REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO.2 OF 2013

OTIENO, RAGOT ADVOCATES...APPLICANTS

VERSUS

DENIEL ODUOR OKUMU..RESPONDENTS

R U L I N G

This is an application under section 51(2) of the Advocates Act (Cap 16) seeking that the certificate of costs dated 9/1/13 and issued on 15/2/13 for Kshs.291,693/= be adopted as judgment and decree of the court together with interest thereon at 14% from 9/1/2013 till payment in full. In the affidavit sworn by David Otieno, an advocate and partner in the applicant's firm, it was deponed that the respondent retained the firm to act for it in Kisumu HCCC No.14 of 1992. At the conclusion of the case the respondent did not pay fees. The applicant wrote a letter dated 5/12/12 to demand payment in 14 days. The respondent did not react to the letter. A bill of costs was filed for taxation. There was no response. The bill was taxed at the amount above. The respondent did not file any reference or appeal against the taxation.

The respondent filed a preliminary objection to oppose this application. The ground was that:

“The taxation of the bill of costs dated 5th December, 2012

by the firm of Otieno, Ragot & Company Advocates in this

matter is incompetent the sole reason being that he has

never instructed the said firm to act for him nor has the

said firm been an advocate for any party in KISUMU HCCC

14/97 as he was represented in the said matter by the firm of David Otieno & Company Advocates with whom fees was negotiated and paid in full and to whom nothing remains owing from the defendant as respect legal fees"

The court was addressed on the application by Mr. Otieno for the applicant and Mr. Kopot for the respondent.

Under section 51(2) of the Advocates Act:

"**The certificate of the taxing officer by whom any 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 judgment be entered for the sum certified to be due with costs."**

The certificate herein has not been set aside or altered by the court. It is therefore final as to the amount of costs covered thereby. Mr Kopot's client sought to rely on the "Preliminary Objection" to defend the application. In the "Objection" it was stated that the applicant had not been retained by the respondent. Mr. Otieno's reaction was that, the issue as to whether or not the applicant had been retained was a factual one; that the respondent needed to swear an affidavit in that regard. Mr. Kopot responded by making reference to section 108 of the Evidence Act (Cap. 80) which states that:

"**108. The burden of proof in a suit or proceeding lies on that person who will fail if no evidence at all were given on either side."**

BLACK'S LAW DICTIONARY 6TH EDITION, 1990 defines the word "retainer" as follows:

"**In the practiseof law when a client hires an attorney**

to represent him, the client is said to have retained

the attorney. This act of employment is called to

retainer. The retainer agreement between the client

and attorney sets forth the nature of the services to be

performed, costs, expenses, and related matters."

A retainer need not be in writing **(AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES .V. NATIONAL BANK OF KENYA LTD [2007] eKLR).** Where there is no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case.

A preliminary objection was defined by LAW, J.A. In **MUKISA BISCUIT COMPANY .V. WEST END DISTRIBUTORS LTD [1969] EA 696, 700** to consist

"**a point of law which has been pleaded, or**

which arises by clear implication out of pleadings, and

if argued as a preliminary point may dispose of the suit."

The point of law is argued on the assumption that all the facts are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.

In my view, whether or not the respondent retained the applicant to act for him in **KISUMU HCCC NO.14 OF 1997** is a matter of fact. It can only be ascertained through the calling of evidence. In the instant case, an affidavit was sworn by the advocate, who is a partner in the applicant's firm, to say that they were retained to act for the respondent. No replying affidavit was sworn to rebut this, or at all. In other words, retainer was not disputed. It could not be disputed through the objection. This is because the objection was not evidence.

In any case, the respondent lost the opportunity to challenge retainer when a demand for fees was made to him and when he was served with a bill and invited to the taxation. When he learnt of the certificate of costs he had opportunity to seek reference, or stay.

In short, there is an unchallenged certificate of costs and this court has no option but to enter judgment in its terms. The application dated 19/2/13 is therefore allowed with costs.

Dated, signed and delivered this 10th March 2014.

A. O. MUCHELULE

J U D G E