



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPLICATION NO. 63 OF 2014

JANE NYABIAGE ODIYA

T/A MUSYOKI MOGAKA & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

MISSION IN ACTION BABY ORPHANAGE.1ST RESPONDENT/APPLICANT

IVAN BUDULICA.....2ND RESPONDENT/APPLICANT

MARTHA MONGINA.....3RD RESPONDENT/APPLICANT

(Sued through its trustees, and Directors, Slavica Budulica, Ivan Budulica and Martha Mongina)

RULING

1. By an application dated 22nd May 2014 an filed on the 23rd May 2014, **Ivan Budulica & Martha Mongina** (as trustees of Mission In Action Baby Orphanage) the applicants herein seek orders that:

1. This Honourable Court be pleased to strike out their names from these proceedings
2. That the costs of the suit being **Nakuru HCCC No. 93 of 2013** be borne personally by the Respondent Slavica Mary Budulica Upon whose instructions the suit giving rise to these proceedings was filed and withdrawn.

It is grounded on provisions of **Orders 1 Rule 10(2) and 14 of the Civil Procedure Rules and Section 3A of the Act, Chapter 21.**

2. The applicants state that proceedings in **Nakuru HCCC No. 93 of 2013** were filed by the Respondent in her personal capacity and benefit on 18th October 2013 and on her own instructions, she ordered withdrawal of the said case on the 19th March 2014, and therefore liable for all consequences including costs of the suit. They state that they were never served with the summons to the plaint and were unaware of the case upto the time they were served with a Bill of Costs dated 19th March 2013 relating to services, both legal and miscellaneous rendered by the Respondent on behalf of the said Slavica Mary Budulica in her personal capacity. It is the Respondents submission that the suit having been instituted and withdrawn under her personal instructions, the said Budulica without involving the Applicant hereof, then it follows that costs arising from the personal suit ought to be paid by her personally, and cannot be transferred to the institution as the institution never gave instructions to file and/or withdraw the suit to the

Advocates, Musyoki Mogaka & Company Advocates. The above is reiterated in the supporting affidavit sworn by Ivan Budulica, one of the trustees and with authority of the other trustees of the institution. It is the applicants submission that there is no basis upon which they could be joined as parties in the suit for purposes of costs and have urged the court to strike out its name (of the institution) from the proceedings.

3. In response, the Respondent Advocates, through Jane Nyabiage Odiya Advocate swore an affidavit on the 8th July 2014 and stated that one Slavica Mary Budulica instructed her firm, as an official of mission in Action Nakuru Baby Orphanage on issues touching administration of the Orphanage and not on her individual capacity, that she was thus acting on behalf of the institution leading to the filing of **Nakuru HCCC No. 93 of 2014** on the 18th October 2013 and upon her instructions the same was withdrawn on the 10th March 2014. She avers that the plaintiff was spouse to the applicants-director and their marriage was on the rocks and that he left the country without paying their professional fees.

Ms. Jane Odiya further depones that she was dealing with the said client as an official of the institution and has in her possession vital documents of the applicant that she continues to charge storage fees.

She states that efforts to trace him abode at Australia have borne no fruit forcing them to file the Advocate–client bill of costs for services rendered.

4. In my opinion, the issues for the courts determination are:

1. Who was the instructing party to the Advocates (Respondents) in the matter of **Nakuru HCCC No. 93 of 2013**.

2. Is the Applicant liable to pay costs to the Advocates?

The applicant is categorical that the institution (through its trustees did not retain the Advocates services or give them any instructions to file **Nakuru HCCC No. 93 of 2013** nor did they give instructions for its withdrawal, that the Advocates were instructed by the said Slavica Mary Budulica in her personal capacity hence she is the one who ought to pay costs of the suit. No retainer instructions by the institution have been furnished to the court.

5. I have seen a letter dated October 21st 2013 written by Slavica Mary Budulica to the Advocate, Jane Odiya. It is an exhibit in the replying affidavit. I will repeat its contents here for its probative and evidential value, as hereunder:

“Oct 21st 2013

Dear Madam Jane Odiya

*I am writing to you in reference to the case **Civil Suit No. 93 of 2013 of myself Slavica Budulica** requesting for you to act on **my behalf** on suing the Co-director Ivan Budulica of Mission in Action Nakuru Baby Orphanage.(emphasis mine)*

Due to evidence and statements you were able to build a strong case, and I also state that all information given to you was true and correct. And also state the complaint of threats of physical violence against myself, my staff and friend by Ivan Budulica is true and correct.

***You acted under my directions and presented me as my Lawyer.** Since our last conversation to proceed with the order I have to inform you that **I wish to withdraw the case** and request that you do NOT follow through with serving Ivan Budulica with the Civil Suit order.(emphasis mine)*

It is upon the request of my children that I withdraw this case against Ivan Budulica their father, therefore after giving this matter considerable thought I have agreed to do so.

Therefore once again I request that we withdraw this case and thank you for all your assistance in this matter. You have always acted in a professional manner for which I am grateful I also wish to apologise for the inconvenience this matter may have caused your office.

Thank you and kindest regards.

Slavica Mary Budulica

Director

Mission in Action

Please note that a hard copy of this request has been sent to your office.”

6. The letter refers to the primary case **Nakuru HCCC No. 93 of 2013**. It indicates that the advocate was acting for her, not the respondents. See Paragraph 3 of the letter:

“On my behalf in suing the Co-directors -----, You acted under my direction and represented me as my lawyer--- I wish to withdraw the case --- request that you do not follow through with serving Ivan Budulica with the civil suit order ----. It is upon the request of my children that I withdraw this case against Ivan Budulica their father ----”

From the above letter, it is clear who the instructing client was to the Advocates.

7. I have considered the Replying Affidavit. Written instructions from the institution through its trustees, among them Slavica Mary Budulica are not attached. Authority in writing by the trustees of the institution nominating the said Slavica Mary Budulica to act on their behalf is also not attached or shown. That fact of her letter to the Advocates that she should not follow through with serving Ivan Budulica – one of the trustees – with the civil case order demonstrates that they were not aware of the institutioN of the suit, and certainly not party to the withdrawal of the same.

8. **Order 31 Rule 2 of the Civil Procedure Rules** provides that where there are several trustees, executors of administrators, they shall all be made parties to a suit against one or more of them.

In **Miscl. Appl. No 471 of 2012 Lumumba & Lumumba Advocates**, and **Miscl. Application No. 599 of 2012, Kigano & Associates Advocates -vs- Samuel Muundati**, the Learned Judges held that **retainer instructions to an Advocate need not be in writing but can be inferred from the clients conduct.**

I have scrutinised the clients conduct in this matter. By her letter dated 21st October 2013 to her advocate, it is clear she gave instructions, and retained the Advocates, to act for her in her personal capacity. She was instituting the suit against the Co-Directors of the institution but the matters were purely personal, her matrimonial issues with her husband, a Co-Director. No where were the Respondents involved in the suit. They did not know the existence of the suit nor its withdrawal. They can therefore not be burdened with issues of costs to advocates they did not instruct, orally or in writing. They are therefore not liable to pay for the services rendered to the said Slavica Mary Budulica. The Respondent stated that the Advocates could not trace their client's whereabouts in Australia, only then did they revert to the Respondents.

9. That having been stated, it is the courts finding that the application dated 22nd May 2014 is merited. It is allowed in terms of Prayer 1 and 2.

Costs of the application shall be borne by the Respondent.

Dated, signed and delivered in open court this 19th day of November 2015.

JANET MULWA

JUDGE