



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC. CIVIL SUIT NO. 89 OF 2016**

**GATHENJI & COMPANY ADVOCATES.....ADVOCATE/APPLICANT**

**=VERSUS=**

**DAVID N. THUKU.....CLIENT/ 1<sup>ST</sup> RESPONDENT**

**SUSAN THUKU.....CLIENT/2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter was referred to me for determination of one issue; that is whether there was a retainer. The respondents in this matter had instructed the firm of S.T.G. Muhia & Associates to defend them in Nairobi ELC No. 434 of 2009. The firm of S.T.G. Muhia & Associates took up the brief but the respondents were represented in court by advocates instructed by Mr. Muhia of S.T.G. Muhia & Associates. Those Advocates included Mr. Gathenji of Gathenji & Co. Advocates who is the applicant in this matter and Mumbi Ngugi of Njogu & Ngugi Advocates who is now a Judge of the High Court.

2. On 1<sup>st</sup> March 2010, the applicant firm filed a notice of change of Advocates taking over the conduct of the case from the firm of S.T.G. Muhia & Associates. The matter went to the Court of Appeal where the respondents instructed the firm of S.T.G. Muhia & Associates to file an appeal. The documents for appeal were prepared by Mr. Gathenji of Gathenji & Co. Advocates who later filed a notice of change of Advocates in the Appeal matter. The notice of change of Advocates from S.T.G. Muhia & Co. Associates to Gathenji & Co. Advocates appears to have incensed the respondents who decided to hire the firm of Mwaura & Kiguatha Advocates to act for them. It is after the respondents took another law firm to represent them that, the applicant filed an advocate/client bill of costs for taxation.

3. As the bill was pending taxation before the taxing officer, the advocate for the respondents and the applicant agreed to have the issue of whether the firm of Gathenji & Co. Advocates had been retained by the respondents determined by this court.

4. The respondents contend that they have never engaged the services of Gathenji & Co. Advocates and that they were not aware that the applicant had filed a notice of change of Advocates taking over the conduct of their matter from S.T.G. Muhia & Associates.

5. The applicant on the other hand contends that they are the ones who had been drawing documents for filing in both the Superior Court and Court of Appeal and that the respondents had always known this fact. That when notice of change of Advocates was filed in the Superior Court, that notice was served upon S.T.G. Muhia & Associates and Kinoti Kibe & Co. Advocates and therefore the respondents cannot

claim that there was no advocate/client relationship between the applicant and the respondents.

6. I have considered the respective positions taken by the parties herein as shown in their affidavits. I have also considered their submissions. As I said herein before, there was only one issue referred to me for determination. This issue is whether the firm of Gathenji & Co. Advocates had been retained by the respondents.

7. Paragraph 12(1) & (2) of the Advocates Remuneration Order states as follows:-

***“with the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.***

***(2) The procedure for such reference shall follow that of a case stated but shall be to a judge in chambers”***

8. In the instant case, the advocates for the parties in this matter had appeared before the Deputy Registrar on number of occasions. It is on 20<sup>th</sup> February 2017 that they agreed to have the issue of retainer decided by a Judge. The parties had already filed their submissions and affidavits in support of their respective positions. The parties agreed that the Judge was to make his or her decision based on the documents already filed as well as the submissions. This was perhaps in an effort to save them time of stating their case as envisaged in Paragraph 12 of the Advocates Remuneration order.

9. A look at the documents filed by the applicant show that the applicant filed a notice of change of Advocates in the year 2010. This is soon after the case had been filed in court the previous year. This notice was served upon the firm of S.T.G. Muhia & Associates. Mr. Gathenji kept on appearing for the respondents in the High Court matter. He is the one who also filed the documents in the Appeal. After he filed notice of change of Advocate in the Court of Appeal, he wrote a letter to the respondents asking them to go to his office for preparations of the Appeal case two weeks in advance. This is the time the respondent claim that they knew that he had filed a notice of change.

10. There are a number of documents which show that Mr. Gathenji appeared for the respondents. There is also a correspondence from Mr. Muhia to Mr. Gathenji describing the respondents as their mutual clients. Mr. Muhia knew very well that the firm of Gathenji & Co. had filed notice of change. The respondents tried to have Mr. Muhia sign an affidavit disowning Mr. Gathenji's representation of the respondents but Mr. Muhia declined to sign the affidavit. Though the respondents have blamed Mr. Muhia for letting them down, the truth of the matter is that there existed an advocate/client relationship between the applicant and the respondents with effect from 1<sup>st</sup> March 2010 until the time when the firm of Gathenji & Co. Advocates were removed from the record through notice of change of Advocate in the Court of Appeal matter. An Advocate who has acted for his clients who later engage another advocate is entitled to his fees. I therefore find that the firm of Gathenji & Co. Advocates had been retained by the respondents. There was therefore an advocate/client relationship between the parties. I direct that this file be taken back to the Deputy Registrar who was handling the taxation to proceed with the same. The upshot of this is that I find no merit in the Preliminary Objection which was the basis of the reference of this matter to me. The Preliminary Objection is struck out with costs to the applicant.

It is so ordered.

Dated, signed and delivered at **Nairobi** on this **13<sup>th</sup>** day of **June**, 2017

**E.O .OBAGA**

**JUDGE**

In presence of:

Ms. Kathungu for Mr. Mwaura for the respondent

Court clerk - Hilda