



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 329 OF 2018

AFRIKON LIMITED.....PLAINTIFF

VERSUS

IVRCL LIMITED1ST DEFENDANT

SUTANU SINHA2ND DEFENDANT

RULING

1. There has been a fall out between counsel and his client and another firm of advocates who propose to take over the conduct of this matter on behalf of the Plaintiff bring a Notice of Motion dated 14th July 2020 for the following prayers:-

1. THAT leave be granted to the firm of MCKAY AND COMPANY ADVOCATES to come on record for the Plaintiff in place of the firm of KAGWIMI KANG'ETHE & COMPANY ADVOCATES.

2. THAT this Honourable Court be pleased to set aside the consent dated 24th February 2020 and filed in Court on 12th March 2020.

3. THAT the sum of KES 21,645,000.00 paid to the firm of J. K. Wachira on the basis of the consent dated 24th February 2020 be refunded to the Plaintiff.

2. Because of the path this Ruling will take, the Court need only set out some short background.

3. In this matter the firm of Kagwimi Kangethe & Company Advocates represents Afrikon Limited (Afrikon or the Plaintiff). The Plaintiff, at the time of presenting the suit, also filed an application dated 14th August 2018 seeking to preserve the funds/assets of the Defendant. That application was dismissed by Court on 18th January 2019 with costs to the Defendant.

4. As would want to, the Defendant presented a Bill of Costs dated 15th March 2019. That Bill of Costs was compromised at Kshs.21,645,000/= vide a consent dated 24th February 2020 between Kagwimi Kangethe & Co. Advocates and J. K. Wachira & Co. Advocate appearing for the Defendant.

5. On 28th April 2020, Mr. Kangethe appeared before the Taxing Officer and informed her that a consent had been filed on 12th March 2020. That is the consent of 24th February 2020. Hon. Tanui DR, the Taxing Officer, then made the following order:-

“In view of the contents of the consent the matter is marked as settled.”

6. It is common ground that the firm of Kagwimi Kangethe paid a sum of Kshs.21,645,000/= being the consented costs to the firm of J. K. Wachira & Co. Advocate from the funds belonging to the Plaintiff which came into the hands of the advocate. Details of how those funds passed to the firm of Kagwimi Kangethe & Co. Advocate are not relevant in resolving the matter at hand.

7. The Plaintiff is aggrieved by these state of affairs, and more, and asserts that its advocate/client relationship has irretrievably broken down. The Client contends that the consent compromising the Bill of Costs was signed and filed fraudulently as their advocate on record did

not have instructions to compromise the alleged party and party Bill of Costs.

8. The firm of Kagwimi Kangethe & Co. Advocates and Wachira & Mumbi Advocates (previously J. K. Wachira & Associates Advocates) oppose the Motion.

9. This Court has considered the arguments made by the parties to the application.

10. On the change of Advocates, the Applicant relies on Order 9 Rule 9 and 10 of the Civil Procedure Rules which reads:-

“[Order 9, rule 9.] Change to be effected by order of court or consent of parties.

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

[Order 9, rule 10.] Procedure.

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

11. It is common ground that the change of advocates is sought after Judgment of Kshs.456,820,264.00, in respect to the entire proceedings, has been entered in favour of the Plaintiff. The procedure for change of advocate is therefore that cited by the Applicant.

12. In addition to the plea for change of advocates, the Motion seeks two other substantive prayers; for setting aside of the consent and for refund of the money paid to J. K. Wachira & Associates. Order 9 rule 10 anticipated that there will be an occasion when such a combined application would be filed and allows the filing of an application for change of advocate to be combined with other prayers provided the question of change of advocate shall be determined first.

13. It seems to this Court that the other prayers can be determined in one Ruling as the application for change of advocates upon the Court determining and allowing the prayer for change. This is the approach I take.

14. From the respective affidavits of the Advocate and the Client it is crystal clear that the existing Advocate/Client relationship has irretrievably broken down. Indeed, the Advocate acknowledges this state of affairs.

15. However, the advocate states that the Client still owes him legal fees in respect to services rendered in this suit and that he has already filed a Bill of Costs in respect to those fees said to be outstanding in other matters. The Advocate is willing to let go but on condition. In paragraph 60 he deposes:-

“THAT since the Plaintiff has not settled my outstanding legal fees for services rendered in this suit in terms of the Bill of Costs dated 5th August 2020, I verily believe that it will suit the interests of justice to order the Plaintiff to deposit in this court the entire amount of Kshs. 26,103,332.40/= sought in the Bill of Costs as a condition for granting leave to the firm of McKay & Co. Advocates or any other Advocate to take over the conduct of this matter on behalf of the Plaintiff.”

16. The Client submits that it is not necessary for a condition to be imposed because the Advocate has recourse through the filed Advocate/Client Bill of Costs. Further that Costs of Ksh.10,000,000/= has already been received by the advocate and that the advocate has received a hefty sum of Kshs.176,990,207.62 on behalf of the Plaintiff and continues to withhold the same without full account of it.

17. The Advocate, on the other hand, states that he has fully accounted for the sum of Kshs.176,588,395/= received by him. He gives the following tabulation:-

Decretal sum received on

15th March 2020 from 43A 176,588,395.10/=

Less:

i Paid to GreeMax Consultants Ltd.Kshs.70,000,000/=

ii Paid to J. K. Wachira & Co. Adv. Kshs.21,645,000/=

iii Reimbursement of Arbitrators fees Kshs.3,950,000/=

18. In respect of whether the Advocate has rendered a true and just account, the Client has sued the advocate on Civil Suit No. E251 of 2020 which is still pending and this Court restrains itself from making further comments on that respect.

19. In the matter at hand, there is a relationship that has broken down beyond retrieve and both parties will be relieved by a separation. The concern of the Advocate is alleged outstanding fees. On the other hand, the grief of the Client is that no fees is owing and that, to the contrary, the Advocates hold money owed to it. As to who owes the other is a matter which is already before another Court on litigation and shall be resolved there.

20. For this Court, it has a duty to balance the competing interests of the two. This is how it balances those, almost intractable, interests. The Court will allow the change of advocates but on condition that Kshs.26,103,332.40 of any further monies received by the Plaintiff in respect to the decree it holds shall be deposited in Court pending the outcome of the taxation in Miscellaneous Cause No. E 1077 of 2020 (Kagwimi Kang'ethe and Co Advocates vs Afrikon Limited) and the litigation in HCCC No. E251 of 2020 (Afrikon Vs George Kagwimi Kangethe t/a Kangthe Kagwimi Limited.)

21. On the other two prayers, the Advocate has raised an objection on jurisdiction and there could be merit in it. The Applicant seeks to set aside an order recorded in Taxation proceedings. Indeed it was the Taxing Officer who, on the strength of the written consent and representations made by the Advocate, marked the Taxation proceedings as settled. It seems to me that a review of the consent should first be made before the Taxing Officer who had conduct of the Taxation proceedings.

22. Although the client seeks the intercession of the Judge on the basis of section 3A of the Civil Procedure Act which saves the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court, I think that the client is not without an avenue for redress.

23. The power of the Judge to intervene in matters of the remuneration of an Advocate are circumscribed by the provisions of the Advocates Remuneration Order 1962. There is, for instance, Rule 11 which reads as follows:-

“Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

24. On the place of the Civil Procedure Rules in respect to an advocates remuneration and the role of the Judge in such proceedings, Ojwang J in Nyamogo vs Nyamogo held as follows:-

“Although I would not go so far as opining that the Civil Procedure Act (Cap. 21) would not apply to taxation of costs, it is my view that the primary avenue for resolving grievances related to the taxation of costs is the Advocates Act (Cap.16) and the Advocates (Remuneration) Order. For it is that special legal regime that enables a party to move, in a reference, from the taxing officer to the Judge in Chambers; and the Judge is thereby empowered to refer a matter back to the taxing officer, or to vary the decision of the taxing officer; and it is by virtue of this special regime that an appeal on taxation of costs may be taken forward to the Court of Appeal. A legislative framework so comprehensive and so practice-oriented, could not have been established in vain; it ought to be regarded as the normal path where a party is aggrieved on bill-of-costs matters.”

25. Even if the client cannot find a specific provision in the Remuneration Order or in the Civil Procedure Rules, still a review of the consent will have to be before the Taxing Court which had jurisdiction, and presided, over the proceedings in which the consent was entered.

26. And there could be an alternative. The client can mount a separate action to challenge the consent. This is a viable route which was alluded to by Hancox JA in Flora N. Wasike v Destimo Wambokof[1988] eKLR;

“The question is, then, how is the party objecting to it to go about setting aside the consent judgment or order, assuming he cannot appeal it? There are passages in the Annual Practice which indicate that a separate action has to be brought to do so: see the 1979 edition, vol 2 at para 2010. In the Brooke Bond Case, Law Ag P, with whom the rest of the court agreed, said that the consent judgment could be challenged in the suit itself, and, as I understand him, by an application for review under the Order relating to that procedure. But he did not rule out the bringing of a separate suit for this purpose, and the burden in either case would be on the party seeking to set the judgment aside. In my view, either method is possible, and which is

adopted must depend very much on the circumstances of the case, as to what witnesses have to be called, the nature of the grounds relied on for setting aside, and so on.”

27. In the matter before Court the client alleges fraud. Proof of fraud requires a high threshold. The client will have to elect whether an application for setting aside before the Taxing Officer or a separate suit for that purpose serves it better. It is not for the Court to advise.

28. Prayer 1 of the Notice of Motion of 14th July 2020 is allowed but on condition that Kshs.26,103,332.40 of any further monies received by the Plaintiff in respect to the decree it holds shall be deposited in Court pending the outcome of the taxation in Miscellaneous Cause No. E 1077 of 2020 (Kagwimi Kang’ethe and Co Advocates vs Afrikon Limited) and the litigation in HCCC No. E251 of 2020(Afrikon Vs George Kagwimi Kangethe t/a Kangthe Kagwimi Limited). Prayers 2 and 3 of the Application are struck out. Costs to the Respondents.

Dated, Signed and Delivered in Court at Nairobi this 26th Day of May 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nixon: Court Assistant

Kangethe for Plaintiff

Wachira for Defendant

Miss Muriranja for Applicant