



Tom Ojienda & Associates v National Land Commission (Miscellaneous Application 8 of 2020) [2025] KEHC 417 (KLR) (Civ) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 8 OF 2020

EC MWITA, J

JANUARY 24, 2025

BETWEEN

TOM OJIENDA & ASSOCIATES APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

RULING

1. This is a ruling on a preliminary objection to the taxation of the advocate-client bill of costs dated 10th February 2020. The bill of costs arose from petition No. 5 of 2014 in which the Advocate is said to have acted for the client.
2. When bill of costs came up for taxation before the taxing officer (C O Muchoki), the client raised an objection to taxation of that bill of costs on the ground that the advocate had not been instructed to act for the client in that petition. Counsel for the parties submitted on the issue and in a ruling dated 16th October 2020, the taxing officer held that the issue of instruction/retainer could only be determined by a judge. The taxing officer thus, referred the dispute on retainer to this court for determination.
3. The advocate filed a replying affidavit to the objection sworn by Prof. Ojienda on 3rd August 2022 and written submissions. The advocate stated that on 17th July 2014, the client gave oral instructions to represent it in petition N0. 5 of 2014. The advocate filed a notice of appointment dated 17th July 2014. A copy of the notice of appointment was sent to the client by letter dated 21st July 2014 and was dully received by the client.
4. Thereafter, the client sent formal instructions dated 13th August 2014 to the advocate. The instructions were signed by Chavanga Aziz Tom, the client's Secretary and Chief Executive Officer (CEO). The Advocate received the letter of instructions on 14th August 2014. The client's chairperson signed a replying affidavit which the advocate filed in court on 30th October 2014. The advocate forwarded a



- filed copy of the affidavit to the client by letter dated 31st October 2014 and a fee note. The letter and the enclosure(s) were received by the client on 3rd November 2014. The advocate represented the client until the conclusion of the matter when it was discontinued.
5. The advocate then sent several reminders over the fee note but were not acted on. They then filed the bill of costs which the client opposed on grounds that it never instructed the advocate.
 6. The advocate argued that the client was misleading the court that there was no retainer. The advocate maintained that they had instructions to act for the client, and relied on the decisions in *Gladys Pereruan v Betty Chepkorir* [2020] eKLR citing *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696; *IEBC v Jane Cheperenger & 2 others* [2015] eKLR and *Oraro v Mbaja* [2005] eKLR on the meaning of a preliminary objection.
 7. On whether the advocates had instructions, reliance was placed on *Ochieng Onyango Kibet and Obaga Advocates v Akiba Bank Limited* [2007] eKLR and *Gitonga Mureithi & Co Advocates v Centre for Multiparty Democracy* [2018] eKLR, citing *Machira & Co Advocates v Arthur K. Magugu & another*, (Misc. Application No. 358 of 2001). The advocate urged the court to dismiss the objection and allow the advocate-client bill of costs to be taxed.
 8. Counsel for the client informed the court that they had filed written submissions dated 6th June 2023 which they were fully relying on and urged the court to uphold the objection. However, the only documents appearing on the portal were filed 4 years ago (on 28th August 2020) but cannot be viewed. There is no copy of written submissions dated 6th June 2023 on the portal or in the physical file.
 9. There is, however, a notice of preliminary objection dated 11th August 2020 and written submissions of the same date, filed by Edmond Gichuru Advocate on behalf of the client in opposition to the bill of costs before the taxing officer. The objection was that there was no retainer. In the submissions, the client argued that the advocate purported to act for it in petition No. 5 of 2014 without instructions. The client relied on the decision in *George Ndungu Kimani t/a George N. Kimani & co Advocates v Ronald Schaich* [2013] eKLR, that a retainer is but instruction, express or otherwise by a client to an advocate to represent the client or offer particular legal services to the client in a particular matter or generally. That decision emphasized that such instructions must not necessarily be in writing. A retainer may be inferred from the conduct of the parties.
 10. The other decisions in the submissions are on the jurisdiction of the taxing officer and the fact that only a Judge should determine the issue of retainer.
 11. I have considered the arguments by parties on this issue and perused the record. The question before this court is whether the advocate had instructions to act for the client.
 12. The advocate filed a replying affidavit to the client's objection and attached documents to show that they had instructions to act for the client. The client did not file an affidavit to respond to the depositions in the advocate's affidavit.
 13. A perusal of the replying affidavit and annexures shows undisputable facts that the advocate filed a notice of appointment dated 17th July 2014 to act on behalf of the client. A copy of the notice was sent to the client vide letter dated 21st July 2014 and was duly received. On 13th August 2014, the client's CEO wrote to the advocate perfecting the instructions and formally informing them that they had been appointed to act for the client in that petition. The client's chairperson swore an affidavit which the advocate filed in court and a copy thereof was sent to the client and was received on 3rd November 2014 together with the advocate's fee note. These facts have not been controverted.



14. The law is settled that retainer can be express or implied from the conduct of the parties. (See *Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Limited* (*supra*) and *Gitonga Mureithi & Co Advocates v Centre for Multiparty Democracy* (*supra*). The same position was adopted in *George Ndungu Kimani t/a George N. Kimani & co Advocates v Ronald Schaich* (*supra*) relied on by the client.
15. Although the advocate stated that initial instructions were oral, those instructions were formalized when the client's CEO issued the letter dated 13th August 2014, informing the advocate that they had been instructed to act for the client in that matter. The advocate filed documents in court and sent copies of those documents to the client which were dully received and have not been disputed.
16. Clearly, this is not even a case of implied retainer. Instructions were express and the advocate acted for the client based on those instructions. The client did not dispute the origin of the letter of instruction; the affidavit sworn by the client's chairperson and filed by the advocate and the copies the advocate forwarded to the client which were dully received.
17. It is undisputed that from the facts as disclosed by the advocate and supported by the documents, there can be only one inescapable conclusion, that there was retainer and the advocate had instructions to act for the client. The argument that there was no retainer falls. The objection is overruled and dismissed with no order as to costs.
18. The advocate-client bill of costs dated 10th February 2020 to be placed before the taxing officer of this court to proceed with taxation.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

E C MWITA

JUDGE

