Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited (Miscellaneous Application 255 of 2013) [2023] KEHC 1252 (KLR) (Civ) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS APPLICATION 255 OF 2013

JK SERGON, J

FEBRUARY 23, 2023

BETWEEN

ANTHONY THUO KANAI T/A THUO KANAI ADVOCATES ..... APPLICANT

AND

CANNON ASSURANCE LIMITED ..... RESPONDENT

RULING

1. The applicant in the present instance filed the Advocate-Client Bill of Costs dated 8th March, 2013 arising out of Nairobi High Court Civil Appeal no. 665 of 2011.

2. Before the Bill of Costs could be heard for purposes of taxation, the respondent filed the notice of preliminary objection dated 25th March, 2022 which is now the subject of this ruling.

3. In the aforementioned preliminary objection, the respondent is challenging the jurisdiction of the court to tax the Bill of Costs on the grounds that no advocate-client relationship exists between the parties herein. The respondent therefore urges this court to strike out the Bill of Costs, with costs.

4. The respondent also put in the affidavit sworn by its Legal Affairs and Compliance Officer, Martha Mutoro on like date to echo the arguments raised in the preliminary objection.

5. In response to the preliminary objection, the applicant put in the Grounds of Opposition dated 10th May, 2022 featuring the following grounds:

    a. That the said preliminary objection is res judicata in view of previous High Court and Court of Appeal decisions in Petition No. 433 of 2013 Cannon Assurance Ltd v Anthony Thuo Kanai & the Attorney General and in Civil Appeal No. 177 of 2014 Cannon Assurance Ltd v Anthony Thuo Kanai & the Attorney General and in Nairobi Misc. Application No. 263 of 2013 A.

Thuo Kanai Advocates v Cannon Assurance Ltd that have all been determined in the applicant's/advocate's favour.

b. That the said preliminary objection is bad in law as it raises contested issues of fact and relies on the replying affidavit dated 25th March, 2022 of Martha Mutoro to canvass the issues of fact instead of being confined purely on a point of law and therefore it is not a preliminary objection at all.

c. That the said preliminary objection is an irregularity and unprocedurally filed application disguised as a preliminary objection.

6. The parties filed written submissions in respect to the preliminary objection.

7. Before I consider the ground raised in the preliminary objection, I will first address the issues raised in the applicant's Grounds of Opposition.

8. The first issue concerns itself with whether the preliminary objection is res judicata.

9. As indicated hereinabove, the applicant contends that the issue on whether an advocate-client relationship existed between the parties herein was addressed and conclusively determined by the respective courts in Petition No. 433 of 2013 Cannon Assurance Ltd v Anthony (Thuo Kanai & the Attorney General); Civil Appeal No. 177 of 2014 (Cannon Assurance Ltd v Anthony Thuo Kanai & the Attorney General); and in Nairobi Misc. Application No. 263 of 2013 (A. Thuo Kanai Advocates v Cannon Assurance Ltd) with the courts arriving at the findings that the applicant was entitled to costs for services rendered in his capacity as an advocate.

10. The applicant therefore submits that the respondent is precluded from bringing before another court a similar issue and involving the same parties, citing the case of Anne Delorie v Aga Khan Health Service Limited [2009] eKLR where the court held that:

> " A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, of one mixed fact and law."

11. In reply, the respondent submits that the above-cited cases did not conclusively address the subject on whether an advocate-client relationship existed between the parties and hence the res judicata rule cannot apply here.

12. The Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR offered the following interpretation on the legal term 'res judicata' in the manner hereunder:

> " Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;
>
> > "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the

same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

13. Upon my perusal of the authorities referenced by the applicant to support his claim on res judicata, I concur with the argument by the respondent that in both cases namely Petition No. 433 of 2013 Cannon Assurance Ltd v Anthony (Thuo Kanai & the Attorney General); Civil Appeal No. 177 of 2014 (Cannon Assurance Ltd v Anthony Thuo Kanai & the Attorney General), the courts did not make a determination on the issue of whether the applicant and respondent enjoyed an advocate-client relationship. As concerns Nairobi Misc. Application No. 263 of 2013 (A. Thuo Kanai Advocates v Cannon Assurance Ltd), it is apparent that the same arose out of a finding made by the taxing master in respect to a separate matter.

14. In view of all the foregoing circumstances, I do not find the preliminary objection to be res judicata.

15. The second issue raised in the Grounds of Objection touches on whether the preliminary objection is premised on a pure point of law.

16. According to the applicant, the preliminary objection coupled with the affidavit objecting to the Bill of Costs touches on issues of fact and does not therefore constitute a preliminary objection in the real sense of the word.

17. The respondent on its part argues that the main issue raised is that of jurisdiction and which issue is of a legal nature.

18. Upon my consideration of the rival arguments, I find that the preliminary objection; which raises a legal issue on jurisdiction; is properly before this court.

19. Returning to the preliminary objection, it is clear therefrom that the gist of the matter is whether there existed a retainer between the applicant and the respondent at all material times, thus giving rise to an advocate-client relationship.

20. The applicant on the one hand states and submits that though he was employed by the respondent at all material times, he operated his own firm and undertook work in that capacity on behalf of the respondent, and was therefore entitled to charge legal fees for the work done.

21. The applicant further states and submits that the respondent has not cited any legal provision that prohibits him from earning fees for services rendered in an independent capacity.

22. In response, the respondent states and submits that there has never existed an advocate-client relationship between the parties herein and that the applicant was at all material times employed by the respondent.

23. The respondent further states and submits that during the course of his employment, the applicant did not disclose that he was practicing in the name and style of Thuo Kanai Advocates and that the respondent is aware that the applicant represented it using his own name but in his capacity as an employee.

24. Upon my perusal of the record, it is not in dispute that the applicant was at all material times an employee of the respondent, pursuant to the appointment contract dated 1st November, 2005 and which employment terminated on 13th November, 2012. It is also not in dispute that the applicant had been employed in the position of Legal Officer, undertaking the legal duties and responsibilities on behalf of the respondent.

25. What is in issue is whether the circumstances surrounding the employment relationship would give rise to a retainer and consequently, an advocate-client relationship between the parties.

26. I turn to the case of Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR, where the court while borrowing from previous decisions, described a retainer in the following terms:

> " ...I note that in Black's Law Dictionary the word retainer is explained as follows: -
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> > "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 the Attorney sets forth the nature of services to be performed, costs expense and related matters...
> >
> > The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client: - consequently, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment."

27. Furthermore, the court in the recent case of Nyachoti and Company Advocate v Giriama Ranching Company Limited [2021] eKLR echoed the above as follows:

> " In Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Ltd (2007) eKLR, Osiemo J. (as he then was), observed that:-
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> > "Justice L. Njagi pointed out as follows in HCCC No. 416 of 2004, Nyakundi & Company Advocates- vs- Kenyatta National Hospital Board (unreported) and gave the definition and form of retainer from Halsbury's Laws of England, 4th Edition, at paragraph 99, page 83 where it stated:
> >
> > > "the act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment..."
> >
> > Njagi J. pointed out that in the same work, it is further explained that a retainer need not be in writing, unless under the general law of contract, the terms of the

retainer or the disability of a party to it makes writing requisite. It is then further stated, the Judge added, at paragraph 103:

> "Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case..."

28. Upon my perusal of the record, I have not come across anything credible to indicate that the applicant herein had been engaged in an independent capacity as opposed to an employment capacity for which he received a salary in addition to retaining certain sums on party and party fees upon successful claims.

29. In my view, the applicant did not bring any credible evidence to indicate the existence of an advocate-client relationship with the respondent independent of and separate from his employment with the respondent in respect to the matters giving rise to the Bill of Costs herein, in order to lay basis for claiming legal fees.

30. In my reasoning above, I draw support from the case of Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited & another [2020] eKLR where the court rendered itself thus:

> " Rule 4(ii) of the Advocates Practice Rules does not give an employed advocate a right to charge his employer legal fees for the services rendered by the advocate to his employer in the course of employment and for which he is paid a salary. It only provides exceptions to the rule against sharing of profit costs between an employed advocate and his employer where there is an agreement between them on the charging of fees and setting off of the same against salary and expenses...
>
> I am in agreement with the applicant that the services that he rendered to the respondents which were the subject of his bills of costs were reserved for advocates under the *Advocates Act*. I am however not in agreement with the applicant that he was working for the 1st respondent in two capacities; one, as a legal officer and the other as an advocate of the High Court of Kenya, so that for the services he rendered as a legal officer he was earning a salary and other benefits and those he rendered as an advocate of the High court of Kenya, he was charging legal fees. It was common ground that when the applicant was employed by the 1st respondent, he was already an advocate. Most of duties which he was supposed to perform according to his employment contract could only be performed by an advocate of the High Court of Kenya. I doubt if the 1st respondent would have employed the applicant as a legal officer if he was not admitted as advocate of the High Court of Kenya. I do not understand therefore the applicant's argument that he was performing some of his duties as an advocate of the High Court of Kenya and others as a legal officer.
>
> I am of the view also that nothing turns on the use of the name of the applicant's law firm in the documents and instruments that he drew on behalf of the 1st respondent. The law allows an advocate to practice in his name or in the name of a firm. As at the time of his employment, the applicant had registered a law firm under the name A. Thuo Kanai & Co. I am in agreement with the applicant's contention that the 1st respondent employed him but not his law firm. However, from the evidence on record, A. Thuo Kanai & Co. was a sole proprietorship which meant that Anthony Thuo Kanai t/a A. Thuo Kanai & Co. and Anthony Thuo Kanai Advocate was one and the same person. No evidence was led before the taxing officer that after the applicant was employed by the 1st respondent he continued to run a law firm within or outside his employment. The applicant had argued that the 1st respondent had allowed him to continue running a law firm. In my view, there is no evidence

that the applicant was running a law firm in his place of work. As I have stated earlier, what the applicant called practising law was performance of the work that he was employed to do."

31. In view of all the foregoing circumstances, I am not convinced that there existed a retainer or advocate-client relationship between the applicant and the respondent which could give rise to the Bill of Costs dated 8th March, 2013.

32. Consequently, the notice of preliminary objection dated 25th March, 2022 is upheld. The Bill of Costs dated 8th March, 2013 is hereby ordered struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2023.

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J. K. SERGON

JUDGE