



**Trustees Kenya Railways Staff Retirements Benefits Scheme v Mwanzia (Suing as Legal Representative of the Estate of Boniface Mutinda Kabaka - Deceased) (Civil Suit 156 of 2015) [2025] KEHC 14945 (KLR) (Commercial and Tax) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14945 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 156 OF 2015  
H NAMISI, J  
OCTOBER 24, 2025**

**BETWEEN**

**THE TRUSTEES KENYA RAILWAYS STAFF RETIREMENTS BENEFITS SCHEME ..... PLAINTIFF**

**AND**

**VASCOLINE KATANU MWANZIA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF BONIFACE MUTINDA KABAKA - DECEASED) ..... DEFENDANT**

**JUDGMENT**

1. The matter before this Court strikes at the very heart of the Advocate-Client relationship, a fiduciary bond that forms the bedrock of legal practice. The central question for determination is whether such a relationship, with its attendant rights and obligations, was formed between the Plaintiff and the late Boniface Mutinda Kabaka, Advocate.
2. The genesis of the dispute lies in an Advocate-Client Bill of Costs dated 1 December 2014, filed by the Deceased in Miscellaneous Application No. 587 of 2014. The Deceased sought his fees for legal services he averred to have rendered to the Plaintiff in connection with the intended sale of property known as LR No. 209/12401 NAIROBI – Railways Goods Shade.
3. In response, the Plaintiff commenced these proceedings against the Defendant, seeking judgement against the Defendant as follows:
  - i. A declaration that there is no Sale Agreement in respect of all that property known as LR No. 209/12401 NAIROBI – Railways Goods Shade that could entitle the Defendant from seeking to charge fees based on the subject matter and/ or consideration of the intended sale;



- ii. A declaration that there exists no client-advocate relationship between the Plaintiff and the Defendant in respect of the intended sale of all that property known as LR No. 209/12401 NAIROBI – Railways Goods Shade;
- iii. A declaration that there is no legal fee which has accrued in favour of and/or is due to the Defendant from the Plaintiff in respect of the intended sale of all that property known as LR No. 209/12401 NAIROBI – Railways Goods Shade;
- iv. An order that the taxation proceedings as commenced by way of a Miscellaneous Cause in Milimani High Court Misc Application Np. 587 of 2014 – Boniface M. Kabaka t/a Kabaka & Associates Advocates v The Trustees of the Kenya Railways Staff Retirements Benefits Scheme be and is hereby struck out with costs;
- v. Costs of this suit be borne by the Defendant;
- vi. Such further or other relief(s) as this Honourable Court may deem fit and just to grant.

### **The Plaintiff’s Case**

4. The Plaintiff’s case is anchored on the premise of corporate governance and procedural formalities attendant to a public body entrusted with the management of pension.
5. Sometime in 2013, Kenya Railways Corporation, the sponsor of the Plaintiff, through its Acting Managing Director, Alfred Matheka, expressed interest in purchasing the Plaintiff’s property known as known as LR No. 209/12401 NAIROBI – Railways Goods Shade (“subject property”). Prior to formal engagement, several meetings and discussions were held between Mr, Alfred Matheka, and the Chairman of the Board of Trustees, James Olubayi, on the modalities of the intended sale. It was at one of these informal meetings that Mr. Matheka introduced Boniface Kabaka (Deceased) to Mr. Olubayi, stating that it would be necessary to have a lawyer present at the preliminary stages in order to advise on any legal issues arising.
6. It is the Plaintiff’s case that the intended sale did not materialise, for various reasons. Firstly, the parties did not settle on the terms and conditions of the sale. Secondly, the intended purchaser was reluctant to complete the transaction due to a disclosed interest of a third party, Jipe Close Ltd, which has previously registered its interest in leasing the property.
7. On 13 October 2014, the Plaintiff received a letter dated 6 October 2014 from the Deceased referenced as professional services rendered in respect of the sale of the subject property. Attached thereto was a draft Sale Agreement in respect of the subject property. In its response dated 3 November 2014, the Plaintiff informed the Defendant that the sale had not materialized, terms and conditions has not been fully agreed, no instructions has been issued to a law firm to act for the Plaintiff and that the Deceased’s requests could not be honoured.
8. This action by the Plaintiff then led to the filing of taxation cause - Misc Application No. 587 of 2014 by the Deceased.
9. PW1, Isaac Sila, the Chief Executive Officer, testified that the engagement of any professional service provider requires a formal and structured process. This process must commence with a resolution of the Board of Trustees, followed by a formal written letter of instruction from the Chief Executive Officer. He was unequivocal that no such Board resolution was ever passed, nor was a letter of instruction ever issued to the Deceased’s law firm, Kabaka & Associates Advocates.



10. It was PW1's testimony that the Deceased's involvement was peripheral and unsolicited. His presence in certain preliminary meetings concerning the intended sale was at the instance of a third Party, Alfred Matheka, and not at the invitation of the Plaintiff. He further testified that the entire transaction was abortive and never materialised. Consequently, no Sale Agreement was ever executed, and no consideration passed between the parties.
11. It is the Plaintiff's case that the Deceased's claim for legal fees was fictitious since there was an unexplained discrepancy between the two fee notes. The fee note dated 6 October 2014 demanded a sum of Kshs 50,834,100/= while the Bill of Costs was for a sum of Kshs 127,621,220/=.
12. In their submissions, the Plaintiff states that it is a public body whose operations are governed by statute and principles of public finance management. Relying on the Court of Appeal decision in Wilfred N. Konosi t/a Konosi & Company Advocates v Flamco Ltd eKLR, the Plaintiff argued that it is imperative for instructions from such a public authority to be in writing. It was submitted that in the absence of a Board resolution or a formal letter of instruction, no valid retainer could have been formed. It was further contended that, the burden of proving the existence of the retainer, once denied, falls squarely on the advocate, a position supported by the holding in Ochieng, Onyango, Kibet and Ohaga Advocates v Akiba Bank Ltd eKLR.
13. The Plaintiff challenged the competency of DW1 as a witness, arguing that her evidence was hearsay and inadmissible as she possessed no first-hand knowledge of the events in question.

#### **The Defendant's Case**

14. The Defendant argues that while there may have been no formal letter of appointment, a retainer was unequivocally created by the conduct of the Plaintiff's senior officials. The Defendant filed an Amended Statement of Defence, tracing the engagement to September 2012, when the Deceased's law firm was pre-qualified to provide legal services to the Plaintiff. This pre-existing relationship was activated on or about 5 August 2013 when Mr. Olubayi, the Chairman of the Plaintiff's Corporate Trustee, verbally instructed the Deceased to act in the conveyance of the subject property. These verbal instructions were subsequently ratified and cemented by a series of actions that can only be interpreted as constituting an implied retainer.
15. These actions include Mr. Olubayi directing the Deceased to meet with the Plaintiff's CEO, Mr. Simon Nyakundi, who then furnished the Deceased with crucial and confidential transaction documents, including the Letter of Allotment for the subject property. This was followed by an email from Mr. Olubayi on 7 August 2013, which forwarded a summary of the commercial terms and explicitly requested that they be synthesised into the legal agreement. The engagement was further solidified by a subsequent email on 13 August 2013, where Mr. Olubayi issued a specific drafting instruction, "Please remember to include a clause that says we shall assign ALL existing leases to KRC."
16. It is the Defendant's case that the Deceased, acting upon these clear and unequivocal instructions, proceeded to perform the legal work required of him, including drafting the Agreement for Sale and the corresponding transfers, which were duly forwarded to the parties on 15 August 2013. The Defendant submits that these actions, taken in their totality, paint a clear picture of an Advocate who was not a mere volunteer or an officious bystander, but one who as duly engaged and instructed by the Plaintiff.
17. In her submissions, the Defendant submitted that a retainer need not be in writing and can be inferred from the conduct of parties. Reliance was placed on the case of Ochieng, Onyango, Kibet and Ohaga Advocates (supra) as well as Gitonga Mureithi & Co. Advocates v Centre for Multiparty Democracy eKLR, to argue that the series of meeting, email correspondence and provision of documents by



the Plaintiff's senior officials constituted an implied retainer. It was argued that the Plaintiff, having knowingly received and benefited from the Deceased's professional services, is now estopped from denying the engagement.

18. In response to the challenge on DW1's testimony, the Defendant submitted that as legal representative, she is a competent witness under the *Evidence Act*, and her role was to present the records of the Deceased, the admissibility of which is governed by specific statutory exceptions to the hearsay rule, particularly sections 33 and 35 of the *Evidence Act*.

### **Analysis & Determination**

19. Having carefully considered the pleadings, the evidence adduced and the rival submissions, the issues for determination by this Court are:
  - i. Whether the Defendant's sole witness is a competent witness, and whether her evidence, being based on the Deceased's records, is admissible herein;
  - ii. Whether an Advocate-Client relationship, by way of a retainer, was established between the Plaintiff and the Deceased, either expressly or by necessary implication from the conduct of the parties;
  - iii. Whether the Plaintiff is nevertheless entitled to declaratory orders sought;
  - iv. Who shall bear the cost of the suit.

### **Competency of Defendant's Witness**

20. The Plaintiff has mounted a preliminary challenge to the entirety of the Defendant's evidence by questioning the competency of DW1 to testify. The objection is grounded on the fact that DW1 was not privy to the interactions between the Deceased and the Plaintiff's officials, and, therefore, has no personal knowledge of the matters in issue. The Plaintiff submits that her testimony is, therefore, hearsay and of no evidential value.
21. This Court must first distinguish between the competency of a witness and the admissibility of the evidence they seek to adduce. The general principle on competency is laid down at section 125 of the *Evidence Act*, which provides:

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.(2)A person suffering from a mental illness is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them”
22. DW1 is an adult of sound mind and the legal representative of the Deceased Advocate's estate. There is nothing to suggest that she falls within the exceptions contemplated by statute. She is, therefore, a competent witness.
23. The Plaintiff's objection, in substance, is not to her competency to speak but to the nature of her evidence, which is an objection based on the rule against hearsay. However, the law of evidence is not blind to the realities of life, including the finality of death. It provides clear exceptions to the hearsay rule to ensure that the unavailability of a witness does not defeat the ends of justice. Section 33 allows for



the admission of a statement made by a person in a document where the maker has personal knowledge of the matters and is now deceased.

24. The evidence tendered by DW1 consists primarily of documents authored or received by the Deceased, such as emails, letters and the draft Agreement for Sale. Her role as a witness was to produce these documents and to testify as to their origin and custody from the records of the Deceased's practice. This is a foundational role. She testified to facts within her knowledge; that the author of the documents is deceased, and that these documents form part of his professional records. The documents themselves, being statements made by a deceased person in the course of his professional business, are admissible under the aforementioned statutory exceptions. The Plaintiff's reliance on the case of *Brigitie Korn v Kahindi Msanzu Ndurya* [2021] KEELC 1959 (KLR) is misplaced as that case concerned a donee of a power of attorney testifying on matters of personal feeling and conclusions of the donor, which are not transferable. In this instance, the matter relates to documentary records of a professional engagement.
25. For these reasons, the Plaintiff's objection to the competency of DW1 and the admissibility of her evidence is without merit and is hereby dismissed.

### **The Retainer**

26. This is the substantive question upon which this entire suit turns. The Court is faced with two competing, yet valid, legal principles. ON one hand, there is the principle that public entities, such as the Plaintiff, must act in a structured, transparent and formal manner, and that written instructions are the surest manifestation of a valid engagement. This was expressed in *Wilfred Konosi* case (supra). For a corporate body, a resolution or written instructions are the proper way to create a retainer. The Plaintiff is not just any corporate body; it is a custodian of public trust, managing the retirement benefits of thousands of pensioners, a fact established in cases such as *Satrose Ayuma & 11 others v Registered trustees of the Kenya Railways Staff retirement benefits scheme & 3 others* [2015] KEHC 8007 (KLR). The requirement for formality is, therefore, not a mere procedural nicety but a bulwark of good governance.
27. On the other hand, the law recognizes that contracts, including retainers, can be formed by conduct. As was held in the *Ochieng, Onyango, Kibet & Ohaga Advocate* case (supra), a retainer is simply an authority given to an advocate to act, and this authority can be implied or discerned from the conduct of the client. The burden of proving such a retainer, when it is denied, rests on the advocate, as correctly submitted by the Plaintiff and confirmed in the case of *Omulele Tollo & Company Advocates v Mount Holdings Ltd*, Msa CA Civil Appeal No. 75 of 2015 eKLR.
28. The resolution of this tension lies in a careful examination of the facts and the application of the doctrine of ostensible or apparent authority. A corporation, being an artificial person, can only act through its human agents, primarily its directors and senior officers. When such officers act in a manner that represents to a third party that they have the authority to enter into a transaction on behalf of the corporation, the corporation may be bound by those actions, even if the officer lacked actual authority or contravened an internal procedure. The critical question is whether the Plaintiff, through its senior officials, held out the Deceased as having been retained.
29. The chain of events as presented by DW1 and viewed objectively, overwhelmingly support the Defendant's position. The Plaintiff, through its highest official, Mr. Olubayi, engaged with the Deceased, provided him with confidential title documents and gave him specific, technical instructions to draft an agreement. These are not the actions of a party seeking clarification, as alleged by the Plaintiff. These are the actions of a client instructing his advocate.



30. The Plaintiff cannot be allowed to approbate and reprobate. It cannot hold out its Chairman as having the authority to lead a significant commercial transaction and then subsequently disown his actions by citing internal procedural failures. To do so would be to create an untenable commercial environment where third parties cannot rely on the representations of the senior leadership of public corporations. The Deceased was entitled to believe that the Chairman of the Corporate Trustee, acting in concert with the C.E.O, had the authority to retain his services. An implied retainer was, therefore, created by the conduct of the Plaintiff's officials.
31. Having found that a valid Advocate – Client relationship existed, the Court must now consider the prayers sought herein. In light of the finding hereinabove, the prayer seeking a declaration that no Advocate – Client relationship existed and that no fees are due must, obviously, fail. Consequently, the prayer for an order to strike out the taxation proceedings in Misc Application No. 587 of 2014 must also fail.
32. In view of the foregoing, I make the following orders:
- i. The Plaintiff's suit against the Defendant is hereby dismissed.
  - ii. The interim orders staying the taxation proceedings in Milimani Misc Application No. 587 of 2014 issued on 3 June 2016 are hereby vacated. The said taxation shall proceed before the Taxing Master.
  - iii. The costs of the suit are awarded to the Defendant.

**DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF OCTOBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Plaintiff: Mr. Wafula

For the Defendant: N/A

Court Assistant: Lucy Mwangi

