



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISCELLANEOUS APPLICATION NO. 77 OF 2017**

**MUTUA WAWERU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**GILPHINE MOKEIRA OMWENGA.....1<sup>ST</sup> RESPONDENT**

**JOAB BURUDI MANYASI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are three applications for simultaneous determination, dated 15<sup>th</sup> September 2020, 29<sup>th</sup> September 2020 and 25<sup>th</sup> February 2021, according to directions that were given on 5<sup>th</sup> March 2021. They were to be canvassed by way of written submissions, going by the directions of 23<sup>rd</sup> March 2021. It would appear that there are only two applications for determination, that dated 15<sup>th</sup> September 2020 and 15<sup>th</sup> February 2020/2021, for that dated 29<sup>th</sup> September is not on record. Directions on disposal of the other pending application, dated 25<sup>th</sup> June 2021, were not given, but I shall nevertheless determine it based on the material on record, for joinder goes to the heart of the dispute.

2. The application dated 15<sup>th</sup> September 2020, seeks entry of judgment of Kshs. 1, 246, 775.00, with interests, following the taxation conducted herein, and in respect of which a certificate of costs was issued, dated 7<sup>th</sup> September 2020. The taxation was by a ruling by Hon. JN Maragia, Resident Magistrate, delivered on 24<sup>th</sup> October 2018, dated 18<sup>th</sup> October 2018. The application dated 25<sup>th</sup> February 2020, which I believe should be 25<sup>th</sup> February 2021, given that it talks of a certificate of costs dated 7<sup>th</sup> September 2020, seeks in principal, stay of execution and the setting aside of the ruling delivered on 24<sup>th</sup> October 2018, the certificate of costs of 7<sup>th</sup> September 2020, and all consequential orders. It also seeks leave to defend the bill of costs dated 29<sup>th</sup> October 2017.

3. The principal case for the applicants, in the application dated 25<sup>th</sup> February 2020 or 25<sup>th</sup> February 2021, is that they were let down by their Advocates, who dropped out of the matter without notifying them or filing an application to cease acting. The said Advocates never attended any of the hearings, did not communicate the same to them despite having their contacts. They urge that the mistake of counsel ought not be visited on them, and further that they were not served with hearing notices nor were they ever notified of the ruling of 24<sup>th</sup> October 2018. They assert to have a strong and arguable case. The Advocates who are being blamed for the fiasco is the firm of Oduk & Co., Advocates.

4. The defence being advanced is that the Advocate who handled the matter the subject of the taxed costs, Boniface Masinde, did so on a *pro bono* basis, using the firm of Mutua Waweru & Co., Advocates, the applicant herein. It is averred that the said Mr. Masinde had contested the same election, the subject of the petition, which gave rise to these proceedings, besides the 2<sup>nd</sup> respondent, and he was interested in the dispute. It is averred that he drew and filed the election petition without instructions, in the name of the applicant, and the 1<sup>st</sup> respondent never met any of the Advocates from the applicant firm.

5. An Advocate from Oduk & Co. Advocates, June Ashioya, has sworn and filed an affidavit. She talks of losing contact with the respondents, but concedes being served with the taxation notices. She avers that she did inform the applicant that she no longer had instructions, and asked the firm to serve the respondents directly. She avers that she was served several times with such notices despite advising that the respondents be served personally directly.

6. In her affidavit of 25<sup>th</sup> February 2021, the 1<sup>st</sup> respondent asserts that she sued in her personal capacity, and not on behalf of a political party or any other contestant, including the 2<sup>nd</sup> respondent, who was her spouse. She says that Mr. Masinde contacted her through the phone of the 2<sup>nd</sup> respondent, and talked of assisting *pro bono* to file the petition. She agreed, and Mr. Masinde went ahead. He prepared the petition, and filed it in the name of the applicant, a firm which was unknown to her. She avers that they fell out after Mr. Masinde failed to execute a written agreement to provide *pro bono* services to her with respect to the petition, an indemnity against costs by the applicant and an indemnity from the media house through which she was to serve the petition by way of substituted service.

7. The application dated 15<sup>th</sup> June 2021 seeks the removal of the name of the 2<sup>nd</sup> respondent from the suit. It is averred that he is not a necessary party as he was not a party to the primary suit, being Kakamega HC Election Petition No. 10 of 2017. He asserts that he was

improperly joined to the suit, and that he never instructed the applicant to defend him in the petition.

8. These proceedings arise from conduct of the petition in Kakamega HC Election Petition No. 10 of 2017, where the 1<sup>st</sup> respondent was the petitioner. I have perused the file in Kakamega HC Election Petition No. 10 of 2017. The 1<sup>st</sup> respondent lodged that petition on 7<sup>th</sup> September 2017. The petition itself is dated 7<sup>th</sup> September 2017, and was drawn and filed by the applicant. The supporting affidavit is sworn by the 1<sup>st</sup> respondent, and the same was also drawn and filed by the applicant. Both the petition and the affidavit bear the signature of the 1<sup>st</sup> respondent. On 11<sup>th</sup> September 2017, a notice of change of Advocates was lodged at the registry, by Lumumba & Ayieko, Advocates, expressing that they had been appointed by the 1<sup>st</sup> respondent. It is not clear whether they were taking over from the applicant, because the notice does not say so in its body, neither is it indicated that the notice was to be served on the applicant. The record of the proceedings after 11<sup>th</sup> September 2017 indicate that the firm of Lumumba & Ayieko, Advocates was, in effective conduct of the matter. Mr. Lumumba, Advocate, and Mr. Ayieko, Advocate, attended court on alternate dates, on 4<sup>th</sup> October 2017, 11<sup>th</sup> October 2017, 10<sup>th</sup> November 2017, 21<sup>st</sup> November 2017, 27<sup>th</sup> November 2017, 1<sup>st</sup> December 2017, 5<sup>th</sup> December 2017 and 6<sup>th</sup> December 2017. There is no indication as to whether Mr. Masinde or an Advocate from the applicant ever attended court at any time.

9. Based on that record, I shall proceed to determine the three applications. I shall start with that dated 15<sup>th</sup> June 2021, on whether the 2<sup>nd</sup> respondent should have been joined to the suit, for it would not be prudent to determine merits of the applications with him as a party, if in fact he ought not have been joined in the first place. I shall follow with that dated 25<sup>th</sup> February 2021, on whether the applicant had instructions to act or was acting *pro bono*, whether the respondents were let down by their Advocates at taxation. Finally, I shall consider the application dated 15<sup>th</sup> September 2020, on whether I should enter judgment in terms of the certificate of taxation.

10. The 2<sup>nd</sup> respondent was not a party to Kakamega HC Election Petition No. 10 of 2017. It was the 1<sup>st</sup> respondent who was a party in there, as a petitioner. I have not seen an affidavit from the applicant, elaborating on the role of the 2<sup>nd</sup> respondent in the whole affair, to warrant his being made a party to the taxation proceedings. I have not seen a retainer agreement executed by him, as instructing the applicant to act for the 1<sup>st</sup> respondent in Kakamega HC Election Petition No. 10 of 2017. Consequently, it is my finding that he should not have been joined to these proceedings, and his name ought to be removed.

11. There are three elements or arguments in the application dated 25<sup>th</sup> February 2021. The first is whether the applicant had been instructed by the 1<sup>st</sup> respondent to file the petition on her behalf. Secondly, whether the applicant was to act *pro bono*. Thirdly, and finally, whether the failure by the 1<sup>st</sup> respondent to participate in the taxation was occasioned by her Advocates on record, Oduk & Co., Advocates.

12. On the first issue, it is not contested that the applicant drew the petition that initiated the proceedings in Kakamega HC Election Petition No. 10 of 2017. The petition that the applicant drew and filed is the one that Lumumba & Ayieko, Advocates, took over and prosecuted until it was withdrawn, vide the application dated 6<sup>th</sup> December 2017. The 1<sup>st</sup> respondent signed on both, the petition and the affidavit sworn in support of it, to authenticate the two documents. On the face of it, the 1<sup>st</sup> respondent endorsed the petition and its filing, and, therefore, acquiesced to the process, by so doing, she, ostensibly, by conduct, had retained or instructed the applicant to draft and file the petition. See *Ochieng' Onyango, Kibet & Ohaga Advocates vs. Akiba Bank Limited* [2007] eKLR (Warsame J), *Njeru Nyaga & Co. Advocates vs. George Ngure Kariuki* [2014] eKLR (Gikonyo J), *Omulele & Tollo Advocates vs. Mount Holdings Limited* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA), *Zakhem Construction (Kenya) Ltd vs. Mereka & Company Advocates* [2017] eKLR [2017] eKLR (Musinga, Gatembu & Murgor JJA) and *Stephen Aluoch K'Opot t/a K'Opot & Company Advocates vs. Cornel Rasanga Amoth* [2017] eKLR (Majanja J).

13. The 1<sup>st</sup> respondent has argued that she did not know the applicants or the principals behind the applicant, and that the said firm was used by Mr. Masinde as a vehicle for filing the petition. The record I have before me, shows that the drawer of the petition that initiated Kakamega HC Election Petition No. 10 of 2017 was the applicant herein. The 1<sup>st</sup> respondent then endorsed on that petition to authenticate it, and that petition was actively prosecuted in court until it was withdrawn. I find it difficult to find and hold that the petition was filed without instructions, for the 1<sup>st</sup> respondent does not deny signing the petition and the affidavit in support. Whether she knew the applicant or not is not here or there, so long as she endorsed their work. By endorsing the documentation prepared by the applicant, and allowing or permitting the same to be lodged in court as such, meant that she acquiesced to the activities of the applicant, and can be deemed to have instructed the applicant by her conduct. The applicant rendered services by drafting the petition and the supporting affidavit, having the same endorsed by the 1<sup>st</sup> respondent, commissioned and filed in court.

14. The second argument is really an admission that the applicant had ostensible authority or instructions to draw the election petition. However, it is argued that the applicant is not entitled to fees for those services as it rendered them *pro bono*. It is averred that Mr. Masinde had intimated to the 1<sup>st</sup> respondent that the services were being offered *pro bono*. Mr. Masinde has not reacted to that allegation, through an affidavit, saying one thing or other relating to the matter of *pro bono* services. There is nothing on record to show that Mr. Masinde drew the petition. On the face of it, the drawer of the papers is the applicant, and there is nothing on record pointing to the fact that it was Mr. Masinde acting behind the applicant or that the applicant was rendering legal services *pro bono* with respect to the petition.

15. On the matter of the 1<sup>st</sup> respondent being let down by her Advocates, who, she claims never notified her of the proceedings, I have noted from the record that the said Advocates, in turn, blame her for failing to keep contact with the firm on record. What I have on record is that the firm of Oduk & Company, Advocates, filed a notice of appointment of Advocates, in this cause, on 16<sup>th</sup> November 2017, dated 15<sup>th</sup> November 2017. The firm was served with a taxation notice on 26<sup>th</sup> March 2018, in respect of a taxation slated for 26<sup>th</sup> April 2018. The firm received the service, embossed on the taxation notice served its official stamp and signed it. There is an affidavit of service with respect to that service. Another taxation notice was served on 3<sup>rd</sup> August 2018, in respect of a taxation scheduled for 5<sup>th</sup> September 2018. The firm received the service, affixed the signature of the recipient and embossed its official stamp. There is an affidavit of service with respect to that service, sworn on 7<sup>th</sup> August 2018 and filed herein on 6<sup>th</sup> September 2018.

16. I have seen the affidavit from the firm of Oduk & Company Advocates. The deponent blames the respondents, and states that she had

intimated to the applicant that her law firm had no instructions. I note that on all the occasions that the law firm was served, it accepted service, but no Advocate from the firm would attend court on the due date. I note too that there was no endorsement on the taxation notice, returned to court as served, that the firm had no instructions, and the service had been received under protest.

17. An Advocate who places themselves on record in a matter, as appearing for a party, does not get out of the record, for lack of instructions, by merely dropping out, by failing to attend court, while continuing to accept service of process. An Advocate on record owes a duty, to the party that they represent, to attend court at all times, so long as they are on record for them. They owe a duty to the court to attend or show up in court on the date indicated in the process served on them. Failure to attend court, upon being duly served, is a dereliction of duty. It is an act of breach of professional etiquette and decorum on the part of the Advocate. It amounts to professional negligence and a let down to the party who had instructed the Advocate. An Advocate who strictly adheres to the ethics of the legal profession and upholds the standards of professional conduct expected of him as Advocate, must dutifully attend court whenever he is served and required to. If he is unavailable, for whatever reason to attend court, professional courtesy and decorum requires that they brief another Advocate to stand in for them, or, should that not be possible, write to both the court and the other party explaining themselves. If an Advocate is unable to discharge their duties due to lack of instructions, they should apply formally, for they had come on record formally, for leave of the court, to cease acting. Seeking leave of court to cease acting is part of the professional discipline that Advocates are expected to adhere to. It is courteous, decorous and good etiquette. The formal application for leave to cease acting must be served on the party that the Advocate is on record for, and the Advocate should stop attending court only after court has granted leave to cease acting. It is part of the courtesies that Advocates are expected to extend to the courts for the sake of good order. An Advocate comes on record formally, by filing a notice of appointment or notice of change of Advocates, which ought to be served on all the parties on record. Conversely, when an Advocate has to get out of the matter or the record, they have to do so formally, either upon leave of court vide an application to cease acting, or by way of another Advocate coming on record by filing a notice of change of Advocates. The notion that an Advocate on record can get or come out of a matter or the record, as appearing for a party, informally, by merely disappearing or stopping to attend court, is alien to the tenets of professional conduct and legal practice. It is an impediment to proper and smooth administration of justice, and it should be abhorred.

18. The conduct of Oduk & Company, Advocates, of placing themselves on record, as appearing for the respondents, being served with taxation notices and accepting the service without any protest, and then failing to attend court when the matter was due for taxation as per the notices served, failing to inform the respondents of the court process, and failing to file a formal application to cease acting for the respondents while continuing to remain on record, fell below the standards expected professionally of Advocates, and it was serious let down to the respondents. It amounted to professional misconduct and negligence, in respect of which the respondents can maintain a suit for any loss that they might have suffered as a consequence.

19. The respondents argue that they should not be made to pay for the sins or wrongs of their Advocates. There is a long line of judicial authority to effect that parties ought not be punished for the mistakes of their Advocates. See *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR (**Potter, Kneller JJA & Chesoni Ag JA**) *Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR (**Makhandia, Ouko & M'Inoti JJA**), *Christopher Muriithi Ngugu vs. Eliud Ngugu Evans* [2016] eKLR (**Githinji, Mohammed & Kantai JJA**), *Wachira Karani vs. Bildad Wachira* [2016] eKLR (Mativo J). There are equally other authorities to the effect that a party ought not be held at ransom by another party who fails to take steps expected of them in court proceedings, only to turnaround later and blame it on their Advocates. See *Ketteman & others vs. Hansel Properties Ltd* [1988] 1 All ER 38 (**Lords Keith, Brandon, Templeman, Griffiths and Goff**), *Savings and Loans Limited vs. Susan Wanjiru Muritu* Nairobi Milimani HCCS No. 397 of 2002 (unreported) (Kimaru J), *Rajesh Rughani vs. Fifty Investment Ltd. & Another* (2005) eKLR (**Karanja, Mwilu & Otieno-Odek JJA**), *Bains Construction Co. Ltd vs. John Mzare Ogowe* [2011] eKLR (Aganyanya J), *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR (**Waki JA**), and *Josephine Lunde Matheka vs. Gladys Muli* [2018] eKLR (Odunga J). The Advocate acts as the agent of the party, and the omissions or commissions of the Advocate can quite properly be visited on the party, who is not without remedy against the Advocate, for they can sue for damages for professional negligence. To sympathize with the party, let down professionally by their Advocate, and look away from the misconduct of the Advocate, is to condone and encourage professional misconduct, incompetence and ineptitude. At the end of the day, however, each case ought to be considered from the perspective of its own peculiar circumstances.

20. Should the plea by the 1<sup>st</sup> respondent be allowed so that the taxation herein is set aside? The only complaint that the 1<sup>st</sup> respondent raises is that she did not get a chance to defend herself. I have found that the applicant had instructions to render the services that were rendered by it, and that there was no evidence that the said services were to be rendered *pro bono*. The only other issue that can be raised at the taxation would be around the substance of the bill of costs. Yet, the 1<sup>st</sup> respondent has not sought to demonstrate that the bill, the subject of these proceedings, was not properly taxed. She has not sought to explain how her participation in the taxation could tilt the scales in her favour, and make a difference. She has not challenged any of the items of taxation. I have no material before me that would suggest that the 1<sup>st</sup> respondent would have an arguable case before the taxing officer, to warrant a repeat of the taxation process.

21. Having concluded that there was no proper case for setting aside or stay of execution of the taxed costs, I do find that no case has been made out for not entering judgment for the applicant, in terms of the certificate of costs on record, as sought in the application dated 15<sup>th</sup> September 2020.

22. In view of everything that I have discussed above, these are the final orders with respect to the three applications:

**(a) That the application dated 15<sup>th</sup> June 2021 is allowed in its entirety;**

**(b) That the application dated 25<sup>th</sup> February 2020 (25<sup>th</sup> February 2021) is allowed to the extent of granting leave to Lumumba & Ayieko, Advocates, to come on record for the respondents, in the place of Oduk & Co., Advocates, but it is dismissed with respect to all the other prayers;**

**(c) That the application dated 15<sup>th</sup> September 2020 is allowed as prayed; and**

**(d) That each party shall bear their own costs.**

23. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25<sup>th</sup> DAY OF February 2022**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Mr. Masinde, instructed by Wafula Wawire & Co., Advocates, for the applicant.**

**Mr. Ayieko, instructed by Lumumba & Ayieko, Advocates, for the respondents.**