



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHT DIVISION

MISC. APPLICATION NO. 18 OF 2017

MUGOYE & ASSOCIATES ADVOCATES.....APPLICANT

VERSUS

KIAMBU COUNTY ASSEMBLY SPEAKER.....RESPONDENT

RULING

1. On 17th May 2017, the firm of *Mugoye & Associates* Advocates, *the Advocates*, filed their advocate/client Bill of costs against *Kiambu County Assembly Speaker, the client*, dated 12th May 2017. When the Bill of costs came up for taxation before the Deputy Registrar of this Court on 20th June 2017, the issue of instructions was raised and the taxing officer referred the matter to this Court for resolution of the question of instructions before taxation could proceed.
2. On 20th September 2017 Parties appeared before this court, when they were directed to file their necessary responses before the matter could be heard. Both the Advocates and the client filed affidavits respecting their positions and the matter was set down for hearing on 10th April 2018.
3. During the hearing of the objection, *Mr. Waithaka*, learned Counsel for the client, submitted that the client did not instruct the *Advocates* to act for it in *Petition No 71 of 2014*. *Mr. Waithaka* relied on the client's replying affidavit sworn on 18th July 2017 and filed in Court on 19th July 2017 and a further affidavit sworn on 20th March 2018 to fortify their position. In those affidavits, it was deposed that the client did not instruct the *Advocates* to act for it in the petition that gave rise to the advocate – client Bill of costs.
4. Learned counsel submitted that *the client* being a public entity could give instructions, if any, in writing and upon procuring the services in terms of the *Public Procurement and Asset Disposal Act (PPAD Act)* as read with section 131(1) of the county Government Act on public finance expenditure. *Mr. Waithaka* also relied on section 121 of the *Public Finance Management Act* to submit that procurement should be in terms of the Constitution and the *PPAD Act*.
5. Learned counsel went on to contend that there must be an agreement/contract following procurement procedure for there to be a contractual relationship between *the client* and *the Advocates*. He made reference to sections 134 and 135 of the *PPAD Act* arguing that there was no procurement process; that there is no letter of instruction from the client to *the advocates* and therefore, there is no Advocate/client relationship. *Mr. Waithaka* further submitted that there has to be pre-qualification and then *the Advocate* issued with a letter of instruction a procedure that was not followed in the present case. He therefore argued that in the absence of instruction letter, *the client* could not legally address the advocates' Bill of Costs or make payments.
6. Learned counsel relied on a number of authorities and in particular that of the *County Council of Bureti v Kennedy Nyamokeri t/a Nyamokeri & Co. Advocates* [2006] eKLR for the proposition that instructions must be in writing to result into a contract, a position counsel said is similar to section 6 of the County Government Act. He also relied on the case of *Wilfred N Konosi t/a Konosi & Co. Advocates v Flamco Limited* [2017] eKLR for the same proposition. Learned counsel submitted that failure to abide by provisions of the law and in the absence of instructions, it will put the client's accounting officer in direct conflict with the law, thus offends section 196 of the *Public finance management Act*.
7. *Mr. Mugoye*, Learned Counsel for *the Advocate* submitted that the Advocates acted for *the client* in the matter giving rise to the Bill of costs, being *Petition No.171 of 2014*. He contended that the client had not denied this fact and had also not denied that legal services were actually rendered by the Advocates to the client. According to learned counsel, that alone justifies the advocate-client Bill of costs because the client had indeed benefited from legal services offered by the advocates.

8. Learned counsel contended that **the client** had earlier instructed **the advocates** to Act for them in petition No 47 of 2014 which the client dully paid for and that petition No. 71 of 2014 was the second petition the advocates were being instructed to act on behalf of the client. He submitted that **the advocates** could not have known about the existence of the case without instructions from **the client**. He argued that the firm of advocates tendered during the year 2013 and on 3rd February 2014, the advocates received a telephone call from the client's offices asking them to collect pleadings relating to the petition in question and proceed to act on the petition.

9. He went on to submit that instructions to an advocate ought not always be in writing, but can be inferred from the conduct of the parties. He relied on section 45 of the Advocates Act (Cap 16) which creates the Advocate-client relationship and contended that instructions can be implied from the conduct of the parties. **Mr. Mugoye** further contended that if the client had any objection to representation by the firm of advocates in Petition No. 71 of 2014, they should have done so.

10. **Mr. Mugoye** contended that there is correspondence between one **David Ngare** and the Advocates dated 3rd February 2014 and also relied on a correspondence from the Advocates to the client ("GMM5") dated 6th February 2014 relating to Petition No 47 of 2014. Counsel relied on a number of authorities including **Marete & Co. Advocates v Zakhem Construction (Kenya) Ltd** [2014] eKLR and **Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Ltd** [2007] eKLR to submit that instructions need not be in writing but can be inferred from the conduct of the parties.

11. In a short reply, **Mr. Waithaka** submitted that the authorities relied on by **Mr. Mugoye** were between private enterprises and advocates and therefore had nothing to do with Public authorities.

Determination

12. I have considered the objection, the grounds in support and those in opposition. I have also considered submissions by counsel for the parties and the authorities relied on. The question for determination is whether the Advocates had instructions to act for the client in petition No. 71 of 2014.

13. The client is Speaker of the County of Kiambu, the ex officio of the county assembly who presides over proceedings in the county Assembly. The county Assembly is a state organ and any payments made by the county are f Public funds which and must be expended in accordance with the Constitution, the county government Act and public Finance Management Act. Section 6 of the county government Act provides that **"the county may enter into contracts which are binding.** In that regard only in the case of a lawful contract, can the county government as a Public entity, use public funds and only as authorized by law.

14. The advocates' case is that they offered legal services to the county and are therefore entitled to payment. The client has maintained that there were no instructions hence the advocates are not entitled to any payments. The law governing use of public resources is the Constitution, the Public Finance Management Act, and PPDA Act. Section 6 of the County Government Act allows the County government to enter into contracts and section 6(4) thereof states that **all contracts lawfully entered into under this section shall be valid and binding on the county government, its successors and assigns.** Article 227 of the Constitution provides that (1) **when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.** Sub Article 2 required Parliament to enact a law to prescribe a framework within which policies relating to procurement and asset disposal were to be implemented.

15. In compliance with Article 227(2) the National Assembly enacted the **PPOD Act**, 2015 the principle law regulating procurement and asset disposal by state organs and public entities. The preamble to the Act states that it is **an Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.**

16. In that regard, the Act defines **"procurement"** to mean **"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods** including livestock or any combination and includes advisory, planning and processing in the supply chain system." The Act further defines "procuring entity" as **a public entity making a procurement or asset disposal to which this Act applies;** and **"procurement contract"** as **an agreement concluded between the procuring entity and a contractor (or contractors) resulting from a tendering proceeding.**

17. The law is clear therefore, that public entities must procure goods and services through an open and transparent procurement process as required by the PPDA Act. Section 3 of the Act provides that public procurement and asset disposal by State organs and public entities shall be guided by the values and principles of the Constitution and relevant legislation including the national values and principles in Article 10; equality and freedom from discrimination in Article 27; and the principles of public finance under Article 201 including the fact that there should be openness and accountability, including public participation in financial matters.

18. The Advocates contend they provided legal services to the client a public entity. They did not produce a contract signed between them and the client or a letter of instruction for provision of legal services. They did not also produce any evidence to show that their professional services were procured in accordance with the law and that thereafter, they signed a contract with the client to offer those services. In the absence of a contract or evidence to that effect, it would be difficult for this Court to find that there is a contractual relationship between the advocates and the client for purposes of taxing the Advocate-client Bill of costs.

19. While considering an issue similar to the present one, but prior to the current constitutional scheme and legal regime, in the case of **County Council of Bureti v Kennedy Nyamokeri t/a Nyamokeri & Co. Advocates** (supra), the court stated;

"The respondent did not annex any letter or instructions by the applicant authorizing him to make the demands in question. The applicant being a public authority established under the Local Government Act (Cap 265 Laws of Kenya) cannot make decisions where public money will be expended for services without a resolution of the Council or where the sum involved is more than ten

thousand shillings without tender... The applicant is not an individual who can make a decision to engage the services of an advocate at the spur of the moment or without ceremony. The law mandates the applicant to give instructions which may result in it incurring expenditure in writing... It was therefore imperative that the respondent, knowing that he was dealing with a public authority, to demand that the instructions given to him be in writing.”

20. In another decision, that of *Wilfred N Konosi t/a Konosi & Co. Advocates v Flamco Limited* (supra), the Court of Appeal while dismissing an appeal that had risen from the finding of the High Court that there was no advocate- client relationship, observed ;

“Not a single letter by the appellant was exhibited to demonstrate that the relationship of advocate- client obtained. The onus reposed on the appellant it was not discharged. 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 learned Judge of the High Court was right to uphold the decision of the taxing officer.”

21. The client as a public entity is required to procure for goods and services in compliance with the Constitution and PPAD Act. There is no evidence that there was any compliance with the law in so far as procurement of legal services from the advocates is concerned. There is not even a contract signed between the advocates and the client conferring the advocate –client relationship that could enable the advocates offer legal services. The advocates seem to have taken the risk of offering their professional services premised on a false belief that they would be paid as it may have happened in an earlier case. It must clear on those willing to offer goods or services that this is a new constitutional architecture and legal regime where procurement of goods and services is a constitutional requirement and must be done in accordance with the guidelines contained in the Public Procurement and Asset Disposal Act. Section 53(1) of PPAD Act is clear that **all procurement by state organs and public entities are subject to the rules and principles of this Act**, while subsection (8) states that **accounting officer shall not commence ant procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.**

22. It must also be appreciated that section 121 of **Public Finance Management Act** states in no uncertain terms with regard to procurement for county government entities that **all procurement of goods and services and disposal of assets required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the public Procurement and Disposal Act.** With that in mind and in the absence of evidence that the law was followed, the Court will find it difficult to find in favour of a party who violated the Constitution and the law.

23. The advocates have relied on previous conduct between them and the client and some authorities, to argue that the previous conduct of the parties entitles them to infer advocate-client relationship and therefore payment. I must state here that conduct cannot override clear provisions of the Constitution and the law with regard to expenditure of public resources. It was upon the Advocates to ensure that they had the necessary contractual documents before they offered legal services to the client. If the Advocates had previously acted and their fee was paid without following the law, the omission cannot be construed as a certificate to use public resources without following the Constitution and the law.

24. I must also point out that the authorities relied on by **Mr. Mugoye** on behalf of the Advocates, relate to private entities as opposed to state organs or public entities. Further, provisions of the Advocates Act must be read in tandem with the 2010 Constitution and the Public Procurement and Asset Disposal Act. In doing so regard must be had to section 7(1) of the Sixth Schedule to the Constitution that **all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**

25. Considering the facts of this matter, the Constitution and the law, I am satisfied that the objection is well founded and must succeed. It is my finding therefore, that there is no evidence that there was advocate –client relationship between the firm of Mugoye & Associates Advocates and the Speaker of Kiambu County Assembly. Each party do bear their own costs of the objection.

Dated, Signed and Delivered at Nairobi this 30TH Day of July 2018

E C MWITA

JUDGE