



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 27 OF 2011

BETWEEN

NYAMWEYA OSORO & NYAMWEYA ADVOCATES ADVOCATES/APPLICANTS

AND

SOTIK TEA COMPANY LIMITEDCLIENT/RESPONDENT

RULING

1. In March and April 2011, the firm of *Bosire Gichana and Company Advocates*, on instructions from the firm of *Nyamweya Osoro and Nyamweya Advocates* (“the Advocates”) filed applications to tax several bills of costs in respect of legal services rendered by the Advocates to Sotik Tea Company Limited (“the Client”). Before the bills of costs could be taxed, the Client disputed the jurisdiction of the taxing officer to tax the bill of costs by filing the Chamber Summons dated 15th December 2017.

2. The facts supporting the Client’s application are set out in the supporting affidavit and further supporting affidavit of Doreen Kituku sworn on 15th December 2017 and 10th July 2018 respectively. The applicant’s case was that on or about 28th March 2003, the Client entered into a retainer agreement for the provision of legal services with the Advocates. The agreement was signed on behalf of the Advocates by Mr Osoro who was handling the Client’s portfolio.

3. Unfortunately, Mr Osoro passed away causing the Client to write to the Advocates a letter dated 20th March 2007 asking them to, “*hold any further action on all our matters pending in the above mentioned courts (Kisii and Keroka)*”. The Client added that should any action be required, the Advocates were required to seek written instructions. On 29th March 2007, the Client followed up with a letter requesting the advocates to release files pending appeal to the firm of *Ochillo and Company Advocates*.

4. On 15th April 2008, the Advocates, in a letter written by Hon. George Omari Nyamweya, addressed a letter to the Client stating, in part, as follows;

My late partner, Japhet M. K. Osoro, was our managing partner of our law firm, and indeed was instrumental in introducing and conducting your portfolio with us.

I clearly understand the circumstance affecting his family and the need for (sic) There are outstanding fees due to our firm from you amounting to Kenya Shillings Eight Hundred Thousand (Kshs. 80000) whilst continuing with the winding up of my late partners estate in respect of our law firm. I hereby state that I have no objection if the above payment could be made directly to late Japhet M. K. Osoro’s Estate Administrators and I, as the surviving and sole partner of Nyamweya Osoro and Nyamweya advocates instruct you to do.

I and the deceased’s family would be truly grateful if this could be done as soon as possible.

5. Following that letter, on or about 26th April 2008, the Client entered into an agreement with the Advocates by which they accepted payment of Kshs. 800,000/= and acknowledged receipt by signing a Discharge Voucher. The Discharge Voucher was signed by Hon. George Omari Nyamweya, the surviving partner of the Advocates and on behalf of the estate of the late Japhet M. K. Osoro, Advocate. It was an express term of the discharge agreement that by acknowledging receipt of the settlement, the Advocates declared that they had no further claim for legal fees against the Client.

6. Counsel for the Client, Mr Ng’eno, submitted that the agreement signed between the Advocates and Client was a valid agreement within the provisions of **section 45(1) and (6) of the Advocates Act (Chapter 16 of the Laws of Kenya)** and as such the bills ought not be taxed. He also contended that the bills of costs could not be filed as the matter had already been settled in terms of the Discharge Voucher.

7. The Advocates opposed the application through the replying affidavit sworn by Kennedy Bosire Gichana on 1st August 2018. He deponed

that the Client instructed the firm of *Nyamweya Osoro and Nyamweya Advocates* which was ran and operated by two advocates; the late Japheth Mecha Kebaki Osoro and himself. During that period the Advocates rendered legal services to the Client who made deposits in respect of several files and also paid a quarterly fee to cater for operational expenses for handling their matters in various courts including Kisii, Keroka, Kericho and Eldoret. Mr Gichana deposed that on 7th May 2007, he demanded fees for services rendered but in order and with intent to avoid payment and/or undercut the Advocates, the client opted to deal with other third parties.

8. Mr Gichana, acting on behalf of the Advocates, argued that the application before the court is incompetent as it merely seeks to refer the matter to the High Court. As regards the agreement, he pointed out that it was not an agreement recognised by the *Advocates Act*. He also argued that the settlement agreement was null and void as the parties who signed it lacked the capacity to bind the firm of Advocates. He indicated that the agreement was between George Omari Nyamweya and David Ogamba Osoro who, as administrator of the firm of the estate of Japhet Osoro, lacked the capacity to bind the estate as the administrators of the estate could only act jointly. Counsel submitted that before 19th June 2007, the Advocates rendered services to the Client through two advocates as the firm had not been registered by then and the advocates who did work were entitled to be paid and that the advocate who by signed the agreement, George Omari Nyamweya, was neither a partner nor qualified to act as an advocate. He added that the Discharge Voucher was an illegal contract as it was contrary **section 35** of the *Advocates Act*.

9. Before I deal with the substantive issues raised by the Client, let me settle the issue of jurisdiction raised by counsel for the Advocates. He pointed out the Chamber Summons dated 15th December 2017 was for the subject bill of costs to be referred to the High Court hence there was nothing further to be determined. He also pointed out that the issues raised are *res-judicata* as they were determined by a judgment dated 8th February 2017 in *Sotik Tea Company v Nyamweya Osoro and Nyamweya Advocates Kisii HCCA No. 154 of 2012 [2017]eKLR*.

10. The Client responded that the validity of the retainer and Discharge Voucher fell outside the jurisdiction of the taxing officer and that this matter was properly before this court. It relied on the findings of Okwany J., in *Sotik Tea Company v Nyamweya Osoro & Nyamweya Advocate [2017] eKLR* where she held that:

[T]he issue of whether or not fees had been paid to a third party and further, whether the said third party should have been enjoined in the taxation proceedings are, in my humble view, substantive issues which ought to have been referred to this court for determination...

11. The issue in that case related to whether a third party could be joined to the taxation proceedings and since the substantive issue regarding the retainer was not determined, these proceedings are not *res judicata* as argued by the Advocates. The court in that decision relied on the holding in *Mugambi and Company Advocates v John Okal Ogwayo & Another [2013] eKLR* where the court held that the jurisdiction of the taxing officer is to tax bills of costs in accordance with the applicable schedule of the *Advocates Remuneration Order* where there is no dispute as to retainer.

12. I also note that on 15th January 2018, the Deputy Registrar referred this matter to the Judge hence for all intents and purposes, the application was superfluous. In any case, the issue of the validity of the retainer and discharge voucher are matters to be dealt with by the High Court and all parties having placed before the court all the facts necessary for such determination, I do not find any prejudice to either party if I proceed with such determination. In any case, I find that the *issue of validity of a retainer agreement and the discharge voucher strips the taxing officer of jurisdiction to tax the bill of costs*.

13. I now turn to the substantive issue for determination. It is whether the retainer and discharge agreements are valid. There is not dispute that there was a remuneration agreement between the Advocates and Client. The point of contention is whether the discharge voucher or settlement agreement dated 26th April 2008 settled the issue of outstanding fees between the Client and Advocates.

14. The dispute revolves around the partners of the firm of Advocates at the time the remuneration agreement was signed and when the settlement was reached. On the face of the Discharge Voucher, the Advocates were represented by the surviving partner, Hon. George Omari Nyamweya, as the partner who had originally signed the remuneration agreement and who dealt with the Client's portfolio, Mr Osoro, had passed away.

15. The nature of the partnership or the relationship between the parties is set out in the affidavit of Bosire Gichana sworn on 15th April 2011 which I set out in extensor as follows;

[2] THAT sometime in the year 1995 I joined the late JAPHETH MECHA KEBAKI OSORO as an employee shortly after the demise of his only partner by then the late JAMES NYAMWEYA.

[3] THAT sometime in the year 1999 I opted to leave the said JAPHETH MECHA KEBAKI OSORO (now deceased) to start my own firm but they prevailed upon me to stay on condition that I was at liberty to deal directly with my own clients while assisting him in handling his matter as he had developed interest with his Nyamira office.

[4] THAT shortly thereafter I single handedly took over the running of the Kisii office including paying rent, salaries, telephone expenses, retirement benefits, office expenses, employing advocates to work as associates among them Richard Otar Advocate in the year 2003 Vincent Obondi Nyakundi in the year 2005 and PHILEMON OCHWANGI in the year 2006 and all other activities relating to the smooth running of the office.

[5] THAT I and the late JAPHETH MECHA KEBAKI OSORO agreed that I attend to all his matters on consideration that he receives payment of the retainer fees and instruction fees from his client and I was entitled to have the other costs of legal service rendered more specifically for SOTIK TEA FACTORY LTD and KENYA TEA DEVELOPMENT AGENCY.

[6] THAT I verily state that during the lifetime of the late Japheth Mecha Kebaki Osoro we attempted to have the particulars of the firm of M/s NYAMWEYA OSORO & NYAMWEYA Advocates changed but the file could not be traced at the Registrar of Business name offices at Nairobi.

[7] THAT it is well within my knowledge that sometime in the year 2003 I and the late senior colleague Japheth Mecha Kebaki Osoro sent our office clerk Mr. Peter Omani Obiria to find out from the Registrar about the registration of our firm "M/s NYAMWEYA OSORO & NYAMWEYA Advocates" but nothing was forthcoming until sometime in the year 2006 when we discovered that the "NYAMWEYA OSORO & NYAMWEYA Advocates" was never registered.

[8] THAT soon after the demise of the late Japheth Mecha Kebaki Osoro on 5th March 2007 I requested Hon. George Omari Nyamweya to regulate his position as I had earlier been informed by the late Japheth Mecha Kebaki Osoro that he was struck out of the Roll of Advocates sometime in the year 1991, when he joined politics, though his names continued to appear on the firms letter heads.

[9] THAT I verily state that Hon. George Omari Nyamweya agreed to regulate his position but in the meantime could proceed and have the firm registered in our names. Annexed herewith is the Certificate of Registration marked as exhibit KBG – 1.

[10] THAT I and Hon. George Omari Nyamweya further agreed that he would only remain as a sleeping partner until his position is regularized.

[11] THAT I verily state that it was our internal arrangement that I was entitled to all other costs for legal services rendered save for instruction fees and retainer fees.

[12] THAT I verily state that I ceased being an employee of Japheth Mecha Kebaki Osoro sometime in the year 1999 nor did I ever draw any salary since then, save for my share of the services rendered upto sometime in the year 2001.

[13] THAT I verily state that most correspondences between the firm of Nyamweya Osoro & Nyamweya Advocates were between me and the Respondent herein. Annexed herewith are some of the correspondences directed to me and marked as exhibit KBG – 2(a), (b) and (c).

[14] THAT I verily state that I issued fee notes both in the subordinate and High Court and the respondent duly acknowledged receipt of the same. Annexed herewith are the fee notes and acknowledgements marked as exhibit KBG – 3(a) and (b), 4(a) and (b) respectively.

[15] THAT it is well within my knowledge that the firm of Nyamweya Osoro & Nyamweya Advocates started rendering legal services SOTIK TEA COMPANY LIMITED together with its sister company Sotik Highlands sometime in the year 1996 until mid 2007.

[16] THAT I acted for the Respondent honestly, diligently and professionally and no suit was ever handled negligently during the entire period save for matter that came up after the Respondent's letter dated 20th March, 2007 which asked the firm of Nyamweya Osoro & Nyamweya Advocates not to take any further action on all their matters pending in court, unless with written instructions.

16. The relationship was further expounded in the letter dated 17th November 2008 from the firm of *Momanyi Aunga and Company Advocates* acting on behalf of Mr Kennedy Bosire Gichana, Advocate to the Client. It summarised the relationship as follows:

Our client is duly registered together with one George Nyamweya Omari as proprietors of NYAMWEYA OSORO and NYAMWEYA Advocates. However the said George Omari Nyamweya has disowned the certificate of registration and the existence of partnership between us, resulting to our client commencing proceedings for dissolution of the partnership which may result in appointment of a receiver to collect monies due to firm and payout all liabilities.

Further we wish to inform you that all legal services rendered to yourselves were done by our client through the instructed counsel the late Japheth Mecha Kebaki Osoro whose estate has a dispute as his widow Edith Billiah Kwamboka Osoro who obtained a confirmed grant of letters of administration were obtained fraudulently

17. The deposition of Mr Gichana and the contents of the letter I have set out do not contest the fact that George Omari Nyamweya was a partner in the firm of Advocates. He was therefore competent to act on behalf of the Advocates. As I understand, the issues raised by Mr Gichana is that he too was a partner, having initially been an employee and was entitled to fees for work done during the period covered by the Discharge Voucher. In my view, the issues raised implicate the nature of a partnership; the relationship between the partners of the firm of Advocates and the relationship between the Advocates and third parties namely the Client.

18. At the time material to the suit, the law in this area was governed by the now repealed **Partnership Act (Chapter 29 of the Laws of Kenya)** and the common law relating to partnership. The foundation of a partnership is the ability of each partner to bind the firm or one another. This is clearly set out in **sections 7 and 8 of the Act** as follows:

7. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

8. An act or instrument relating to the business of the firm, and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners: Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

19. The effect of these provisions was summarised by the Court of Appeal in **Vijay Kumar Saidha and Another v Tribhuvan Gordhan Barkrania and Others NBI CA Civil Appeal No. 9 of 2007 [2015]eKLR** as follows:

Section 7 of that repealed **Act** provided that every partner being an agent of the firm was bound by the acts of other partners performed in the ordinary course of business that was carried on by the firm. The exception was that the partners would not be bound if the partner so acting had in fact no authority to act for the firm in the particular matter and the person he was dealing with knew or did not know that he had no such authority or believed him to be a partner.

20. From the evidence I have outlined elsewhere, George Omari Nyamweya was a partner of the firm of Advocates. He was thus entitled to negotiate fees and agree on a settlement as against the Client and that settlement was binding on the firm. The negotiation and settlement of fees is within the ordinary cause of business of a law firm and is indeed within the scope of authority of an individual partner. From the correspondence annexed to the parties' affidavits, the Client was entitled to deal with George Omari Nyamweya in negotiating and settling fees and signing the Discharge Voucher on behalf of the firm. There is no allegation in any of the depositions that the Client knew of or had any notice of the internal arrangements regarding the payment of fees to Mr Gichana, any other partner or any other persons. The firm of Advocates was accordingly bound by the Discharge Voucher.

21. As regards the death of Mr Osoro, the applicable law at **section 37(1)** of the **Act** which states that:

37 (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

22. Whether the firm is dissolved or not is a matter of agreement between the partners and what is evident from the averments of Mr Gichana is that the firm was in fact not dissolved hence Mr Nyamweya had full authority as a partner to deal with the Client on behalf of the Advocates. At the end of the day, the issues raised by Mr Bosire were matters of internal arrangements between the partners in the firm of Advocates for which the Client did not have any notice.

23. Since one partner may bind the firm, it follows that it was not necessary for the estate of the deceased to execute the Discharge Voucher for it to be valid. However, the administrator did so and despite the Advocates raising the issue of the capacity of the representative of the estate entering the agreement on behalf of the deceased's estate, neither the deceased's estate, administrators or beneficiaries have raised any complaint in the matter.

24. Having found that Mr George Omari Nyamweya had the capacity to bind the firm of Advocates, I also hold that the Discharge Voucher constitutes a valid discharge of all the fees due from the Client as at the date of the agreement. I would only quote what Odunga J., stated in **Republic v Permanent Secretary in Charge of Internal Security – Office of the President & another ex-parte Joshua Mutua Paul NBI HC Misc. Civil Appl. No. 100 of 2010 [2013] eKLR**:

[16] In a layman's language an accord and satisfaction is a compromise with something in it for both sides; it is the purchase of a release from an obligation whether under contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration, which makes the agreement operative. In a defence of accord and satisfaction there must be something given or done by the defendant to or for the plaintiff which the latter adopts as a discharge of the cause of action. But before such a defence can succeed, it must be shown that the agreement (accord) was valid in law. The agreement cannot be valid unless it is supported by consideration. There must be some benefit that the plaintiff is getting by promising to forebear from making further claim. It is an essential element of a valid accord and satisfaction that the agreement, which constitutes the accord, should itself be binding in law, and such agreement cannot be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz performance of an agreement of accord, does not provide retroactive validity of accord, but depends for its effect upon the validity of the accord as a binding contract at the time when it is made.

25. In this case the Discharge Voucher was entered into between the Client and the surviving partner of the Advocates and the administrators of the deceased partner, Japheth Osoro. The Advocates knowingly represented to the Client that Kshs. 800,000/- was due to the firm of Advocates as legal fees. In consideration of the receipt of the said fee, the Client was discharged from any further liability to pay fees and in consideration the Advocates undertook not to make any further claim for fees in the future.

26. Before I conclude this decision, I will deal with the argument raised by the Advocates that the claim for fees was for less than the amount provided for in the **Advocates Remuneration Order** hence amounted to undercutting contrary to **section 46(d)** of the **Advocates Act**. In this respect I would adopt the statement of the Court of Appeal in **Njogu and Company Advocates v National Bank of Kenya NBI CA Civil Appeal No. 165 of 2007 [2016]eKLR** that:

[26] In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate's Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention

27. Since the issue of fees was settled by the Discharge Voucher, I find that the taxation of client-advocate bill of costs between the Advocates and Client cannot proceed as the Client has discharged all its obligations towards the Advocates.

28. The bill of costs is accordingly struck out together with the bill of costs filed in **Kisii Miscellaneous Civil Application Nos. 33, 34, 35, 40, 41 and 51 of 2011**. Each party shall bear their own costs.

DATED and **DELIVERED** at **KISII** this 27th day of November 2018.

D.S. MAJANJA

JUDGE

Mr Bosire Gichana instructed by Bosire Gichana and Company Advocates for the applicant/Advocates.

Mr Ng'eno instructed by Kaplan and Stratton Advocates for the respondent/Client.