



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CAUSE NO. 60 OF 2016

MUEMA KITULU & CO. ADVOCATES.....APPLICANT

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT

RULING

1. The Law Firm of **MUEMA KITULU & COMPANY ADVOCATES** has lodged an Advocate/Client Bill of Costs for taxation. The respondent to the said Bill of Costs is **KENYA DEPOSIT INSURANCE CORPORATION**.

2. Upon being served with the Bill of Costs, the client raised a Preliminary Objection, in the following terms;

“TAKE NOTICE that the Respondent will raise a Preliminary Objection on a point of law at the earliest opportunity in relation to the Applicant’s Bill of Costs dated 23rd February, 2016 on the following ground:-

1. The Honourable Deputy Registrar lacks jurisdiction to proceed with taxation of costs in an instance where the parties had agreed on the legal fees and the Client/Respondent has settled the agreed fees in full?.

3. The advocate acknowledges that the respondent is a public entity funded by tax payers money, and it is established pursuant to the provisions of the Kenya Deposit Insurance Corporation Act, (*Cap 487*).

4. It is common ground that sometimes in the year 2015, **DUBAI BANK (K) LIMITED** was placed under receivership, and that the **CENTRAL BANK of KENYA** appointed the respondent as the sole and exclusive receiver of the said bank.

5. Having been appointed as the receiver, the Kenya Deposit Insurance Corporation appointed **ADAM M. BORU** as the Receiver Manager of the bank.

6. There is consensus that on 2nd October 2015, the respondent was served with summons to enter appearance in **RICHARDSON & DAVID LIMTIED Vs CENTRAL BANK of KENYA & ANOTHER, Hccc No. 482 of 2015**.

7. The respondent was the 2nd defendant in that suit.

8. The parties are in agreement that the respondent wrote to the advocate, asking the said law firm to give a quotation for its fees, if the advocate was to represent the respondent in that case.
9. On 6th October 2015, the advocate sent its fee-note to the respondent. The said fee-note was for the sum of Kshs. 3,130,320/-.
10. Having received the fee-note, the respondent requested the advocate for a meeting to discuss the fee.
11. The parties herein held a meeting on 2nd November 2015, whereupon the advocate agreed to revise its fee-note dated 6th October 2015.
12. The parties before me also agree on the following;

“That following the agreement aforesaid, on 4th November 2015, the Advocate/Applicant sent a revised fee note to the Client/Respondent of Kshs. 2,538,256/- for professional services in handling Hccc No. 482 of 2015, NAIROBI?.

13. Thereafter, the respondent remitted to the advocate payment of Kshs. 1,300,000/-, being partial payment.
14. At that point, there arose a divergence of views between the applicant and the respondent. Whilst the client expressed the view that the balance of the fees was Kshs. 1,238,256/-, the applicant’s position was that the fees it had already asked for was only for interim services, and that the parties knew that thereafter, there would an exercise in which they would take accounts.
15. On 2nd February 2016, the respondent wrote to the advocate, informing it that the respondent had decided to withdraw instructions from the advocate.
16. On 15th February 2016, the advocate sent to the respondent a fee note of Kshs. 56,156,214.70.
17. If, as the client states, there was an Agreement between it and the advocate, on the fees which the advocate would charge the client, for the services rendered, it would not be open to the advocate to charge a fee which was inconsistent with the Agreement.
18. In this case, neither of the parties has provided the court with a copy of the Agreement. Therefore, there is no way that the court can determine the nature and scope of the said Agreement.
19. Was the Agreement in respect to “*Interim services?*”, as suggested by the Advocate, or was the Agreement in respect to All the services rendered by the Advocate?
20. Was there a variation of the services which the client originally instructed the Advocate to undertake, so that the said services mutated well beyond the scope anticipated by the parties?
21. Should the Advocate have anticipated that the services to be rendered would mutate, considering the very nature of the initial instructions?
22. The point that I am making is that the court would first have to establish the facts, in certain respects, before it can determine the Preliminary Objection. Accordingly, the said Preliminary Objection violates one of the cardinal requirements of a proper objection, which was set out by Sir Charles Newbold P, as follows, **in MUKISA BISCUIT MANUFACTURING Co. LTD Vs WEST END DISTRIBUTORS LTD [1969] E.A 697, at page 701;**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial

discretion?

23. The client has asserted that there was an agreement on the exact fee to be paid to the Advocate. Such an agreement is known as a “*Retainer Agreement?*”, and is anchored upon Section 45 of the Advocates Act.

24. As was explained by the Court of Appeal in **OMULELE & TOLLO ADVOCATES Vs MOUNT HOLDINGS LTD, CIVIL APPEAL No. 75 of 2015, (at Mombasa)**;

“An agreement entered into pursuant to the above section (45) is what is termed as a ‘retainer agreement’. As the section indicates, under such agreement, the parties “fix? or put a cap on the advocate’s instruction fee, meaning that both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and/or his agent. It is therefore erroneous, as submitted by counsel for the respondent, that the retainer and the retainer agreement mean one and the same thing?.

25. A retainer is essentially the agreement through which the client engages the advocate to render professional services. Such engagement of an advocate can be formalized in a written document or could simply be oral.

26. In the absence of instructions from a client, the advocate will not have been retained. In other words, there can be no Advocate/Client relationship if the client did not give instructions to the advocate.

27. On the other hand, a client may give instructions to an advocate, but the two sides do not go as far as fixing the amount of the advocate’s remuneration or they could not have reached the stage in which they agreed on Instruction Fee or on the fee to be charged in respect to each court appearance.

28. The failure to agree either on the Instruction Fee or on the fee for court appearances would not negate the instructions given by the client.

29. Indeed, the parties might deliberately choose to leave open the issue of the fee, if they should feel that neither of them could have an accurate evaluation of the scope of work to be undertaken by the advocate.

30. On the other hand, because the manner in which a case puns out is not entirely determinable by one party, an advocate and his client may find it prudent to cap the instruction fees or the fees for court appearances, or both the instruction fees and the fees for court appearances.

31. If the parties had signed a retainer agreement, they would both be bound by the terms and conditions of that agreement, even if the relationship between them had broken down.

32. However, at this stage, the court cannot yet determine whether or not there was a retainer agreement, and if so, what the terms and conditions of such agreements were.

33. Accordingly, the application before me cannot be determined through the Preliminary Objection. Parties will have to address the court on the merits of the application.

34. Accordingly, the Preliminary Objection is overruled. The client will pay to the advocate the costs of the Preliminary Objection.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of November 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Deya for Kitulu for the Applicant

Owiti for the Respondent

Collins Odhiambo – Court clerk.