



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 365 OF 2014

BETWEEN

ZAKHEM CONSTRUCTION (KENYA) LTD APPELLANT

VERSUS

MEREKA & COMPANY ADVOCATES.....RESPONDENT

(An appeal from the ruling and Order of the High Court at Nairobi, (R. Ougo, J.) dated 5th day of November, 2014

in

MISC. CIVIL APPLICATION NO. 336 OF 2012)

JUDGMENT OF THE COURT

1. The appellant has challenged a ruling of the High Court (R. E. Ougo, J.) delivered on 5th November 2014 in which that court found that the appellant had instructed and retained the respondent “*in realizing*” a project and that the appellant “*is estopped from denying*” that it instructed the respondent “*to act on its behalf.*” In effect, the court found that a client/advocate relationship was established between the parties on the basis of which the respondent could present its bill of costs for taxation. The issue is whether that finding is well founded. In other words, did the respondent have instructions from the appellant to render professional services as claimed?

Background

2. On 18th June 2012, the respondent, Mereka & Company Advocates, a firm of advocates, initiated proceedings against the appellant before the High Court at Nairobi in Miscellaneous Civil Application No. 336 of 2012 seeking taxation of an advocate/client bill of costs quantified at Kshs. 13,074,225.00 “*arising from instructions with regard to the proposed Zakhem Shopping Mall on LR NO. 7200/4 Ruaraka Nairobi.*”

3. The appellant objected to the taxation of the respondent’s bill of costs and contested that “*the firm of Mereka & Company had any instructions from the Company*”.

4. In an affidavit sworn on 16th August 2012, Adnan Annous, a director of the appellant, deposed that sometime in July 2010, Mr. David Mereka of the respondent firm, of his own accord, procured several consultants to come up with development proposals for LR No. 7200, a property owned by the appellant; that the appellant did not at the time have any plans to develop that property; that no instructions were given to the firm of Mereka & Company Advocates to proceed with the proposal; that the firm of Mereka & Company Advocates having made, of its own volition, unsolicited proposals cannot turn around and charge the appellant fees for the same.

5. On his part, Mr. David Mereka, in an affidavit sworn on 4/9/2012, deposed that his firm “*had authority to deal with the project proposal, liaise and arrange for meetings with the project managers among other consultants and with the consent of the [appellant] and it is inconceivable for the [appellant] to assume that the [respondent] was acting on pro bono basis including making payments on its behalf.*”

6. After considering the affidavits and submissions made on behalf of the parties, the court concluded that the appellant is estopped from denying that it did instruct the respondent to act on its behalf.

7. With that, the court dismissed the appellant’s preliminary objection, paving way for the taxation of the respondent’s bill of costs.

The appeal and submissions

8. The appellant has faulted that decision. In its memorandum of appeal, the appellant complains that the respondent did not discharge its burden of proof to establish that the respondent had been retained to act for the appellant; that the Judge was wrong in holding that the respondent had instructions to act for the appellant or that instructions could, in the circumstances of the case, be implied; and that the judge misapprehended the law in reaching her decision.

9. During the hearing of the appeal, counsel relied on their written submissions, which they highlighted. Mr. Mansur Issa, learned counsel for the appellant, submitted that the appellant neither retained nor employed the respondent to undertake any work relating to the alleged development so as to be considered a “client” under Section 2 of the Advocates Act. Citing past decisions including the decision of this Court in **Kinluc Holdings Ltd vs. Mint Holdings Ltd & Another [1998] eKLR**, counsel urged that for there to be a retainer, an advocate has to be instructed or authorized to act by the client.

10. According to Mr. Mansur, there was evidence that Mr. Mereka, of the respondent’s firm, came up with an unsolicited proposal, of his own accord, to develop the appellant’s property and approached a number of consultants to set up a team to convince the appellant to buy into the proposed project; that at the time the appellant had no plans of developing its property; that in a letter dated 22nd July 2010 addressed to the appellant, the respondent sought “*instructions to handle the proposed project proposal*” and that the appellant did not at any time issue the respondent with such instructions.

11. Given those circumstances, counsel argued, the Judge was wrong to hold that instructions could be implied from the conduct of the appellant. Counsel submitted that the email correspondence exchanged between July 2010 and August 2012 between the parties demonstrated that the appellant responded to the initial proposals and sought various clarifications “*out of courtesy*” “*but never issued any instructions as requested by the respondent*” and the respondent did not therefore have instructions to undertake any work as set out in the respondent’s bill of costs.

12. It was an error on the part of the Judge, counsel argued, to imply there was a retainer based on the email correspondence. In that regard, counsel argued, the Judge did not properly evaluate the evidence.

13. Counsel further argued, that the burden to establish the existence of an advocate/client relationship in relation to the proposed project lay with the respondent; and that the respondent did not discharge that burden. In support, he referred to English and Canadian decisions as well as the High Court case of **Ochieng Onyango Kibet & Ohaga Advocates vs. Akiba Bank Limited [2008] 1 E A 300**. According

to counsel, although the Judge correctly stated the principle, she erred in failing to apply it correctly to the facts in this case.

14. Counsel concluded by urging that by proceeding with the proposal without first obtaining instructions from the appellant, the respondent did so at his own peril; that as no retainer was established, there is no obligation on the part of the appellant to pay costs to the respondent and the bill of costs should be struck out.

15. Opposing the appeal, learned counsel for the respondent, Mr. Martin Gitonga, submitted that the course of dealings between the parties between August 2010 and mid 2011 in relation to the proposed development of the appellant's property L R No. 7200/4 establishes that the appellant did 'retain' the respondent firm in the sense of 'employing' or 'engaging' or 'instructing' the respondent; that as a result of an oral agreement between the parties, a surveyor, Geodata Land Surveyors and Consultants, was engaged to carry out, and did carry out, a preliminary survey of the property on the basis of which a subdivision proposal was agreed upon; that a project brief was then provided by a firm known as Protocol Solutions that included the respondent's firm as legal consultants; that the appellant then requested for more experienced project managers whereupon the respondent proposed Pinnacle Projects who were then brought on board; that consultations ensued between the appellant, the respondent and Pinnacle Projects in relation to conceptualizing the development resulting in a project plan; that after seeking additional information on the budget for the proposed development and financing conditions, the appellant went silent and did not respond to correspondence, whereupon the respondent concluded that instructions had been withdrawn and thereafter filed the advocate/client bill of costs.

16. Citing the decision in **Ochieng Onyango Kibet & Ohaga vs. Akiba Bank Limited** (above), counsel submitted that retainer can be implied from conduct; that the appellant is estopped from denying the existence of a retainer having acknowledged that it was a client; and that the respondent discharged its burden of proof to establish retainer.

Determination

17. The question for determination in this appeal as already indicated, is whether the respondent discharged its burden of proof to establish that the appellant retained it in connection with the matters in respect of which it sought to tax an advocate/client bill of costs. In other words, did the respondent establish an advocate/client relationship in respect of the matters it sought taxation?

18. In addressing that question on a first appeal, we are not bound by the findings of the lower court. It is incumbent on us to review and evaluate the material that was placed before the lower court in order to draw our own conclusions. [See **Selle and Another vs. Associated Motor Boat Company Ltd and others [1968] E. A. 123.**]

19. It is common ground that the respondent bore the burden of proving that it was indeed retained by the appellant in connection with the project. The question is whether it discharged that burden.

20. In **Kinluc Holdings Ltd vs. Mint Holdings Ltd & another** (above), this Court adopted the definition assigned to the word "retainer" in the 3rd edition of **Halsbury's Laws of England** at paragraph 84 as meaning:

"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties under the contract will depend on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract."

21. Warsame, J. (as he then was) expressed a similar view, with which we agree, in **Ochieng Onyango**

Kibet & Ohaga Advocates vs. Akiba Bank Limited (above) where he stated that:

“The act of authorizing an advocate to act on behalf of a client constitutes the advocate’s retainer by the client. It is not the law that an advocate must obtain a written authority from the 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.”

22. In the present case, the respective affidavits that were before the learned Judge establishes that the parties had dealings prior to the matters giving rise to the present dispute.

23. The parties were known to each other. The respondent then conceived the idea that the appellant’s “prime plot of 5.2 acres on Thika/Outer Ring Road” had great-untapped economic potential. The respondent floated the idea to the appellant that that potential could be tapped by developing a shopping mall on the property. In the respondent’s view (a view that the appellant readily embraced) the appellant was “sitting on a gold mine.”

24. On 5th August 2010, Mr. Ibrahim Zakhem, of the appellant, sent an email to Mr. David Mereka of the respondent firm as follows:

“Dear David,

Your proposal for Ruaraka Plot development is rather confusing. As discussed with you over the phone we need to consider developing the plot in three sections. One to be retained by us occupying the existing offices and building. The other section includes the store area and the third the workshop. The division will be concluded accordingly. The provision would be to sell one portion develop the second and retain the third. We require your proposal for developing one section including finance provisions. Pls (sic) discuss the matter in detail with Adnan and update us.”

Best regards.

Ibrahim S. Zakhem.” [Emphasis added]

25. The respondent then went ahead, with the full acknowledge, concurrence and acquiescence of the appellant: to engage Geodata Land Surveyors and Consultants, Land Surveyors, who inspected the property, carried out a survey of the property and submitted preliminary drawings; and to engage project management consulting firms, Protocol Solutions and Pinnacle Projects, whose proposals the respondent shared with and sought input from the appellant.

26. One of the proposals put forward by Pinnacle Projects, that appears to have dampened the appellant’s zeal in the quest for gold, was the proposal that the appellant needed to inject funding in the project in addition to the land. On 25th January 2011, Albert Zakhem of the appellant sent an email to Mr. David Mereka as follows:

“Dear David,

Happy New Year.

We thank you for the project plan and we have studied it. It is very promising and Rosy (sic) as it appears now we will need to discuss it further now.

Our major comments:

1) Client Equity is 30% according to Mr. Muchiri that is the cost of the land with cash injection of 150 M Ksh.

We as client wish not to use our cash hence our contribution will be limited to the land contribution and may be participate in the construction if we give a competitive price to the PM.

2) As budget nos as noted some of them are to be reviewed vis a vis the market and quality today.(sic)

In principle we r fr (sic) expediting (sic) this project pls advise by return with the financiers what is the impact of non availability of cash client contribution.

Rgds.

Albert Zakhem.” (Emphasis added)

27. Further discussions pertaining to the concept appear to have taken place between the parties thereafter. On 17th August 2011, Mr. Adnan Annous of the appellant wrote an email to Mr. David Mereka as follows:

“Attn: Mr. David Mereka

Further to our discussion please find below the proposal recommended by the Management;-

Development in two phases, phase 1 covering 2/3 of the area and phase 11 after completion of Phase 1 covering 1/3 of the area. Built up area for Phase 1 180,000 to 240,000 or more if possible.

Finance requirement 35% equity of the overall project plus and additional US\$ 2 million.

Development cost to be sourced from financial constitution at minimum interest.

Regards.

Adnan Annous.”

28. The respondent in turn transmitted that information to Pinnacle Projects by an email on 22nd August 2011 seeking revision of the proposal on the basis suggested by the appellant.

29. Thereafter the appellant’s interest in the ‘project’ appears to have waned and the respondent ultimately presented its contested bill of costs for taxation.

30. Given the course of dealings between the parties as demonstrated by the correspondence we have sampled, can it then be said that the respondent did not have the appellant’s authority to act for it? We do not think so. We agree entirely with the learned Judge when she stated in the impugned ruling that:

“From the email correspondence between the parties, the emails dated 2/8/2010 and 25/8/2010 from Albert Zakhem to Mr. Mereka, Mr. Zakhem acknowledges that he had gone through the proposal and further calls for financial proposal which he indicates was not provided in the said proposal. While in the later email he has indicated the extent of the intended project; from these it can implied (sic) that the client was agreeable to the process and the steps taken by the advocate in realizing the said project. It would then be superfluous for the client to claim that no instructions had been given or any retainer obtained. It is trite law that a retainer need not only be in writing but can be implied from the parties conduct.”

31. We are unable to fault the conclusion reached by the learned Judge. Immediately the respondent conceived of the project and sold the idea to the appellant, nothing would have been easier than for the appellant to inform the respondent that it was not interested in the project and to inform the respondent that it did not have the mandate or the finances to go ahead with developing the proposal for the project.

32. The finding by the Judge that the appellant is estopped from denying that it did instruct the respondent to act on its behalf is, in our view, well supported by the evidence.

33. The foregoing does not mean that the respondent is entitled to fees as claimed in the bill of costs. The nature and scope of instructions and the fees to which the respondent may be entitled to claim is a matter for the taxing master to determine.

24. The result is that this appeal is devoid of merit. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR