



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 64 OF 2019(O.S)

SAMUEL GACHIE KAMITI PLAINTIFF

VERSUS

OSEKO & OUMA ADVOCATES LLPDEFENDANT

RULING

1. There has been a fallout between Advocate and Client in respect of the Advocates fees. Perhaps not unusual. Samuel Gachie Kamiti (the client) has in an Originating Summons dated 7th February 2019 sought that the Retainer agreement dated 13th November 2015 entered between him and Oseko & Ouma Advocates LLP (the Advocates) be declared harsh and unconscionable.
2. In the meantime, the client has filed a Chamber Summons dated 7th February 2019 for the following prayers:-
 1. That the Honourable Court be pleased to direct the Respondent to release the Applicant's file in Nairobi HCCC No. 543 of 2010, Samuel Gachie Kamiti –vs- Equity Bank Limited & 6 Others with immediate effect pending hearing and determination of the Originating Summons.
 2. That this Honourable Court be pleased to order the Respondent to release the sum of Kshs.40,000,000.00 to the Applicant and deposit the balance of Kshs.5,000,000.00 in a joint interest earning account pending hearing and determination of the Originating Summons.
3. The Court gives a very brief version of how matters came to head because, for purposes of the matter before Court, greater detail is unnecessary. The Advocate firm as presently constituted is the successor in title of Oseko & Company Advocates who initially represented the client in Nairobi HCCC No. 543 of 2010 Samuel Gachie Kamiti –vs- Equity Bank Limited & 6 Others (The Civil Suit). The Advocates later came on record in succession of Oseko & Company Advocates.
4. The client was successful in the Civil Suit and was awarded the sum of Kshs.78,934,010.00 together with interest thereon at Court rates from the date of filing suit until payment in full. Costs were also to the client.
5. There has been part payment of the decree to the sum of Kshs.45,000,000.00 which was paid to the Advocates and is now held in an interest earning account in the name of the Advocates. The Advocates lay a claim of Kshs.44,290,900.00 over this sum on account of fees and base their claim on a retainer Agreement dated 13th November 2015 entered between them and the client. There has been a standoff because the client has taken the view that the fees is undeserving and in fact states that he has already paid the Advocates a sum of Kshs.20,053,705.00 as legal fees, actuarial valuation fees and other charges which he considers to be more than enough in fees.
6. Following this impasse, the Advocates held both the deposit and the client's office file in the civil suit as lien for fees.
7. The Advocates not only resist the Chamber Summons but raise a Preliminary Objection on the jurisdiction of this Court to hear and determine the main summons and the chamber application. The essence of the Preliminary Objection dated 25th February 2019 is that the Retainer Agreement has an arbitration agreement/clause and this matter should be referred to arbitration.
8. Although the parties have filed lengthy affidavits for and against the application and made extensive submissions, I would think that the issues required to resolve this matter are narrow.
9. The arbitration clause in the Retainer Agreement, being clauses 12.2, 12.3, 12.4 and 12.5 read;-

12.2. In the event of any dispute, controversy or claim, a “dispute” as to our or your respective rights and obligations or as to any matter arising from or that in any way is related to this appointment, including any question as to its existence, validity or termination, both parties shall attempt in good faith to resolve the dispute between ourselves.

12.3. If both parties are unable to resolve the dispute by mutual agreement within fourteen (14) days after the dispute is notified in writing by either of us to the other, or within such further period as both of us may agree, then the dispute shall be submitted to and finally resolved by arbitration in accordance with the Rules of the Chartered Institute of Arbitration, Kenya Chapter by an Arbitrator agreed upon between both parties or failing agreement, appointed by the Chairman of Chartered Institute of Arbitrators, Kenya Chapter.

12.4. Unless otherwise agreed by both parties in writing, the arbitration shall be held in Nairobi.

12.5. The construction, validity and performance of this appointment shall be governed in all respects by Kenyan Law.

10. This is one provision of the agreement upon which the Advocates hinge their arguments on jurisdiction.

11. The client on the other hand argues that the arbitration agreement does oust the jurisdiction of this Court because, in his view, the arbitration clause does not give the arbitrator jurisdiction to arbitrate on the quantum of costs. He takes the view that the jurisdiction belongs to the Taxing Master of this Court by dint of Rules 13 and 13A of the Advocates (Remuneration) Order, 1962 which reads:-

[13] Taxation of cost as between advocate and client on application of either party;

(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.

[13A] Powers of taxing officer; For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.

12. Yet even before the Taxing Master can assume jurisdiction, the Retainer Agreement dated 13th November 2015 would have to be set aside and this must be the wisdom behind prayer 4 of the Originating Summons sought by the client in which he bespeaks the setting aside of the Retainer Agreement.

13. Now, in regard to the procedure of challenging the validity of a retainer agreement, Section 45(2) of the Advocates Act provides as follows:-

S. 45 (2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

(a) that the agreement be upheld; or

(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or

(c) that the agreement be set aside; or

(d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.

(2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.

14. As I understand it, the core of the resistance to arbitration by the client is or should be, that notwithstanding the arbitration clause of the Retainer Agreement, an arbitrator would not have jurisdiction to determine the issues raised herein because taxation of bills is in the realm of jurisdiction bestowed on the Taxing Master by the Advocates Act.

15. That posturing however ignores the competence of an arbitral tribunal to rule on its jurisdiction as explicitly granted by Section 17 (1) of

the Arbitration Act in the following words;

S.17 (1). Competence of arbitral tribunal to rule on its jurisdiction;

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

16. As is evident the competence of the arbitral tribunal is wide and includes not only the power to rule whether it has jurisdiction to deal with a dispute referred to it through an arbitration agreement but also the power to determine the existence or validity of the arbitration agreement itself. In my view an arbitrator duly appointed under the terms of the Retainer Agreement has the competence to determine whether or not he has jurisdiction to determine the dispute before him in addition to whether he has legal authority to determine the dispute notwithstanding the provisions of Section 45(2) of the Advocates Act and/or the provisions dealing with taxation of an advocates/clients bill of costs.

17. Any party aggrieved with the decision of the arbitrator on the question of jurisdiction can escalate the grievance to the High Court by way of application as provided by Subsection 6 of Section 17 which provides;-

“17(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter”.

18. There is logic and good sense to the scheme provided by Section 17 of the Arbitration Act because parties having, on their own will and volition, chosen to settle a dispute or differences by way of arbitration should afford the arbitral tribunal the first opportunity to determine whether or not it has the jurisdiction to determine the dispute or difference submitted to it. Only upon such determination can recourse be had to the High Court by a party dissatisfied by the decision of the tribunal. In this way parties to an arbitration agreement will not be allowed to renege on their promise to submit their differences to arbitration in the absence of a true and serious question of jurisdiction.

19. The second issue is easier to resolve. It is trite that an advocate has a right of lien over funds in his/her possession for fees owed by the client. It is security for the advocate's fees. In this regard a passage from the decision of Onguto J. in Booth Extrusions Limited (Formerly Booth Manufacturing Africa Limited) -vs- Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR is a brief but concise statement of the nature and rationale for an advocates lien. The Judge observed;

“[18]. A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien”.

20. In the matter at hand, there is still a dispute as to the validity of the Retainer Agreement. If found to be invalid, then the advocates costs will have to be determined through taxation. Yet the Advocates have a right of lien over the deposited sum because that right accrues once a claim for payment of fees is made even though fees has not been ascertained with finality by taxation or formal recognition of the retainer agreement.

21. That said, because this Court will be referring this dispute to arbitration, I am inclined to make an order that does not compromise the Advocate's right of lien over the money but which addresses the anxiety of the client about recovering whatever amount, if any, may be payable to him on resolution of the dispute. Such an order is for the money to be deposited in an account in which the lawyers for both parties have control.

22. On the question of holding the client's file as lien, this really is not necessary as the deposit of Kshs.45,000,000.00 sufficiently secures the Advocate's claim for fees of Kshs.44,290,900.08. There can be no reason to hold both the file and the deposit.

23. In the end, and this is not only in respect to the Chamber Summons of 7th February 2019 but the entire proceedings, I make the following orders;-

23.1 The dispute herein shall be referred to arbitration in terms of Clause 12 of the Retainer Agreement of 13th November 2015.

23.2 The monies now held in deposit by the Advocates and all accrued interest thereon shall, within 30 days hereof, be moved into an interest earning account in the joint names of the Advocates or their lawyers on record in this matter and the lawyers for the client and shall remain in the said account pending the hearing and determination of the Arbitration or further orders of this Court.

23.3 The Advocates shall release the client's file in Nairobi HCCC No. 543 of 2010 Samuel Gachie Kamiti -vs- Equity Bank Limited & 6 Others to the firm of Kipkenda & Company Advocates within 30 days hereof.

23.4 In the meantime, these proceedings are stayed.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of December 2019.

F. TUIYOTT

JUDGE

PRESENT:

Nduhiu holding brief Oseko for Advocate

Odoyo for Client

Court Assistant: Nixon