Defence and Counter-claim, it was not necessary for the applicant to seek further instructions from the respondents before filing a Defence to the Counter-claim.

16. On the other hand, the respondents insist that the applicant should have sought and obtained instructions on the counter-claim.

17. In **UNDERWOOD, SON & PIPER Vs LEWIS [1894] 2 Q B 306,** at page 309 to 310, Lord Esher M.R. pronounced himself thus;

> ***"When one considers that nature of a common law action, it seems obvious that the law must imply that the contract of the solicitor upon a retainer in an action is an entire contract to conduct the action to the end. When a man goes to a solicitor and instructs him for the purposes of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all the necessary steps in it, and to carry it on to the end".***

18. In Kenya, the position is the same in respect to advocates as is the case for solicitors in England, as spelt out above.

19. In **KINLUC HOLDINGS LIMITED Vs MINT HOLDINGS LTD & ANOTHER, CIVIL APPEAL No. 264 of 1997,** the Court of Appeal held as follows;

> ***"A retainer binds an advocate to act for his client in such manner as to protect his client's interest and not to jeopardize his interest".***

20. By filing a Defence to the Counter-claim, the applicant was, in my considered view, taking appropriate action to protect his client's interest.

21. If a Defence was not filed to answer to the Counter-claim, it is possible that the court could enter judgement against the respondents herein; and such a step would have jeopardized the interests of the respondents.

22. A reading of the provisions of Order 9 Rule 13 of the Civil Procedure Rules fortifies my finding that once an advocate is duly instructed, the law deems him to continue to act for his client until the court gives him leave to cease acting for that client.

23. In this case, there is no contention either that there had been a Notice of Change of Advocate, *(as envisaged under Order 9 Rules 5 and 6),* or that the plaintiffs had issued a Notice of Intention to act in person, *(as envisaged under Order 9 Rule 8).* Therefore, the applicant was under a legal obligation to take appropriate action to safeguard the interests of the plaintiffs.

24. Whereas, the applicant did not need to receive separate instructions in respect to each and every step in the court proceedings, ordinarily an advocate does require to obtain specific instructions from his client about how to respond to a counter-claim.

25. The nature and scope of such instructions would vary from case to case. For example, in a case in which there were numerous allegations of a factual nature, the client's input would probably more important than in a claim largely founded on matters of law.

26. But there is no legal bar to an advocate filing a defence to a counter-claim simply because his client had not specifically instructed him to do so.

27. In the case of **NGURUMAN LIMITED Vs KENYA CIVIL AVIATION AUTHORITY & 3 OTHERS, PETITION No. 143** of 2011, Lenaola J. accepted the following line of reasoning as made by the learned Taxing Officer;

> ***"To me, there is nothing wrong in receiving two sets of different instructions from different clients in the same matter and executing those instructions vide single pleading. That does not in any way make instructions one, and does not disentitle the executing advocate from demanding payment for each of the separate instructions received".***

28. I am in agreement with the said holding.

29. But I hasten to add that just because there were more than one client being represented by one advocate in the same case, does not imply that each of the clients gave separate instructions to the advocate.

30. Whether or not an advocate was given separate instructions is a matter of fact, to be established in each case.

31. In this case the Law Firm had asked each client to pay a deposit of Kshs. 300,000/-. That suggests that each client was paying fees in respect to its own case.

32. However, on 30th April 2013, Mr. Steve Rukwaro of Amazon Consultants Limited sent an email to Mr. Odera advocate, stating as follows;

> ***"On further perusal of our records the contract was awarded as a consortium to provide consultancy services under U Design as the lead firm hence the case will be treated as one.***
>
> ***It therefore means that the referred deposit of Kshs. 300,000/- is applicable once and not for each consulting firm and that's what I had earlier briefed Architect Wariithi and Eng. Mbogua.***
>
> ***Attached herewith is a scanned copy of the engagement letter for your perusal.***

……

Kindly confirm the above issues at your earliest so that we can make arrangements for the deposit".

33. It is noteworthy that the email above was sent at 11.22 a.m, which was after the Law Firm had asked Mr. Rukwaro to confirm that each client would pay a deposit of Kshs. 300,000/-.

34. Thereafter, on 7th May 2013 Mr. Rukwaro received an email from Mr. Odera Advocate. By that email the advocate said;

"We refer to discussions held between Mr. Odera and yourselves.

We hereby confirm that as agreed your shall jointly pay a deposit for legal fees in the sum of Kshs. 300,000/-.

We also confirm that as discussed and agreed the further sum of Kshs. 100,000.00 shall be paid when we attend the pre-trial directions and conferences".

35. I find and hold that by that letter the advocate confirmed that he had agreed with the clients that their instructions to him were joint.

36. The fact that thereafter each client provided the advocate with details of its own work on the project, could not alter the agreement.

37. Meanwhile, as regards the counter-claim, there can be no doubt that it is a separate and distinct claim which was independent of the plaint. Therefore, the instruction fees in respect to the counter-claim is independent of the instruction fees in relation to the plaint.

38. In conclusion, the Law firm was given joint instructions by the 3 clients in this case. Therefore, the instruction fee will be one in respect to all the 3 clients.

39. Secondly, the Law firm is entitled to Instruction Fees on the counter-claim.

40.I make no order as to the costs of the Directions which were sought by the advocate, and which have given rise to this Ruling.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **6th day** of **June** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Odera for the Applicant.

No appearance for the 1st Respondent

No appearance for the 2ndRespondent

No appearance for the 3rdRespondent

Collins Odhiambo – Court clerk.