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This is the very basis on which the relationship of advocate-client comes into being. A retainer is a contract where in return for the client's offer to employ the advocate, the advocate expressly or by implication undertakes to fulfill certain obligations.

At common law there is no general right to representation of a litigant or client in any particular circumstances. The retainer is based on the law of contract where freedom to contract is deemed essential. The advocate is free to choose whom to represent and the client is free to choose who it is that may represent them.

The history of the merged profession in Kenya differs with that of the UK where barristers are generally under an obligation not to decline to act for particular parties at their own discretion. The *Cab -rank rule*, as it is known in the UK, requires that the ethics of the profession of the English Bar, oblige the Barrister to take up instructions of all and any matters subject to other duties of confidentiality and agreement as to fees. The rule protects Barristers from accusation of choosing causes that they only identify with. It is for the benefit of the public that the Barrister should be available to represent client irrespective of their personal opinions or on the popularity of otherwise, in the public forum, of a clients cause.

This is a rule that applies, perhaps not with a tradition as that in the English Bar, to the merged profession in Kenya.

The Constitution of Kenya Section 77 does not provide for representation, or the right to an advocate, as of a right. However, an accused person has a right to representation. A right to representation exists only for persons charged with capital offences.

See sections 44, 45, 46 and 47 OF THE Advocates Act Chapter 16 Laws of Kenya.

#### Retainer:

A contract whereby in return for the client's offer to employ the advocate, the advocate either expressly or impliedly undertakes to fulfil certain obligations.

### *Obligations under the retainer*

- Those expressly agreed upon when the retainer was constituted or subsequently varied by mutual consent.
- Those the law will imply in certain circumstances even though nothing has been expressly agreed.
- Those expressly imposed by law and which are applicable to the particular retainer.

### Modes of retainer

- In writing.

This is always advisable. However, the absence of writing will not invalidate the retainer but in a number of circumstances could render it non-enforceable where the law requires a written retainer, especially with regard to retainers by liquidators and trustees. In contentious proceedings, it is the duty of the advocate to obtain written authority from his client before he commences the suit. The written retainer should be given with regard to specific proceedings.

- Oral retainer

This can also be obtained and upheld in appropriate circumstances although it is inherently risky. The advocate should usually confirm oral instructions in writing as soon as possible.

- By implication

- Where a client acquiesces to and adopts the proceedings. A purported plaintiff may ratify the act of the Advocate who started the proceedings and approve all that has been done and instruct the advocate to proceed. See Danish Mercantile Co. Ltd v Beaumont(1951 Ch 680).
- Client will be estopped by his conduct from denying advocate's right to act where appropriate circumstances exist to infer a retainer.
- Where the client has by conduct performed part of the contract of employment an retainer may be implied.
- Where the client is party to proceedings where the representation is by the same advocate of other parties in similar circumstance and so similarly represented by the advocate, upon consent to a consolidation order, it will be implied that there was agreement to be so represented by that advocate in the consolidated suit and costs thereof will accrue as though it was from the clients suit. A client who does

not take any steps to have their names struck out of a cause do not by that mere fact provide for an implication by the court that indeed a retainer existed. The court will therefore not imply the existence of a retainer by the mere fact that the name of a client who has been enjoined as a plaintiff in a suit without his authority does not take steps to have his name removed and an advocate has to show special circumstances other than that fact, for an implication to be so drawn. Where an advocate has been retained by a client, and that advocate instructs another advocate( lead counsel or co-counsel), then the fees of the second advocate are due from the 1<sup>st</sup> advocate and not client.

### Duration

Generally this is until the conclusion of the matter for which an advocate is retained. An advocate can also be retained by an individual, company or other organization for whatever business or matter arises. In this case, remuneration will be by salary. Rule 4 of the *The Law Society of Kenya Digest of professional Conduct and Etiquette (As at 1<sup>st</sup> January 2000)* (*Available from the Law Society of Kenya*) provides guidance on this aspect of retainers. An advocate can be retained for specific periods of time on ordinary terms or by salary as explained above. Given the dangers and the probability of breaches of the obligations as to the independence of the Bar and the upholding of the good conduct of the profession including the fact that advocates cannot be hired guns for clients, there cannot be a continuing relationship of a client-advocate for all purposes and for all time.

On a several retainer, each client is only liable for his own portion of the costs. However, on a joint retainer, each client is liable for the whole cost. This is preferable as the advocate can recover his costs from any of the solvent parties. When an advocate is acting for joint litigants, the retainer is presumed to be joint unless the contrary is shown.

### Retainer by special persons

#### i. Minors

The general rule is that minors cannot contract except where the service of the advocate is in the nature of a necessary. This flows from the lack of capacity to contract on the part of, minors. In contentious business, a minor cannot bring a suit unless through a next friend- who is responsible for the costs- but who is entitled to indemnification out of the minor's property. As a defendant, the minor will defend an action through a *guardian ad litem*. The guardian is not liable for the costs of an unsuccessful defence.

ii. *Persons of unsound mind*

These persons are in the same position as minors. They can contract for necessities only. There is a general presumption of sanity. If an insane person contracts and it is upon the person alleging insanity to prove it. An advocate will not be liable for other costs of a sane person who has retained him and later becomes insane. See Yonge v. Toynebee [1910] 1 KB 215 and Richmond v Branson & Son (1914) 1 Ch 968

iii. *Poor persons*

A person who cannot afford a lawyer can retain an advocate and be represented through what are referred to as pauper briefs quite apart from advocates offering *pro bono publico* services. Under a proper Legal Aid scheme , which is absent in Kenya, application can be made by indigent clients to access state aid and representation.

iv. *Companies*

Whether a company can retain an advocate depends on what is written in the memorandum and articles of association of a company. Costs of forming a company are due from the nominees (promoters) given that a company cannot ratify pre-incorporation contracts..

v. *Unincorporated bodies*

Generally, unincorporated bodies usually have trustees or committees who can retain an advocate as they are themselves not *sui juris* and can therefore not contract or give a retainer. See Keys and another v Boulter and others (1971) 1 All ER 289.

vi. *Trustees, Executors and Liquidators*

These can and may retain an advocate in the usual way. They are then personally liable for the costs and are entitled to indemnity from the trust estate or company.

vii. *Receivers*

The same case as in trustees applies and therefore an advocate can be retained are personally liable as above. Receivers can look to assets of company for their costs.

viii. *Partners*

A partner is consonance with general partnership law can and may retain an advocate and thereby commit other partners to that retainer.

ix. *Agent*

Generally, an agent may pledge his principal's credit if he has authority to do so and may therefore so contract and give a retainer which can then be ratified by the principal.

x. *Persons with conflicting interests*

An advocate should not represent person(s) with conflicting interests. He or she should always advise the other party to seek separate advice. See *Rakusen v Ellis, Munday and Clarke* (1921) 1 Ch 831 CA.

**Termination of retainer**

The rules of construction that apply in answer to the question whether a retainer has been terminated or not are the same as the ones that apply in contract law. Most retainers are in the nature of an "entire contract", though this doctrine has now been under question, and therefore it is presumed that an advocate undertakes to take an action until the end and cannot discharge himself unless for good cause and with reasonable notice to the client. In criminal cases an advocate may be obliged and be required by the court not to seek to cease from acting for an accused person given the special circumstances of the trial. An advocate may withdraw from acting in contentious business upon reasonable notice to the client.

A retainer may be terminated under the following circumstances without breach

- a) Where retainer is for a fixed period; by effluxion of time;
- b) Where client fails to perform his part of the bargain e.g. payment, adequate instructions; the advocate is then entitled to costs until the point of discharge.
- c) Where the client fails to put the advocate in funds when reasonably required to do so.;
- d) The death of client;

- e) To insanity of the client or advocate which operates as a discharge of the advocate or client respectively;
- f) The bankruptcy of the client which operates as a discharge to the advocate and *vice-versa*;
- g) A general discharge (withdrawal of instructions) by the client; See *Watts v. Official Solicitor* [1936] 1 All ER 249, CA and *Krakauer v. Katz* [1954] 1 All ER 244
- h)
- i) Advocate may for a definite, clear, precise and express reason withdraw from acting for the client.
- j) By frustration of the retainer.

### **Effects of termination**

In litigation, it will not be enough that a retainer will have been terminated, as long as an advocate's name is on the record, his authority is deemed to have continued and his duty to the client continues until he is removed.

The advocate can sue the personal representatives of a client for work done under the retainer should a client die. It is doubtful that the personal representatives of a deceased can sue for costs incurred under the retainer.

Should a client discharge the retainer without just cause, an advocate can refuse to hand over the documents in his possession until his lien is satisfied.

An advocate will generally be entitled to his costs under a retainer where a retainer is terminated without breach or frustration or is repudiated by the client.

Where a retainer is frustrated a client may recover costs from the advocate less any allowed fees for work done before the frustrating event.

### **Change of advocate**

As a general rule, a client may change his advocate whenever he chooses to do so. However, whenever this is done where there is a matter in court, the client must comply with the rules of court e.g. the Civil Procedure Rules.

See Section 9A as inserted by The Civil Procedure (Amendment) Rules 2001, amending Order III rule 9A, Civil Procedure Rules.

Where there is one of several joint plaintiffs, he may not change the Advocate at will. A nominal litigant may not change his advocate to the detriment of the real litigant who is often carrying the burden of the proceedings. This applies especially under contract of insurance and under the doctrine of subrogation.

A second advocate may give an undertaking to the first advocate to effect that they shall return documents to the first advocate or otherwise protect their lien for unpaid costs. This is especially advisable where any delay in continuation of the work under the retainer may be prejudiced by continued exercise of the right to lien by the first advocate.

#### **Authority of an advocate on retainer**

The retainer is the basis of the authority for an advocate. See *Re Storer* (1884) 26 Ch D 189

It limits the authority of an advocate. There is no general relationship of advocate and client for all time and all purposes. For an advocate to be retained by the client, it must have been for a particular purpose or a particular transaction.

Where a retainer is given for a particular purpose, the advocate may transact only the business specified in the retainer. A general retainer will authorize all such matters as flow from the retainer but as expenses which require special authority will not be implied in that retainer.

#### **Limits on authority and acts generally authorized**

##### **Contentious business**

- i. An advocate retained to defend proceedings is authorized to accept service of such proceedings and to acknowledge service on behalf of such a client. For as long as his name remains on record, an advocate is authorized to accept service of all documents which do not require personal service.
  
- ii. An advocate may make admissions. This is applicable in civil cases as opposed to criminal cases where admissions unless made with express authority are not binding unless made with the express authority of the accused person. In civil proceedings, formal admissions made by an advocate in accordance with the facts and for purposes of dispensing with proof bind the client in all matters relating to the action. If the admissions are against the facts then this may open an advocate to a claim in negligence. See *Groom v. Crocker* [1939] 1 KB 194; [1938] 2 All ER 394. Such admissions can be

challenged under the fraud exception i.e. fraud against the client, admissions will not stand. It is the duty of an advocate to see that admissions are in writing. Admissions made by clerks managing an action are on the same footing as admissions made by an advocate.

- iii. To make arrangements as to trial. For example where there is a chance that a **test case** may need to be heard before the matter proceeds the advocate may make arrangements to abide by the decision in the test case.
- iv. An advocate has general authority to compromise proceedings and as between himself and his client has authority to compromise without reference to his client. See Waugh v. HB Clifford & Sons Ltd [1982] 1 All ER 1095, CAThe advocate has ostensible authority vis-a- vis the client's opponent to compromise without actual proof of actual authority. This ostensible authority is only exercisable when proceedings are in being or existence.

An advocate retained to bring an action cannot without authority compromise it without the writ or other originating process in issue. In some proceedings, especially those involving minors or persons of unsound mind, the authority of the court may be required to make a compromise.

Irrespective of authority to compromise, a court will have jurisdiction to intervene in the compromise especially when an order is required for the court. Inspite of authority to compromise, it may not extend to matters collateral to the action. A consent order made with express authority of the client is binding from when it is made, A perfected consent order is binding and the court will not interfere as courts do no act in vain.

- v. An advocate has general authority to receive payments or tender debt, damages or costs.
- vi. An advocate has authority to produce documents.
- vii. An advocate has authority to act as a client's agent in matters which may reasonably be expected to arise for decision in the course of proceedings.
- viii. Exception: in civil proceedings, unless there are very special circumstances, an advocate as an agent may not receive a bankruptcy or other notice in bankruptcy proceedings. The client should be served directly.

#### **Non-contentious business**

- i. An advocate has authority to hold or to have custody of deeds.
- ii. The authority to receive consideration on sale.