



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 27 OF 2013

OMULELE & CO. ADVOCATES APPLICANT

V E R S U S

SYNRESINS LIMITED RESPONDENT

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 28 OF 2013

OMULELE & CO. ADVOCATES APPLICANT

V E R S U S

SYNRESINS LIMITED RESPONDENT

RULING

1. The Applicant in both the above matters is a firm of Advocates. Both matters relate to the Bill of Costs filed by the Applicant being Advocate/Client Bill of Costs. Those Bills of Costs relate to matters where the Applicant represented the Respondent being **Mbsa CMCC No. 4133 of 2005** and **1905 of 2010**.
2. The Applicant on 31st January 2012 filed in both matters an Advocates/Client Bill of Costs. In

both matters the Bill of Costs proceeded to taxation and according to the Rulings of the Taxing Master of 2nd March 2012 in both matters the Bill of Costs were taxed at Kshs. 147,900/- and Kshs. 54,090/-. When the Certificate of Costs were drawn in both matters for reasons I cannot understand the amounts taxed were interchanged. That is in **High Court Misc. No. 27 of 2013** the amount taxed was Kshs. 147,900/-. The Certificate of Costs that was issued in that matter reflected the amount taxed as Kshs. 54,090/-. In **Misc. No. 28 of 2013** the amount taxed was Kshs. 54,090. The Certificate of Costs that was drawn in that matter reflected the amount taxed as Kshs. 147,900/-.

3. The dispute for determination before me is whether the Applicants Advocate was barred from taxing his Bill of Costs by virtue of Section 45 of The Advocates Act Cap 16.
4. The Respondent has filed a Notice of Motion dated 12th October 2012 in both matters. The Respondent by those Motions seeks the striking out or dismissal of Certificate of Costs in both matters on the ground that the Bill of Costs were filed when there existed a retainer agreement between the parties for payment of legal fees.
5. Section 45(1) recognizes that there can be agreements with respect to Advocates Remuneration. That subsection then provides-

“and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.” (underlining mine).

It is clear for an agreement to meet the requirements of that Subsection it ought to be-

- An agreement
 - In writing
 - Signed by the client or agent
6. What is the position here? There are series of letters which need to be considered to determine if Section 45(1) applies to the parties relationship. Firstly is a letter dated 15th April 2008 written by the Applicant to the Respondent? It is in the following terms-

“Our ref: OC/PROFILE/01/08

15th April, 2008

MR. ARUN DEVANI

MANAGING DIRECTOR

SYRENSINS LIMITED

P.O. BOX 18725

NAIROBI

By hand delivery

Dear Sir,

RE: LETTER OF INTRODUCTION

It was our pleasure meeting with you and Ms Ngure on 14th April, 2008.

Following our said meeting, please find enclosed our Firm Profile.

We confirm that the agreed monthly retainer in respect of the legal services to be provided by us is Kshs. 50,000/- beginning 1st April, 2008 payable monthly in arrears.

We are grateful for appointing us as your legal advisors and look forward to working with you.

Yours faithfully,

Christopher Omulele

Esther Njiru Omulele

omulelechris@yahoo.com

eomulele@wakili.com

The Respondent responded to that letter by theirs dated 17th April 2008 in the following terms-

“April 17, 2008

Our Ref: AD/AO/1229/08

Mr. Christopher Omulele/Mrs. Esther Njiru Omulele

Omulele & Company Advocates

Shankardas House, 4th Floor,

Moi Avenue,

P.O. Box 2050-00200

Nairobi

Dear Christopher/Esther,

Thank you for your letter dated 15th April, 2008.

I am simply clarifying a few silent (sic) points:

1. You will as part of retainer handle all company legal

maters that is cases, disputes, defenses, conveyance

etc.

2. Except all disbursements such as court fees, the

retainer includes all legal fees and as such no extra legal fees will be payable. Please clarify this for my Directors. We have a board meeting on the 23rd of April 2008.

3.It would also include us having a formal meeting

minimum twice a month at our offices with you. The dates to be fixed and casted (sic).

4. Between yourself and Catherine Ngure from our offices

you will provide us with the minutes of each meeting within 24 hours via email.

5. At the end of each month you will provide us with a summary of all the outstanding issues and positions.

In absence of Catherine Ngure mobile number 0721249074, if Catherine is not available please feel free to leave a message with my Secretary Aysha Osman mobile 0721-486930, landline 533358/651845.

Kindly confirm this is in order and separately send us details of your bank account so that we can be remitting the money through bank transfers.

Kind regards.

Arun Devani

Ayub Varyant

Managing Director

CEO”

At the end of that letter there is handwritten words as follows-

“I, Omulele Christopher hereby accept the foregoing terms and undertake to abide by the same.”

Signed 28th April 2008.

The Applicant further wrote a letter dated 28th April 2008 in these terms-

“Your ref: AD/AO/1229/08

28th April 2008

MR. ARUN DEVANI

MANAGING DIRECTOR

SYNRESINS LIMITED

P.O. BOX 18725-00500

NAIROBI

Dear Sir,

RE: TERMS OF THE RETAINER

We refer to your letter dated 17th April 2008.

We confirm that the terms set out in your letter dated 17th April 2008 (copy attached) are in order.

We look forward to working with you.

Yours faithfully,

Christopher Omulele

Esther Njiru Omulele

omulelechris@yahoo.com

eomulele@wakili.com

7. The Respondent submitted that since the Applicant had not controverted the facts contained in those letters either by a replying affidavit or grounds of opposition the Court should then find that a retainer agreement does exist and would bar the Applicant from taxing the Advocates/Clients Bill of Costs. The Respondent relied on the case **NJOGU AND COMPANY ADVOCATES - VS- NATIONAL BANK OF KENYA LTD [2007]IEA 296** where it was held-

“An advocate is permitted to enter into an agreement with any particular client for any particular business, but he has an obligation to conform to the requirements of the Advocates Act, including the prohibition of touting and under-cutting. An advocate who makes an agreement for fees, removes himself from being entitled to scale fees.”

8. The holding of that case was in compliance with Section 45(6) which provides-

“Subject to this Section, the costs of an Advocate in any case where an agreement has been made by virtue of this Section shall not be subject to taxation”

9. As stated before the Applicant did not file a replying affidavit to the Motion. Accordingly any factual submissions by the Applicant would be rejected. For example the statement that the firm of Omulele & Co. Advocates is solely owned by Christopher Omulele is a factual submission which should have been proved under oath. The Applicant also referred to an authority a copy of which was not provided to the Court and the Court therefore has not had the benefit of considering it.

10. The Applicant submitted in opposition that the Respondent's letter

dated 17th April 2008 was exploratory seeking to establish a relationship and does not therefore meet the requirements of a retainer agreement.

11. I see it differently the letter was an offer by the Respondent to pay a

fixed amount for services which the Applicant accepted so in that one letter and also in the Applicant's letter dated 28th April 2008 there is an agreement and there is compliance with Section 45(1) in that the Client (the Respondent) signed the retainer agreement.

12. In the Court's view the Respondent has proved that there was a

retainer agreement and accordingly there was no justification for the Applicant to tax its costs.

13. Therefore-

- a. **The taxation on 31st January 2012 and the Ruling of the Taxing Master of 2nd March 2012 and the Certificate of Costs dated 24th May 2012 in High Court Misc. No. 27 of 2012 and High Court Misc. No. 28 of 2012 are hereby vacated and expunged from the record.**
- b. **The costs of the Notice of Motion dated 12th October 2012 in Mbsa Misc. No. 27 and 28 of 2012 are awarded to the Respondents.**

Dated and delivered at Mombasa this 1st day of November, 2013.

MARY KASANGO

JUDGE