



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2018

PROFESSOR TOM OJIENDA & ASSOCIATES.....ADVOCATE/APPLICANT

VERSUS

NATIONAL LANDS COMMISSION.....RESPONDENT/CLIENT

RULING

[NOTICE OF MOTION DATED 10TH JULY, 2018]

1. Through the Notice of Motion dated 10th July 2018, the National Land Commission, hereinafter referred to as the Client, moved the Court seeking for stay of taxation of the Advocate's Bill of Costs, a determination whether retainer existed between the Client and the Advocate, an order dismissing the Advocate's Chamber Summons and Bill of Costs dated 5th March, 2018. The application is based on the seven grounds on its face marked (i) to (iii) and (f) to (i) respectively, and supported by the affidavit sworn by **Brian Ikol**, Director, Legal Affairs and Enforcement of the Client summarized as follows;

(a) *That the Client did not retain the Advocate to act for it in **Environment and Land Court Petition No. 10 of 2013** and is therefore a stranger to the bill of costs dated 5th January, 2018.*

(b) *That the Client had been sued as 2nd Respondent in Eldoret ELC Petition No. 10 of 2013 by virtue of its mandate. That without instructions from the Client, the Advocate purported to have acted for it and is now claiming **Kshs.166,739,851.38** as Advocate's/Client's costs while there is no evidence that the Advocate attended Court at any time on behalf of the Client.*

(c) *That the unsigned letter of instructions the Advocate is relying on did not emanate from the Client, and the manner in which the Advocate purported to represent the Client was not in line with the **Public Procurement and Asset Disposal Act**, as the Advocate did not tender for the alleged service.*

(d) *That the client has called for investigations to be conducted on the matter by the relevant agencies and the Advocate's Chamber Summons and Bill of Costs dated 5th March, 2018 should be dismissed with costs.*

2. The application is opposed by **Professor Tom Ojienda & Associates**, the Advocate, through the replying affidavit sworn by Professor Tom Ojienda, S. C., on the 23rd July, 2018 summarized as follows;

(a) *That the Advocate received instruction from the Client vide a letter dated 21st November, 2014 reference NLC/L/G/001 to act for it in Eldoret ELC Petition No. 10 of 2013 in which the Client was the 2nd Respondent. A copy of the letter signed by **M/s Kaptuiya Cheboiwo**, Director Legal Affairs and Enforcement is attached and marked "**PTO1**".*

(b) *That the Advocate personally attended Court on various occasions and other times was represented by **Mr. Opondo Henry Opiyo**.*

(c) *That appointment of an advocate could be covered under "**urgent need**" and his appointment does not contravene the provisions of the **Public Procurement and Asset Disposal Act, 2003**.*

(d) *That the Client's application should be dismissed with costs.*

3. That in addition to the Client's Motion dated the 10th July, 2018 under Certificate of Urgency dated the 9th July 2018, the Deputy

Registrar in her ruling of 5th October, 2018 referred the matter to the Judge for determination of the issue of retainer before she could proceed to tax the Advocate's/Client's Bill of Costs. That when Counsel for both parties appeared in Court on the 13th November 2019, they agreed to file and exchange written submissions. That consequently, the Counsel for the Advocate filed their submission dated the 18th May, 2020. That by the time the matter was mentioned on the 15th July 2020, and the ruling date fixed, the Client had not filed their submissions.

4. The following are the issues for the Court's determinations;

(a) Whether the Advocate had been formally instructed by the Client to act for it in Eldoret ELC Petition No. 10 of 2013.

(b) Whether the Client has made a case for dismissal of the Advocate's Chamber Summons and Bill of Costs.

(c) Who pays the costs of the Motion?

5. The Court has carefully considered the grounds on the Motion, the parties affidavit evidence and annexures thereto, the written submissions filed and come to the following determinations;

(a) That the learned Counsel for the Advocate has in their submissions drawn the Court's attention to the Blacks Law Dictionary, 6th Edition 1990 on the meaning of the word "retainer" which is as follows;

"In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. The act of employment is called the retainer. The retainer's agreement between the client and attorney sets forth the nature of services to be performed, costs, expenses and belated matters."

The learned Counsel further referred the Court to the decisions of superior courts on the meaning of retainer in the following cases;

- ***Mbugua & Mbugua Advocates Vs Kenindia Assurance Company Limited [2015] eKLR,***
- ***Omulele & Tollo Advocates Vs Magnum Properties Ltd [2016] eKLR, in which reference was made to the cases of Njeru Nyaga & Company Advocates Vs George Ngure Kariuki, Nairobi Hccc No. 723 of 2012, Nairobi High Court Misc. Application No. 698 of 2004 A. N. Ndambiri & Company Advocates Vs Mwea Rice Growers Multipurpose Co-operative Ltd and Owino Okeyo & Company Advocates Vs Fuelex Kenya Ltd [2005] eKLR, and***
- ***Hezekia Ogao Abuya t/a Abuya & Company Advocates Vs Kunguru Food Complex Ltd, Nairobi Misc. Application No. 400 of 2001.***

The learned Counsel submitted that the letter dated the 21st November, 2014 under reference NLC/L/G/001 signed by M/s Kaptuiya Cheboiwo, Director Legal Affairs and Enforcement with the Client then, and which is attached to their replying affidavit and marked "P.T.O.1", is evidence of their having been retained by the Client in the Eldoret ELC Petition No. 10 of 2013. The Court has carefully perused the said letter which on page 1 bears the letterhead details of the Client and "OFFICE OF THE SECRETARY/CEO". That though the Client had in their application alleged that the letter of instruction the Advocate was relying on was unsigned, that alleged unsigned copy has not been availed in support. The signed copy attached to the Advocate's replying affidavit has not been challenged in any way. That letter is addressed to the Advocate and at paragraph 3 sets out the details of the suit/petition that they had appointed the Advocate to act for it. That paragraphs 4 to 7 further states as follows;

"We are pleased to inform you that you have been appointed to act for the National Land Commission in the above-mentioned matter under the terms and conditions set out in the enclosed TOR.

Attached, please find copies of the pleadings and supporting documents for your immediate attention.

In view of the urgency of the matter, kindly proceed to file replying documents to forestall any prejudicial orders being made against the commission. Payment shall be negotiated before any fee note is presented to us as per your agreement with the Commission."

The attached copy of the "TERMS OF REFERENCE FOR LITIGATION COUNSEL" elaborated on what the Client expected the Advocate to do, including preparing the relevant pleadings, documents, research and feedback to the Client. That the last bullet in the said TOR addressed the issue of payment as follows;

- ***"The Commission intends to pay you a retainer for this matter."***

That having considered the meaning of the word retainer as set out above, the decisions by other superior Courts on similar issue in the above cited cases, and evaluating the Client's letter dated the 21st November, 2014 addressed to the Advocate, the Court finds the Client had retained the Advocate to act and represent it in the said petition.

(b) That in view of the finding in (a) above, the Client has not made a reasonable case for the Court to stay or dismiss the chamber summons and or bill of costs filed by the Advocate.

(c) That the Client having failed in their application, and in accordance with **Section 27 of Civil Procedure Act Chapter 21 of the**

Laws of Kenya, should pay the Advocate the costs of the Motion.

6. That flowing from the above findings, the Client's/Respondent's Motion dated the 10th July, 2018 is without merit and is dismissed with costs.

Orders accordingly.

Delivered virtually and signed at Eldoret this 30th day of September, 2020

S. M. KIBUNJA

JUDGE

In the presence of:

Advocate/Applicant: No appearance.

Client/Respondent: No appearance.

Counsel: Mr. Ogada for Prof. Ojienda S. C. for Advocate

Court Assistant: Christine

and the ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.