



Kenindia Assurance Co Limited v Olendo t/a Olendo, Orare & Samba LLP (Miscellaneous Civil Application E016 of 2022) [2023] KEELRC 2638 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2638 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E016 OF 2022
CN BAARI, J
OCTOBER 26, 2023**

BETWEEN

KENINDIA ASSURANCE CO LIMITED CLIENT

AND

RAYMOND OLENDO T/A OLENDO, ORARE & SAMBA LLP ADVOCATE

RULING

1. The ruling herein, relates to a chamber summons application dated May 15, 2023, 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/client seeks orders That:
 - i. The decision of the Taxing Officer dated 26th April, 2023, in respect of the Advocate-Client bill of costs dated 20th January, 2022, and filed on 25th January, 2022, be set aside.
 - ii. The resultant Certificate of Costs emanating from the decision of the Taxing Officer dated 11th October, 2022, be recalled and annulled.
 - iii. The Advocate-Client bill of costs dated 20th January, 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 SRMCC no. 89 of 2014, from which fees in respect of the Appeal lodged therefrom, in Kisumu ELRCA no. 10 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 J.B 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 J.B Shilenji and Co. Advocates.
4. The Applicant further avers that by proceeding to render her decision when there exists a dispute as to 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 did not oppose the application.
6. The Applicant filed submissions. The Respondent did not.

Determination

7. I have carefully considered the application, grounds and affidavit in support and the submissions by the Applicant. I have also carefully perused the Ruling delivered by the Hon. Taxing Master on 26th April, 2023. 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 decision of the Taxing officer rendered on 26th April, 2023

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

8. 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.”

9. In *Mugambi & Co Advocates v 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.”



10. 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.

11. In *Omulele & Tollo Advocates v Mount Holdings Ltd* C.A.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.....”

12. Further, the court in *Obaga and Akiba Bank* [2008] 1 E.A, 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.”

13. I have 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 this reference.

14. 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 it proved that an Advocate/Client relationship existed between it and the Applicant.

15. 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.

16. I find and hold that the Taxing Officer acted without authority in taxing a bill of costs when retainer is disputed.

17. Consequently, I make orders as follows: -

- a. That the decision of the Taxing Officer dated 2 April 6, 2023, in respect of the Advocate-Client bill of costs dated January 20, 2022, be and is hereby set aside.
- b. That the Certificate of Costs issued on May 9, 2023, be and is hereby annulled.
- c. I make no orders on costs.

18. Orders accordingly.

SIGNED, DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Ochieng present for the Client/Applicant



Mr. Mario Jackson h/b for Mr. Olendo for the Advocate/Respondent

Ms. Christine Omolo & Arwin Odhiambo - Court Assistants

