



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 585 OF 2019**

**DAVID KAKETHE.....APPLICANT**

**VERSUS**

**WAIGANJO WACHIRA & CO. ADVOCATE.....RESPONDENT**

**RULING**

The respondent is a firm of advocates who raised a bill of costs dated 23<sup>rd</sup> August, 2019 and filed on 28<sup>th</sup> August, 2019 in CMCC No. 5806 of 2017 between the parties therein where the applicant was named as the plaintiff.

Upon service of the said bill the applicant filed an application dated 6<sup>th</sup> July, 2020 to strike out the said bill of costs on the ground that he never instructed the firm of advocates in that suit and there has never been advocate client relationship between the two. Further, the firm of advocates filed the said civil suit without his instructions and or his authority. In fact, the said firm of advocates withdrew the suit on 19<sup>th</sup> August, 2019 after the applicant informed the court that he did not instruct the said firm of advocates to represent him.

There is a replying affidavit sworn by James Wachira Ichaura Advocate, in answer to that application insisting that, indeed, the applicant had instructed the firm of advocates to represent him in that suit. Both parties have filed submissions which I have considered.

Annexed to the replying affidavit of Mr. Ichaura is an instruction note in the name of the applicant David Kakethe which bears the date of instructions to be 27<sup>th</sup> March, 2017. That instruction note also has the telephone number of the applicant David Kathethe, his Identity Card number and signature.

It is the applicant's case that his signature was forged and insisted that he never gave any instructions to the firm of advocate. Forgery is a criminal offence. There is no evidence that, on discovering that his signature had been forged the applicant reported to the police. He did not seek the services of a handwriting expert to disapprove the contention of the respondent that he instructed them to represent him.

Two questions come to light. If the applicant says he did not instruct the firm of advocates, how did that firm obtain his telephone number? Further, how did that firm obtain his identity card number? There is also the averment that on several occasions the applicant visited the advocate's chambers to check on the progress of his case. That averment has not been countered by the applicant.

It is true that CMCC NO. 5806 of 2017 was withdrawn at the instance of the respondent. The reason has been given by the respondent. It is not because they had no instructions, but because another suit had been filed and the applicant instructed another advocate. Proof in civil proceedings is on a balance of probability.

Going by the averments of the parties herein, it is more probable than not that the applicant instructed the firm of advocates to represent him. A bill of costs is a pleading. Striking out of pleadings is provided for under Order 2 Rule 15 of the Civil Procedure Rules which provides as follows,

**“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law;**

**or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) It may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

Decided cases have held that the power to strike out a pleading is discretionary, which discretion should be exercised sparingly and only in cases where the pleading is shown to be clearly untenable – see **Blue Shield Insurance Co. Limited vs. Moses Mboya Ogutu (2009) e KLR.**

Proof of advocate client relationship is the foundation for the advocates claim for costs from such a client. – See **Winfred N. Konosi t/a Konosi & Co. Advocates vs. Flamco Limited (2017) e KLR.**

Based on the facts in this dispute I am persuaded that there was an advocate-client relationship between the respondent and the applicant and that injustice shall be occasioned if the bill of costs is truck out.

Accordingly, the application to strike out the bill of costs is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Ms. Wayua h/b for Mr. Uvyu for the applicant

Ms. Matengo h/b for Mr. Waigango for the respondent