



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS SUIT NO. 662 OF 2012

WAMBUGU, MOTENDE & CO. ADVOCATE.....APPLICANT

- VERSUS -

KAJULU HOLDINGS LIMITED.....1ST RESPONDENT
KISUMU CONCRETE LIMITED.....2ND RESPONDENT
LALJI KARSAN RABADIA.....3RD RESPONDENT
ARVIN JADVA RABADIA.....4TH RESPONDENT
CHANDRAKANT LALJI RABADIA.....5TH RESPONDENT
RAMBAL J. RABADIA.....6TH RESPONDENT
SUDHIR BRAHMBHATT.....7TH RESPONDENT

RULING

1. This Ruling is on a reference from the decision of the Taxing Officer dated 22nd July 2013. The Clients have challenged the Ruling on taxation on the following grounds;
 - i. *When the Taxing Officer awarded costs to the Advocate in respect to services which the advocate did not render, that was an error, in principle.*
 - ii. *The only clients who had instructed the Advocate were KISUMU CONCRETE PRODUCTS LIMITED and DEVELOPMENT BANK OF KENYA LIMITED. Therefore, the other persons should not have to pay any costs to the Advocates. The said other persons are;*
 - a. *KAJULU HOLDINGS LIMITED ;*
 - b. *LALJI KARSAN RABADIA;*
 - c. *ARVIN JADVA RABADIA;*
 - d. *CHANDRAKANT LALJI RABADIA;*
 - e. *RAMBAL J. RABADIA; and*
 - f. *SUNDIR BRAHMBHATT.*
 - iii. *The Advocates were only instructed to Register the following 2 things;*

1. **Transfer from Kajulu Holdings Limited to Kisumu Concrete Products Limited.**
 2. **Charge over the Title No. KAJIADO/KITENGELA/2354 by Kisumu Concrete Products Limited, in favour of the Development Bank of Kenya Limited.**
- iv. **In respect to the two things which the Advocate was instructed, the parties agreed on the sum of Kshs. 750,000/- to cover the Stamp Duty on the Transfer and on the Charge; the Special Land Control Board Consent; and Legal Fees.**
 - v. **Although the advocate has instructions to undertake two tasks, he only performed the task of effecting the Transfer of the property from Kajulu Holdings Limited to Kisumu Concrete Products Limited.**
 - vi. **The Value Added Tax (VAT) should only be calculable on the amount which this court finds to payable to the advocate.**

2. When canvassing the application, Mr. Amuga, the learned advocate for the clients, submitted that the Instructions to the Advocate were spelt out in the letter from Development Bank of Kenya Limited (hereinafter the "Development Bank"), dated 10th November 2011.
3. The said letter asked the Advocate to Transfer L.R. No. Kajiado/Kitengela/2354 to Kisumu Concrete Products Limited.
4. The Development Bank made the following position clear;

"As per our records in your possession, we financed this Land and the Title has been with us since then, as a deposit. After the transfer is done, you are to return back the original Title back to the Bank for safekeeping".

5. The advocate acknowledged receipt of that letter by signing it and dating the endorsement, on 17th November 2011.
6. As far as Development Bank was concerned, they could not have instructed the Advocate to handle the issue of the Sale Transaction, as the said Sale Transaction had been completed before the Advocate was instructed.
7. The clients also said that the fees and disbursements that were payable to the Advocate were duly negotiated and agreed upon. Following the agreement on the fees and the disbursements, the Advocate is said to have given the details thereof on a written note.
8. The written note was actually a complimentary slip bearing the name and the address of **WAMBUGU MUTENDE & COMPANY ADVOCATES.**
9. The hand-written particulars on that complimentary slip were as follows;

<i>"Stamp-Duty-Transfer</i>	<i>400,040/-</i>
<i>Stamp-Duty-Charge</i>	<i>15,040/-</i>
<i>Special Board/Disbursements</i>	<i>50,000/-</i>
<i>Legal Fees</i>	<i>250,000/-</i>
<i>TOTAL</i>	<i>715,080/-"</i>

10. The clients were categorical, that the Advocate never registered the charge.
11. In response to the application, Mr. Ngigi, the learned advocate for the Advocate, submitted that the Advocate was not paid for the services which he had rendered.
12. He pointed out that the Advocate was instructed to Transfer a property valued at Kshs. 20.0 million.
13. In support of that contention, the Advocate drew the court's attention to the Loan Agreement dated 15th January 2009. That Loan Agreement was between Kisumu Concrete Products Limited and Kajulu Holdings Limited.
14. A portion of the Loan Agreement stipulated as follows;

“i) Kajulu Holdings Ltd wishes to purchase Land title SKJD/Kitengela/2354 at a price of Kshs. 20 million (Kenya shillings Twenty Million only) but has no borrowing capacity at the moment”.

15. It was the Advocate's contention that because that Loan Agreement made reference to the “purchase” of land, there was both a sale and a purchase of that land.
16. The Advocate also submitted that both Kisumu Concrete Limited and Kajulu Holdings Limited had instructed the Advocate to act for them.
17. At that stage, the Court inquired from the Advocate, the whereabouts of the note which contained the instructions which the clients gave to him.
18. The Advocate informed the court that the instructions were not in writing.
19. The Advocate then explained that the Development Bank instructed the Advocate to prepare both a Transfer and a Charge. To support that contention, Mr. Ngigi Advocate drew my attention to the letter dated 19th October 2011. That letter was from the Advocate to the Bank.
20. The Advocate was forwarding to the bank the Charge and Transfer documents, duly executed by Kisumu Concrete Limited and Kajulu Holdings Limited.
21. From the submissions of the Advocate, it is evident that he does not lay claim to having received any instructions from the following persons;

- a. **Lalji Karsan Rabadia;**
- b. **Arvin Jadva Rabadia;**
- c. **Chandrankat Lalji Rabadia;**
- d. **Rambal J. Rabadia; and**
- e. **Sudhir Brahmhatt.**

22. Therefore, based on the Advocate's own submissions, I find that those five individuals are not liable to pay any fees or costs to the Advocates. The Certificate of Taxation is set aside, in total, as against those five persons.
23. As regards the Loan Agreement dated 15th January 2009, I note that it was an agreement which enabled Kajulu Holdings Limited to borrow Kshs. 25 million from Kisumu Concrete Products Limited. The loan was to be sourced from Development Bank of Kenya Limited, who were to be repaid directly by Kisumu Concrete Products Limited.
24. But the Agreement also made it clear that the Title document for **KAJIADO/KITENGELA/2354** would;

“be deposited and retained by DBK if requested, but shall otherwise be the property of Kisumu Concrete Products Ltd until the loan is repaid”.

25. I understand that clause in the agreement to mean that, in reality, there was no sale to Kajulu Holdings Limited, by Kisumu Concrete Products Limited.
26. In any event, there is nothing provided by the Advocate, to show that he was instructed by either Kajulu Holdings Ltd or by Kisumu Concrete Products Limited, to handle the sale transaction.
27. When the learned Taxing Officer rendered his Ruling, he said that the Complimentary slip was never made available to him. If that be the position, then the clients would have only themselves to blame, for not providing the Taxing Officer with a relevant document.
28. A party who fails to make available evidence to the Taxing Officer or to the court cannot thereafter blame the Judicial Officer for failing to take such evidence into consideration when determining the issue at hand.
29. The Advocate placed reliance upon the Loan Agreement dated 15th January 2009, because it made reference to the wishes of Kajulu Holdings Limited, to purchase L.R. Kajiado/Kitengela/2354. That means that if the property was sold, it was to be transferred to Kajulu Holdings Limited.
30. The parties have provided the Court with a copy of the Title Deed for the suit property which shows that as at 28th March 2012, the registered proprietor was Kisumu Concrete Products Limited.
31. That citation was right, as it was founded upon the Transfer instrument dated 9th February 2012,

- which showed that Kajulu Holdings Limited had transferred Title No. Kajiado/Kitengela/2354, to Kisumu Concrete Products Limited.
32. Therefore, whereas the Advocate told this court that the Loan Agreement talked about a sale by Kisumu Concrete Products Limited, to Kajulu Holdings Limited, the facts are quite the opposite.
33. In any event, in the Bill of Costs dated 25th October 2012, the Advocate said that his instructions were received on 14th April 2011. It cannot therefore be right that the Advocate can trace the instructions he received from the clients, back to 15th January 2009.
34. The Advocate told this court that the instructions to him were not in writing. That is yet another reason why I find that the Loan Agreement dated 15th January 2009 cannot be construed as constituting instructions to the Advocate.
35. In the Bill of Costs, the Advocate made it clear that his instructions were;

“...to prepare a Charge and transfer of the parcel of land Kajiado/Kitengela/2354....”

36. There is no mention in the Bill of Costs to any instructions for the preparation of an Agreement for sale. The Advocate was to prepare the Charge Instrument and to transfer the property.
37. That is why in respect to item No. 1(a) in the Bill of Costs, it was specified that the instructions were to prepare a charge. That is to be contrasted with the item No. 2, in respect to which the Advocate said that he was instructed to transfer the land. In other words, the Advocate did not lay claim to have been instructed to prepare the Agreement for Sale or any other instrument which would thereafter give effect to the transfer of the land.
38. In his Ruling, the Taxing Officer awarded to the Advocate the sum of Kshs. 468,619.92 as fees for instructions and legal services rendered.
39. Thereafter, the Taxing Officer made it clear that the sums which the clients had paid, must be deducted from the Taxed costs, so as to arrive at the balance which would still be payable by the clients.
40. That holding was arrived at on the basis of the acknowledgement that the Advocate had already received some payment. At this moment, the question that needs to be answered is as relates to the identity of the person or persons who made those payments.
41. Why is that question important?
42. It is because the clients have submitted that it was only Kisumu Concrete Products Limited and Development Bank of Kenya Limited who gave instructions to the Advocate. If that be true, then Kajulu Holdings Limited would also be let off the hook.
43. Of course, it would not be just because they had not made any payment to the Advocate that Kajulu could be held not liable to pay costs to the Advocate, but that fact would be indicative of the lack of instructions from that client.
44. Vimal L. Rabadia is a director of Kisumu Concrete Products Limited. He has made it clear that it was his company and the Bank which had given instructions to the Advocate. That implies that Kajulu Holdings were exonerated from the Advocate's contention, that they too had given instructions.
45. Neither Vimal nor Kisumu Concrete Products Limited stand to benefit in any way, by exonerating Kajulu Holdings Limited from the liability to pay legal fees. I therefore find that because of the express assumption of responsibility by Kisumu Concrete Products Limited, (to the exclusion of Kajulu Holdings Limited); coupled with the lack of any positive evidence from the Advocate to show that Kajulu Holdings Limited had instructed them, the said Kajulu Holdings Limited are not liable to pay any costs to the Advocate.
46. In effect, the Certificate of Taxation is set aside in full, as against Kajulu Holdings Limited.
47. The next issue for determination is whether or not there had been an Agreement between Kisumu Concrete Products Limited and the Advocate on the quantum of the fees payable to the Advocate.
48. I have already held that the client has only itself to blame for having failed to make available to the Taxing Officer, the complimentary slip from the lawyer.
49. But both the client and the advocate acknowledge the existence of that complimentary slip. The said slip was made available to this court.
50. Mr. Ngigi advocate submitted that the complimentary slip was not a Fee Agreement. He described it as an indication of part-payment.

51. It is a cardinal principle of the law of evidence, that documents speak for themselves. And the complimentary slip has spoken loudly. It has indicated the costs of the Stamp Duty for the Transfer and the Charge. It has also specified that the “**LEGAL FEES**” was Kshs. 250,000/-.
52. Nowhere is there any indication that that sum, in respect to legal fees, was only a deposit. That can only mean one thing; that that figure reflected the quantum of the legal fees which the Advocate had agreed to receive from Kisumu Concrete Products Limited, in respect to the registration of both the Transfer and the Charge.
53. The client did indicate that although it had instructed the Advocate to register the Transfer and the Charge, the only task that the Advocate undertook was the registration of the Transfer.
54. In the face of that express assertion, the Advocate made no response. In particular, the Advocate did not challenge the client’s factual assertion. I therefore find that the client’s said assertion was uncontroverted. In effect, the Advocate did not register the Charge: He only registered the Transfer.
55. I would therefore allow the fees which the Taxing Officer assessed for the instructions to prepare the Charge: That is a sum of Kshs. 150,000/-.
56. The Advocate did not prepare the Transfer instrument. However, he prepared the Application for Land Control Board Consent.
57. The Advocate thereafter helped to obtain the consent from the Land Control Board. For those services, the Advocate was entitled to charge fees.
58. The fees payable in respect to the preparation and registration of the;

- i. **Charge;**
- ii. **Application for Land Control Board Consent; and**
- iii. **Transfer,**

may be worth more or less than Kshs.250,000/-. However, the parties did agree upon the fee of Kshs. 250,000/-.

59. I find no reason, in law to vary the Agreement between the parties.
60. Accordingly, I now set aside the Ruling of the Taxing Officer, and replace it with an order that the legal fees payable to the Advocate is Kshs. 250,000/-.
61. The sum of Kshs. 3,987/- which the Taxing Officer allowed for the incidentals, is also retained.
62. As for the VAT on the legal fees, the same amounts to Kshs. 40,000/-.
63. Therefore, the Reference is successful. The total sum payable by Kisumu Concrete Products Limited is Kshs. 293,987/-.
64. The Advocate will pay the costs of the reference to the 1st, 3rd, 4th, 5th, 6th and 7th Respondents.
65. Meanwhile, as between the Advocate and the 2nd Respondent, each party will pay his own costs. The reason for that is that each of those two parties have been partially successful in the Reference.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of June 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss G. Kariuki for the Applicant

Karanja for Amuga for 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Respondents.

Collins Odhiambo – Court clerk.