



**Kenindia Assurance Co. Limited v Raymond Olendo t/a Olendo, Orare  
& Samba Co. Advocates (Employment and Labour Relations Cause  
E019 of 2022) [2023] KEELRC 923 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 923 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E019 OF 2022  
CN BAARI, J  
APRIL 20, 2023**

**BETWEEN**

**KENINDIA ASSURANCE CO. LIMITED ..... CLIENT**

**AND**

**RAYMOND OLENDO T/A OLENDO, ORARE & SAMBA CO.  
ADVOCATES ..... ADVOCATE**

**RULING**

1. The ruling herein relates to a Chamber Summons application dated December 19, 2022, brought pursuant to Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* and Paragraph 11 (2) of the *Advocates Remuneration (Amendment) Order*. The Applicant seeks orders THAT:
  - i. The decision of the Taxing Officer dated October 11, 2022 in respect of the Advocate-Client bill of costs dated January 20, 2022, and filed on January 25, 2022, be set aside.
  - ii. The resultant Certificate of Costs emanating from the decision of the Taxing Officer dated October 11, 2022, be recalled and annulled.
  - iii. The Advocate-Client bill of costs dated January 20, 2022, be remitted back to another Taxing Officer and the same be taxed afresh and/or the Court be pleased to tax a fresh the items objected to, and to render a decision thereon.
  - iv. The Costs of this application be provided for and in any event the same, if at all, be fixed and determined by this Court.
2. The application is supported by the grounds on the face of it and the affidavit of Josephine Onyambu. The crux of the application is the issue of retainer, with the Applicant disputing ever retaining the



services of the Advocates/Respondent herein in Butali Pmcc No 70 Of 2014, From Which Fees In Respect Of The Appeal Lodged Therefrom In Kisumu Elrca No 39 OF 2019, arose.

3. The Applicant's position is that instructions to defend the suit before the subordinate court were issued to the Firm of JB Shilenji and Co Advocates, and that no nexus has been established between this Firm and the Advocate/Respondent, as to entitle the Respondent herein to obtain professional fees for and on behalf of the JB Shilenji and Co Advocates.
4. The Applicant further avers that by proceeding to render her decision when there exists a dispute as to the retainer, the Taxing Officer committed an error in law and fact. It is the Applicant's further contention that the Taxing Officer erred in failing to give reasons for her decision.
5. The Advocate/Respondent opposed the application vide a replying affidavit sworn by Raymond Olendo on January 10, 2022. The Respondent's assertion is that the Applicant instructed him through the insured to take up the matter in a tripartite agreement premised on the insurer and insured contractual relationship.
6. The Respondent further avers that under the agreement, the Applicant agreed that the Respondent would defend all the insured's legal interests where the Applicant is the insurer, and that the Applicant would pay both the legal fees and the decretal sum payable to a successful plaintiff.
7. The Respondent avers that the Applicant instructed him to appeal and seek a stay in BUTALI PMCC NO 70 OF 2014, in an effort to get more time to engage the Plaintiff for a settlement. The Respondent further avers that upon reaching an agreement with the Plaintiff, the Applicant herein proceeded to settle the decretal award and costs therein.
8. The Respondent avers that the Applicant showed no interest in pursuing the appeal which he proceeded to withdraw with the concurrence of the Plaintiff's Advocates. It is his argument that he had clear, unequivocal and apparent instructions from the Applicant to act for and on their behalf.
9. Parties filed submissions on the application and which have been duly considered.

### **Determination**

10. I have carefully considered the application, grounds and affidavit in support, together with the replying affidavit in opposition, and the rival submissions. I have also carefully perused the Ruling delivered by the Hon Taxing Master on October 11, 2022. The following issues arise for determination: -
  - i. Whether there was Retainer and/or Retainer Agreement between the parties?
  - ii. Whether sufficient grounds have been advanced to warrant the setting aside of the Taxation of October 11, 2022.

### **Whether there was Retainer and/or Retainer Agreement between the parties?**

11. Section 45 of the *Advocates Act*, provides thus on retainer: -
  - ' 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 [Civil or Criminal Court] make an agreement fixing the amount of the advocate's remuneration in respect thereof;
    - (b)



(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.'

12. In *Mugambi & Co Advocates vs John Okal Ogwayo & Ruth Rebecca Auma Misc Application 447 of 2010*, The Court held:

' That the jurisdiction of a Taxing Officer is provided for in the Advocates (Remuneration) Order, and that jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration Order where there is no dispute as to retainer, or where costs have been duly awarded by an order of the Court.

**Where the very fundamental issue is whether or not an advocate was duly retained and thus entitled to any costs arises before a Taxing Officer, that issue ought first to be determined by the Court.'**

13. It is therefore the power of this court to determine whether the Respondent herein was retained to act for and on behalf of the Applicant.

14. In *Omulele & Tollo Advocates vs Mount Holdings Ltd CA 75 of 2015*, the Court defined retainer in the following words: -

' 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 fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship.'

15. The Respondent contends that there was a tripartite agreement between his Firm, the insured and the insurer/Applicant herein, that he will act in the legal interest of the insured and that the insurer would pay his legal fees. The issue is whether this agreement amounts to a retainer. In *Ohaga and Akiba Bank (2008) 1 EA*, the Court held thus on retainer: -

' It is the position of the law that if there is no evidence of a retainer except the oral statements of the Advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission the burden of proof to establish the retainer is always on the shoulders of the advocates.'

16. To begin with, the tripartite agreement said to form the basis of the existence of a retainer was not part of the documents annexed to the Respondent's replying affidavit. It is also not clear whether this agreement was oral or written.

17. I have also not found in the court record, anything indicating that the Respondent was given instructions to lodge the appeal subject of the bill of costs giving rise to his reference.

18. Further, the letters updating the Applicant of the progress of the matter subject herein, though addressed to the Applicant, were received by West Kenya Sugar Company-the insured. Nothing indicates that the letters was received by the Applicant and even if they were, they are not in my view, prove of there being a retainer between the parties herein.



19. The Respondent without a doubt acted for the insured (West Kenya Sugar Company) and the insured was under the cover of the Applicant. I have however not found a direct link between the Respondent and the Applicant herein. In other words, the Respondent has not discharged the burden of proof to establish retainer with the Applicant, and neither has he proved that an Advocate/Client relationship existed between him and the Applicant.
20. In *Simon Kitalei Kachapin & 2 Others v Joel P Arumonyang & Another (Civil Appeal No 64 of 2016) (2021) KECA 36*, the Court of Appeal held that a decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.
21. I find and hold that the Taxing Officer acted without authority in taxing a bill of costs when retainer is disputed. Consequently, I make orders as follows: -
  - a. That the decision of the Taxing Officer dated October 11, 2022 in respect of the Advocate-Client bill of costs dated January 20, 2022, be and is hereby set aside.
  - b. That the resultant Certificate of Costs be and is hereby annulled.
  - c. I make no orders as to costs.
22. Orders accordingly.

**SIGNED, DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Client/Applicant

N/A for the Advocate/Respondent

Ms. Christine Omolo - Court Assistant

