IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 75 OF 2015

BETWEEN

OMULELE & TOLLO ADVOCATES …………………………………………… APPELLANT

AND

MOUNT HOLDINGS LIMITED ……………………..……………………..……RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Mombasa (Omollo, J.) dated 16th September, 2015

in

Misc. C. Appl. No. 2 of 2015)

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JUDGMENT OF THE COURT

By an unwritten agreement between **Mjad Investments Limited** *(the third party)* and a law firm then known as **Omulele & Company Advocates** *(the appellant)* the former engaged the latter as its lawyers to defend Mombasa HCCC No 158 of 2008. In addition to these instructions, the third party also engaged the appellant's services in two other suits, namely **Mombasa HCCC No. 89 of 2008** and **Mombasa HCCC No. 55 of 2008**, which involved the third party's two other subsidiaries, namely Great Lakes Ports Limited and Delgreen Limited respectively. The third party is the respondent's holding company. It was orally agreed that the third party would pay a fixed monthly sum to the appellant as the legal fees for each of the matters aforesaid. It is common ground that these monthly sums were initially paid and services duly rendered.

Meanwhile, in the course of its operations, the appellant brought in a new partner and henceforth came to be known as Omulele and Tollo Advocates. The appellant is nonetheless said to have continued serving the respondents in the same manner as before. Thereafter, but prior to the determination of the aforesaid suits, the relationship between the appellant and the third party soured, leading to termination of the three oral agreements. According to the appellant, this was attributable to the third party's failure to remit its monthly dues as earlier agreed. In a bid to realize the payment of its fees, the appellant moved the High Court through three separate miscellaneous applications in which three advocates/client bills of costs dated 25th September, 2014 were filed. The taxation of these bills was contested by the respective respondents, who took out motions on notice dated 12th February, 2015 each seeking *inter alia* that;

“a) ……..spent.

b) There be a stay of taxation of the applicant’s bill of costs scheduled for taxation on 13th February, 2015 until further orders of this Honourable court.

c) The Honourable Judge do give directions and determine whether retainer existed between the firm of Omulele & Tollo Advocates and make appropriate orders.

d) The Honourable Judge do dismiss the application for taxation filed by Omulele & Tollo Advocates.”

It was the respondents’ contention in those applications that the appellant had no *locus standi* to tax the bills of costs, since the retainer (if at all), was between the third party and Omulele and company advocates and not with the appellant. The appellant as presently constituted was therefore a stranger to the agreement.

The respective applications were heard together, and rulings thereof delivered on 16th September, 2015. In all three, **Omollo J.,** found that a valid retainer existed between the parties and that notwithstanding the addition of a new partner and subsequent change of the firm name, the appellant was at all material times seized of instructions to act for the three companies. This conclusion is said to have been inferred from the conduct of the parties. In particular, that since the respondent had even paid monthly legal fees in respect of the retainer to the appellant, they could not now turn around and disown their agreement with the appellant. However, that notwithstanding, the court also held that in view of those retainer payments, the appellant was now divested of the right to tax their bills of cost. Accordingly, the court imposed a bar upon appellant from taxing the said bills after it concluded that there was a retainer agreement.

Unhappy with that bar on taxation, the appellant preferred three appeals before this Court on each of the respective rulings; namely **Civil Appeal No. 74 of 2015: Omulele & Tollo Advocates v. Great Lakes Ports Limited**; **Civil Appeal No 75 of 2015: Omulele & Tollo Advocates v. Mountain Holdings Limited**; and **Civil Appeal No. 76 of 2015: Omulele & Tollo Advocates v. Delgreen Limited**. At the hearing thereof, all were consolidated, with **Civil Appeal No. 75 of 2015** being the running file.

Basically, in the appeals, the appellant contends that the ruling of the High Court went against the spirit of **section 45** of the **Advocates Act**. It is the appellant’s contention that a retainer is distinct from a retainer agreement and that the Judge erred in failing to distinguish the two concepts. According to the appellant, what was in place between the parties was a retainer and not a retainer agreement. The appellant thus faults the Judge for finding that an unwritten agreement can be deemed to be a retainer agreement, enough to limit the fees payable between the appellant and the respondent. The appellant further contends that the Judge erred in interpreting *‘retainer’* to mean *‘agreement’* instead of instruction, employment, appointment or engagement of a lawyer, thereby failing to appreciate the distinction between a retainer agreement and a retainer relationship. The Judge is also faulted for assuming that the monthly fee notes raised by the appellant constituted sufficient evidence of a retainer agreement, despite a glaring lack of additional evidence to support such a finding; and lastly, that the Judge wrongly and prematurely determined issues that could only be determined at taxation, to wit, whether the fees paid so far to the appellant were sufficient.

To further shed light on these contestations, **Mr. Tollo**, learned Counsel for the appellant orally submitted that the trial court mistook the meaning of ‘retainer’ to have the same meaning as a *‘retainer agreement’* as envisaged by **section 45** of the **Advocates Act.** To the contrary he said, *‘a retainer’* and a *‘retainer agreement’* have distinct definitions. According to learned counsel, a retainer means the instruction, employment or engagement of an advocate by his client. On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including the fees payable. Therefore, it was submitted, while a retainer denotes a *‘relationship’* between the parties, the retainer agreement is merely the physical written document or manifestation of such a relationship. In Mr. Tollo’s view, the issue before court was whether there was a retainer between the

parties, not whether there was a retainer agreement. Instead of determining whether there was a retainer, he contended, the trial court addressed itself to whether there was a retainer agreement, an unpleaded issue, resulting in a wholly erroneous conclusion by the court. It was argued that while a retainer agreement must be in writing, a retainer per se need not be in writing and that it can be oral or even inferred from conduct of the parties. For the above propositions, the appellant relied on **The Black's Law Dictionary, 9th Edition; Halsbury's Laws of England, 5th Edition, 2009 vol 66; Njeru Nyaga & Company Advocates v. John Ngure Kariuki [2014] eKLR; IEBC & Another v. Stephen Mutinda Mule & 3 others [2014] eKLR** and **section 45 of the Advocates Act Cap 16 Laws of Kenya.**

On her part, **Ms. Wafula**, learned counsel for the respondents, asserted that contrary to the appellant's contention, there existed a retainer agreement in view of the invoices produced in court, detailing monthly payments of fees to the appellant. That a retainer and a retainer agreement meant one and the same thing, that is, a contract like any other and as such, where such an agreement is seen to exist and the advocate is found to have received remuneration pursuant to that contract, he is barred from taxing his bill of costs thereon. That failure by the advocate to reduce the retainer agreement into writing should not be visited on the client as it is the Advocate's duty under **section 45** of the Act to ensure that the retainer is reduced into writing. That while a retainer agreement puts a ceiling on the fees payable by the client, a retainer does not. Lastly, Counsel submitted that the aforecited authorities relied upon by the appellant are all English, and that unlike the situation in England where solicitors instruct barristers to attend court, such is not the situation here.

The resolution of this dispute appears to us to turn on the definition of two concepts; a retainer and a retainer agreement and the rights of the parties thereto.

According to the **Black's Law dictionary,** (supra) a retainer is defined as:

> "1. A client's authorization for a lawyer to act in a case.
>
> 2. 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.
>
> 3. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.
>
> 4. An advance payment of fees for work that the lawyer will perform in the future- also termed retaining fee. "

In **Halsbury's Laws of England,** (supra) **at page 13 para 763*;*** the concept is also defined thus:-

> **"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……"**

From the above definition, *'retainer'* covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. 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 (see. **Halsbury's Laws of England,** (supra) **at page 14 para 765).**

On the other hand, the term *'retainer agreement'* is anchored in the Advocates Act and in particular **section 45** thereof. It provides *inter alia*:

> **45. Agreements with respect to remuneration**
>
> **"(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) ………………

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**."**

An agreement entered into pursuant to the above section is what can be termed as a *'retainer agreement.'* As the section indicates, under such agreement, the parties *'fix'* or put a cap on the advocate's instruction fee, meaning that both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent. It is therefore erroneous as submitted by counsel for the respondent that retainer and retainer agreement mean one and the same thing. The learned Judge also seem to have fallen in the same error in equating a retainer with a retainer agreement when she held that there was a retainer agreement in this case in line with **Section 45** of the Act. We would also agree with counsel for the appellant that what was before her for determination was whether there was a retainer between the parties and not whether there was a retainer agreement. In introducing the issue of retainer agreement in the mix, the Judge chartered an unpleaded path which was an error.

As with any other agreement, the onus of proving the existence of the retainer agreement lies with he that wishes to enforce it. This is in line with the ordinary rules of contracts and evidence. *(*See **Kenya National Capital Corporation Limited v. Albert Mario Cordeiro & Another [2014] eKLR** and **Section 107** of the **Evidence Act Cap 80**). Under the proviso to **Section 45 (5)** of the Act**,** an advocate who is a party to a retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. Infact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee. Consequently, it behooves such advocate to ensure that the retainer agreement once made, is reduced into writing.

The same onus of proof applies to a retainer. As said earlier, where a client disowns an oral retainer or even the existence of a retainer relationship, it is for the advocate who claims under that retainer to prove to court that such a relationship indeed existed, otherwise the court will deem that he acted without instructions.

In this case, it is common ground that was no written but oral agreement regarding the retention and payment of the appellant's fees by the respondent. There was therefore no retainer agreement as envisioned by **section 45** of the **Advocates Act** but simply a retainer. It is also common ground that the appellant had been duly instructed to act for the respondents and in so acting, used to be paid monthly fees as remuneration, as evidenced by the invoices adduced in evidence detailing those monthly payments. The trial court appreciated as much and went on to hold and rightly so in our view that despite the change of firm name, those instructions continued to subsist up until when the respondents changed advocates. The monthly payments were in pursuit of the retainer and not retainer agreement. The Judge therefore erred in holding that the monthly payments evidenced by invoices and payments thereof created a retainer agreement.

In view of the foregoing analysis, the oral instructions to the appellant, merely created a retainer relationship and not a retainer agreement. For the retainer agreement to exist, the terms thereof must have been reduced into writing, which was not the case here. It was the duty of the respondent to prove the

existence of the retainer agreements since they were the ones making the claim. They did not discharge that burden as required. That then left their relation as one governed by a retainer.

Having established that the relationship between the parties was based on a retainer and not a retainer agreement, what remedies are available to the parties should the retainer relationship break down?

According to **Halsbury's Laws of England,** (supra) **at page 14 para 764,** where an oral retainer exists or where a retainer relationship is implied, the relationship thus created is a fiduciary one with the advocate being the agent and the client his principal. As a result, the parties' rights and obligations fall within the realm of the Law of agency.

Section 44 of the Advocates Act mandates the Chief Justice to make rules on remuneration of advocates. These rules gain automatic application whenever an advocate is engaged by an unwritten agreement with his client, namely a retainer relationship. Subject to the fees fixed by the Chief Justice, the advocate then compiles his advocate/client bill of costs and presents the same for taxation by the taxing master. In this case, the cases for which the appellant was retained pertained to cases filed in 2008. As such, the appellant was well within its rights to take steps to realize its remuneration under the Advocates (Remuneration) (Amendment) Order, 2006.

Lastly, we did not find any of the authorities cited helpful as they did not address the central issue, the difference between a retainer and a retainer agreement. In this case, there is no doubt at all that on the evidence on record, the relationship that governed the appellant and the respondents was a retainer and in the event of a disagreement, the appellant was entitled to tax its bill of costs.

To that extent the appeal is allowed with costs. The ruling and order of **Omollo J**. dated 16th September, 2015 is set aside. *In lieu* thereof the applications dated 12th February, 2015 filed in the High Court are dismissed with costs to the appellant as well.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…..…………..………………

JUDGE OF APPEAL

K. M'INOTI

……………..…………..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR