



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**MISC. CIVIL APPLICATION NO. 184 OF 2014**

NJUGUNA MATIRI & COMPANY ADVOCATES..... APPLICANT

VERSUS

NATIONAL BANK OF KENYA..... RESPONDENT

**RULING**

1. **A Brief Background** giving rise to the Application hereof by the Applicant, **Njuguna Matiri & Co. Advocates** is that the said law firm was empaneled by the Respondent Bank under terms and conditions continued in a letter of appointment dated the 12<sup>th</sup> May 2010.

**Under clause I** of the terms of service, it is stated that the bank's remuneration on fees shall be negotiated as per provisions of **Section 45(a) and (b) of the Advocates Act** where substantial transactions are involved and the scale fees under the applicable **Advocates Remuneration Order** may be inappropriate, Clause I states:

*“The Banks remuneration fees shall be negotiated as per provisions of Section 45(a) and (b) of the Advocates Act scale fees under the applicable Advocates Remuneration Order may be inappropriate.-----”*

*Paragraph 10 states:*

*“That the Bank reserves the right to terminate further allocation of work to your firm or terminate further procurement of services by removing you from the panel of Advocates---, in which event you shall immediately tabulate your fees for our consolidation and using the relevant bank fee policy, ---- and hand over all relevant files to the Bank.*

*In this respect you irrevocably waive your right to hold onto the files as a lien on your fees in the event of a dispute over the fees you shall follow your fees as a civil debt.”*

The said firm accepted the terms of appointed and returned a duly signed acceptance to the bank on the 20<sup>th</sup> May 2010.

2. On the 28<sup>th</sup> August 2013 the Bank instructed the law firm to prepare and perfect some securities for a customer borrowing in excess of Kshs.69,000,000/=. The law firm prepared and returned the perfected instruments to the bank. During the process, under instructions of the bank the law firm gave various professional undertakings to pay the correspondent banks sums secured under the charge instruments.

In the letter of instructions dated 28<sup>th</sup> August 2013, the Advocates were notified that the Borrowers will bear their reasonable legal costs and fees, inclusive of disbursements.

3. After completion of the task as mandated by the Bank, it appears that the Borrower failed to pay the Advocates fees forcing the said Advocates to file the **Advocate-client Bill of costs** dated 21<sup>st</sup> August filed on the 21<sup>st</sup> August 2014 in this application the Bank being the respondent.

The Bank customer and Borrower in the transaction was **Tulips Collections Limited & Davis Nyanjui Njehia t/a Davis Academy**.

4. Upon being served with the subject Bill of costs, the Respondent bank, by its advocates **Kamonjo Kiburi & Company Advocates** filed an objection to the Bill of Costs, by an affidavit sworn on the 28<sup>th</sup> October 2014 by the Banks Head of Securities and documentation one Elisha O. Nyikuli, and stated the following objections:

- (a) That the instructions letter clearly stated that the borrowers will bear the advocates reasonable fees inclusive of disbursements.
- (b) That the Debentures and charges prepared and registered stated that the borrowers would pay the Advocates charges and expenses incurred.
- (c) That upon completion and perfection of the securities, the Advocates forwarded all the documents back to the bank and that no fee note was sent to the bank. Thereafter, no demand for legal fees was ever sent to the bank - until the Bill of costs was filed and served upon the bank.
- (d) The borrower had paid the Advocates legal fees and no claim is outstanding.

The borrowers, through the Managing Director of Tulips Collections Limited, one David Nyanjui Njehiah swore an affidavit on the 28<sup>th</sup> October 2014 and stated that they do not owe the Advocates any legal fees having paid to them Kshs.547,422 by cheques and cash.

5. The parties framed and filed issues for the court's determination as follows:

**1. By the Applicant**

- (a) Whether the Respondent was the Applicant's clients for purposes of drawing up, registration and delivery up of the documents giving rise to the taxation.
- (b) whether the respondent is liable to settle the advocates fees subject to taxation.

**2. By the Respondent**

- a) On what terms were the Applicants legal services sought by the Respondent
- b) who is obliged to settle the advocate's fees in a borrowing transaction?

- c) Is the Applicant justified in demanding further fees from the Respondent after being paid by the Borrowers?

In the courts view, two issues arise as deduced from the parties framed issues:

1. Who between the Respondent Bank and the borrower is the Applicant's client?
2. Who is liable to pay legal fees to the Advocates – the bank or the borrower?

## 6. Applicants Submissions

The applicant submits that it is the bank that instructed the Advocates vide its letter dated the 28<sup>th</sup> August 2013 and not the Borrower, that there is no privity of contract with the said borrowers and the Advocates, who until the instructions were given and securities prepared were strangers to the Advocates. It is further submitted that upon its instructions, the Advocates, on its behalf gave professional undertakings to corresponding banks and released the title documents to the advocates. It was submitted that such instructions could not have come from the borrowers but from the Bank thus for purposes of the transaction, the Respondent Bank was the client.

The applicant relied on the Case **NAI HCC ELC No. 59 of 2013 Davis Mukare -vs- Muriu Mungai Advocates (2014) @KLR** where the court held that there was no privity of contract between the advocates and the borrower in a similar situation. The court was urged to find that the contract of service was between the Bank and the Advocates pursuant to which the Advocate-client bill of costs was filed.

7. **The Respondents submissions** are that the letter of instructions to the Advocates was clear that the legal fees to the advocates was to be met by the Borrowers and that since the borrowers paid, the Advocates-Client Bill of costs was incompetent. Mr. Kiburi for the Bank further submitted that the Advocates after receiving the instructions letter should have rejected the said instructions that their legal fees was to be paid by the Borrower, and insist that the Bank pay their fees.

He relied on **Paragraph 31 of the of the Advocate Renumeration Order that provides:**

*“The costs of mortgage for the investigation completion and registration of his security or any other discharge or assignment thereof made at the request of the borrower, whether or not the transaction is completed shall be payable by the borrower----.”*

The Respondent took a stand that the borrower had paid the Advocates fees, and that the Advocates had the opportunity to negotiate their fees with the borrowers.

8. The court is to determine the following:

(a) Between the Respondent Bank and the borrowers, who is the Advocates' client? In **David Mukare Case (Supra)** in a conveyancing matter, with advocates having been instructed by the bank, the court noted that there was no privity of contract between the borrower, a customer of the bank and the advocates.

**Section 31 of the Advocates Renumeration Order 2014** – quoted above, rightly states that the fees for the preparation and registration of a security made at the **request of the borrower** shall be payable by the borrower.

In my view, the above provision clearly indicates that the **request made by the borrower** – can only mean, **a request to the bank, not to the Advocates, meaning, the bank ought to debit the borrowers account to the order of the Advocates fees when it becomes payable and or demanded.** This is informed by the fact that there exists no privity of contract between a borrower and an advocate for the bank.

It is the borrower who enters into a contract with the bank for advancement of finances against securities that the Bank commissions its lawyers, as its agents to prepare and perfect. In such scenario, the Bank then enters into another contract between itself and the Advocate for payment of its fees, upon completion, or on whatever terms of payment of legal fees, but not with the borrowers who at this point are strangers to the Advocates.

In **National Bank of Kenya Limited -vs- Kangethe George t/a Kangethe & Company Advocates – Misc. Appl. No 718 of 2014 (2012) KLR**, in very similar circumstances, the court held that there can be no privity of contract between a borrower and an advocate instructed by the bank. The client was held to be the instructing bank and ordered that an Advocate-client bill of costs be filed.

Authorities in support of the above findings are plenty.

9. Mr. Kiburi Kamonjo Advocate argument that the Advocates ought to have negotiated their fees with the borrower cannot be said to be sound submission. As I have stated above, the borrowers were total strangers to the advocates since the instructions were not from the borrowers, There was no obligation upon the Advocates to negotiate their fees with the borrowers.

10. On the second issue as to **who is liable to pay legal fees to the Advocates**, it is now obvious from my above finding that the bank ought to pay legal fees to the Advocates. I agree that in its letter of instructions to the Advocates, legal fees was to be paid by the borrower. That may be so. My but view is that that fees was to be collected and/or charged/debited into the borrowers account for payment to the Advocates, See the **David Mukare Case (Supra)**.

Having so found, the Advocate-client Bill of costs dated 21<sup>st</sup> August 2014 and filed against the Respondent Bank is properly filed, and ought to be taxed to determine what fees is payable to the Advocates.

Issues of alleged payments by the borrowers to the Advocates may be factored during the taxation, where the Bank/Respondent may produce evidence of the said payments.

11. In view of the above, the Respondents objection to the Bill of Costs is dismissed.

Consequently, the Advocate-client bill of costs dated 21<sup>st</sup> August 2011 is remitted back to the Taxing master of this court for taxation.

**Dated, signed and delivered in open court this 30<sup>th</sup> day of November 2015**

**JANET MULWA**

**JUDGE**