



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 336 OF 2012**

**IN THE MATTER OF ADVOCATES ACT CAP 16 RULES OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF TAXATION OF COSTS BETWEEN MEREKA & COMPANY  
ADVOCATES/PLAINTIFFS**

**-VERSUS-**

**ZAKHEM CONSTRUCTION (KENYA) .....CLIENT/RESPONDENT**

**RULING**

1. The matter for determination is on preliminary issue on retainer filed on 6/9/12. The client in their affidavit sworn by Adnan Annous dated 16<sup>th</sup> August 2012 claims that the advocate did not have any instructions from the company to render any professional services or employ any consultants; that by a letter dated 22/7/2012 the advocate sought instructions as follows; *“In order for us to proceed with the proposal. I suggest you give me the instructions to handle the proposed project proposal which will include subdivision, liaising with architects, finances and any other person required or connected within the proposed project and generally handling all matters relating to the proposed project up to and including the completion.”*
2. That no decision would be taken without the instructions of the company; that no instructions were given to the said firm to proceed with the proposal. Subsequently Mr. Mereka wrote to the director on 25<sup>th</sup> January 2011 seeking instructions on the project proposal by Pinnacle projects Limited and still no instructions were given to the advocate and although the respondent company considered the two proposals none had been considered. Further that there was no indication in the proposal by Protocol Solutions Limited that any fees was payable to the legal consultants and the advocate having secured unsolicited proposals cannot run around and charge the respondents fees; that the bill of costs is an abuse of the Court process and should be struck out with costs.
3. The advocate in response in their affidavit sworn by David Mereka dated 4<sup>th</sup> September 2012, deponed that the firm filed a Bill of Costs dated 18<sup>th</sup> June 2012 for Kshs. 13,074,225/-. The advocate deponed that the understanding of the retainer is as laid out in the case of ***Owino Okeyo & Company Advocates –vs- Pelican Engineering and Construction Ltd (2006)*** quoted ***Hezekiah O. Abunya vs. Kunguru Food Complex Ltd Nairobi HMCA No. 400 (UR)*** that:-

*“I am persuaded that the word retainer as used in section 51(2) of the Advocates Act is synonymous with “employment”, “engagement” or “instruction” an advocate duly*

*instructed duly instructed is retained and where there is no dispute that an advocate was duly instructed by the Client in any matter, the retainer cannot be said to be in dispute.”*

4. That instructions can be in writing, oral or by actions between the Advocate and Client, that from 22.07.2010 and 3.02.2012 the advocate had authority to deal with the project proposal; that on or about July 2010 the advocate made a proposal for development of L.R. 7200/4 Ruaraka situated opposite Kenya army barracks; that the client requested the advocates to take over the matter and gave the look for fresh firms of consultants to design the project; that pursuant to putting the project in motion the advocate contracted referred M/S Geodata Surveyors and Consultants to the clients who made site visit on the proposed L.R. No.7200/4 and they gave Geodata a map indicating where they wanted subdivision to be made and they subsequently issued their report on 23<sup>rd</sup> August 2010 and their invoice of Kshs. 52,200/- for services rendered.
5. Further that between August 2010 to November 2011 it was orally agreed that the advocates would look for a project manager. In October 2011 the applicant met with Mr. Muchiri of Pinnacle Project, they visited the site and received further instructions to proceed with the project proposal which was completed on 29.11.2010 and in the same at page 6 paragraph page13 estimated the advocate's administrative charges and fees at Kshs. 3,500,000. On 10.12.2010 the client requested for a copy of the project manager's letter of appointment which was forwarded to them; that the parties have fallen out and the respondent is bent on not paying any fees to the advocate.

### **SUBMISSIONS**

6. Parties filed written submissions. The applicant/client gave a background of the matter. The advocate filed a Bill of Costs on 18<sup>th</sup> June 2012 the client filed affidavits in opposition and raised a preliminary issue on whether the firm of Mereka & Company Advocates had instructions from the client to render any professional duties or employ consultants who came up with the development proposals of L.R. No.7200; that the firm did not intend to develop the said parcel of land; that by letter dated 22/7/2010 advocate was seeking instructions and that no instruction were given to the advocate to undertake the work; that the lack of instructions is also supported by emails that followed; that the sequence of emails from July 2010 to January 2011 was a confirmation of that the firm of Mereka & Company Advocates never received instructions from the client; that the email dated 30th July 2010 to Ibrahim Zakhem from David Mereka, *“attached find draft proposals. Kindly give instructions to Adnan on the way forward”* and a further email of 25<sup>th</sup> January 2011; that the writer Mereka in his affidavit admits that no instructions were given and states, *“we need to proceed further in the matter and await your instructions”*; that the Black's law dictionary defines retainer as, *“a client's authorization for a lawyer to act in a case.”*; that it is trite law that where there is no retainer it is a presumption in law that the advocated acted without authority. The client relied on the case of **OHAGA AND AKIBA BANK [2008] 1 E.A.**, where the Court held that; *“It is in the position of the law that if there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission... the burden of proof to establish the retainer is always on the shoulders of the advocates. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yard stick for such proof is not beyond reasonable doubt. In fact it is in the normal parameters of balance of probability.”*
7. That the section 107 of the Evidence Act places the burden on the advocate to prove that there is a retainer. The applicant referred the Court to section 107 of the Evidence Act which stipulates;

*“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”*. The client urged the court to declare that the firm of Mereka was not instructed to undertake work as claimed in the bill of costs dated 18th June 2012 and strike out the advocate's bill of costs dated 18<sup>th</sup> June 2012.

8. The advocate submitted that they had acted on behalf of the client for many years and had visited the premises located on L.R. 7200/4 Ruaraka to take instructions; that during the month of July 2010 he made a proposal for the development of the said part which had been lying idle.; that the client asked the advocate to take up the matter and gave the earlier plans by Image Architects and asked that it looks for a firm of consultants to design the project. The advocate took up the matter and referred Geo Data Surveyors to the client who visited to the site and made their report on 23<sup>rd</sup> August 2010 and invoiced Kshs.52, 200/- which it paid on behalf of the client. On presenting the said surveyors report at around August 2010 it was agreed upon orally with the client that it secures a project manager for the said project. The advocate secured Muchiri of Pinnacle Project who proceeded to do a project proposal dated 29<sup>th</sup> November 2010. The proposal estimated the cost of the project at Kshs. 640,929,845/-. By a letter dated 10/12/12 the client requested for the project manager a letter of appointment of the; that it would be incorrect and false for the client to assume that the services so rendered were free; that in an email dated 3<sup>rd</sup> August 2011 the advocate had even intimated on the client to consider payment of a deposit; that the Black's law dictionary edition 6 defines a retainer as, *"in the practice of 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 a retainer."*

The respondent/Advocate relied on the cases of **Hezekiah O Obunya –vs- Kuguru Food Complex Ltd –vs- Nairobi HMCA No. 400 of 2001**, where it was held, *"I am persuaded that the word retained as used in section 51(2) of the advocates Act, is synonymous with employment, "engagement" or "instruction" an advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute."*

9. It was further submitted that a retainer is the basis of a relationship between the client and advocate however that the said relationship can be express or by implication. The advocate referred to the case of **Ochieng Onyango and Kibet & Ohaga Advocates –vs- Akiba Bank Limited**, where the court held that; *"it is not the law that an advocate must obtain a written authority from client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it maybe wide. And nevertheless it can be implied from the conduct of the Client/Advocate "relationship"*.
10. The advocate urged the Court not to allow the client take advantage of the work done by the advocate by failing to pay for services rendered. that the client knew of the advocates actions assented, adopted verified and recognized their continued representation and even paid a third party on its behalf; that Section 2 of the Advocates Act defines a client as, *"a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs"*

In conclusion it was submitted that the client was acting in bad faith by denying the existence of a retainer.

### **DETERMINATION**

11. I have carefully read and considered the parties affidavits, cases relied on and submissions and find as follows; From the email correspondence between the parties, the emails dated 2/8/2010 and 25/8/2010 from Albert Zakhem to Mr. Mereka, Mr. Zakhem acknowledges that he had gone through the proposal and further calls for financial proposal which he indicates was not provided in the said proposal. While in the later email he has indicated the extent of the intended project; from these it can implied that the client was agreeable to the process and the steps taken by the advocate in realizing the said project. It would then be superfluous for the client to claim that no instructions had been given or any retainer obtained. It is trite law that a retainer need not only be in writing but can be implied from the parties conduct on this am guided by the case of **OHAGA – vs- AKIBA BANK LIMITED [2008] 1 EA 300**, where it was held that, *"a retainer may be*

*implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order.”*

12. In this application the respondent is estopped from denying that the company did instruct the advocate to act on its behalf. Though the client has the right to choice of representation it is only fair for them to pay for services already rendered by taxing the Bill of Costs before securing another advocate of their own choice. On this am guided by the decision of Ringera J, (as he then was) in the case of **MACHIRA & COMPANY ADVOCATES v ARTHUR K. MAGUGU & ANOTHER HCC Misc. App. No. 358 of 2001**. The Court held that, “A client who chooses to withdraw instructions from his advocate without any payment, undertaking or any other appropriate arrangement regarding the advocate’s fees must be prepared to pay to the advocate such sum as may be found due and payable upon taxation of advocate/client bill of costs. It would be oppressive to require that advocate to wait until the matter is finalized by other advocates for him to recover his fees.”

13. It is wrong for the client would assume that the advocate would shoulder costs attracted by a project that they stand to benefit. It is in the interest of justice that the said Bill of Costs dated 18<sup>th</sup> June 2012 proceeds for taxation before a taxing master for purposes of ascertaining what is due to the advocates. I therefore find that the applicant’s/client application lacks merit and dismiss it with costs.

Orders accordingly.

**Dated, signed and delivered this 5<sup>th</sup> day of November 2014.**

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....For the Client/Applicant

.....For the Advocate/Respondent

.....Court Clerk