REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 23 OF 2014

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN

ADVOCATE & CLIENT

BETWEEN

THOMAS K'BAHATI & PETER KALUMA

T/A LUMUMBA MUMMA & KALUMA ADVOCATES…..........APPLICANT/ADVOCATE

VERSUS

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS………...............................………APPLICANT/RESPONDENT

ARISING FROM

MISCELLANEOUS APPLICATION NO. 632 OF 2008

REPUBLIC…………………..………………….................……………………APPLICANT

VERSUS

THE INDUSTRIAL COURT OF KENYA………...............................………RESPONDENT

EX-PARTE

BRITISH AMERICAN TOBACCO KENYA LIMITED.......................................APPLICANT

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS…..………............................……………INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion expressed to be brought under section 3A of the ***Civil Procedure Act***, and some unspecified provisions of the ***Advocates Remuneration Order*** as well as what was stated to be all other enabling provisions of the law, the Respondent herein, **Kenya Union of Commercial Food and Allied Workers** (hereinafter referred to as "the Union"), seeks the following orders:

> **1. That the Application be certified urgent and be heard ex-parte in the first instance.**
>
> **2. That pending the hearing and determination of this Application, the Honourable Court do restrain the Advocate/Respondent from proceeding with the taxation of the bill filed herein.**
>
> **3. That the Honourable Court do order and declare that the Applicant is not the right entity to bear the Advocate/Respondent's cost.**
>
> **4. That the Honourable Court do strike out the bill of costs dated 26th May, 2014.**
>
> **5. That costs of this application be borne by the Advocate/Respondent.**

<u>Respondent/Applicant's Case</u>

2. According to the applicant in this application, by a letter dated 12th November, 2009, the Claimants, in the High Court, Misc. Application Number 632 of 2008, **Mr. Robert Machira**, **Japhet Nyaga Mati**, **Joseph Obonyo Nyang**, **Benson Mwangi Macharia**, **Justus Musembi** and **Lawrence Muraya** sought the legal representation of the Respondent in the matter. By a letter dated 20th November, 2009, the Unions appointed the Respondents to represent the Claimants' interest in their case on strict conditions that the Claimants were to pay the legal fees; terms and conditions which had been expressly agreed upon both verbally and documented through letters.

3. It was averred that following the above payment arrangement, the Respondents naturally wrote fee notes to the Claimants themselves regarding payment of their legal fees for purposes of representation for Kshs, 60,000/= each which sum as settled by the said claimants in full payment of the legal fees as agreed. After settling all the legal fees in full, the Claimants were dissatisfied with the service they were getting and wrote a letter to the Respondent demanding withdrawal of their representation and gave reasons of their dissatisfaction therein. However on 13th June, 2013 upon receipt of the Union's letter dated 29th May, 2013, the Respondents acknowledged receipt thereof and made a demand of payment of their costs.

4. It was disclosed that the Fee Notes raised by the Respondent demanded an additional payment of Kshs. 352,673/= from **Benson Mwangi Macharia**, Kshs. 411,581/= from **Robert Gichohi** and Kshs. 368,821/= from **Japheth Nyaga Mati** respectively contrary to their arrangement of Kshs. 60,000/= being the full legal fee from each which had already been paid. According to the Union, in the Respondent's letter to the Union dated 13th June, 2013 the Respondents refer to the Union as their client on record and therefore bound to settle their costs: an assertion that is not true, lacks basis as at no point did the Union authorize them to represent the claimant. In the same letter, the Respondents claimed that the Respondents had signed an undertaking with the Claimants. It was however contended that there is no agreement to that effect.

5. It was averred that the Union wrote back to the Respondent vide a letter dated 14th June, 2013 referring the Respondent to the letter dated 29th May, 2013 in which the claimants expressly undertook to jointly settle any outstanding costs of the Respondent. To the Union, the above statement is explicit clear and devoid of any clarification and its import is that the Respondents were to strictly get paid by the Claimants, and seeking payment from the Union would be highly irregular and would amount to unjust enrichment.

6. It was disclosed that on 17th June, 2013, the firm of **Machira & Company Advocates** who had just come on record, having taken over from the Union/Respondent wrote to the latter addressing the same

concerns of the fact that they had already been paid in full. It was reiterated that the agreement between the Respondent/Advocate and the Union was that the costs were to be met by the individual grievants (sic) and the advocates took it upon the brief knowing the very clear terms of contract which was binding on the parties.

7. It was clarified that the Union's letter dated 20th November, 2009 was the only contract formed between the Union and the Respondent whose terms were explicit to wit: *"other than appointing you, we agreed that you represent the Claimants on their own costs, but any advise required from us by your firm…is highly appreciated"*. Following the above terms, the Respondent all along communicated to the grievants (sic) personally and at no point was the Union involved.

8. It was therefore the Union's case that the Union cannot be condemned to pay costs to the Respondent only on the basis that the Union was the interested party in the suit as the Advocate-Client relationship is evidently lacking in the instant circumstance. To the Union, the laws of natural justice do not allow the Respondent to demand costs from the Union having received full payment from the Claimants as this would be tantamount to unjust enrichment. In its view, the rules of taxation as provided for in law envisage a scenario where there is a solid relationship between the Advocate and the Client. The Union took the position that the legal technicalities employed by the Respondent are unconstitutional and untoward, lack basis and should not be entertained by this Honourable Court and that the prayers sought herein should be granted.

<u>Respondent/Advocates' Case</u>

9. The application was opposed by the Respondent Advocates herein, **Thomas K'Bahati & Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates** (hereinafter referred to as "the Advocates").

10. According to the Advocates, application seeks that the Bill of Costs herein be struck out on the basis that there was no Advocate- Client relationship between the Applicants and Respondent which assertion the Advocates contended was perjury in so far as it was made on oath.

11. It was averred that vide the letter dated 2nd November 2009, six members of the Union met and instructed the Advocates to represent their interest in HCC Misc App No. 632 of 2005: *BAT(K) Ltd -vs- Industrial Court.* Since they were not parties, the Advocates sought and obtained instructions from their union-Kenya Union of Commercial Food and Allied Works- which was the party in the matter they sought to instruct the dated 19th November 2009, it was expressly stated "*You verbally indicated that we can proceed as instructed by the Union members. However, since it is the Union (and not the individual members) who is named as a party in the suit, it is the union that can give instructions to us. As agreed, therefore, kindly express the instructions in writing; to <u>obviate disputes over representation</u> and to proceed in a professional manner."*

12. The Advocates averred that they had foreseen that a situation of denial of instructions and refusal to pay legal fees might arise in future since the instructing client was not the party whose interest was being protected in the suit. The Advocates averred that all correspondence exchanged herein confirm beyond any shade of doubt that the Respondent was their client and not the union members since the documents exhibited show that the party who was the client and who appointed the Advocate to act on its behalf was the Respondent. It was the Advocates' case that the letter dated 29th May, 2013 was a letter by the Respondent terminating the instruction to them hence the Respondent would not have terminated the services if it was not the client.

13. It was contended that even the current advocate on record for the Respondent confirms in the letter dated 12th June, 2013 that the Respondent was the Advocate's previous client. It was therefore asserted that there can thus be no ambiguity or doubt whether the Union gave instruction to the Advocates. Consequently, there can be no doubt or ambiguity that Advocate- Client Relationship existed between the Applicants and the Respondent.

14. It was deposed that the difference between the Applicant and the Respondent's three members was their attempt to run away from paying the legal fees as had been arranged with the Respondent. It was expounded that the three attempted to circumvent paying fees by mischievously changing advocates after the Advocates had negotiated and settled for them the matter in order to receive the settled payments through another law firm in order to defeat the Advocates' legitimate fees. This was so because the arrangement with the parties was that other fees would be based on the settlement or judgement and deducted accordingly.

15. The Advocates contended that whereas three other union members agreed, received their settlement and paid the due fees as determined based on the settlement to each of them, these three remaining ones became clever. Instead of the Respondent helping the Advocates obtain their fees from its members as guaranteed since it is the one in control of them, it also terminated our services before the same was settled.

16. The Advocates noted that **Justice Korir**, by his ruling dated 22nd May, 2013, dismissed the three union members attempt to be parties to this matter and since they have not been made parties to this suit, the bill of costs can only be filed against the Respondent. Upon the termination of their services, the Advocates forwarded the Draft Fee Note to the Respondent to settle or cause its three remaining members to settle. This did not happen and there ensued this Bill of Costs.

17. It was the Advocates' case that as the client on record, the Union was the one legally bound to settle the costs. Despite the fact that the Union indicated that the union members ought to settle the legal fees, that was only tenable if the said parties cooperated. In the event of failure, the client known to the Advocates and to the court and chargeable with the costs is the client on record.

18. According to the Advocates, there is no evidence before the Court to decide that Advocate-Client relationship did not exist between the Applicants and the Respondent but rather between the Applicants and the Union members. To them, in a situation like this, the client chargeable would be taxed and would pay, and at its own option, would seek restitution from the parties on whose behalf it gave instructions.

19. The Advocates termed as a blatant lie and false the allegation that the legal fees was agreed at Kshs. 60,000/= since the documents annexed are invoices and not fee notes at the bottom of which it is clearly written: "*NOTE: A Final Fee Note will be sent to you when the transaction has been completed in which credit will be given for this amount. This is not a Tax Invoice.* Further, the invoices are not an agreement for remuneration of an Advocate as per section 45 of the ***Advocates Act***. In fact the receipts of the payments annexed by the Respondent clearly show that the payments were on account of disbursements and not final legal fees.

20. It was submitted that the argument that since the fees were to be paid by the union members, they should be the client's and not the Union is farfetched and untenable since that only makes the Union an agent. Still as the instructing party; as the party in court; as the party represented by the Applicant, it is the client chargeable with the costs and the one to pay. This proposition was based on **Nderitu & Partners Advocates vs. Mamuka Valuers (Management) Ltd [2006] eKLR,** in which the client also argued that it gave instructions on behalf of Kenya Tae Kwondo Association, and so it should not be pursue with a bill of costs. The Judge held thus;

> **"In my view being the party chargeable with the bill of costs, it is also the party liable to pay it. It can always claim a reimbursement from its principal. As far as the Advocate is concerned, he must look to the client for payment of his costs as it is the Client who instructed him to act in the matter. The Advocate cannot look to the principal for payment of his costs as he was not instructed by the principal."**
>
> **"In the instant case there is no dispute that the client duly instructed the Advocate in writing to act in the matters giving rise to the taxed costs. It matters not that the instructions were given on behalf of someone else. The retainer cannot be in dispute. Once again, I will state that the Client can always get a reimbursement from his principal of the costs due to the**

advocate."

21. In this case it was submitted that since the instructions were in writing, there can be no dispute on retainer. Even if there was no written instruction, the representation of the Union in the matter is sufficient to infer instruction to the Applicant and reference was made to **Ochieng Onyango Kibet & Ohaga Advocates vs. Adopt A Light Ltd (Misc. App. No. 729 of 2006).**

22. It was submitted that the fact that the Respondent indicated in the instruction letter that the fees will be borne by its members does not matter. As held in the *Nderitu & Partners Advocates case*, it can always pursue them. In any event, the letter is not an agreement between the Applicant and the Respondent on the manner the fees would be paid. Those were the wishes of the Respondent. The wishes cannot legally bind a non party, the advocate. It was an agreement between the Respondent and its members; only they enjoy privity of the contract and can be bound. The advocate was neither a party nor did he execute it. The advocate has neither privity of contract nor locus, and thus is legally not bound by such agreement.

23. With respect to the issue that there was an agreement for payment of Kshs 60,000.00 each, it was submitted that there is no supporting evidence of this other than invoices from the Applicant yet invoices have never constituted any agreement on legal fees. Moreover, the invoices bear the *Notice* that '*A Final fee Note will be sent to you when the transaction has been completed in which credit will be given for this amount. This is not a Tax Invoice*."

24. Further, it was submitted that it is trite law that an agreement on fees between an Advocate and a Client should comply with *section 45 of the **Advocates Act*** which section mandatorily requires that such an agreement must be in writing and signed by the Client or its duly authorized agent. To the Advocates, for any stretch of imagination, an invoice cannot amount to an agreement envisaged under the said section. More importantly, no any agreement or document purporting to comply with section 45 has been adduced in Court.

25. In light of the foregoing, it was submitted that there is no doubt that the Respondent instructed the Advocates and in furtherance thereof, the Advocates offered legal representation for it in the matter. They therefore prayed that the Notice of Motion dated 2nd July 2014 be dismissed with costs.

26. There were other submissions relating to the quantum but that is an issue for determination by the Taxing Officer in the initial stages and not for this Court.

Determinations

27. I have considered the foregoing and this is the view I form of the matter.

28. As appreciated by the parties herein, the issue for determination is whether there was a relationship of Advocate/Client between the Applicant and Respondent with respect to Miscellaneous Application No. 632 of 2008. The word "client" is defined in section 2 of the ***Advocates Act*** to include:

> ***any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.***

29. From the letter dated 12th November, 2009, it is clear that by the time the Advocate was instructed, the interested party in the suit was the **Kenya Union of Commercial Food and Allied Workers Union** (hereinafter referred to as "the Union"). The Advocates were instructed to proceed and file a Notice of Change of Advocates and come on record for the interested party. However all other issues were to be raised with the Union. From the letter dated 20th November, 2009, it was clear that it was the Union that appointed the Advocates, though the Union contended that the advocates' fees would be settled by the Claimants.

30. When the relationship between the Advocate and Client became sour, it was in fact the Union that instructed the firm of Machira & Co. Advocates to take over the matter from the firm of Lumumba, Mumma & Kaluma Advocates. That the Union was the client of the latter firm was acknowledged by the firm of Machira & Co. Advocates in its letter dated 12th June, 2013.

31. In his ruling dated 22nd May, 2013, **Korir, J** found that the Union represented the interests of the Claimants in that suit. In his view, the Claimant ought to have instructed the Union to terminate the services of the Advocates otherwise they were stuck with the said firm since the Union was the organ that took the dispute to the Industrial Court. In other words the learned Judge found that the Union was the representative of the Claimants in that suit.

32. From the definition of the word "Client" in section 2 of the ***Advocates Act***, it is clear that the Union fell squarely within that definition. I agree with the decision of **Waweru, J** in **Nderitu & Partners Advocates vs. Mamuka Valuers (Management) Ltd** (supra) that a person who gives instructions in a suit is the client and not the person on whose behalf he purports to act. I also agree with the decision in **Ochieng Onyango Kibet & Ohaga Advocates vs. Adopt A Light Ltd (Misc. App. No. 729 of 2006)**, where the court held that:

> **"The burden of establishing the existence of a retainer is always and primarily on the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service… The participation and/or instruction of an Advocate can either (be) expressed or implied. And it need not be in writing even where the instruction is expressly given."**

33. This was the view adopted by **Lesiit, J** in **Alex S. Masika & Co Advocates vs. Syner-Med Pharmaceuticals Kenya Limited Nairobi (Milimani) HCCC No. 959 of 2006** where the learned Judge expressed herself as hereunder:

> **"The act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by a client. A retainer need not be in writing. Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case… There is evidence that the client instructed the advocate to act for it because during the hearing of the application/appeal, the client was present as the advocate made representation on its behalf before the Board and during those proceedings the client did not object to the advocates appearing for it. Therefore the client instructed the advocate to act for it and the retainer can be inferred from the conduct of the parties since the retainer need not be in writing."**

34. It is therefore my view that **Kenya Union of Commercial Food & Allied Workers Union** was the client of **Thomas K'Bahati & Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates** in Misc. Application No. 632 of 2008 and is liable to settle the said Advocates fees. As was rightly pointed out in **Nderitu & Partners Advocates vs. Mamuka Valuers (Management) Ltd** (supra) **Kenya Union of Commercial Food & Allied Workers Union** can always get a reimbursement from the claimants who are its members.

35. Consequently I find no merit in the Notice of Motion dated 2nd July, 2014.

Order

36. In the result the Motion fails and is dismissed with costs.

37. It is so ordered.

Dated at Nairobi this 18th day of October, 2017

G V ODUNGA

<u>JUDGE</u>

<u>Delivered in the presence of:</u>

Mr Onenga for Mr Nyabena for the Respondent

Miss Wambui for Mr Bahati for the Advocate/Respondent

CA Ooko