



**CM Advocates LLP v Cole (Sued as the administrator of the Estate of Josephine Eleanor Moikobu)
(Miscellaneous Application E241 of 2021) [2024] KEELC 4302 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E241 OF 2021**

JA MOGENI, J

MAY 27, 2024

BETWEEN

CM ADVOCATES LLP APPLICANT

AND

**ANDREW OMANDI COLE (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF JOSEPHINE ELEANOR MOIKOBU) RESPONDENT**

RULING

1. The Applicant filed a Reference vide a Chamber Summons application dated 28/11/2023 which was accompanied by a supporting affidavit sworn by Wilfred O Lusi where the Applicant sought the following orders:
 - a. That the Honorable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of the learned Taxing Master Judith Omollo dated and delivered on 16th November, 2023 striking out the bill costs dated 21st June, 2021
 - b. That in the alternative to prayer (a) above, the Honorable Court be pleased to remit the Bill of Costs dated 21st June, 2021 for re-assessment of the quantum of total fees and disbursements chargeable before the Taxing Master or a different Taxing Master with appropriate directions thereof
 - c. That costs of this Application be provided for.
2. The grounds upon which the reference is predicated, are that the taxing officer misdirected herself and arrived at a decision that was not only erroneous but unreasonable by finding that there was in existence a retainer agreement in respect of the prevailing suit from which the taxation proceedings arose.
3. That the taxing master relied on facts raised for the first time in submissions notwithstanding the fact that facts cannot be raised in submissions. In fact there was no replying affidavit filed by Respondent in



response to the bill of costs. The Taxing Master instead relied on facts placed in submissions whereas it is clear the applicant would not have an opportunity to respond.

4. That the Taxing Master relied on a draft agreement dated 12/07/2016 to hold that the client had a signed retainer yet there are two (2) administrators of the estate and only one had allegedly inserted the agreement constituted a retainer yet where there is more than one administrator they have to jointly sign any agreements relating to the estate thus the Taxing Master's findings being erroneous.
5. That the agreement had provided that acceptance was to be signified through signing and return to the Applicant and no evidence has been produced to show there was acceptance through signing by the Respondent nor the Applicant accepting the terms contained in the draft agreement.
6. Therefore, the Taxing Master misdirected herself by finding that draft agreement presented by the client constituted a retainer agreement contemplated under section 45 of the Advocates Act.
7. So with that finding the Taxing Master proceeded to erroneously strike out the bill of costs and find that the payments alleged to have been made by the respondent were in respect of the primary suit yet no evidence had been presented by the respondent.
8. The Taxing Master also found that the averments of the Respondent were undisputed yet these were facts raised for the first time in submissions were never served on applicant who only learnt of the issues raised by the respondent upon delivery of the ruling. Further that the Taxing Master misapplied the law and principles of taxation thereby arrived at a wrong decision. The applicant further faulted the taxing officer for holding that there was a valid agreement and retainer for legal.
9. The respondent in opposition to the application filed a replying affidavit sworn on 14/04/2024 by Andrew Omandi Cole as an administrator of the estate of Josephine Eleanor Moikobu and averred that on 12/07/2016 the advocate agreed to represent the respondent on a retainer agreement as is evidenced by annexure AOC-1 detailing the work to be undertaken. One of which included investigations, checking on the claims for outstanding rates of Kesh 21 million as at 30/06/2016 and 3% per annum interest on the property LR No. 1159/92 by Nairobi City County.
10. He averred that the retainer agreement at clause 5 enlisted the terms of the agreement and the amounts of money to be paid int total fees. That pursuant to schedule 5 of the Advocates (Remuneration) Order 2014 the parties agreed to charge a prorated fee of Kesh 2 million all inclusive of VAT and disbursement.
11. At the same time it was his averment that Clause 6 of the Retainer Agreement provided that the Bill of Costs was to be paid within one month of receipt of the request and that failure to honor the payment would lead to the advocates suspending the activity on the file. Further there would a charge of interest on the outstanding balance. This is evidenced by annexure AOC-2 which show true copies of the receipts of payment.
12. That between 2018 – 2021 the advocate despite receiving the Kshs. 5 million as evidenced through annexure AOC-5 never appraisal the respondent of the work which created a strain leading to the respondent/client seeking services of another advocate to conclude the work.
13. That through various emails and correspondence as evidenced via annexure AOC-3 the advocate/ applicant confirmed that the agreement was from 2016 and that it guided by the retainer agreement and from the emails the applicant sought for the pending fees.
14. Vide a letter dated 2/02/2021 the advocates terminated their services having collected the entire fees for the retainer agreement forcing the respondent to hire another advocate and this was communicated to the advocate through an email dated 25/07/2021 as evidenced by annexure AOC-4.



15. In an attempt to move away from the original agreement, the advocate filed numerous bills of costs all arising from initial arrangements as evidenced by annexure AOC-5 a, b, c, d and e. That on 21/06/2021 in contravention of section 45 of the Advocates drew a bill of costs claiming Kshs 3,586,182.20 as instructions fees and other services rendered.
16. That through the ruling dated 16/11/2023 annexure AOC-6 the Taxing Master estopped the advocate/applicant from seeking intervention by taxation of the Bill of Costs since there existed a retainer agreement. It is his contention that the Bill of Costs dated 21/06/2021 should be dismissed.
17. The Applicant filed submissions dated 5/05/2024 outlining several issues for determination including:
 - a. Whether the taxing master erred in relying on facts raised in submissions and further whether despite the Applicant's inadvertent failure to respond to the Respondent's submissions she was obligated to apply the law correctly;
 - b. Whether the taxing master erred in finding that there was a valid and binding retainer agreement between the parties;
 - c. Whether the taxing master erred in finding that the Respondent had settled the legal fees owed to the Applicant;
18. On the first issue the applicant submits that the Taxing Master erred because the draft agreement did not satisfy section 45 (1) of the *Advocates Act* for retainer and he relied on the Court of Appeal case of *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR. It was his submission that the Taxing Master erred by relying on facts that were pleaded in submissions by the respondent who did not plead these facts through a replying affidavit to allow the applicant to respond to them. On this he relied on among others the cases of *Robert Ngande Kabathi v Francis Kivuva Kitonde* [200]eKLR and the Court of Appeal case of *Avenue Car Hire & Another v Silpha Wanjiru Muthengu* Civil Appeal No 302 of 1997.
19. On the second issue he submitted that taxing master relied on an agreement that was neither signed by the client nor by the advocate and that it only had one signature of one administrator. Thus that there was no valid and binding remuneration agreement between the parties. He relied on the case of *Micheal Cole Lugalia (suing as administrator of the estate of Ezekiel Majani Lugalia) vs Jonathan Ligure Ayodi* [2016]eKLR
20. He thus submitted the said administrators never signed and returned the agreement nor the respondent, then that does not constitute agreement for remuneration. On the 3rd issue the applicant submitted that the payment documents produced by the Respondent did not show that the payments related to the matter being handled by the respondent and applicant relating to the issues at hand. He further submitted that the respondent did not place evidence before the court to attest what the payments were meant for. He relied on the cases of *Amuga & Company vs Kisumu Concrete Products Limited* [2021] eKLR
21. Ultimately the applicant submitted that the reference was merited since there was an error of principle by the decision of the Taxing Master and he relied on the case of *Del Monte Kenya Limited v Kenya National Chamber of Commerce and Industry (KNCCI) Murang's Chapter & 2 Others* [2021] eKLR
22. The respondent did not seem to have filed any submissions.
23. I have carefully considered the Application together with the supporting affidavit, the replying affidavit (although the applicant had stated that the respondent had not filed a replying affidavit), plus the submissions made by the learned counsel. I did see the replying affidavit of the respondent and I have considered it in this ruling.



24. In my view, there is only one issue that this Honourable court is called upon to decide and that is, whether a retainer agreement existed between the firm of CM Advocates LLP and the Respondent herein.
25. The applicant has called upon this court to vacate and set aside in its entirety the Ruling and reasoning of the learned Taxing Master Judith Omollo dated and delivered on 16th November, 2023 striking out the bill costs dated 21st June, 2021. On the basis that the taxing master misdirected herself and arrived at a decision that was not only erroneous but unreasonable by finding that there was in existence a retainer agreement in respect of the prevailing suit from which the taxation proceedings arose.
26. The respondents on their part, argued that there was agreement for fees between them and the applicant and therefore, the matter did fall under section 45 of the *Act*. It was their case that there being retainer agreement for fees, the taxing officer was perfectly in order to estopp the applicant from seeking intervention by taxation of the Bill of Costs.
27. Section 45 broadly provides:
- (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
 - (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
 - (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;
 - (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof; and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.
28. An agreement under section 45 is not absolute and conclusive. Subsection (2) grants a client a right to challenge such an agreement if it is harsh and unconscionable, exorbitant or unreasonable. It states:
- (2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years’ standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—
 - a. that the agreement be upheld; or
 - b. that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or
 - c. that the agreement be set aside; or
 - d. that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.
29. From the depositions in the applicant’s affidavit and submissions there is disagreement on whether or not there was a legal fees agreement. Whereas the applicant argued that there was no agreement,



the respondent maintained that there was one. The respondent from the replying affidavit sworn on 14/04/2024 argued that the agreement for fees could be deduced from letter of engagement dated 12/07/2016 exchanged between the parties or their conduct.

30. The respondent attached several payments made to the applicants following this letter of engagement which has 16 paragraphs on termination and notices. Annexures AOC – 2a to 2e are receipts showing the payments made towards the agreed retainer fees between the respondent and the applicant. These payments were not denied by the applicant when this matter was heard by the Taxing Master and therefore not having been an issue then it cannot be introduced as an issue through the reference.
31. In considering what a retainer is and what it entails and in so doing, I wish to borrow the words of Justice Gikonyo in the case of *Njeru Nyaga & Co. Advocates v George Ngure Kariuki*, High Court of Kenya at Nairobi (Commercial & Admiralty Division) Case No. 723 of 2012 where the learned Judge said: -

“This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the *Advocates Act*, probably because of the special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the *Advocates Act*, the innumerable previous courts’ rendition on the phraseology...where the retainer is not disputed...provide the content of the term “retainer”. “Retainer” in the wider sense entails the instructions by a client or a client’s authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the Black’s Law Dictionary, 9th Edition. The appropriate sense of the word “retainer” as used in the *Advocates Act* and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of NBI HC Misc App No 698 Of 2004 A.n. Ndambiri & Co Advocates v Mwea Rice Growers Multipurpose Co-op Limited, And Owino Okeyo & Co Advocates v Fuelex Kenya Limited [2005] eKLR, respectively. Let me quote what Waweru J said in the former case that;

My understanding of the term “retainer” as used in section 51(2) aforesaid [read...of the *Advocates Act*] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that “retainer” means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer.”

32. The term “retainer” was also considered in the case of *Hezekia Ogao Abuya T/a Abuya & Co. Advocates Vs Kunguru Food Complex Limited Nairobi*, Misc. Appl. No. 400/2001 where an advocate who had been instructed by a client in a conveyance matter had his Advocate/Client Bill of Costs taxed and a judgment under Section 51(2) entered in his favour, in an Application by the client to set aside the said judgment inter-alia, on the ground that there was no retainer, Ringera J (as he then was) delivered himself at page 6 therefor: -

“in this case, such a defence is predicated on the client’s understanding of the word “retainer” in that regard, I note that in Black’s Law Dictionary the word retainer is explained as follows:

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“In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This Act of employment is called the retainer. The retainer



agreement between the client and the Attorney sets forth the nature of services to be performed, costs expense and related matters.”

33. In *Stroud’s Judicial Dictionary of words and phrases*, 1986, Vol 4 at page 2283 it is posited that to retain is “is to keep in pay” “to hire”. And in words and phrases legally defined in 2nd Edition Vol 4 by J. B. Sainders (ed) it is posited that: -

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client: - consequently, the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment.”

34. Then in the *Oxford Advanced Learners Dictionary of Current English*, the word retainer is defined in one usage as to secure the services of somebody especially a lawyer, by paying for them in advance.

35. An Advocate duly instructed is retained and where there is no dispute that an Advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute.

“Justice Njagi, J in the case of Nyakundi & Co. Advocates gave the definition and form of retainer from Halsbury’s Law of England, 4th Edition, Re issue at paragraph 99, page 83 where it stated: -

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client. Thus the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment. Njagi J pointed out that in the same work, it is further explained that a retainer need not be in writing unless, under the general law of contract, the terms of the retainer or the disability of a party, to it make writing requisite. It is then further stated, the Judge added at paragraph 103 “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.”

36. In the case before me, it is the Applicant’s contention that there was no retainer between the Respondent and the firm of CM LLP Advocates that there is no valid retainer agreement signed

37. In his submissions, Counsel for the Applicant submitted that the retainer or agreement referred to by the respondent was signed by only one administrator. The respondent’s replying affidavit affirms at paragraph 9 that the clients had accepted the terms of engagement and based on the acceptance they made payments as evidenced documents in annexure AOC-2. Also annexure AOC-3 bears copies of correspondence between 20/08/2020 to 23/10/2020 affirm this position.

38. On the issue of the retainer, I have said enough in this judgment to explain what a retainer is. The cases cited hereinbefore have brought out clearly, the difference between a “retainer” and a “retainer agreement”.

39. In this case, the Respondent avers that there was a retainer between it and the firm of CM Advocates LLP. I think I have done enough to show that a retainer does not have to be in writing but the same can be inferred from the conduct of the parties or the circumstances of the case. In the case before the court, the Respondent has exhibited enough material before the court to show that an Advocate/Client relationship existed between it and the Applicant

40. The Advocate/Client relationship between the Applicant and the Respondent was terminated vide a letter dated 2/02/2021 before concluding although they had collected the entire fees as per the retainer agreement. Annexure AOC-4 which was produced is a copy of the email communication



dated 25/07/2021 to the applicant by the respondent communicating the decision of the respondent to hire another advocate to complete the work.

41. In my view, this then means that upto the month of July, 2021, there was a retainer agreement on fees payable to CM Advocates LLP. It is, therefore, the finding by this Honourable Court that there was a retainer between the Applicant and the Respondent and the ruling by the Taxing Master of 16/11/2023 was well founded

42. I therefore find no merit in the Application dated 28/11/2023 and the same is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MAY 2024.

MOGENI J

JUDGE

In the virtual presence of: -

Mr. Oriwa for Respondent

Ms Wangio holding brief for Ms. Otunga for Applicant

Caroline Sagina: Court Assistant

MOGENI J

JUDGE

