



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CAUSE NO 397 OF 2018

KANGETHE & COMPANY ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

GREENHILLS INVESTMENT LIMITED.....2ND RESPONDENT

INTERNATIONAL MALL LIMITED.....3RD RESPONDENT

RULING

Background

1. Before this court for consideration are two applications, namely; the 2nd respondent's Notice of Motion dated 2nd April 2019 and the advocate/applicant's Notice of Motion dated 11th December 2018. The applications were precipitated by the filing of the Advocate/Client Bill of Costs dated 19th October 2018 arising from instructions issued to prepare and register a Lease, Building Agreement and Concession Agreement in relation to a tender for the lease of land for the development and management of a retail complex at Moi International Airport, Mombasa which tender was awarded to the 2nd respondent by the 1st respondent. The advocate was also to prepare and register a Deed of Assignment between the 2nd and 3rd respondent and an Agreement for Assignment of Contractual Position.

2. When the applications came up for directions on 4th April 2019, the parties agreed to canvass the two applications together.

3. In the application dated 11th December 2018, the applicant/advocate primarily seeks orders that this honourable court be pleased to determine which party is liable to pay the advocate's costs as drawn in Advocate/client bill of costs.

4. The application is supported by the affidavit of **Katherine N. Kisila** who deposes that the 1st respondent instructed the applicant to prepare the various agreements listed hereinabove with instructions that the legal fees would be met by the 2nd respondent. She states that the respondents are aware of their obligation to pay the legal fees but are yet to honour it. She therefore urges this court to determine which party is liable to pay the advocate's said costs.

5. In the 2nd application dated 2nd April 2019, the 2nd respondent herein seeks the following orders;

i. The honourable court be pleased to and hereby orders the 2nd respondent to be struck off from this application

ii. The honourable court be pleased to and hereby orders that there is no advocate client relationship between the applicant/advocate and the 2nd respondent and the lawful assignees

iii. The honourable court be pleased to and hereby orders that there is no privity of contract or agreement between the Applicant advocate and the 2nd respondent

iv. The honourable court be pleased to and hereby orders that all disputes, if any, arising from the agreement between the 1st respondent and the 2nd respondent is subject to arbitration

v. The honourable court be pleased to and hereby orders that there is no agreement ad idem between the 1st respondent and the

2nd respondent or its lawful assignees on the issue of legal costs

vi. The honourable court be pleased to grant or make any such other and/or further orders as it may deem just and fit to make in the circumstances

vii. The costs of this application be awarded to the 2nd respondent

6. The application is supported by the affidavit of **Sanjay Ramniklal Shah** who states that there existed no advocate/client relationship between the 2nd respondent and the applicant/advocate as it never issued any instructions to the advocate to act for it. The 2nd respondent's case is that the issue of legal costs for the preparation of the agreements was a contentious issue even before the Letter of Offer was issued and that the said Letter of Offer was only signed to pave way for progress to be made in respect to the tender.

7. The 2nd respondent contended that since there is no advocate/client relationship between it and the applicant, the claim of costs could only be made against the 1st respondents.

8. On its part the 3rd respondent opposed the first application through the grounds of opposition dated 22nd May 2019 wherein it states that the advocate received instructions from the 1st respondent and that there was no advocate/client relationship between it and the said advocate. It is the 3rd respondent's case that at no time did it negotiate any form of legal fees with the advocate and that the 3rd respondent's presence is not necessary in the matter at hand.

9. The 2nd respondent submitted that under Clause 3.14 of the invitation to tender, the parties agreed that all the disputes arising from the tender would be solved through negotiations and that if negotiations failed, the matter would be referred to arbitration. It was further submitted that the advocate could only tax and claim its fees against the 1st respondent who is the party that instructed him in the matter. Reliance was placed on the decisions in **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited** [2017] eKLR, **Nderitu S Partners Advocates v Mmuka Valuers (Management)Ltd** [2006]eKLR

10. The applicant/advocate opposed the 2nd respondent's application on the basis that the 2nd respondent accepted the terms of the Letter of Offer containing a clause on the payment of costs and fees by executing the said letter of Offer. It was the advocates' case that the 2nd respondent did not indicate that there was any coercion or undue influence when it signed the contract and that it is therefore bound by the terms of the Letter of Offer. The advocate contends that the arbitration clause cannot be invoked in this matter as the advocate was not privy to the agreement between the respondents. It was argued that the 2nd respondent submitted to the jurisdiction of the court when it entered appearance without applying for stay of proceedings pending arbitration.

11. The applicant/advocate maintains that the 2nd respondent never disputed his retainer and was from the inception of the agreement fully aware of his retainer in the matter. Reference was made to several decisions including the case of **Vincent M Kimwele v Diamond Shield International Limited** [2018] eKLR and **Ali Abdi Mohammed v Kenya Shell & Company Limited** [2017] eKLR.

Analysis and Determination

12. I have carefully considered the pleadings filed herein and I note that the main issues for determination is the ascertainment of the party liable to pay the advocates' costs and whether the matter should be referred to arbitration. A determination of the first issue will also require this court to establish if a client/advocate relationship existed between the 2nd respondent and the advocate/applicant herein.

Advocate/Client relationship

Section 2 of the Advocates Act defines the word client as follows:

Client includes any person who, as a principal or on behalf of another or as a trustee or personal representative or in any other capacity, has power express or implied to retain or employ and retains or employs, or is about to retain or employ an Advocate and any person who is or may be liable to pay to an Advocate any cost.'

13. The next issue that arises is whether the 1st and the 2nd respondent applicant fit the description cited above in as far as their relationship with the applicant is concerned. From the above definition, it is clear that the nexus between the advocate and the client is what gives rise to the advocate/client relationship and that such a relationship springs from instructions by the client to the advocate to act in a specific matter.

14. The 2nd respondent's case is that it did not issue any instructions to the applicant/advocate to act for it in the matter. The 1st respondent, on the other hand, states that in light of the agreement dated 18th February 2015, instructions were given to the firm of M/s Kang'ethe & Co Advocates to prepare the Agreements. Reference was made to Clause 13 of the said agreement stipulates as follows:

All costs of preparing and compiling the building agreement, royalty agreement as well as the lease agreement together with stamp duty, registration fees and any other disbursements shall be borne by you.'

15. My finding is that while the Letter of Offer and the Lease Agreement spelt out the party liable to pay the legal fees to be incurred in respect to the work to be done by the advocate, in this case, the 2nd respondent, it turned out that at the actual instructions to the advocate were issued by the 1st respondent and not the 2nd respondent.

16. According to the advocate, it is the instructing party who is liable to pay the advocates fees. For this argument, the Advocate cited the case of *Ochieng' Onyango Kibet & Ohaga v Akiba Bank Limited* [2007] eKLR wherein it was held:

“...He who engages an advocate must be ready and willing to bear the consequences of his own action. The consequence that arises from such engagement is the payment of fees.”

17. The advocates case was that having established that there was a client/advocate relationship between him and the 2nd respondent, in line with Clause 13 of the Letter of Offer as read together with the instructions letter to them dated 18th March 2015, the 2nd respondent should bear his costs.

18. Considering the advocate's submissions, this court gets the nagging feeling that the advocate is not very specific or categorical on who, between the 1st and the 2nd respondents, is answerable for his fees. I say so because while on one hand the advocate states that his instructions to draft the agreements were from the 1st respondent who is then the instructing client, in the same breath, he cites Clause 13 of the Letter of Offer and the letter to him dated 18th March 2015 as the documents indicating that the 2nd respondent is liable to pay the advocate's fees.

19. On its part, the 2nd respondent does not deny that it signed the Letter of Offer in question but states that said letter was accepted on the following conditions:-

“We request KAA to provide at least three names of preferred legal service providers and their respective fair costs estimates that will be borne by us.....These legal costs need to be agreed by both parties with a maximum cap in a subsequent letter to progress to the next stages”.

20. The 2nd respondent's case is that the 1st respondent purported to appoint the advocate contrary to the counter offer contained in the above condition, without their participation and without following the due process. It was therefore the 2nd respondent's case that it is not liable to pay the advocates costs.

21. I find that while it is not in dispute that the Letter of Offer stipulated that the 2nd respondent would be liable for all costs including the advocate's costs, I note that the Letter did not indicate the manner of appointing the said advocate or state that the advocate in question shall be Kangethe & Co Advocates. I note that in their letter to the 1st respondent dated 5th March 2025, the 2nd respondent clearly indicated their preferred manner of appointment of the advocate.

22. It is not in dispute that the advocate performed his duties in accordance with the instructions issued to him by the parties. The main issue in dispute is who between the 1st and 2nd respondent should pay the advocate's fees. Having regard to the different positions taken by the 1st and 2nd respondent over the party liable to settle the advocate's fees, I find that this is a matter that ought to be resolved through arbitration in line with the contractual agreement between the parties that provided for that all disputes be first referred to arbitration. Needless to say, a court of law cannot rewrite the agreement between the parties. This was the position adopted in *National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 wherein it was held that ***“a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”***

23. I therefore direct that the dispute between the 1st and 2nd respondent regarding who, between them is responsible for the advocate's fees be referred to arbitration after which the advocate will be at liberty to tax his bill against the party who will found liable for his fees.

Dated, signed and delivered in open court at Nairobi this 21st day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the advocate/applicants.

Mr. Ouma for the 2nd respondent.

Mr. Ouma for Wandabwa for 3rd defendant.

No appearance for the 1st respondent.

Court Assistant: Sylvia