



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC MISC. CIVIL SUIT NO. 262 OF 2016
NJOROGE NYAGAH & CO ADVOCATES.....PLAINTIFFS
VERSUS
LEXIS INTERNATIONAL LIMITED..... DEFENDANT
RULING

Introduction

1. On 28/9/2016, Njoroge Nyagah & Co. Advocates (**the Advocate**) filed a Bill of Costs totalling KShs.2,060,606.40 against M/s Lexis International Limited (**the Respondent**) in relation to an aborted land sale transaction involving Land Reference Number 1870/1/440. Subsequently, on 21/2/2017, the Respondent brought a Notice of Motion dated 20/2/2017 inviting this court to determine whether the respondent did retain the advocates to render legal services to the respondent. For avoidance of doubt, the Notice of Motion seeks the following prayers:

- 1. THAT this Honourable Court be pleased to make a determination on the issue of instructions of the Applicant/Respondent***
- 2. THAT the costs of this Application be in the cause.***

2. That Notice of Motion is the subject of this Ruling. The single issue to be determined in the Application is whether or not the advocate was retained by the respondent to render legal services to the respondent.

3. The initial affidavit supporting the Notice of Motion bore the name of Humphrey Manyange as the deponent but the signature on it was that of Mahesh Vekaria. On 15/3/2017, by consent of the parties, the affidavit was expunged from the court record and replaced with a supporting affidavit sworn by Mahesh Vekaria on 7/3/2013. In paragraph 1 of the supporting affidavit, Mr Mahesh Vekaria deposes that he is the Managing Director of the Respondent Company, fully conversant with the facts of this case and duly authorized to swear the supporting affidavit.

Respondent's Case

4. The Respondent's case is that it never instructed the advocate to act for it in the aborted land purchase transaction. It contends that the advocate was instructed by one Humphrey Wachira and those instructions to the advocate were never affirmed by the Respondent.

Advocate's Case

5. The advocate responded to the Notice of Motion through a replying affidavit sworn by Maryanne Njoroge on 23/2/2017. She contends that the respondent, through its agent, Humphrey Wachira Gichuru, issued instructions to the advocate to act for the respondent. She further deposes that the Firm of P.J Kakad & Company Advocates was retained to act for the vendor in the aborted land transaction.

6. She further contends that upon receipt of the instructions, she commenced work by conducting an official search. She then requested the vendor's advocate to forward the draft agreement for sale in tandem with the practice in conveyance legal practice. After the terms of the agreement for sale were settled and the agreement engrossed, she forwarded it to the respondent who duly executed it on 31/12/2015. The respondent then returned to her the executed agreement but without the 10% deposit, indicating that one of the directors of the respondent was out of the country.

7. She adds that, subsequently, the respondent communicated its inability to pay the 10% deposit. The deponent further contends that the subject of retainer was never raised as an issue. She also contends that in all subsequent correspondence between her and Mahesh Vekaria, retainer was never in issue.

Submissions

8. In written submissions dated 28/3/2017, counsel for the respondent argues that the respondent did not instruct the advocate. He contends that the person against whom the bill should be taxed is Humphrey Wachira who gave the instructions. He further argues that the advocate's actions in pursuance of the instructions were never sanctioned by the respondent. He contends that the advocate/client relationship which existed was between the advocate herein and Mr Humphrey Wachira who was an agent of the seller. He invited the court to be guided by the Court of Appeal decision in **OMULELE & TOLLO ADVOCATES V MOUNT HOLDINGS LIMITED, eKLR.**

9. In written submissions dated 25/5/2017, counsel for the advocate submitted that indeed the onus of proving that the advocate was instructed by the client lay on the advocate. She argued that the emails annexed to both the affidavit of Mahesh Vekaria dated 7/3/2017 and the affidavit of Maryanne Njoroge dated 23/2/2017 confirm two things: 1) first that instructions to the advocate were given by an agent of the respondent, one Humphrey Wachira, and 2) second that there were corroborative correspondence between the advocate, the respondent and the said Humphrey Wachira.

10. She further submitted that the respondent had not disputed the fact that the advocate caused the agreement to be finalized and forwarded it to the respondent who executed it on 31/12/2015 and returned it to the advocate without the 10% deposit. She further submitted that the respondent had not disputed the correspondence attached to the replying affidavit.

Analysis & Determination

11. I have carefully considered the application, the parties' respective affidavits and submissions and the relevant law. The court is invited to determine whether the advocate was retained by the respondent, Lexis International Limited, to render legal services in an aborted land sale transaction relating to Land Reference Number 1870/1/440. The respondent contends that they did not retain the advocate. The advocate on their part contend that the respondent retained them to act for it in the land transaction.

12. The Halsbury's Laws of England, 5th Edition, 2009 Vol. 66 defines retainer in the current context as:

“the act of authorizing or employing a solicitor to act on behalf of a client.”

13. The Court of Appeal [*Makhandia, Ouko and M'Inoti, JJ.A*] in **OMULELE & TOLLO ADVOCATES V MOUNT HOLDINGS LIMITED, [2016] eLRL** gave the following key features of a retainer:

“A retainer need not be written, it can be oral and can even be inferred from the conduct of the

parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client.”

14. In ***OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES V AKIBA BANK LIMITED***, [200] 1 LA 380, the court held that:

“It is not the law that an advocate must obtain a written authority from a 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 may be wide. And nevertheless, it can be implied from the conduct of the client/advocate relationship.”

15. There is no doubt that retainer is the contractual foundation upon which a bill of costs is drawn. If there is no retainer, the taxing officer has no legal basis for taxing a bill of costs presented to him. Put it differently, in the absence of a retainer, the taxing officer has no jurisdiction to entertain a bill of costs.

16. I have carefully examined the materials placed before court. The first annexure to Mr. Mahesh Vekaria’s affidavit is a copy of the material agreement for sale. In the agreement for the sale, the joint vendors were **Shiraz Hassanali Kanji** and **Almas Shiraz Hassanali Kanji** while the purchaser was **Lexis International Limited**. The respective parties’ advocates are captured at Clause 7 of the agreement for sale which provided as follows:

“The advocates acting for the vendors are Messrs P.J. Kakad & Company Advocates, Jubilee place, 4th floor, Mama Ngina Street, Post Office Box Number 57762 – 00200, Nairobi and the advocates acting for the purchaser are Messrs Njoroge Nyaga & Company Advocates of Travel House, 5th floor, Muindi Mbingu Street, Post Office Box Number 5306 – 00200 Nairobi.”

17. It is instructive that the Agreement for sale which bore the above clause identifying parties’ respective advocates was duly executed by the respondent’s two directors. In my view, this execution is adequate evidence of retainer and I would properly infer retainer from the fact that the Agreement containing details of the Respondent’s advocates was duly executed by the respondent’s two directors.

18. I have similarly examined the correspondence emails exchanged between the advocate, the respondent and the vendor’s advocates. They are annexed to Maryanne Njoroge’s affidavit. The first correspondence is an email sent by Humphrey Wachira on 3/11/2015 at 3.35 pm to the advocate. It was copied to the respondent at lexisinternational@gmail.com. The email reads as follows:

“Good afternoon Maryanne!

You have been appointed on behalf of Lexis International Limited, Amolo and Gachoka Advocates were taking too long to conclude a sales transaction on behalf of my client, Lexis International Limited. Liaise with the vendor’s advocates, P.J Kakad. The purchase price for the land is KShs.120 million. Attached find copy of title.

Regards Humphrey Wachira.”

19. On 8/6/2016 at 5.45 pm Mr. Mahesh sent the following email to the advocates:

“Hi Maryanne,

We have discussed the same and are comfortable to pay 0.7% (about KShs.840,000.00) of the land value for the Westlands plot.

Regards

Mahesh Vekaria.”

20. On 20/6/2016 at 20.10 the advocate wrote to Mahesh the following Email:

“Hello Mahesh,

I have already responded to your email by my attached email. Sorry for the omission. Thank you for your email. I highly regret the delay in responding due to pressure of work. Your proposal to pay 0.7% is far below the rate.

I am however agreeable to 1% for the sake of avoiding unnecessary conflict and concluding the matter amicably and expeditiously. This is purely on without prejudice and I would appreciate to receive your cheques in settlement of the same.

Good evening

Maryanne Njoroge.”

21. On 6/7/2016 Mahesh Vekaria wrote to the advocate the following Email:

“Hi Maryanne.

Sorry for late response. I have spoken to Humphrey on a proposal on how we can settle this dues. He will be calling you shortly to explain the same to you. Humphrey, please call Maryanne on what we have discussed.

Thanks and Regards. Mahesh Vekaria.”

22. In my view, the above correspondence constitute a further corroboration that there was retainer. Secondly, they confirm that the respondent agreed to pay the advocate’s fees but the parties could not agree on the exact sum to be paid in full and final settlement of the legal fees.

23. In light of the foregoing, I am satisfied on a balance of probabilities that, indeed, the respondent, Lexis International Limited, retained the advocate, Njoroge Nyagah & Company Advocates, to act for it in an aborted land purchase transaction involving Land Reference Number 1870/1/440. Consequently, the Deputy Registrar is hereby ordered to proceed to tax the Bill of Costs herein and issue a certificate of taxation in accordance with the law.

Dated, signed and delivered at Nairobi on this 22nd day of September, 2017.

B. M. EBOSO

JUDGE

In the presence of:

Woodward h/b for Manduku: Advocate for the Applicant

Kali h/b for Owino: Advocate for the Respondent

Halima: Court Clerk