



Owiti Otieno & Ragot Advocate v Kenya Pipeline Company Ltd (Miscellaneous Cause E051 of 2022) [2023] KEHC 23259 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CAUSE E051 OF 2022
MS SHARIFF, J
SEPTEMBER 29, 2023**

BETWEEN

OWITI OTIENO & RAGOT ADVOCATE PLAINTIFF

AND

KENYA PIPELINE COMPANY LTD DEFENDANT

RULING

A. Background

1. The Advocate/Applicant had represented the Client/Respondent in Tamu SPMCC No 6 of 2018. John Kimama –vs- AG & Kenya Pipeline Company Limited. On conclusion of the said case the Advocate/Applicant’s agreed fees were duly settled by the Client/Respondent.
2. The aforementioned suit attracted an appeal being Kisumu HCCA No E086 of 2021: John Kimama –vs- AG & Kenya Pipeline Co Ltd.
3. The Advocate/Applicants were duly served with a memorandum of appeal and wrote to the client about the same and sought instructions on the same. The client wrote back and stated that it was going to handle the appeal internally whereupon it requested for the handing over of the lower court file and it proceeded to file a notice of address of service through its in house advocate one Nelson Odongo.
4. The Advocates/Applicant then sent the Client/Respondent a letter dated November 11, 2021 where it forwarded the record of appeal and a mention notice. It also included a fee note of kshs 100,000 which it termed as nominal fee note for defending the appeal.
5. The Client/Respondent responded to the said letter and maintained that it did not issue any fresh instructions of the appeal wherefore the advocate’s fee note was not payable.



6. After a back and forth on the issue of the fee note for the appeal, on February 15, 2022 the Advocates/Applicant filed an advocate/client bill of costs dated February 14, 2022 computed at a sum of Kshs 539,085.

B. Application:

7. Upon service of the advocate/client bill of costs the Client/Respondent filed Notice of Motion dated March 18, 2022 under the provisions of Order 2 Rule 15 and order 51 Rule 1 of the [Civil Procedure Rules](#) wherein it seeks for the following orders:-
 - i) That the advocate's Advocate/Client Bill of Costs dated February 14, 2022 be struck out as the same is scandalous, frivolous, vexatious and an abuse of the court process with no basis whatsoever in law.
 - ii) The costs of this application be in the cause.
8. This application is supported by affidavit of Elizabeth C Rop sworn on March 18, 2022 and a further affidavit of the same deponent sworn on August 31, 2022.
9. The Advocates/Applicant have resisted the application vide replying affidavit sworn by David Otieno Advocate on June 27, 2022.
10. The Client's case is that it had not instructed the advocates to defend the appeal whilst the advocates' position is that once the law firm was served with the memorandum of appeal it was entitled to full instructions fees.

C. Submissions:

11. Parties were directed to file written submissions and they duly complied.

i. Applicant/Client's submission:

12. The Client/Applicant submits that the advocates were duly paid for services rendered in the subordinate court case and that the client had not gotten the requisite authorization from the Attorney General to instruct the advocates on the appeal. Further that the advocates have not rendered any services to the client on account of the appeal as the same is being defended by one Nelson Odongo Advocate. The client thus maintains that the advocates are out to enrich themselves unjustly. Reliance has been placed on the cases of [Samwel Omondi Adera Lore & Co Advocates](#) (2022) eKLR where the court held that an advocate-client bill of costs is on account of professional services rendered by an advocate to a client and the case of [Moronge & Company Advocates -vs- Kenya Airports Authority](#) (2014) eKLR where the court held that an advocate's pay must be commensurate to the work rendered otherwise any claim for work not rendered amounts to unjust enrichment.
13. The client finally submits that its failure to file a notice of change of advocates is a procedural lapse that is a mere technicality that is curable and thus not fatal to its defence of the appeal.

ii. Advocates/Respondent's Submission:

14. The advocates maintain that pursuant to the provisions of Order 9 Rule 5 of the [Civil Procedure Rules 2010](#), the law firm is still legally recognized as the advocates who are on record for the client until conclusion of the appeal unless a notice of change of advocates is duly filed, wherefore the advocates are entitled to full instruction fees. The cases of [James Kibara Muthundu -vs- Leonard Ngonde 7 others](#)



(2005) eKLR and *Aggrey Ndombi & Another –vs- Grace Ombara* (2008) EKLR have been cited in support of the advocates’ position.

15. The Advocates/Applicant posits that the power to strike out a suit is exercisable sparingly and in the clearest of cases. The case of *Madison Insurance Company Ltd –vs- Augustine Kamanda Gitau* (2020) eKLR has been cited in this regard.

D. Analysis and determination:

16. This court has considered the Client’s application, the advocates’ responses and the rival submissions of parties. The issue that emerges for determination is whether the Advocates’/Respondent’s bill of costs dated February 14, 2022 is so frivolous, vexatious and scandalous to merit its striking out at infancy.
17. It is common place that the Respondent represented the Client/Applicant in the subordinate court in Tamu SRM CC No 65 of 2018: John Kimama –vs- Attorney General & Kenya Pipeline Company Limited, which case attracted an appeal in Kisumu High Court Civil Appeal No E086 of 2021: John Kimama –vs- Attorney General & Kenya Pipeline Company Limited. Further that whereas the advocates were served with the memorandum and record of appeal, the Client/Applicant opted to conduct its own defence through its own in-house advocate who duly filed a notice of address for service but did not file any notice of change of advocates.
18. The advocates’ position that their instructions flow from the primary suit is one that this court disagrees with. Advocates instructions are founded on a retainer agreement and advocates that represent a party in the primary suit are presumed to have instructions on appeal, until that presumption is rebutted as was the case between the parties herein where the client expressly communicated to the advocates that it shall conduct its own defence of the appeal due to policy changes that took effect with the advent of the new government within the Republic of Kenya.
19. Given that the Client/Applicant is a parastatal, there is need to protect public coffers and the advocates have a civil obligation not to advance beneficial use of public resources.
20. It is indeed frivolous, vexatious and an abuse of court process for the Respondent/Advocates to issue an initial fee note of Kshs 100,000 with the full knowledge of the fact that the client never retained them in the appeal case and this sad situation is worsened by the filing of the advocates/clients bill of costs of a sum of Kshs 539,085. Item No 1 on the said bill of costs seeks a sum of Kshs 300,000 on account of instructions fees to defend Kisumu High Court Civil Appeal No E086 of 2021. John Kimama –vs- AG & Another, yet the client was categorical that it shall not be requiring the services of the advocates in the appeal.
21. It is instructive to note that the client herein did not institute the appeal but rather was a Respondent.
22. On the balance I do find that the application herein is well merited and I therefore allow it and I proceed to strike out the advocate-client bill of costs dated February 14, 2022. Each party to bear its own costs.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2023.

MWANAISHA S. SHARIFF

JUDGE

