REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Misc Appli 463 of 2004

NDERITU & PARTNERS ADVOCATES.....ADVOCATES/APPLICANT

VERSUS

MAMUKA VALUERS (MANAGEMENT) LTD.....CLIENT/RESPONDENT

RULING

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization. The delay is regretted.

In this application (by notice of motion dated 3rd May, 2005) the Advocate seeks judgment against the Client for taxed costs under section 51(2) of the Advocates Act, Cap 16. Under that subsection a certificate of taxation by the taxing officer who has taxed a bill of costs shall be final as to the amount of costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs. The Client opposes the application upon the main ground that though it instructed the Advocate to act in the matter, it did so as the agent of somebody else, KENYA TAE KWONDO ASSOCIATION. The Client further contends that though, as instructing agents, it is the

party chargeable with the bill of costs, it is not the party liable to pay the costs as the principal was disclosed from the very outset.

I have read the supporting affidavit, the grounds of opposition and the replying affidavit. I have also considered the submissions of the learned counsels appearing, including the cases cited by them. The issue here is whether or not the retainer is in dispute. The Client has admitted that he duly instructed the Advocate in writing to act in the matters concerned, though the instructions were given on behalf of someone else. The Client has also conceded in paragraph 5 of the replying affidavit that it is the party chargeable with the Advocate's bill of costs. In my view, being the party chargeable with the bill of costs, it is also the party liable to pay it. It can always claim a reimbursement from its principal. As far as the Advocate is concerned, he must look to the Client for payment of his costs as it is the Client who instructed him to act in the matter. The Advocate cannot look to the principal for payment of his costs as he was not instructed by the principal.

Is the retainer disputed? I prefer the definition of the term "retainer" (as used in section 51(2) of the Advocates Act) adopted by Ringera, J. (as he then was) in the case of **HEZEKIAH OGAO ABUYA (t/a ABUYA & COMPANY ADVOCATES) -VS- KUGURU FOOD COMPLEX LTD., HCMISC. APPL. NO. 400 OF 2001** (Milimani) (Unreported). That definition is that the term is synonymous with "employment", "engagement" or "instruction". The term, as used in section 51(2) of the Advocates Act, does not mean an agreement with respect to remuneration as provided for in section 45(1) of the Act. I respectfully agree, as held by Ringera, J., that

> ***"an advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute".***

39A.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Misc Civ Appli 382 of 2004

OWINO OKEYO & COMPANY ADVOCATES.....APPLICANT

VERSUS

FUELEX KENYA LIMITED.....RESPONDENT

RULING

This is an application brought pursuant to the provisions of Section 51(2) of the Advocates Act, as read together with Order 50 rule 1 of the Civil Procedure Rules. It is the plea of the applicant that judgement be entered in its favour, in accordance with the taxed costs.

The Bill of Costs was taxed on 20th May 2005, and a Certificate of Taxation issued thereafter on 14th June 2005. It is common ground that the said Certificate of Taxation had neither been set aside nor varied.

Following the taxation, at which the Advocate/Client Bill was taxed in the sum of Kshs. 403,822.50, the applicant sent a demand for payment, to the respondent. However, the respondent had not yet paid the said taxed costs. It was for that reason that the applicant has moved this court, so that judgement may be entered in its favour.

1

Furthermore, the applicant asks the court to award it interest at the rate of 9% per annum.

When faced with the application, the respondent opposed it. However, the facts are not disputed, and therefore the respondent did not file any Replying Affidavit. All that it did was to file Grounds of Opposition.

It is the respondent's contention that the court could only grant judgement if there was a retainer, which was not disputed. And, as far as the respondent is concerned, he who avers that he has a retainer must prove it. It is only then that he can then be entitled to judgement.

In this case, the respondent submits that the applicant did not adduce any evidence to prove retainer, as no such evidence had been placed before the court. It is further contended that the court could only give judgement if the respondent to a taxation did not dispute the retainer. But, in order to decide whether or not to dispute such retainer, the respondent says that the said issue would have to be first pleaded by the person seeking to have his Bill of Costs taxed.

In **MILIMANI MISC. APPLICATION NO. 1465 OF 2002, ORUKO & ASSOCIATES v. BROLLO KENYA LIMITED** (unreported), Nyamu J. held as follows:-

> **"The wording of the sub-section is clear as to when judgement can be entered by the court. Judgement under this section can only be entered where there is proof of a retainer and the retainer is not disputed.**

> **The sub-section does not in my opinion entitle an Applicant to a judgement in any other situation. This is clear from the reading of S. 45 which deals with retainer."**

The court went on to hold that the Applicant was not entitled to judgement as he had not exhibited any retainer in the application. It further expressed the view that if an Applicant did not exhibit a retainer, which was then not disputed by the respondent, such an Applicant would be obliged to sue for the recovery of his costs, in accordance with Section 48 of the Advocates Act.

In **MISC APPI. No. 698 OF 2004 A.N. NDAMBIRI & CO. ADVOCATES V. MWEA RICE CROWERS MULTIPURPOSE CO-OPERATIVE LIMITED,** Waweru J. expressed the view that a "**retainer**" need not be exhibited. This is how he went about the issue:-

> **"My understanding of the term "*retainer*" as used in Section 51(2) aforesaid 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. In the circumstances I find that there is no dispute as to the retainer."**

In that case, the respondent had not filed any replying affidavit, and the court held that by the wording of one of the grounds of opposition, the respondent had indeed confirmed that the advocate had instructions to act in the matter.

To my mind it is clear that if a party entered into an agreement "**as to the fees to be paid,**" there would be no room for arguments, hence no need for the advocate to tax

his bill. But, one must also appreciate that a client may instruct an advocate to act for him, but not agree either on the fee to be paid or even on the format to be used in calculating the fee that was payable. It is in those scenarios that it would become necessary for the advocate to tax his bill. However, in such a scenario, there would be no dispute about the fact that the client had given instructions to the advocate. The only dispute would relate to the fee payable in respect of the instructions. In my understanding of the provisions of Section 51 (2) of the Advocates Act, it enables an advocate to get judgement for the taxed costs, without having to sue for it, provided that his client did not dispute the fact that the advocate had been instructed (or retained) in the first instance.

Section 51 (2) of the Advocates Act reads as follows:-

> **"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs thereby, and the court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs."**

That section has many parts to it. First, it attests to the finality of a certificate of taxation which had not been set aside or altered by the court. Secondly, it confirms that the sum so certified is deemed to be due. And, finally, it states that the advocate was entitled to judgement in the taxed costs, provided only that the retainer was not disputed.

BLACK'S LAW DICTIONARY, 6th Edition, 1990 defines the word retainer as follows:-

> **"In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. This act of**

employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses, and related matters."

In a nutshell, the act by a client, of engaging an advocate is known as a retainer. In that regard, I have not come across any rule or regulation which makes it mandatory for the client to give his instructions in writing. Indeed, the reality is that some clients may be illiterate, but that would not stop them from hiring advocates. Secondly, advocates may be given instructions over the telephone or at meetings with the client. In such situations, there would not necessarily be a written note of instructions. To my mind, therefore, the non-existence of written instructions would not negate the fact that the advocate had been duly retained.

Accordingly, with due respect to my brother, the Hon. Nyamu J. I think that by insisting on having the retainer "exhibited", he introduced a requirement which was not stipulated by law. I would therefore go along with the decision of the Hon. Waweru J. in **MISC. APP. NO. 698 OF 2004 A. N. NDAMBIRI & CO. ADVOCATES V. MWEA RICE GROWERS MULTI-PURPOSE CO-OPERATIVE LTD,** that, since a retainer need not be in writing, there was no obligation for the advocate to exhibit it when applying for judgement under Section 51 (2) of the Advocates Act.

However, that does not exonerate the advocate if the client should deny having instructed him. In **MISC APPL. NO. 400 OF 2001 HEZEKIAH OGAO ABUYA t/a ABUYA & CO. ADVOCATES v KUGURU FOOD COMPLEX LTD,** Ringera J. (as he then was) held as follows:-

> **"An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute."**

I wholly subscribe to that line of reasoning. And, applying it to this matter, I hold that in its Bill of Costs the applicant herein had expressly asserted that it had been duly instructed

> **"to sue on behalf of the respondents where they were claiming the sum of Kshs. 9,881,000/=."**

By so doing, the applicant made a clear statement, asserting that the respondent had given it instructions. Having been served with the Bill of Costs, the respondent participated in the taxation thereof, without challenging the applicant's assertion that it had been duly instructed.

And even when this application was served upon the respondent, it did not file a Replying Affidavit to challenge the assertion by the applicant regarding the retainer. In the circumstances, I hold that there is no dispute as to the applicant's retainer by the respondent. Accordingly, the applicant is entitled to, and is hereby granted judgement against the respondent for the sum of Kshs. 403,822.50. Furthermore, by virtue of the provisions of Regulation 7 of the Advocates (Remuneration) Order, I award interest to the applicants, at the rate of 9% from 15th July 2005. Finally, the applicant shall have the costs of this application.

Dated and Delivered at Nairobi this 13th day of October 2005.

FRED A. OCHIENG

JUDGE

39B

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Misc Appli 511 of 2004

MENYEE & KIRIMA ADVOCATES.....APPLICANTS

VERSUS

KENYA COMMERCIAL BANK.....RESPONDENTS

RULING

This is a matter between an advocate and a former client over the advocate's costs. The Advocate, M/S MEENYE & KIRIMA, has applied by notice of motion dated 24th November, 2004 for two main orders; one, for judgment for taxed costs under section 51(2) of the Advocates Act, Cap. 16 in the sum of Kshs.3,440,000/00 and, two, for liberty to execute such judgment without further or other proceedings. To the supporting affidavit sworn by one of the partners in the firm of advocates is annexed a certificate of taxation dated 18th November, 2004. It is stated therein that taxation was by consent.

The Client, KENYA COMMERCIAL BANK LIMITED, has opposed the application. In the replying affidavit sworn by its senior legal manager it is deponed that the amount of deposit towards the advocate's fees is disputed in that the same has not been properly taken into account, and cannot be taken into account unless the accounts between the parties have been taken. It is further deponed that the Advocate has retained

a sum in excess of Kshs.2.5 million received for and on behalf of the Client, which the Advocate has stated he has appropriated in settlement of his fees *"due and to be due"* from the Client. It is also deponed in the replying affidavit that the Client has a claim against the Advocate in excess of the amount claimed herein arising out of the advocate/client relationship between them in regard to a security-realization transaction where the Advocate had instructions to act for the Client and subsequently retained the amounts received for and on behalf of the Client and converted the same to his own use. It is stated that the said claim by the Client is the subject-matter of HCCC No. 195 of 2002 between the same parties.

In a supplementary affidavit the Advocate has denied retaining a sum in excess of Kshs.2.5 million belonging to the Client. He however admits receiving for and on behalf of the Client a total of Kshs.2,349,000/00. He has further deponed that his various advocate/client bills of costs have subsequently been taxed in the total sum of Kshs.952,902/43 and that if this sum is taken from the aforesaid sum of Kshs.2,349,000/00 the only sum that the Client would be entitled to claim from the Advocate is Kshs.1,396,097/57. The Advocate further depones that although the Client is not entitled to set off this sum against the Advocate's taxed costs herein the Advocate is quite prepared to allow that set-off, which would still leave a balance of Kshs.2,043,902/43 due and payable by the Client to the Advocate in respect to the taxed costs herein.

In the oral submissions the position taken by the learned counsel for the Advocate is that taxation was by consent and there is no dispute as to retainer. Therefore the issue raised by the Client regarding monies received for and on behalf of the Client by the Advocate and retained by him cannot constitute a valid objection to the application. For

the Client it was submitted that summary judgment could not be sought in a miscellaneous cause, and that therefore the application is incompetent. It was further submitted that no retainer as defined in section 45 of the Advocates Act is proved, and that therefore the court will not have jurisdiction to enter judgment as prayed. Substantive suit must therefore be filed by the Advocate.

I have considered the submissions of the learned counsels. Subsection (2) of section 51 of the Advocates Act gives the court the discretion to make such order in relation to a certificate of taxation that has not been set aside or altered by the Court as it thinks fit. Such order would be judgment for the sum certified to be due in the certificate of taxation with costs, where retainer is not disputed. But in my view this subsection does not enjoin the court to enter judgment in ***all*** cases where the retainer is not disputed. I respectfully agree with the learned counsel for the Advocate that in the present case there is no dispute as to retainer. The term ***"retainer"*** as used in the aforesaid subsection, in my view, must mean instructions to act in the matter, and there is no allegation here that the Advocate did not have instructions to act for the Client. ***"Retainer"*** in this case cannot necessarily mean written agreement with regard to fees. Where there is such agreement there would be no taxation. See subsection (6) of section 45 of the Advocates Act.

Having said that, however, it is clear that the Client herein has raised serious issues with regard to accounts as between it and the Advocate. The Advocate has admitted that he has retained money belonging to the Client. The Client asserts that it is entitled to raise a set-off on account of this money. In my view the Client is so entitled, and it can do so only in a substantive suit commenced by plaint. Where it appears to the court that issues have been raised that ought to be investigated and ventilated in a proper

trial, then the Court ought to refuse to enter judgment under subsection (2) of section 51 of the Advocates Act, even if there is no dispute as to retainer. The present is such case.

For the above reasons I will refuse this application with costs to the Client. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JULY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 22ND DAY OF JULY, 2005.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 180 of 2004

EDWARD MAIN NJANGA t/a
MAINA NJANGA & CO. ADVOCATES ..... PLAINTIFF

Versus

NATIONAL BANK OF KENYA LTD. ..... DEFENDANT

Coram: Before Hon. Justice Mwera
Maina for Applicant
K. Shah for Respondent
Court clerk – Kazungu

RULING

The plaintiff firm of advocates sought summary judgement in this cause pursuant to O.35 rr. 1 (1) (2), 5, 8 Civil Procedure Rules and SS. 3A, 27 Civil Procedure Act plus paragraph 7 of the Advocates Remuneration Order. The notice of motion dated 26-8-04 had that prayer predicated on the grounds that the claim is liquidated and it should be paid with interest summarily. That the defence is a disguised form of appeal or reference from the decision of a taxing master. That that purported defence is thus a sham intended only to delay the inevitable judgment and in any case there was no stay order against the plaintiff's action to recover the costs. Mr. Maina, the proprietor of the plaintiff firm swore an affidavit in support of the application which he argued with the aid of annextures/exhibits and authorities. References were also made to the principal pleadings.

Mr. K. Shah for the defendant bank relied on the replying affidavit to stoutly oppose this application. Both arguments, over two sittings, were long and learned and

this court will do no more to them than to endeavour to weave them into the following determination.

There is no dispute regarding the retainer between the two litigants herein. The plaintiff rendered legal services to the defendant and then sought to be paid fees. Seemingly these were not paid straight away and Misc. Application Nos. 583, 584 both of 2003 were filed to tax costs. Taxation proceeded and two certificates of costs (of Shs.10,457,880/- and Shs.6442,077/-) issued. Again it looks like the defendant did not honour them and so the plaintiff was obliged to sue its client to recover the costs. The costs in the two certificates totaled Sh.16,970,157/- but at the time of suing on 14-7-04 the sum claimed stood at Sh.10,421,548/-, having given credit of the sum that the bank had paid but including an element of interest. Up to this point this court is of the considered mind that the plaintiff followed the course provided for in the law when such disputes arise between a firm of lawyers and his/her client.

A month after the suit was filed the plaintiff filed this application on the basis that the defendant did not have a genuine defence to its demand. That the sum pleaded was liquidated i.e. certain. That is was truly owed and so it ought to be paid at this point rather than going through the rigours of a trial. The defendant thinks otherwise. Mr. Shah in the main, argued that the defendant had or intended to file a reference under paragraph 11 of the Advocates Remuneration Order and so the plaintiff should hold on with its move by way of summary judgment.

After hearing both sides, the points on which this court can disallow an application for summary judgement include the defendant demonstrating that it has a triable issue or issues which it must be allowed leave to defend at the trial of the suit.

First and foremost it needs be noted from Mr. Shah's submission here that he did not touch on this aspect or if he did so it was not quite clear as to which point(s) stood out to go to trial. He argued at length that his client was waiting for the written reasons from the taxing master (in Misc. Application No. 583/03) in order to file a reference to challenge (some or all of) the taxed items. That the plaintiff will not suffer prejudice if it awaits the outcome of that reference while the defendant would suffer if at this stage the plaintiff got orders for a larger decree than it is entitled to. That the only liquidated sum of costs can come at the end of the reference either in the High Court or the Court of

Appeal, otherwise the certificates of costs are only prima facie in showing what the plaintiff advocate may be entitled to but they are not final and conclusive. Essentially what is said immediately hereinbefore encompasses what Mr. Shah told the court and the contents of the replying affidavit from his client. Neither made to demonstrate that the defendant has triable issue(s) that should disentitle the plaintiff from obtaining summary judgement. Perhaps this can be gleaned from the defence.

The defence filed here on 10-8-04 denied that the defendant owed the plaintiff any money and put it to strict proof. It averred that the plaintiff was moving in breach of an agreement (probably for services) and thus acting in a manner prejudicial to the defendant. On this, the court however was told that the said agreement was found by Maraga J to be null and void, even if the defence stated that ruling was subject to an appeal. It was further pleaded that the taxing master's decision (on costs) was subject to reference because she awarded enormous instruction fees in simple and uncomplicated matters. There was a threat in the defence that the defendant reserved the right to counterclaim for refund of overpaid sums. Such a counterclaim was not part of this defence and so again this court was denied benefit of whatever may have constituted a triable issue or issues if any.

Having considered this defence vis a vis the plaint (above), on its own this court is unable to discern triable issues or even one that may entitle the defendant to leave to defend. Denying any sum claimed is a standard pleading putting the plaintiff to strict proof but adding no substance to the whole case. For the sake of this application the plaintiff displayed two certificates of costs for the sums sought in the plaint. The sums are certain, liquidated and can be litigated in the manner the plaintiff has moved. Far from Mr. Shah's stand about certificates of costs only being prima facie evidence of what a claimant can seek, the law is certain and clear about such certificates. S. 51 (2) of the Advocates Act (Cap 16) says:

> "51. (1) ----------
>
> (2) The certificate of a taxing officer by whom any bill has been taxed, shall unless it is set aside or altered by the court, be final as to the amount of costs covered thereby, and the Court may make such order in relation thereto as it thinks fit,

> including, in the case where the retainer is not disputed, an order that judgement be entered in the sum certified to be due costs."

No more need be said to add to this clear and mandatory provision of law. Indeed it has been amply commented upon by various authorities including the following to which this court wishes to add nothing lest it dilute the substance and essence brought out in each case: **MACHARIA NJERU ADVOCATE VS. COMMUNICATION COMMISSION OF KENYA NRI (MIL) HCCC 1029/2002 ; NYAKUNDI & CO. ADVOCATES VS. KENYATTA NATIONAL HOSPITAL BOARD NRI (MIL) HCCC 416/04,** and **NDAIGA & CO. ADVOCATES VS. KENYA TEA DEVELOPMENT AGENCY LTD NRI HCCC 223/02.**

This court has already said that there was no dispute over the retainer. There is no stay order of these proceeding in favour of any party or other. In fact there could be none at all. As to the intended references against the taxing officer's decisions they cannot be a bar to proceedings as these. The defendant seems to say so in its defence in a way this court thinks is misconceived. To attack taxation order does not lie in a defence to a suit. It has its procedure. It cannot in terms of S. 51(2) (above), be said that until this court or the Court of Appeal has determined a reference/appeal about taxation does, it become final and conclusive. It is conclusive enough if the taxing officer's certificate is neither set aside nor varied. And that is the case here. In the form these two certificates stand as exhibited here they warrant a judgement to be entered in the sum certified to be the costs. If that is not done, this court will be taking a path away from the law. It cannot do so. To deny the plaintiff firm judgement in the circumstances would also be a prejudice to it. It has not done anything of fault either by the process or the law. It cannot be denied its fruits for work done or the litigation forced on it.

So all in all the prayers sought in the notice of motion are granted with costs.

Delivered on 17th June 2005.

J.W. MWERA

JUDGE