



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 345 OF 2014

MWAURE & MWAURE WAIHIGA CO. ADVOCATES.....APPLICANT

VERSUS

CAPTAIN INGO BERND RAUER.....RESPONDENT

RULING

1. By a bill of costs dated the 22/10/2014 the Advocate/Applicant sought to recover from the Client/Respondent the sum of Kshs.1,025,033.58 being the costs allegedly incurred and earned by the advocate as a result of acting for the client in Mombasa HCC No. 112 of 2014, CAPTAIN INGO BERND RAUER VS TERESIA MURUGI.

2. For some reason, there was filed a Notice of Motion dated 22/10/2014 and expressed to be premised on the provisions of section 48(1) of the Advocates Act as well as other provisions of the Civil Procedure Act. It sought leave of the court to tax the bill; to serve the bill by registered post; an order for deposit of security and that the sums held by another firm of advocates should not be released. Although that application was dismissed for want of attendance on the 10/2/2016, it is worth saying that on the plain words of the statute, and in particular section 48(3) no such leave was necessary prior to taxation.

3. To that application, the client filed a Replying Affidavit sworn on the 5/11/2014 in which it is contended and, so strongly, that the client did not instruct nor deal with any advocate in the firm but rather dealt with a masquerade called JAMES KAMAU MWANGI who denied him a chance to meet any advocate in the firm. The affidavit unequivocally sought that the bill of costs be struck out on account of the fact that it was seeking to recover fees for services rendered by an unqualified person. There was additionally filed a Notice of grounds of objection which reiterated that the provisions of section 39 and 40 of the Advocates Act outlawed recovery of costs from the client on account that the firm of advocates were guilty of violation of several provisions of the Advocates Act by allowing an unqualified person to pass out and masquerade as an advocate.

4. Indeed the Advocate did not leave the allegations unchallenged. The challenge came in the nature of an affidavit by JAMES KAMAU MWANGI. He took the stand that he dealt with the client in this matter in his capacity as a clerk employed by the Advocates firm and not as an Advocate. Infact he denied ever masquerading as an advocate. He admits having met the client but contends that he did so in his capacity as a clerk employed by the advocates firm. That the instructions were infact given on phone to an advocate and by email and that the papers were prepared and signed by an advocate and not him.

5. On the directions by the court, parties were to file and did file written submissions but on the date appointed for hearing, only the client was represented but not the advocate. I have had a valuable chance

to read and consider all the papers filed by the parties and the submissions offered by Mr. Opolu.

Issues for determination

6. The only issue raised in the objection is whether or not the advocate is entitled to fees. That question can only be answered if there is sought and obtained an answer as to who drew the papers in the suit HCC No. 112 of 2014.

7. To interrogate the matter the starting point must be the provisions relied upon by the client to outlaw or disentitle the advocate to fees. My reading of section 37, 38, 39 & 40 reveal that the provisions prohibit sharing of profits, touting of work for an advocate, an advocate acting as an agent of an unqualified person and recovery of costs for anything done by an unqualified person in contravention of the Act.

Analysis and determination

8. Proceedings premised on a dispute for the recovery of fees by an advocate must be seen to be civil in nature hence the standard of proof must be within a balance of probabilities. That however is subject to the rules of evidence that the onus rests upon him who would fail if no evidence at all is led and that he who alleges has the onus to prove.

9. Based on those principles of law, it was, the duty of the client as the person asserting that the advocate is disentitled to fees to prove that:-

- Fees paid had been shared by an unqualified person;
- that the unqualified person had sought to procure the employment of the advocate by the client;
- that the advocate did act as an agent of an unqualified person; or
- that the unqualified person did perform some duty for which costs or fees is being sought for recovery.

10. The evidence on the contested facts has been availed by the affidavits of the client and that of JAMES KAMAU MWANGI. In order to answer the question earlier on posed, this court would have to weigh the two pieces of evidence and come to a determination as to who between the two gave a credible account of what transpired in the matter.

11. I have reviewed the entire file and in particular the evidence on how suit number HCC 112 of 2014 was conceived and filed. I have also had a chance to peruse the court file in HCC No. 112 of 2014 just to find out in whose name the pleadings were drawn and filed. My perusal of the said file has revealed to me that the pleadings were indeed disclosed to be drawn by MS MWAURE & MWAURE WAIHIGA ADVOCATE of Post Office Box Number 2091-80200 MALINDI and Physical address of RUBY PLAZA, FIRST FLOOR, MALINDI that to me fully satisfied the dictates of section 35 of the Advocates Act.

12. There is equally uncontroverted evidence in the affidavit of MR JAMAS KAMAU MWANGI that he is an employee of the said firm and that he had known the clients' wife while employed by other law firms including Opolu & Company and J J Chesaro & Company Advocates. The only positive complaint the client makes and which I find to be prima facie is that he did not meet any advocate nor visit the advocate firm except Mr. Mwangi who he says he came to learn was not a qualified person. However there is no positive evidence that Mr. Mwangi carried himself out as an advocate. There is also lacking evidence that the fees paid and acknowledged by the firm was ever shared by the firm with Mr. Mwangi as a profit.

13. On the evidence availed by the client, I find it deficient, on a balance of probabilities to have proved violation of section 37, 38 & 39 of the Advocate Act. In any event it is deponed on oath without contestation that the suit Notice No. 121 of 2014 continues to be pursued if indeed the client was to have his way that those pleading are bad for having been drafted by or pursuant to instructions to an unqualified person, he ought to disown the suit. He has not. To this court it would be an act of

approbating and reprobating at the same time to pursued the suit yet maintain that the papers were by unqualified person.

14. At paragraph 7 of the affidavit of the client it is asserted that Mr. Kamau personally signed the documents and went to look for an advocate to appear in the court yet at paragraphs 3 and 8 the deponent asserts that Mr. Kamau carried himself out as an advocate. I find such evidence to be contradictory and incredible when compared to the detailed and otherwise following account offered by Mr. Kamau that he was introduced to the client by a long standing friend he had known since the year 2006 when Mr. Kamau worked with Ms. Opulu & Co. Advocates. It is important to note that there was no attempt to counter the account of Mr. Kamau on how they met and what transpired including the assertion that he made the client give instruction on phone to the advocate who advised that he collects documents and that using the documents the pleading were prepared and brought to the client to sign and soon thereafter the client left jurisdiction and by the time the order was obtained in court he was not in Kenya.

15. I do find that it is most probable that Mr. Kamau merely met the client spoke to him and collected the documents on the part of this employer. In any event even if it had been proved that Mr. Kamau prepared the court papers, in the name of the firm and had the same endorsed as such, the proviso to section 35 of the advocates Act sanctions the same provided the name and address of the firm were thereby endorsed.

16. In my view and understanding of the law in this area, an employee of an advocates or a firm of advocate is not barred from talking to client on behalf of the advocate nor is he barred from preparing documents reserved for preparation by an advocate under section 34(1) provided he acts in his capacity as such employee and he remembers to endorse the name and address of his employer on the documents. If that was not to be the law then the remuneration order would not have provided for fees for basic clerical duties like attending court at the registry to file documents and to process service which this court takes judicial notice to be tasks undertaken by paralegal employees of the lawyers.

17. In the same vein I find nothing untoward with an employee of a firm of advocates, like Mr. Kamau in this case, recommending his employer to client. That cannot be termed touting. Touting as I understand it is the action of unqualified person, who as it were, goes marketing an advocate to a prospective client with the sole purpose of financial payment or any other gain while not being an employee seeking to ensure that the earnings of his employer is sustained for his sustained employment.

18. The upshot is that I find no violation of section 37,38,39 or 40 of the Advocate's Act proved to have been committed by the advocate or their employee and I therefore dismiss the objection raised against the bill of costs dated 22/10/2014.

19. I direct that the bill be presented before the taxing officer of this court for taxation in the usual and ordinary way unless otherwise a valid and contrary order is issued by a court of competent jurisdiction.

20. I order that the costs of the objection shall be costs in the cause and be taken into account at taxation under Rule 79(3) of the Advocate Remuneration Order.

Dated and delivered at Mombasa this 21st day of April 2017.

HON. P. J. O. OTIENO

JUDGE