



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.65 OF 2019

MOHAMED AND SAMNAKEY.....APPLICANT

VERSES

DILSHAD MOHAMED.....RESPONDENT

RULING

On 30<sup>th</sup> May 2018, the Applicant M/s Mohamed & Samnakay Advocates filed an Advocate-Client bill of costs pursuant to **Schedule V** and **Paragraph 49A** of the **Advocates (Remuneration)** Order seeking to have the same taxed by the Deputy Registrar of this Court. According to the Applicant, they had received instructions from the Respondent, Mrs Dilshad Mohamed, to file suit before court to unfreeze the Respondent's account which had been frozen pursuant to criminal investigations, which at the time were being conducted by the Economic & Commercial Crimes Unit of the Directorate of Criminal Investigations. According to the Applicant, the Respondent had refused to settle their professional fees, hence their decision to lodge the Advocate-Client bill of costs for taxation by the Deputy Registrar of the Court. In the bill, the Applicant sought to be paid professional fees of Kshs.633,709/= before taxation.

The Respondent filed an affidavit in opposition to the application. It was the Respondent's contention that she had not given any instruction for any suit to be filed by the Applicant, and indeed no such suit had been filed under her instruction. The Respondent pointed out that if such suit had been filed, nothing would have been easier than for the Applicant to attach copies of the duly filed pleadings with the Advocate-Client bill of costs. The Respondent averred that she had not signed any documents instructing the Applicant to file any suit before court nor had she signed any pleadings to give her consent for a suit to be filed on her behalf before the court. The Respondent stated that she only discussed the issue in dispute, in passing, with one of the advocates at the firm and did not give instructions for a suit to be filed. In the premises therefore, the Respondent urged the Deputy Registrar to dismiss the Advocate-Client bill of costs as there was no proof placed before the court that she had given such instructions to the Applicant.

The issue as to whether or not there existed instructions or was argued before the Deputy Registrar. In her (Hon. S. Kanyiri, Deputy Registrar) ruling, delivered on 18<sup>th</sup> July 2019, she declined to assume jurisdiction stating that the issue as to whether an advocate-client relationship existed could only be determined by a Judge. She relied on the decision of **Mugambi & Co. Advocates vs. John Okal Ogwayo & Another [2013] eKLR** to reach her verdict. In the material part of the ruling, she stated thus;

***“In order therefore to tax the bill of costs, it would require of me first to determine whether there exists an Advocate-Client relationship between the Applicant and the Respondent herein, and to establish whether the Applicant was instructed by the Respondent to represent them in the aforementioned matter. The issue of whether an Advocate-Client relationship exists can only be determined by a judge. The Advocates Remuneration Order gives a taxing officer jurisdiction to tax the bill of costs where there is an established Advocate-Client relationship, and where there is no dispute as to retainer (See paragraphs 2, 10, 13 of the Advocates Remuneration Order).”***

The Deputy Registrar then referred the matter to this court to determine the issue of retainer.

During the hearing of the application, this court heard oral submission made by Mr. Mohammed for the Applicant. The Respondent, though served, did not appear before this court on the date that the application was scheduled to be heard. This ruling has therefore been written on the basis of the submission made on behalf of the Applicant, and this court's perusal of the pleadings and affidavits filed by the parties herein in the cause. The issue for determination by this court is whether indeed the Applicant established that they had been given instructions by the Respondent and thus retained to act on her behalf in the case.

On evaluation of the bundle of documents presented to this court by the Applicant, it was apparent that the Respondent did not give written instructions to the Applicant to act on her behalf in the matter. She did not sign any pleadings to signify her approval that the Applicant had given effect to her instructions. What the Applicant attached as exhibits is their own internal client attendance records, indicating that the Respondent had been to their offices on three occasions prior to the preparation of the pleading intended to be lodged in court. There was a further telephone communication. It is not clear from the record what was discussed between the Applicant and the Respondent. There are no written notes indicating what was discussed during these meetings. There is no document signed by the Respondent confirming that she attended any such meetings.

In the letter dated 25<sup>th</sup> January 2017, addressed to the Respondent, it was clear that the Applicant acted on behalf of the Respondent in other matters other than the one the Applicant intended to file an Advocate-Client bill of costs. In an email dated 14<sup>th</sup> April 2017, the Respondent denied that she had given instructions to the Applicant to act on her behalf in the matter. She specifically stated that she had not given instructions to the Applicant to file any suit in court due to the political nature of the case. On their part, the Applicant insists that they were duly instructed by the Respondent to act in the matter hence the preparation of the pleadings that were to be filed in court.

This court forms the view that the Applicant has failed to establish, on a balance of probabilities, the existence of instructions or retainer by the Respondent to file the suit in question. Even if this court were to accept that the client attendance record produced in court by the Applicant is correct, this court cannot rule out that the other legal issues which the Respondent had retained the Applicant to act on her behalf at the time were being discussed in those meetings. Furthermore, the fact that the suit was not filed, and the fact that the Respondent did not sign the affidavit in support of the averment made in the suit to be filed, gives credence to the assertion by the Respondent that he did not instruct the Respondent to file the suit.

While considering this ruling, this court had the benefit of reading the cases of **Muriu Mungai & Co. Advocates vs New Kenya Co-operative Creameries Ltd [2019] eKLR** and **Peter Furmetz vs James G. Mouko & Co. Advocates [2015] eKLR**. In both cases, the client denied either giving instructions to the advocate or agreeing to the professional fees that the advocate was demanding to be paid. In both cases, the client stated that they had withdrawn instructions from the advocate before the suit was filed in court. The court in both cases held that the client had indeed instructed the advocate. The issue, in both cases, to be determined by the Deputy Registrar (taxing master) was the quantum of the work done by the advocate.

In the present application, it was clear to this court that the Applicant did not establish to the satisfaction of this court that they had been given instructions by the client to prepare the pleadings in the case. The paucity of any written instructions made it difficult for this court to reach a finding, as sought by the Applicant, that such instructions were given. This court holds that the Applicant failed to establish the existence of retainer in the case and therefore they are not entitled to file an Advocate-Client bill of cost for taxation by the Deputy Registrar of this court.

The Advocate-Client bill of cost lodged by the Applicant in this suit is therefore struck out but with no orders as to costs. Should the Applicant desire to seek a second opinion from the Court of Appeal, leave is hereby granted for such appeal to be filed. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY 2020**

**L. KIMARU**

**JUDGE**