



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC CIVIL APPLICATION NO. 606 OF 2013

**MAMICHA & COMPANY ADVOCATES.....ADVOCATE/
RESPONDENT**

VERSUS

**NAIROBI CITY WATER & SEWERAGE COMPANY
LIMITED.....CLIENT/APPLICANT**

RULING

The Advocate herein filed his advocate/client bills of costs dated 25th June 2013. Before the bill could be taxed, the Client challenged it by notice of motion dated 15th September 2014 which in essence seeks an order to strike out the bill of costs upon the ground that the Advocate's bill of costs, **"is drawn pursuant to an illegal contract and or lease agreement contrary to the Public Procurement and Disposal Act 2005 and is meant to extort the client herein"**.

The application is supported by an affidavit of **Assumpta Mbesa Reuben**, a Legal Officer for the Client sworn on 16th September 2014. A couple of documents are annexed thereto. In it she depones—

- a. That there has never been a relationship of Advocate-client between the parties with regards to the transaction being cited in the bill of costs.
- b. That the bill of costs emanates from a lease agreement drawn by the Advocates on behalf of the lessee and Client who was the lessor hence the Advocates were not representing the Client.
- c. That as there was no Advocate-Client relationship, the taxing master cannot tax the bill of costs without an order of the Court as it would be contrary to the provisions of the Advocate's Act.
- d. The bill relates to a transaction that did not follow the clear provisions of the procurement laws hence was illegal *ab initio*. A chronology of events leading to the filing of the bill of costs is given.

The Advocate in response has filed grounds of objection and Replying Affidavit sworn on 17th July 2015 by Martin MamichaMugi, an Advocate practicing in the firm.

Having evaluated the evidence on record, it is clear to this court that when an Advocate enters into an agreement with his client regarding his retainer and the payable fees for such retainer, the parties cannot

turn around and disown the agreement on the grounds that the legal fees agreed were illegal since the same did not follow the requisite procurement laws.

It is now trite that a retainer need not only be in writing. It can be implied from the parties' conduct. On this am guided by the case of **OHAGA –vs- AKIBA BANK LIMITED [2008] 1 EA 300**, where it was held that -

“a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order.”

In this application, the respondent is estopped from denying that it did instruct the advocate to act on its behalf as correspondence between its officers and the Advocate are contained in the annexures to the Supporting Affidavit sworn on behalf of the client.

While the client has the right to choice of representation, it is only just for it to pay for services already rendered by taxation of the Bill of Costs before securing another advocate of their own choice. See **MACHIRA & COMPANY ADVOCATES v ARTHUR K. MAGUGU & ANOTHER HCC Misc. App. No. 358 of 2001**. It was stated –

“A client who chooses to withdraw instructions from his advocate without any payment, undertaking or any other appropriate arrangement regarding the advocate’s fees must be prepared to pay to the advocate such sum as may be found due and payable upon taxation of advocate/client bill of costs. It would be oppressive to require that advocate to wait until the matter is finalized by other advocates for him to recover his fees.”

Though the client claims that the requisite laws were not followed when executing the lease agreement, it cannot in the circumstances be put in the position of a layman who can at times plead that he had entered into such an agreement without the benefit of legal counsel. In this case, the client entered into the said agreement from an informed position.

The client’s negligence should not be visited on the Advocate as at all times during the negotiation of the lease, its officers were communicating through its management and legal officers. They had a duty to their employer to ensure that all laws were followed to the letter before accepting the terms of the lease by executing the lease document.

Therefore, the client cannot seek to steal a match on the Advocate and secure a benefit by invoking the illegality of the lease agreement. This court, being both a court of law and a court of equity, cannot allow the client to wriggle out of a contract it willingly and consciously entered into even though it knew or ought to have known that the same was illegal.

It is in the interest of justice that the Bill of Costs dated 25th June 2013 proceeds for taxation before a taxing master for purposes of ascertaining what is due to the Advocate. I therefore find that the Applicant’s/Client application lacks merit and dismiss it with costs.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE

