

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC APPLICATION NO. 79 OF 2013

BOG S.A KYENI GIRLS SEC. SCHOOL.....APPLICANT

VERSUS

MWANIKI IRERI & CO ADVOCATES.....RESPONDENT

RULING

1. This is a reference (an appeal) from the ruling of the Deputy Registrar who taxed the client – advocate's bill of costs in the sum of Kshs 141,676.02 and issued his ruling on 23rd October 2015.

2. The applicant has challenged the respondent alleging that he was not its advocate. It has further challenged that the respondent did not have instructions to represent it in this matter. The application is supported by the grounds on the face of the motion. In ground 1, the applicant has stated that it will suffer loss and damage if the respondent were to execute the bill of costs as taxed. In ground 2, it has stated that no judgement and/or decree has been entered. Furthermore, the applicant has stated that the respondent served on the applicant a proclamation in which they threatened to sell the property of the applicant.

3. In ground 5, it has stated that there is a serious dispute on the issuance of instructions to the 2nd respondent to act for the applicant. Finally, in ground 6, it has stated that the goods which were proclaimed to be sold belonged to a public school which would gravely affect and paralyze the operations of the school.

4. The further supporting affidavit of the applicant was prepared by Wanja Karanga, who is a principal of the school and secretary to the Board of Governors/Management. Her replying affidavit runs to 16 paragraphs. The gist of her affidavit is that the applicant did not instruct the respondent to act for them in this suit. She has further deponed that the advocates/respondent was a student in the school. She has also deponed that he was also a teacher and a member of the Board of Governors and that he took advantage of the workings of the Board and proceeded to act for the school. More importantly, she has deponed that the respondent was not retained by the applicant as their advocate and finally deponed amongst other matters that the applicant paid money owed to their clients directly without using the offices of the respondent/advocate.

5. I have considered the affidavit evidence of the applicant and that of the respondent advocate which runs to 26 paragraphs. I find from the affidavit evidence that the major issue for determination is whether the respondent advocate was retained by the school as their advocate. The 2nd issue is as the amount of money that is claimed by the respondent advocate as his costs. The 3rd issue is as to who should bear the costs of this application.

6. I find from the affidavit evidence of the applicant and the respondent advocate that the respondent advocate was not retained as counsel for the respondent. I also find that there is no agreement of the advocate being retained by the applicant as their counsel. In the circumstances, the permitted procedure is for the advocate to file a plaint against the school to prove that the applicant retained him as its advocate. It is in that forum that the issue of the quantum of the amount payable as legal fees to the respondent advocate will be raised and determined.

7. In the circumstances, I hereby allow the applicant's application. I also direct that the issue of whether

the respondent advocate was retained should be proceeded with by way of a plaint with the sum taxed at Kshs 141,676.02/- being part of the triable issues to be determined by the trial court.

8. The upshot of the foregoing is that the application succeeds and costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **DECEMBER 2016**

In the presence of Mr. Siro for the applicant and in the absence of the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

19.12.16