



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS APP. NO. 201 OF 2017

MWADUMBO & CO. ADVOCATEAPPLICANT/RESPONDENT

VERSUS

JOSEPH MAINA KIMANI

T/A APPRIM CONSULTANT..... RESPONDENT/APPLICANT

RULING

1. The application herein is dated 22 May 2017, brought under the provisions of section 1A, 1B 3A & 63 (e) of the Civil Procedure Act, (Cap 21), Laws of Kenya, Order 42 Rules 6, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law.
2. It is supported by the grounds thereto and an affidavit dated 22nd May 2017, and a supplementary affidavit dated 17th May 2019, sworn by *Joseph Maina Kimani* (herein “the applicant”).
3. The applicant is seeking for orders that, the Honourable Court be pleased to strike out the bill of costs dated; 26th April 2017 (herein “the bill”), *ex debito justitiae* and the Advocate (“herein the respondent”) and the respondent be condemned to pay the costs of the application.
4. It is averred that, the respondent filed the bill purporting to have acted within instructions to file pleadings in the case number HCCC 564 of 2014, *Edwin Ng’anga Kogwe v. Pinkertons Kenya Ltd. & Others*. But the respondent did not have instructions from the applicants to file the pleadings as purported. That to the contrary, the applicants on 9 February 2017, appointed the firm of Mugendi Kangi and company Advocates to file the pleadings, and the firm filed pleadings on 13 February 2017 as instructed.
5. That, on 17 February 2017, the Respondent conceded before the Court that she had filed “defence” on 13 February, 2017 without instructions, as such, she is not entitled to any fees in the absence of the retainer, the same having been withdrawn and communicated accordingly. The applicants argue that the bill of costs filed is therefore, vexatious, scandalous an abuse of the court process and meant to nag them.
6. However, the application was opposed through a replying affidavit dated 5th November 2018, sworn by Angela Ndegi Mwadumbo an advocate of the High Court of Kenya practicing as such as a partner in the firm of Mwadumbo & Company Advocates and the respondent herein. She deposed that on 11th November 2016, she was contracted by one, Victor Kiharo from the applicants’ firm to appear in the case number Milimani HCCC No. 564 of 2014, as the Applicant’s firm had been served with a notice to appear.

7. That she accepted instructions and filed a notice of appointment of advocates and upon appearing in the Court, she discovered the matter had not been scheduled for mention as informed but for Ruling on the notice, on the motion application dated 22 May 2017. Subsequently she appeared in Court on several occasions as follows; 14th, 18th November 2016, 6th, 9th and 15th December 2016 and finally on 13th January 2017.

8. That she obtained copies of documents filed in Court from the applicants and the other parties and held a meeting at their premises on 31st January 2017. The meeting was attended by Jared Momanyi, Victor Kiharo and James Itumo, and they deliberated and devised a strategy for the case. It was further agreed that, she would initial Mr. Jared Momanyi witness statement on his behalf, in order to save on time. She did and notified the applicants that, she had filed and served the statement of defence, so as to safeguard their position. They were grateful and thanked her for it.

9. On 17th February 2017, she learnt while in court that, the firm of Mugendi Karigi and Company Advocates had been appointed to replace her firm and sought for a copy of notice of change from the incoming law firm. That firm responded vide a letter dated 21st February 2017, accusing her of “*moving at lightning speed*” to file the defence. She responded to the letter vide a letter dated 23 February 2017 stating that she had been working on the matter for over three months, having been appointed on 11 November 2016. The respondent argues that the issue herein is not “*retainer*” but how much fee is payable.

10. However, the applicant filed a supplementary affidavit dated 17th May 2019, sworn by Joseph Maina, who maintained that, the respondent was not instructed by one Victor Kiharo, on his behalf as alleged in paragraph 3 of the replying affidavit. That he is the only person who issues instructions to the advocates as and when need arises and he has never delegated this authority to any other person.

11. Further, the respondent has not even demonstrated through the replying affidavit that, she contacted him at any time. Further, Jared Momanyi, has denied instructing the respondent and/or attending any meeting with the respondent as alleged under paragraph 9 of the replying affidavit.

12. That the respondent was not given any permission to initial the signature of Jared Momanyi as alleged, thus it is clear that the signature was forged with ulterior motives only known to the respondent.

13. The parties disposed of the Application by filing of submissions basically reiterating the averments in the respective affidavits in the submissions. The Applicant maintained, that the Respondent did not have instructions. The case of; *Wafula Simiyu & Company Advocates vs East Lard Hotel Limited (2016) eKLR.*

14. The respondent submitted and maintained that, she had instructions and is entitled to fees, as the services of an advocate are not free and must be paid for by a party who engages the advocate. I have considered the arguments advanced and submissions herein and I find that, the only issue to determine is whether, the applicant instructed the advocate/respondent to act for it in the matter; HCCC No. 564 of 2016, between *Edwin Ng'anga Kogwe v. Pinkertons Kenya Ltd & Others.*

15. In that regard, I have considered the documents produced by the respondent in support of the argument that she was instructed and I note an email dated 11th November 2016, addressed to Angela by Victor Kiharo referenced “*court case with Arprim as the interested party*”. The mail reads as follows: -

“Please find attached notice, we have received this afternoon. If you require more information, please contact us.”

16. A further email dated 14 November, 2016 was sent by Victor to Angela and states as follows: -

“Dear Angela. We spoke on Friday. Attached is a summary of the background information regarding the same. Please attend all the hearings related to this case and update us on the progress. Kindly also forward to us a quote for handling this case. We shall await your response.”

Kind regards,

Victor”.

17. Angela, the respondent herein responded to the email on the same date as follows: -

“Dear Victor.

I went to court today for the above mentioned matter but it was not listed as a mention but as a ruling, which means that one of the parties had made an application and the court was to make a determination on it. However, the said ruling was not ready and I could not peruse the court file since it was with the judge who is to prepare the ruling. As it is, I can only know the nature of the application once the ruling is delivered on 18th November 2016. In the mean time, kindly scan and send copies of all the documents that you may have to enable me acquaint myself better with this matter. I send you my fee note once you send me the documents.

Kind regards,

Mwadumbo and company advocates.”

18. Apparently, Victor and Angela continued to exchange emails on the subject matter through the months of November, December 2016 to January to February 2017, as evidenced by the correspondences produced by the Respondent. Notably, the emails email dated 21st, 23rd of January 2017, makes reference to meeting the parties held and in particular, an email dated 1st February 2017 reads as follows: -

“Dear Victor, we refer to the above matter and to the meeting held at your offices on 31st January 2017. During the said meeting, we managed to discuss the case and devise a strategy on how to defend the interests of Arprim consultants. Given the complexity of the case and the work done so far, we request that you pay us a reasonable deposit to ease our operations and cater for the filing fees and other expenses as we act for you in this matter. As such, we request a modest deposit of Kshs.800,000/= as per the attached deposit request note. Also, kindly let me know whether Arprim Consultants is registered as a business name or a limited liability company since we have to provide a description of the company in our court papers.

Kind regards,

Mwadumbo and company advocates.”

19. Apparently, Victor did not respond to the email immediately but did on 13th February 2017, as follows: -

“Dear Angela.

Deepest apologies for my late response to your email below. I am awaiting a response from Mr. Maina regarding the issue of the legal fees and will get back to you soonest.

Kind regards,

Victor.”

20. In an email dated 13 February 2017, the advocate/respondent informs Victor that the firm had filed court documents on behalf of Arprim consultants in order to safeguard the position of the company, even as the parties discuss the issue of outstanding fees. Victor acknowledged and noted the email. In a subsequent email dated 17th February 2017, the respondent complains that, she was not notified of change of Advocates on record but faced embarrassment in court when a different counsel rose to address the

court. Victor responds with an email of 21st February 2017 explaining the reasons for change of the counsels.

21. Be that as it were, it is clear from the correspondences above that, the applicant instructed the respondent to act for it in this matter. Whether she executed the instructions to the letter or not is a different kettle of fish. Indeed, Victor in the email dated 21st February 2017, clearly attributes the change of counsels to the delay by Mwadumbo and Company Advocates to file the defence, not lack of instructions.

22. Indeed, the respondent filed a Notice of Motion application in Court on 14th November 2016. That application is still on record, the Applicant's counsel on record has not sought to have it expunged or struck out, if indeed it was filed without instructions. Similarly, the respondent has produced correspondences herein between the other lawyers in the HCCC No 564 of 2014 and the firm of Mwadumbo and Company Advocates. This confirms that there were instructions from Victor to the respondent to represent the applicant in that matter.

23. I further find that, although Mr. Maina avers in the supplementary affidavit that Victor had no authority to instruct the respondent's law firm, it is surprising that Mr. Maina did not deem it fit and appropriate that, Victor who authored all the emails referred to herein did swear an affidavit himself, to denounce the email and rebut the averments in the replying affidavit.

24. Further, although the firm of Mugendi Kangi and Company Advocates came on record after the Applicant's subject notice of application had been filed, there is no evidence they filed and served the Respondent with the same. In the same vein, although Morris Karigi, the Advocate on record avers that the respondent had no instructions, I find that averment rather strange, because the deponent was not the instructing client. In fact, he cannot depose to matter prior to his appointment to act for the respondent. Ironically, he states that he communicated his appointment to Angela N. Mwadumbo.

25. Why was he communicating notice of his appointment if he knew there was no other lawyer and/or law firm with instructions? He alleges that he called Angela on phone but does not disclose the telephone number he used. He leaves the details of the same blank in his affidavit. He even state that he informed her that the Applicant was unhappy with her since she had "*not acted in instructions to defend the respondent/applicant*", but that not answer as to whether the Applicant instructed the respondent's law firm or not.

26. All in all, based on the evidence herein, I find that, the firm of Mwadumbo and Company Advocates had instructions to act for the Applicant in the subject matter. All the other issues of alleged forgeries and/or failure to execute instructions as given are not for determination herein. In the same vein, whether the defence was filed in time or not is not an issue for this court to deal with. The rest of the issue go for taxation.

27. The upshot of all this is that the notice of motion application dated 22nd May 2017 has no merit and I dismiss it. The issue of costs will abide the outcome of the taxed of the bill.

It is so ordered.

Dated, delivered and signed in an open court on this 23rd day January 2020.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Kipruto holding brief for Mr. Mugendi for the plaintiff

Mr. Mwangi holding brief for Ms. Mwadumbo for the Respondent

Dennis ----- Court Assistant