



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
  
**E.L.C. MISCELLANEOUS APPLICATION NO. 267 OF 2016**  
**NJOROGE NYAGAH & CO. ADVOCATES.....APPLICANT**  
  
**VERSUS**  
**LEXIS INTERNATIONAL LIMITED.....RESPONDENT**

**RULING**

The Advocate/Applicant filed a bill of costs on 29/9/2016. The bill of costs is in respect of instructions to draw a joint venture agreement with Southend Motors Ltd for the development of a 15 storey commercial building on L.R. No. 209/3021 estimated to be worth Kshs. 150 million while the construction of the building would cost approximately Kshs. 673,560,235.

When the parties appeared before the Deputy Registrar for taxation, the Client/Respondent disputed the retainer and the matter was referred to this court. The gist of the Respondent's argument was that it never gave instructions. On its part the Applicant maintained that the Respondent gave instructions through its agent one Humphrey Wachira Gichuru.

The court has looked at the application dated 20/2/2017 urging the court to make a determination on the issue of instructions. It was the Respondent's submission that Lexis International Ltd did not instruct the firm of Advocates hence it has been wrongly sued. The emails that the Applicant relied on are said to have been exchanged between Humphrey Wachira and the firm of Advocates. The Respondent argues that it did not confirm or ratify the appointment of the Advocates in writing. It further argues that Humphrey Wachira was a financial consultant and had no power to bind the company by giving instructions to the firm of Advocates as he purported to do.

The application was opposed. The Advocate relied on two affidavits sworn by Humphrey Wachira and Maryanne Njoroge. The Advocates maintain that they received instructions to act for the company through the company's agent Humphrey Wachira. It is further urged that a director of the company attended meetings in which the firm of Advocates were present which confirms that the company instructed the Advocates. It is stated that the instructions were oral. The Advocates rely on the emails and states that Humphrey Wachira confirmed the instructions.

The Applicant in the bill also contends that the emails exchanged between counsels is indicative of the amount of time and other resources that the firm of Advocates expended on this transaction and that this information was within the knowledge of the Company. It is argued that the emails dated 8/12/2016 show that there was a meeting in the Advocate's offices which a director of the Company by the name Dinesh attended to discuss and finalise on the project. It is also contended that Mahesh Vekaria, another director of the Client Company attended another joint meeting in the office of Churchill Midwa Advocate. The meeting was also attended by Luseno Advocates for Southend Motors Ltd, Humphrey Wachira the consultant and Maryanne Njoroge Advocate.

Mr Mahesh Vekaria depones in his affidavit that the meetings he attended were in regard to the issue of sourcing for finance for the project and that the Advocate's presence in the meetings does not prove that the Company was working with the said advocates.

Both parties relied on the decision in **Omulele and Tollo Advocates V. Mount Holdings Ltd** (2016) eKLR in which the court dealt with the issue of retainer. The court quoted Black's Law Dictionary which defines a retainer as a client's authorisation for a lawyer to act in a case; or a fee that a client pays to a lawyer simply to be available when the client needs legal help for a specified period or matter. The court went further to define the concept of a retainer under the Halsbury's Laws of England at page 13 paragraph 763 in which it is defined as the act of authorising or employing a solicitor to act on behalf of a client and that the giving of a retainer is equivalent to the making of a contract for the solicitor's employment. The court observed in that case that retainer encompasses the instructions given to an Advocate and the fees payable. It went further to state that a retainer need not be written; it can be oral or can be inferred from the conduct of the parties. If there is no evidence of retainer except a statement from the Advocate which is contradicted by the client, the court will treat the Advocate as having acted without authority from the client.

The onus of proving the existence of the instructions fell with the firm of Advocates. Under the proviso to Section 45 (5) of the Advocates Act an Advocate who is party to retainer agreement and who has acted diligently for the client is entitled to sue and recover the whole retainer fee should the client default in making payment. Where a client disowns an oral retainer or the existence of retainer relationship, it is incumbent upon the Advocate who claims under that retainer to prove to the court that a relationship existed otherwise the court will deem that he acted without instructions.

Looking at the Supplementary Replying Affidavit of Maryanne Njeri Njoroge filed in court on 27/3/2017, she depones at paragraph 2 that she received verbal instructions from Lexis International Ltd through its agent Humphrey Wachira Gichuru to act for the Company in a joint venture agreement with Southend Motors Ltd for the development of a 15 storey commercial block on L.R. No. 209/3021 along Dar es Salaam Road/Dunga Road. She states that she also received the schedule of costs and profitability analysis of the development for purposes of drawing the agreement. She annexed several emails to her affidavit which the court has considered. Humphrey Wachira sent the email on 19/11/2015 at 6.36 a.m. to the company stating that Njoroge Nyagah and Company Advocates would be the sole Advocates for the proposed project. In the email dated 27/11/2015 Humphrey Wachira asked Mr Luseno to kindly request for Advocates for the transaction and establish the party to bear the legal costs.

The court has also looked at the draft joint venture agreement drawn by these Advocates and notes that it was never signed by the parties. Clause 42 of that agreement stated that Lexis International Ltd as the developer and the land owner that is Southend Motors Ltd would bear jointly the Advocate charges in respect of the agreement and all matters related to it besides the transaction advisors agreed fees. Humphrey Wachira states in his further affidavit that he submitted a proposal on the cost estimate and profitability analysis after inspecting the land and confirming its suitability for the project.

The court has looked at the submissions filed by both parties. The email dated 13/9/2016 at 4.20 pm shows that the instructions were given by Humphrey Wachira to Nyagah and Njoroge Company and Advocates.

The court is not satisfied that the Applicant who bears the onus of proof has proved that a retainer relationship existed, the client having disowned the oral retainer or the existence of a retainer relationship.

The court deems that Advocates acted without instructions. Each party will bear its own costs.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of September 2017**

**K. BOR**

**JUDGE**

In the presence of: -

No appearance for the Applicant and Respondent

Mr. V. Owuor- Court Assistant