



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 225 OF 2020

CONSOLIDATED WITH MISC. APPN. NO. 226 OF 2020

RATEMO OIRA & COMPANY ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

MAGEREZA SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....CLIENT/RESPONDENT

RULING

The genesis of this dispute is the judgment of this court in Civil Appeal Nos. 76 and 77 of 2014 between the client herein and several of its members which followed the decision of the Co-operations Tribunal. Following the High Court judgment in those appeals delivered on 14th June, 2018 the applicant filed a bill of costs before the taxing master. The advocate for the society then filed an affidavit challenging the instructions given to the applicant.

On the other hand the applicant stated that instructions were properly given by the client. The taxing master then observed she had no jurisdiction to determine the issue raised and therefore the matter was placed before this court for determination. In the course of several mentions, the parties appeared to be negotiating a settlement which however was not successful.

I have considered the submissions filed by both parties and the correspondence that has been referred to in the prosecution of the dispute and opposition thereto. From the record it is clear that the record of appeal was prepared by the applicant. It is also clear that it is the same record of appeal that was used by the advocates who prosecuted the appeal. It is also clear from the record that the appeal was determined in favour of the client.

There has been some blame game in the submissions filed by both parties which however may not be of any help to the court. By a letter dated 19th March, 2014 authored by the society, the client herein and addressed to the advocate, the applicant herein, the society stated as follows,

“We have reliably learnt that you have proceeded and filed pleadings in the High Court, arising from the decision of the Tribunal without passing it through us in spite of previous instructions that any appeal or application to be filed must be passed through us.

We are particularly concerned that we had advised you during our Joint Board of Directors /Supervisory Committee Meeting held on Thursday 6th March, 2014 Re: Min.080/03/2014, that due to the public interest aspect of the matter, we had identified a law firm to lead you in the proposed appeal and it would only be prudent that any document to be filed ought to have been discussed and have the input of the leader. Regrettably, you have ignored our instructions. You have exhibited reluctance to cooperate with us in the prosecution of the intended appeal and as a result we have to take the regrettable step of terminating your representation.

By a copy of this letter, we hereby inform the Co-Operative Tribunal of our decision and further by a copy of this letter, we hereby instruct the law firm of Oraro & Company advocates to take over all aspects of this brief.”

The contents of the above letter were clear and unequivocal. As at 6th March, 2014, the applicant was aware that no step should be taken without the input of the client. That notwithstanding the applicant went ahead and filed a memorandum of appeal dated 12th March, 2014 contrary to the client’s instructions. In addition the applicant filed a notice of motion dated 18th March, 2014 seeking, inter alia, orders of stay of execution of the tribunal judgment.

The record of appeal was subsequently filed on 27th March, 2014 once again without reference to the client as expressed in the above letter.

In the case of **Ohaga vs Akiba Bank Limited (2008) 1 EA 300** the court stated as follows,

“It is in the position of the law that if there is no evidence of a retainer except the oral statement of the advocates which is contradicted by the client, the court will treat the advocate as having acted without authority/permission. the burden of proof to establish the retainer is always on the shoulders of the advocates.....”

-See also Halsbury’s Law of England 4th Edition Vol. 3 (1) and Bugere Coffee Growers Limited vs. Sebaduka (1970) EA 148.

From the record it is clear the applicant acted contrary to instructions set out by the client. However he performed substantial work on behalf of the client which, even if performed without instructions, should be compensated.

This court is not the taxing master and at the end of it all the said officer shall be seized of this dispute.

My assessment of the dispute is that the applicant should be paid for the preparation of the record of appeal so that the effort is recognized.

I leave it to the taxing master to determine the sum to be paid to the applicant in that regard. The two records shall now be returned to the lower court for appropriate action.

Dated, Signed and Delivered at Nairobi this 22nd day of April, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Ratemo Amenya for the Advocate/ Applicant

Ms. Ann Kadima for the Client/Respondent