Kenya Union of Commercial Food and Allied Workers v K'bahati t/a K'bahati & Co Advocates (Civil Appeal 161 of 2018) [2023] KECA 186 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 186 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 161 OF 2018

DK MUSINGA, F SICHALE & PM GACHOKA, JJA

FEBRUARY 17, 2023

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... APPELLANT

AND

THOMAS K'BAHATI T/A K'BAHATI & CO ADVOCATES ..... RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (G.V. Odunga, J.) delivered on 18th October 2017 in High Court Misc. Application No. 23 of 2014)

JUDGMENT

1. This appeal arises from a client-/advocate relationship. The bone of contention is whether the appellant had retained the services of the respondent. The appellant is a trade union with members in the commercial food and allied industry. On its part, the respondent is a firm of advocates. The dispute arises from the legal representation of the appellant's members in High Court Misc. Civil Application No 632 of 2008 between BAT (K) Ltd. v Industrial Court of Kenya. The appellant's position is that it introduced its members to the respondent for legal representation, but each member was to individually meet his or her legal fees. On the other hand, the respondent is categorical that the legal services were sourced and retained by the appellant who is legally bound to meet the legal costs. This dispute led to taxation of costs by the respondents that triggered this dispute.

2. It all started on 12th November 2009 when a letter was sent to the appellants. The letter read as follows:

> " We are interested parties in this matter and are suing under the umbrella of Kenya Union of Commercial Food and Allied Workers (who is the interested party in the above case).

This is to hereby, pursuant to our various discussions, to give you instructions to take over the conduct of this matter and to fully represent us (as the interested party) until the final conclusion of this matter. You may raise any other issues with the Union.

Please proceed and file a notice of change of advocate to come on record in place of Guserwa & Co. Advocates who have been acting for the interested party.

Your fee shall be agreed separately."

The respondents replied by a letter dated 19.11.2009 and the letter read as follows:

"We refer to the tele-conversation between Mr. Kagondu and the undersigned over the instructions to us by the union members (represented by the union in this matter as the interested party).

You verbally indicated that we can proceed as instructed by the union members. However, since it is the union (and not the individual members) who is named as a party in the suit, it is the union that can give instruction to us. As agreed therefore, kindly express the instructions in writing, to obviate disputes over representation and to proceed in a professional manner.

Since the matter is rather urgent, we request to receive your letter as soon as practicable."

The relationship got sour and by a letter dated 29.5.2013 the appellant instructed the firm of Machira &Co Advocates. The letter read as follows:

"We acknowledge receipt of your letter dated 28th May 2013 referenced M&C/L/2180 content noted.

We hereby write to advice you to take over the matter from the firm of Messrs Lumumba, Mumma & Kaluma Advocates with immediate effect.

However, your costs and any other costs arising from the same proceedings shall be settled by M/s Robert Gichohi Macharia, Japheth Nyaga Mati and Benson Mwangi Macharia.

Enclosed herein please find signed agreement by the three grievants."

3. After the fallout, the respondent filed a bill of taxation against the appellants. The appellant filed an application in the High Court seeking the following orders:

a) That the Application be certified urgent and be heard ex-parte in the first instance.

b) That pending the hearing and determination of this Application, the Honourable Court do restrain the Advocate/respondent from proceeding with the taxation of the bill filed herein.

c) That the Honourable Court do order and declare that the applicant is not the right entity to bear the Advocate/respondent's cost.

d) That the Honourable Court do strike out the bill of costs dated 26th May, 2014.

e) That costs of this application be borne by the Advocate/respondent.

4. Upon hearing the parties, the High Court (G.V. Odunga, J. as he then was,) dismissed the application. The relevant part of the ruling, which has triggered this appeal is as follows:

"29. From the letter dated 12th November, 2009, it is clear that by the time the Advocate was instructed, the interested party in the suit was the Kenya Union

of Commercial Food and Allied Workers Union (hereinafter referred to as "the Union"). The Advocates were instructed to proceed and file a Notice of Change of Advocates and come on record for the interested party. However, all other issues were to be raised with the Union. From the letter dated 20th November 2009, it was clear that it was the Union that appointed the Advocates, though the Union contended that the advocates' fees would be settled by the Claimants.

30. When the relationship between the Advocate and Client became sour, it was in fact the Union that instructed the firm of Machira & Co. Advocates to take over the matter from the firm of Lumumba, Mumma & Kaluma Advocates. That the Union was the client of the latter firm was acknowledged by the firm of Machira & Co. Advocates in its letter dated 12th June, 2013.

31. In his ruling dated 22nd May, 2013, Korir, J. found that the Union represented the interests of the Claimants in that suit. In his view, the Claimant ought to have instructed the Union to terminate the services of the Advocates otherwise they were stuck with the said firm since the Union was the organ that took the dispute to the Industrial Court. In other words, the learned Judge found that the Union was the representative of the Claimants in that suit.

32. From the definition of the word "Client" in section 2 of the Advocates Act, it is clear that the Union fell squarely within that definition. I agree with the decision of Waweru, J. in *Nderitu & Partners Advocates v Mamuka Valuers (Management) Ltd* (supra) that a person who gives instructions in a suit is the client and not the person on whose behalf he purports to act. I also agree with the decision in *Ochieng Onyango Kibet & Ohaga Advocates v Adopt A Light Ltd* (Misc. App. No. 729 of 2006), where the court held that:

> " The burden of establishing the existence of a retainer is always and primarily on the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service... The participation and/or instruction of an Advocate can either (be) expressed or implied. And it need not be in writing even where the instruction is expressly given."

33. This was the view adopted by Lesiit, J. in *Alex S. Masika & Co Advocates v Syner-Med Pharmaceuticals Kenya Limited* Nairobi (Milimani) HCCC No. 959 of 2006 where the learned Judge expressed herself as hereunder:

> " The act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by a client. A retainer need not be in writing. Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case... There is evidence that the client instructed the advocate to act for it because during the hearing of the application/appeal, the client was present as the advocate made representation on its behalf before the Board and during those

proceedings the client did not object to the advocates appearing for it. Therefore, the client instructed the advocate to act for it and the retainer can be inferred from the conduct of the parties since the retainer need not be in writing."

34. It is therefore my view that *Kenya Union of Commercial Food & Allied Workers Union was the client of Thomas K'Bahati & Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates* in Misc. Application No. 632 of 2008 and is liable to settle the said Advocates fees. As was rightly pointed out in Nderitu & Partners Advocates v Mamuka Valuers (Management) Ltd (supra) Kenya Union of Commercial Food & Allied Workers Union can always get a reimbursement from the claimants who are its members."

5. Aggrieved by the decision of the High Court, the appellant has approached this Court raising 7 grounds of appeal, which we need not recite in full but summarize as follows: that the honourable judge erred in finding that there was in place a retainer between the appellant and the respondent advocate in place of specific clients whose interests were being represented and that instructions, employment, appointment, engagement or disengagement of the respondent was done by the appellant who was solely an agent of its members; that the judge erred when he failed to appreciate the role that a trade union plays in the employment sector on behalf of its paid up members once employment dispute arises and that the judge erred in law in holding that there was a client advocate relationship between the appellant and the respondent and erroneously assumed that because the appellant was a named party in the suit, it was a client of the respondents.

6. In support of the grounds, the appellant filled written submissions which can also be summarized as follows: it is the appellant's case that the claimants in the High Court Case Misc. App. No. 632 of 2008 i.e., Mr. Robert Machira, Japhet Nyaga Mati, Joseph Obonyo Nyang, Benson Mwangi Macharia, Justus Musembi and Lawrence Muraya sought for the legal representation of the respondent vide a letter dated 11th November 2009. The appellant further stated that it appointed the respondent vide a letter dated 20th November 2009 to represent the claimant's interests strictly on condition that the claimants would pay the legal fees.

7. The appellant further argued that pursuant to the above agreement, the respondent would naturally write fee notes to it regarding payment of their legal fees for Kshs. 60,000.00 each which sum was settled by the appellant in full. At some point in the course of the proceedings, the Appellant was dissatisfied with the respondent's legal representation and wrote to the respondent vide a letter dated 29th May 2013 demanding withdrawal of their representation and gave reasons for their dissatisfaction therein.

8. The respondent acknowledged receipt of the letter and made a demand of their costs. The respondent raised fee notes demanding additional payment of Kshs. 352,673 from Benson Mwangi Macharia, Kshs. 4111,581 from Robert Gichohi and Kshs. 368,821 from Japheth Nyaga Mati respectively. The appellant stated that this was contrary to the earlier arrangement of Kshs. 60,000 which was the full legal fee from each claimant which had already been paid.

9. The appellant further wrote back to the respondent vide a letter dated 14th June 2013 making reference to the letter dated 29th May 2013 where the claimant expressly undertook to jointly settle any outstanding costs of the respondent. The appellant therefore asserts that the respondent was to strictly get paid by the claimants and that the respondent seeking payment from the union amounted to unjust enrichment.

10. The respondent also filed written submissions in contention of the appellant's case. The respondent maintains that they were retained by the appellant to represent it in the High Court case Misc App No. 632 of 2008. It was the respondent's case that vide a letter dated 12th November 2009, the six union members met and instructed the advocates to represent their interest in the High Court case. The respondent after perusing the court file noted that the six union members were not named parties in the suit. The appellant was the named party and therefore the respondent sought and obtained instructions from them vide the letter dated 19th November 2009. The respondent clearly indicated that since the instructing client was not the party whose interest was being protected in the suit therefore the union as the named party should expressly give them instructions.

11. The appellant vide a letter dated 20th November 2009 expressly instructed the respondent to take up the matter. The respondent, therefore, submitted that the union was its client and all correspondence exchanged between the parties confirmed the same. The respondent also went ahead vide a letter dated 23rd November 2009 pursuant to the appellant's instructions to file a notice of change of advocates on behalf of the appellant which was served upon the outgoing advocates for the appellant.

12. We have considered the appeal before us, the written submissions, and the authorities cited. The issue for determination in this appeal appears to be simple, that is, whether there was an advocate/client relationship between the appellant and the respondent and whether we should interfere with the decision of the learned judge.

13. Before us is a first appeal, we remind ourselves of the Court's mandate on a first appeal as set out in *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and Rule 29(1) of this *Court's Rules*, namely: to re-appraise the evidence and to draw inferences of fact. Where the judgment subject of the appeal involves the exercise of discretion, the Court in considering the appeal should remain guided by the principles enunciated in *PIL Kenya Ltd v Oppong* [2009] KLR 442; that it will not interfere unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. We are therefore required to analyze the evidence afresh and reach our own conclusions. It is thus the duty of the Court to analyze and re- assess the evidence on record.

14. The bone of contention between the parties and which also is the crux of this appeal appears to be the interpretation and validity of the agreement between the parties with regards to the letters dated 12th November 2009 and 19th/20th November 2009.

15. The *Black's Law Dictionary* (10th edition) clearly defines "retainer" as follows:

    i) A client's authorization for a Lawyer to act in a case.

    ii) A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.

    iii) A lump sum fee paid by the client to engage a lawyer at the outset of a matter – Also termed engagement fee.

    iv) An advance payment of fees for work that the lawyer will perform in the future.

16. From the above, the appellant and respondent fall within the first definition of a retainer where the respondent expressly sought the authorization of the appellant vide a letter dated 19th November 2009 before it could proceed to act for it. Further by the instruction letter dated 20th November 2009, the appellant engaged the services of the respondent by appointing them as their advocates on record.

Section 2 of the *Advocates Act* defines a 'Client' as also defined by the Court in *Omulele & Tollo Advocates v Mount Holdings Limited* (2016) eKLR as follows:

> "Client includes any person who has a principal or on behalf of another or as a trustee or personal representative or in any other capacity, has power express or implied to retain or employ and retains or employs or is about to retain or employ an Advocate and any person who is or may be liable to pay an Advocate cost."

17. The existence of various correspondences between the appellant and the respondent is evidence that there was an advocate-client relationship between the two parties.

18. The appellant states that the letter dated 20th November 2009 strictly provided that the respondent was engaged to represent the claimants' interests strictly on condition that the claimants would pay the legal fees. From the record, the letter was signed by both the appellant and the respondent. The appellant was being represented by the respondent and therefore it cannot claim that the union members are the ones to pay legal fees to the respondent. The appellant cannot purport to be the members' agents, yet it signed on the letter authorizing the respondent to represent it. The logical conclusion of this finding would be that the contract between the parties regarding the payment of legal fees is only enforceable between the parties that signed it.

19. Furthermore, the appellant issued a letter dated 29th May 2013 to M/s Macharia & Co. Advocates instructing them to take over the matter from the respondent thereby terminating the services of the respondent. It is not possible to terminate any legal services if a party was not receiving the services in the first place. The instructions from the appellant were express and this was further admitted through the withdrawal of the said instructions.

20. As an attachment to the letter, there was another letter addressed to the appellant from the three claimants instructing the union to terminate the services of the respondent. If at all we are to go by this letter, it is clear that the letter is between the appellant and the claimants and therefore the respondent is not a party. The terms of the letter are therefore not binding upon the respondent.

21. Further, the appellant in its submissions admits that it indeed issued the respondent with the letter dated 20th November 2009 duly instructing and appointing them as its advocates on record though the appellants claim it was issued on behalf of the members. The appellant yet again issued a letter dated 29th May 2013 terminating the respondent's services.

22. It is our view that since the appellant was the named party in the suit, and also the party issuing instructions to the respondent, then it is only reasonable that it be the party charged with the legal fees and as such liable to pay the fees. The respondent cannot seek its fees from the members, yet the express instructions came from the appellant. Since the appellant claims that they were only but agents of its members, it can always seek reimbursement from them. We quote with approval the decision of H.P.G. Waweru, J. in *Nderitu & Partners Advocates v Mamuka Valuers (Management) Ltd.* [2006] eKLR:

> "In my view, being the party chargeable with the bill of costs, it is also the party liable to pay it. It can always claim a reimbursement from its principal. It can always claim a reimbursement from its principal. As far as the Advocate is concerned, he must look to the Client for payment of his costs as it is the Client who instructed him to act in the matter. The Advocate cannot look to the principal for payment of his costs as he was not instructed by the principal."

23. Taking into account the above arguments, it is our holding that the ruling delivered by the learned judge was fair and just as it is in tandem with the law. An advocate/client relationship arises when an advocate gets express instructions from the client to represent them in a suit where they are a party. Therefore, it is our view that the appellant was the client of the respondent in the High Court Case No. 632 of 2008 and as such is liable to settle the said Advocates' fees.

24. The upshot of the above is that we uphold the judgment of the High Court and dismiss this appeal with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR