



Njuguna Kahari & Kiai Advocates v Gacanga (Environment and Land Miscellaneous Application E040 of 2023) [2024] KEELC 3868 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3868 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E040 OF 2023
MD MWANGI, J
MAY 16, 2024

BETWEEN
NJUGUNA KAHARI & KIAI ADVOCATES PLAINTIFF
AND
WILSON GACANGA DEFENDANT

(On the issue whether there was a retainer between the Advocates and the client)

RULING

Background

1. On 12th January, 2024, the taxing officer, Hon. Judith Omollo delivered a ruling in this matter in which she ruled that as the taxing officer, she lacked the jurisdiction to determine the issue of retainer which had been raised by the Client/Respondent by way of a Preliminary Objection. she therefore ordered that this matter be placed before this court for determination of the Preliminary Objection in this matter as well as in Misc. E039 of 2023.
2. When the parties appeared before me on 12th March, 2024, they agreed to rely on the submissions they had already filed.
3. The Advocate/Applicant filed the Bill of Costs dated 17th August, 2023 claiming a total of Kshs 4,717,615.60 (inclusive of VAT) against the Client/Respondent. The Bill allegedly arose out of the Advocates' representation of the Client in a civil suit before the Environment and Land Court being Nairobi ELCC No. E087 of 2022 (*EACC v Paul Mbathia Githaiga & 5 others*).
4. The Advocate simply filed the Bill of costs with no supporting documents whatsoever.
5. Upon being served with the Taxation Notice, the Client/Respondent responded by way of a Preliminary Objection dated 17th November, 2023 raising 4 grounds namely:



- a. The purported Advocate/Client Bill of costs is incompetent and ought to be struck out because the firm of Njuguna Kahari & Kiai Advocates was never instructed by the Respondent to act for him in ELC Case No. E087 of 2022.
- b. There has to be a retainer between an Advocate and a client to give rise to costs payable.
- c. An Advocate is only entitled to costs or legal fees arising out of a litigation when he or she has discharged the burden of the retainer.
- d. Even where there is a retainer between an Advocate and a client, which is denied in this case, an Advocate cannot base his or her instruction fees on the purported value of the suit property, where there is no claim in the relevant civil suit for the recovery of the said property, or the value thereof from his purported client. No substantive orders are sought against the Respondent in ELC Case No. E087 of 2022.

Submissions by the Parties

6. The Advocate/Applicant filed the submissions dated 8th December 2023. The Applicant submitted that the Respondent's Preliminary Objection does not meet the threshold set in the case of *Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd* (1969) EA 696. The issues raised are not pure points of law that should be determined by way of a Preliminary Objection.
7. The Advocate/Applicant further submits that a retainer need not be in writing. The Applicant relied on the cases of *Ochieng, Onyango, Kibet & Ohaga Advocates v Akiba Bank Ltd* [2007] eKLR & *Omulele & Tollo Advocates v Magnum Properties Ltd* [2016] eKLR, to support the point. They insisted that they discharged to the Respondent their duties to the Respondent by defending him and are therefore entitled to their costs.
8. The Respondent's submissions on the other hand are dated 13th December, 2023. The Respondent submits that the Question whether or not there was a retainer between an Advocate and his/her Client is an issue that goes to the jurisdiction of the Taxing Maser and as such, must be determined as a Preliminary issue.
9. The Respondent refers to the case of *Wilfred N. Konosi & Co. Advocates v Flamco Ltd* [2017] eKLR, where the Court of Appeal emphasized that the link between the Advocate and his/her Client is the Advocate/Client relationship which springs from instructions by the Client to the Advocate.
10. The Respondent too cited the cases of *Mugambi & Co. Advocates v John Okal Ogwayo & another* [2013] eKLR and *Masore Nyang'au & Co. Advocates v Kensalt Ltd* (2019) eKLR, in support of his argument that the issue of retainer must be determined as a preliminary issue.
11. The Respondent pointed out that the decision in *Omulele & Tollo Advocates v Maguam Properties Ltd* [2016] eKLR, is not relevant and does not relate to the facts in this case. In the Omulele case, the Advocates' law firm placed enough material before the Court to demonstrate that an Advocate/Client relationship existed between it and the Respondent even though there was no retainer in writing. In this case, the Applicant has placed nothing before this Court. Further, in the Omulele case, the Respondent had expressly admitted retaining the firm of Omulele & Co. Advocates. The dispute arose after the firm changed its name.
12. The Respondent submitted that nothing would have been easier than for the Applicant to produce, for instance, correspondence between itself and the client to demonstrate that it represented the Client as alleged or even pleadings prepared and filed on the instructions of the purported client.



13. The Respondent asserts that the consequences of the Applicant's failure to place before the Court any material evidencing the purported retainer or from which a retainer could be inferred, is that the Court will treat the Advocate as having acted without authority from the client. The Respondent cites the decisions in the cases of *Mereka & Co. Advocates v Zakhem Construction (Kenya)* [2014] eKLR and *Ochieng, Onyango, Kibet & Ohaga Advocates v Akiba Bank Ltd* [2007] eKLR .
14. It is the Respondent's position that the Applicant cannot seek to prove the existence of a retainer through its submissions. Submissions cannot take the place of evidence.
15. The 4th point in the Respondent's Preliminary Objection touches on the actual taxation. This Court will restrict itself to the issue whether or not there was a retainer between the Applicant and the Respondent/Client.

Determination:

16. It is obvious that the jurisdiction of the Taxing Master to entertain & consider an Advocate/Client Bill of Costs is premised on the existence of an Advocate - Client relationship. In the case of *Wilfred N. Konosi T/A Konosi & Co. Advocates v Flamco Ltd*, [2017] eKLR, the Court of Appeal was explicit that:

“The nexus between the Advocate and his/her client is the Advocate/Client relationship which springs from instructions by the Client to the Advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill”.
17. The issue whether or not there was a retainer must therefore be determined first before the Taxing Officer embarks on taxing the bill.
18. In the case of *Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court of Appeal held that:

“...a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. a Court of Law lays down its tools in respect of the matter, the moment it holds the opinion that it is without jurisdiction.”
19. The issue whether there was a retainer between the Advocate and the Respondent in this matter has been properly raised as a Preliminary Objection. Indeed, in the case *Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd* (1969) EA 696, one of the examples given on a proper preliminary objection is an objection to the jurisdiction of a court.
20. Based on the holding in the Owners of Motor Vessel 'Lilian S' case, I am obliged to decide on the issue, on the material before me.
21. In the case of *Omulele & Tollo Advocates v Magnum Properties Ltd* [2016] eKLR, Njuguna J, cited with approval the holding by Gikonyo J, in the case of *Njeru Nyaga & Co. Advocates v George Ngure Kariuki*, High Court (Commercial & Admiralty Division) Case No. 723 of 2021, where the learned judge defined a retainer in the following words:

“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”.

22. I agree with the definition by Gikonyo J. So, the Question before me for determination, is simply whether the Applicant herein had instructions to act for the Respondent in ELCC E087 of 2022.
23. Rule 13 of the *Advocates (Remuneration) Order* makes it mandatory that an Advocate/Client Bill of Costs be filed in a Miscellaneous Cause. It is not to be filed in the same suit where the Advocate rendered his/her services on behalf of the Client.
24. Consequently, and logically so, the Advocate/Client Bill of Costs should be accompanied by supporting documents especially where there is no written agreement between the Advocate and his/her Client. Otherwise, how is the Court supposed to infer the retainer? The Court has no responsibility to assist any party in a case. It is the duty of the litigants to place material in support of their case before the court. The Court does not have the responsibility or even the mandate to fact find for any of the parties in a case. That is the direction the Applicant sought to lead the court to by requesting it to call for the original file as it considered the preliminary objection by the Respondent herein.
25. As I noted at the introduction of this ruling, the Advocate/Applicant in this case simply filed the Bill of Costs with no supporting documents. I wonder how the Applicant expected the Taxing Officer to tax the Bill of Costs without supporting documents. Even after the Respondent raised the Preliminary Objection, the Applicant did not endeavour to place any material before the Court to support its position on the existence of an Advocate-Client relationship between it and the Respondent.
26. In the case of *Mereka & Co. Advocates v Zakhem Construction (Kenya)* [2014] eKLR, as well as in the case of *Ochieng Onyango, Kibet & Ohaga Advocates, v Akiba Bank Ltd* [2007] eKLR, the Courts held that:

“A retainer need not be written, it can be oral and can even be inferred from the conduct of 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.” (Emphasis mine.)
27. The burden of proof must be on the Advocate to establish and demonstrate that there was a retainer.
28. Relying on the material before me, there is no evidence of a retainer. In other words, there is no evidence that the Advocate/Applicant had instructions to act for the Respondent in ELCC E087 of 2022. Consequently, the Taxing Officer is bereft of jurisdiction to tax the Advocate –Client Bill of costs presented by the Advocate/Applicant in this matter.
29. The only option then for this Court is to strike out the Advocates-Client Bill of costs dated 17th August, 2023, which I hereby do with costs to the Respondent.
30. This ruling will apply in Misc. Application No. E039 of 2023 as well. For avoidance of any doubt, the Bill of Costs in Misc. Application No. E039 of 2023 is also struck out with costs to the Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE



In the virtual presence of:

Ms. Kinuthia h/b for Mrs. Wambugu for the Advocate/Applicant

No appearance for the Respondent

Yvette: Court Assistant.

M.D. MWANGI

JUDGE

