



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTION & HUMAN RIGHTS DIVISION**

**ELECTION PETITION NO. 5 OF 2017**

**ELIZABETH ONGORO AMOLLO.....PETITIONER**

**VERSUS**

**FRANCIS KAJWANG TOM JOSEPH.....1<sup>ST</sup> RESPONDENT**

**KAREN WACHERA MWANGI.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**AND**

**PHILIP NYACHOTI.....APPLICANT**

**VERSUS**

**MUGA APONDI.....RESPONDENT**

**RULING**

1. By a notice of motion application dated 3<sup>rd</sup> July, 2019 supported by his affidavit of even date the Applicant, Philip Nyachoti, seeks a temporary stay of taxation of the undated bill of costs filed herein on 13<sup>th</sup> June, 2019 by the Respondent, Muga Apondi. He further seeks to have the said bill of costs and all other subsequent pleadings filed in respect thereof to be struck out or in the alternative, the bill of costs filed on 13<sup>th</sup> June, 2019 be stayed pending the taxation of the bill of costs dated 2<sup>nd</sup> July, 2018 and filed in court on 9<sup>th</sup> July, 2018 by the Applicant against the Petitioner in **Milimani Election Petition No. 1 of 2018; Nyachoti & Company Advocates v Elizabeth Ongoro Amollo**.

2. The Applicant and the Respondent are advocates of the High Court of Kenya. The Applicant's case is premised on the grounds that the Respondent filed a bill of costs against the Applicant's firm claiming costs in the sum of Kshs. 2,590,000/- on instructions allegedly issued by the firm to the Respondent to appear and represent the Petitioner, Elizabeth Ongoro Amollo, in the election petition giving rise to the dispute between the advocates. The Respondent's bill of costs was scheduled for taxation on 17<sup>th</sup> July, 2019 but this court, upon the application of the Applicant, stayed the taxation pending the hearing of this application.

3. It is the Applicant's contention that he was never a party to the election petition neither did he instruct the Respondent and as such, a bill of costs cannot be filed in the petition against his law firm. The Applicant further avers that the Respondent approached his firm in September, 2017 and volunteered to prosecute some of the petitions that the firm had filed on behalf of several of its clients who were petitioners in various election courts. The Applicant states that the Respondent indicated to him that he had just started his law practice and needed to keep himself busy. Further, that the decision to assist the Respondent was on the mutual understanding that the Respondent would be paid some fees by the Petitioner, which fees was yet to be agreed between the Petitioner, the Applicant, the Respondent and other advocates who were involved alongside the Respondent in the prosecution of the petition.

4. The Applicant also swore that as regards this particular election petition, the Respondent together with the other advocates were introduced to the Petitioner and subsequently thereafter received full instructions from the Petitioner directly and indeed all issues pertaining to legal fees payable was directly discussed between the Petitioner on the one hand and the Respondent and all the other advocates on the other hand. As such, it was contended that Rule 7 of the Advocates (Practice) Rules is not applicable at all since there never existed any advocate-client

relationship or consultative relationship between the Applicant's firm and the Respondent or indeed the other advocates. It is therefore the Applicant's averment that the bill of costs cannot lie as against his firm.

5. Further, the Applicant deposed that there is no basis whatsoever under the relevant law concerning remuneration for the undated bill of costs filed on 13<sup>th</sup> June, 2019 and in any event, even if the Respondent had been instructed, briefed or consulted by his firm as alleged, Rule 7 of the Advocates (Practice) Rules stipulates that the instructing advocate becomes personally liable for payment of legal fees to the advocate instructed. However, the said rule does not contemplate taxation of a bill of costs since such a claim is a contractual debt which is distinct and a separate cause of action which can only be initiated by way of a plaint or any other pleading.

6. It is therefore the Applicant's assertion that the filing of the bill of costs against his firm by the Respondent being a firm not formally on record and was equally not a party in the petition is grossly misconceived and an abuse of the court process and the bill cannot lie since the Respondent ought to have a separate cause of action against his law firm. The Applicant contended that it is in the interest of justice that the undated bill of costs filed by the Respondent on 13<sup>th</sup> June, 2019 be struck off with costs.

7. The Applicant stated that the petition was drawn, engrossed and filed by his firm on behalf of the Petitioner before the Respondent volunteered to assist in the conduct of the petition with the full knowledge, consent and participation of the Petitioner personally. It was further his averment that the other advocates save for the Respondent were actively engaged in the preparation of the petition from the initial stages of drafting, gathering evidence, interviewing witnesses, researching on all legal aspects of the petition with the instructions, knowledge and consent of the Petitioner but under the firm's name.

8. The Applicant averred that he had filed a bill of costs against the Petitioner being **Milimani Election Petition Misc. Application No. 1 of 2018, Nyachoti & Company Advocates v Elizabeth Ongoro Amollo** and the same had been fixed for taxation on 31<sup>st</sup> July, 2019. In view of the foregoing, the Applicant urged the court to stay the bill of costs filed on 13<sup>th</sup> June, 2019 and/or subsequently strike out the same.

9. The Respondent swore an affidavit dated 16<sup>th</sup> July, 2019 in response to the petition. He averred that the allegation that he volunteered to prosecute the petition in September, 2017 is false and mischievous because he established his firm way back in 2015. Besides, he has been a freelance lecturer in various institutions of higher learning including the Kenya School of Law and even facilitated various lectures for LSK and the Judiciary. It was his averment that there was no agreement or understanding that he would be paid by the Petitioner directly neither was there any particular time that there was a meeting between the Petitioner and the Respondent to discuss legal fees.

10. It was the Respondent's deposition that advocates are paid in accordance with the Advocates Remuneration Order and the Applicant has relied heavily on technicalities to deny him access to legal fees claimed almost two years after judgement was delivered. The Respondent further averred that he has suffered great hardship and injustice as the Applicant has refused to pay his legal fees for about two years and it is only logical and fair that the stay orders granted on 9<sup>th</sup> July, 2019 be set aside to allow the taxation to proceed on such terms as the court may direct.

11. The Applicant filed written submissions dated 23<sup>rd</sup> July, 2019. On whether the Respondent received instructions from his firm, counsel submitted that instructions to appear in the election petition were given to the Respondent by the Petitioner and the issue of instructions goes to the root of the bill of costs filed by the Respondent. He submitted that it was therefore incumbent upon the Respondent to demonstrate clearly how, when and in what manner instructions could have been issued to him by the Applicant firm especially since the Applicant is not a party to the petition and his interests were merely similar to those of the Respondent in carrying out work on behalf of a known client.

12. To buttress his arguments, the Applicant cited the case of **County Council of Bureti v Kennedy Nyamokeri t/a Nyamokeri & Co. Advocates [2006] eKLR** where it was held that the respondent therein had failed to establish that indeed there existed an advocate-client relationship and further that such a client had given instructions that can be recognized by the law. He also cited the case of **Wilfred N. Konosi & Co. Advocates v Flamco Limited [2017] eKLR** where the Court of Appeal in dismissing an appeal held that in the absence of proof that there existed advocate-client relationship, the taxing officer was justified in striking out the bill of costs and the High Court was right in upholding the decision of the taxing officer.

13. The Applicant also asserted that the Respondent has not produced any letter of instructions from his firm to support his claim. In the circumstances, counsel submitted that Rule 7 of the Advocates (Practice) Rules does not apply since there never existed any advocate-client relationship or consultative relationship between his firm and the Respondent including the other advocates acting in the matter. As such, the bill cannot lie against the firm.

14. On whether the Respondent's bill is tenable in law, counsel submitted that even if the Respondent had been instructed or consulted by the firm as alleged, Rule 7 of the Advocates (Practice) Rules stipulates that the instructing advocate becomes personally liable for payment of legal fees and does not contemplate taxation of a bill of costs since any such claim is a contractual debt which is a distinct cause of action which can only be initiated by way of a plaint or any such kind of pleading but not a bill of costs. The filing of the bill according to the Applicant was therefore grossly misconceived, incurably defective and an abuse of the court process. It was urged that in any event the matters in issue are those that would require interrogation at a hearing to determine certain factual matters which issues cannot all be determined by way of affidavits before the Deputy Registrar and this was not the intention of Rule 7 of the Advocates (Practice) Rules.

15. In conclusion, the Applicant submitted that he had filed a bill of costs against the Petitioner which had been fixed for taxation on 31<sup>st</sup> July, 2019. He cited the case of **M M Kioga & Company Advocates v Joseph Macharia & another, Meru H. C. Misc. Appeal No. 42 of 1993** for the proposition that the High Court is clothed with inherent jurisdiction and power to make orders of stay in all causes, including orders of taxation under the Advocates (Remuneration) Order, regardless of the law governing such causes.

16. The Respondent, filed written submissions dated 25<sup>th</sup> July, 2019. In his counter arguments, he attached the following documents being:-

a) a schedule of the petitions, their dates and counsel handling the same, giving a breakdown on the division of the duties performed by the Respondent for the benefit of the Applicant with the current petition topping the list;

b) letter dated 11<sup>th</sup> June, 2018 by the Applicant requesting for the Respondent's proposal on fees payable to his firm in relation to the petitions handled by the firm and explaining the difficulty in collecting fees from the Petitioner in the present petition;

c) letter dated 20<sup>th</sup> November, 2018 by the Applicant evidencing part-payment for Lodwar petitions;

d) letter dated 11<sup>th</sup> December, 2018 by the Applicant evidencing another part-payment; and

e) letter dated 24<sup>th</sup> July, 2018 by the Applicant making an offer of Kshs. 800,000/- as full and final settlement of outstanding amounts.

17. In a nutshell, counsel submitted that the argument by the Applicant that the Respondent would be receiving instructions directly from the Petitioner should have been in the correspondence and the court should address its mind as to whether "volunteers" are paid such sums of money as evidenced in the correspondence if not legal fees. In any event, he submitted that the trial judge already made an order capping the costs and the duty of the Deputy Registrar is to comply with the said order and ensure that the other items claimed are in conformity with the Advocates Remuneration Order. He therefore urged the court to dismiss the application dated 8<sup>th</sup> July, 2019 and direct the Deputy Registrar to tax the bill of costs in accordance with the law noting that he has not been paid his fees two years after the conclusion of the matter.

18. I have carefully perused the record and considered the arguments before the court and in my view, the only issue for determination is whether the Respondent is entitled to recover legal fees from the Applicant.

19. Rule 7 of the Advocates (Practice) Rules, 1966 states:-

**"7.(1) Subject to specific agreement, an advocate who briefs, instructs or consults another advocate is personally responsible for the payment to such other advocate of his proper professional remuneration in respect thereof."**

20. The cited provision is to the effect that an advocate who briefs, instructs or consults another advocate is personally responsible for the payment to such other advocate for his proper professional remuneration. The Applicant argues that Rule 7 does not apply in the instant case because the Respondent received instructions directly from the Petitioner. However, the Applicant has not denied the fact that the Respondent was one of the advocates representing the Petitioner in the election petition herein, the only contention is who was the instructing party, whether the Applicant or the Petitioner.

21. The Respondent's position is that he received instructions to prosecute the petition from the Applicant. It is evident that there was indeed a specific agreement between the Applicant and the Respondent based on correspondences by the Applicant. In one of the letters, the Applicant admitted that the delay in paying the Respondent's fees was caused by the fact that the Petitioner had not paid fees thereby necessitating the filing of a bill of costs against her in **Milimani Election Petition Misc. Application No. 1 of 2018, Nyachoti & Company Advocates v Elizabeth Ongoro Amollo**. If indeed the Petitioner had discussed the issue of payment of fees with the Respondent, the Applicant had no business suing the Petitioner for fees. Having established that there existed a relationship between the Applicant and the Respondent, I find and hold that the Applicant is liable to pay the Respondent's professional fees.

22. The Advocates Remuneration Order contemplates two instances where a bill of costs may be filed, that is, a party and party bill of costs or an advocate-client bill of costs. A party and party bill of costs is one filed by a successful litigant against the other side. An advocate-client bill of costs is one filed by an advocate against his/her client. Rule 7 of the Advocates (Practice) Rules merely states that the instructing advocate becomes personally liable to pay the professional fees of the other advocate but it is silent on how such an advocate may recover the debt. In my view, an advocate who instructs another advocate creates an advocate-client relationship and as such, the instructed advocate can sue his "client" so to speak to recover his legal fees. Where there is no agreement on the fees payable from a client to an advocate, the only way of determining the fees owed to the advocate is through the taxation of the bill of costs. I therefore find and hold that the Respondent is entitled to recover fees from the Applicant just as much as the Applicant is entitled to recover his legal fees from the Petitioner.

23. Considering what I have stated in this ruling, it follows that the application dated 3<sup>rd</sup> July, 2019 is without merit. The Applicant's application is therefore dismissed. For avoidance of doubt, the Respondent's bill filed on 13<sup>th</sup> June, 2019 can proceed for taxation notwithstanding the Applicant's bill of costs in **Milimani Election Petition Misc. Application No. 1 of 2018, Nyachoti & Company Advocates v Elizabeth Ongoro Amollo**. The Respondent's costs for this application shall be met by the Applicant.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2019.**

**W. Korir,**

**Judge of the High Court**