



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO 371 OF 2017**

**MUTHAURA MUGAMBI AYUGI &**

**NJONJO ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**DELTA CONNECTIONS LIMITED.....CLIENT/RESPONDENT**

**RULING**

1. The Applicant M/s Muthaura Mugambi Ayugi & Njonjo Advocates through a Notice of Motion brought pursuant to provisions of section 51(2) of the Advocates Act, Order 51(1) of the Civil Procedure Rules, 2010, and section 1A, 1B, and 3A of the Civil Procedure Act and any other enabling provisions, seeks the following orders:-

- a) THAT this Honourable Court be pleased to enter judgment as against the Respondent herein for a certified amount of Kshs.1, 061,267.60 in terms of the Certificate of Taxation herein dated 2<sup>nd</sup> May 2018.
- b) THAT the said sum of Kshs.1, 061,267.60 be paid with interest at the rate of 14% per annum from 5<sup>th</sup> September 2017, which is the date of filing of the Bill of Costs herein until payment in full.
- c) THAT pursuant to the entry of judgment, hereinabove, a Decree be issued.
- d) THAT the costs of this Application be provided for.

2. The application is premised on the grounds on the face of the application under Nos. (a) – (e). It is further supported by an affidavit of Angela C. Cheronu, sworn on 17<sup>th</sup> July 2018 and attached certificate of taxation (**Acc-1**).

3. The Respondent is opposed to the application. The Respondent filed Replying affidavit dated 21<sup>st</sup> January 2018 and further relied on affidavit dated 6<sup>th</sup> December 2017.

4. I have perused the application, grounds in support of the application, affidavit in support and affidavit in opposition as well as authorities relied upon by the Advocates and have further considered their oral submissions. The issue arising from the aforesaid for consideration is as follows:-

**a) Who is reliable to pay the taxed costs in this matter?**

5. The Applicant contention is that the Bill of Costs for legal fees for services rendered to the Client/Respondent in the High Court **Case No. 270 of 2008 Delta Airlines Incorporation vs Delta Connections Limited** taxed at Kshs.1, 061,267 in favour of the Applicant is payable by the Respondent as it has never challenged the certificate of taxation issued by the court and that it has never bothered to pay the same.

6. It is the contention of the Applicant that the Client/Respondent instructed the Applicant to represent it in the High Court Civil Case No. 770 of 2008 and for which the Applicant acted for the Respondent as required and that it was agreed it would pay the fees for rendering such representation, which the Respondent declined, resulting to filing Advocate/Client Bill of Costs, which was taxed at Kshs.1, 061,267/60 as per certificate of taxation (**ACC-1**). The Applicant urges as the Bill of Costs, was not challenged and the amount remains unpaid the application should be granted as prayed.

7. The Respondent in opposition of the application relies to affidavits dated 21/1/2019 and 6<sup>th</sup> December 2017 and annexures thereto. It is Respondent's contention that in 2010, Mr. Heresh Vrajlal Soni and Mr. Lionel John Smith bought shares in Delta Connection Limited, the Client/Respondent, from Mr. Arvin Pahwa, Mrs. Salome Njeri Kamau, and Mr. David Ayuel Justin Yaac, referred to as "the vendors" vide a sale and purchase of Shares Agreement dated 30<sup>th</sup> March 2010, (marked as exhibit (US-1), which agreement under clause 7, provided that the vendors would retain the absolute and sole responsibility for three ongoing litigation matters at the time of sale, including Hccc No. 770 of 2008, that gives rise to the present taxation in all aspects, including the direction on the conduct thereof and payment of fees and costs.

8. It is contended by the Respondent in the affidavit of Umang Soni dated 6<sup>th</sup> December 2017 that since the sale and purchase of shares Agreement dated 30<sup>th</sup> March, 2010 the vendors ceased participating in the affairs of the company in all respect; that the Advocate herein never communicated to the company, whether by telephone, e-mail or in person, on the status and/or progress of Hccc No. 770 of 2008; that the actual parties for whom the Advocates have been acting/representing in Hccc No. 770 of 2008 since 2010 are the vendors and that since 30<sup>th</sup> March 2010, the first time the Client/Respondent received communication on Hccc No. 770 of 2008 from the Applicant/Advocates was on 24<sup>th</sup> October 2017 when they received a Notice of Taxation and the Bill of Costs. That upon receipt of such notice M/s Clive Msheshwe, Advocate, for Client/Respondent urged the Advocate/Applicant, they had nothing to do with the suit and/or costs owed to them by the vendors but the Advocate/Applicant insisted on proceeding with the taxation (see exhibit US-2 and US-3).

9. The Client/Respondent in its affidavit dated 21/1/2019 contend that in response to the Bill of Costs dated 1/9/2017, it responded to the same by filing of an affidavit dated 6<sup>th</sup> December 2017, referred herein above, referring to the grounds of opposition already captured herein above. It is Respondent contention that upon the matter being placed before late Hon. Justice Onguto he ordered as follows:-

**"Consequent to the filing of the pleadings referred to in paragraph 3 above the taxation matter was placed before the late Hon. Justice Joseph Onguto on 25<sup>th</sup> January 2018, who then directed that the taxation proceeds first and then the issue of whether or not there was a retainer be canvassed once the taxation was concluded."**

10. The Bill of Costs in this matter was taxed pursuant to the direction of the late Justice Onguto, following which now the Respondent and the Applicant seeks determination as to who is supposed to meet the legal fees and costs of the Advocate/Applicant. In every matter an Advocate is engaged once issue of representation arises a retainer is required to be provided to confirm instructions had been given to the Advocate to represent a client or in lieu of the retainer a documentary evidence is required giving the instructions. In the instant matter the Advocate/Applicant has not filed a further affidavit or any affidavit attaching to it a retainership agreement nor has it controverted the contents of the affidavit deposed upon by the Client/Respondent. I find no evidence showing that indeed the Advocate/Applicant had been retained by the Client/Respondent to justify its claim for any legal fees or filing Bill of Costs against the Client/Respondent and purport to execute the taxed costs against the Client/Respondent.

11. Under Clause 7 of the sale and purchase of Shares Agreement dated 30<sup>th</sup> March 2010 (US-1) it is clearly spelled that the vendors' Advocate is said to mean Muthaura Mugambi Ayugi & Njonjo Advocates is clear as clause 7 (i) provides:-

**"The indemnifying vendors shall retain responsibility for conduct of the Existing Litigation and the Purchasers shall and shall procure that the Company shall co-operate with the Indemnifying Vendors in all respect."**

12. The Advocate/Applicant having drawn the sale and purchase shares agreement dated 30<sup>th</sup> March 2010 were all the material time aware of the contents of the aforesaid agreement. The aforesaid agreement expressly stated that the vendors, who do not include the Client/Respondent, would retain the absolute and sole responsibility for the ongoing litigation matter at the time of sale, including Hccc 770 of 2008. That the vendor sale since 30<sup>th</sup> March 2010 severed their relationship with the company and the Advocate never communicated with the company since 30<sup>th</sup> March 2010 till 24<sup>th</sup> October 2017. The Advocate/Client conduct supports the Client/Respondent assertion that the Advocate/Applicant was never representing them in the suit No. Hccc 770 of 2008 for the Advocate/Applicant to claim legal fees between for period between 1/8/2009 – 2016.

13. In the case of **Salmon vs Salmon & Co. Limited (1997) A.C, Lord Macnaghten** it was held as follows:-

**"The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."**

14. Having considered all facts of this, the affidavits in support and annexures thereto, I am satisfied that the parties as per sale and purchase Shares Agreement agreed on who was and is supposed to pay the legal fees due and payable to Advocate/Applicant. The person liable to pay the legal fees and costs was not the Client/Respondent herein but the vendors as per the sale and purchase of Shares Agreement, which agreement was drawn by the Advocate/Applicant herein. The parties are bound by their agreement and court cannot be called upon to rewrite the agreement for the parties.

15. The upshot is that the Advocate/Applicant Notice of Motion dated 17<sup>th</sup> July 2018 is without merit and is dismissed with costs.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of February, 2019.**

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**J .A. MAKAU**

**JUDGE**