



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 419 OF 2012

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE TAXATION OF COSTS

BETWEEN

ADVOCATE AND CLIENT

**IN THE MATTER OF CONVEYANCE AND AGREEMENT OF SALE IN RESPECT OF
APARTMENT NO. B11 BLOCK B ERECTED ON L.R NUMBER 12715/552 EASY
PROPERTIES LTD TO AGNES WANJIKU MUCHOKI**

OSERO & CO. ADVOCATES APPLICANT

VERSUS

EASY PROPERTIES LTD. RESPONDENT

R U L I N G

1. Before the Court are two applications; the first application by **Easy Properties Ltd.** (hereinafter referred to as the “Applicant”) is dated 8th April, 2013 and is brought under the aegis of **Rule 11** of the *Advocates (Remuneration) Order*. The Applicant seeks for orders *inter alia*, the setting aside of the Court’s Ruling dated 25th March, 2013 and for the allowing of its application dated 21st September, 2012. The application is predicated upon the grounds that the Registrar failed and neglected to provide sufficient reasons justifying the dismissal of the Applicant’s Application and that the parties to be enjoined were pertinent to the taxation. The application is further supported by the Affidavit of **Peninah Owendo** sworn on even date. The deponent avers that in accordance with the sale agreement, the purchaser was to settle the vendor’s advocate legal fees and other fees and that the Applicant was not liable for the same. The application is unopposed.
2. The second application dated 4th July, 2013 by **Osero & Co. Advocates**, (hereinafter referred to as the “Respondent”) is brought under the provisions of **Section 51(2)** of the *Advocates Act*, **Section 3A** of the *Civil Procedure Act* and **Order 51** of the *Civil Procedure Rules*. The Respondent seeks the following prayers, *inter alia*:

“1. THAT judgment be entered in favour of the applicant against the

respondent in the sum of Kenya Shillings Ninety Six Thousand, Five Hundred and Sixty Five (Kshs. 96, 565/-) being the taxed and certified costs due to the applicant;

2. THAT the respondent to pay the applicant interest at Court rates on the sum of Kenya Shillings Ninety Six Thousand, Five Hundred and Sixty Five (Kshs. 96, 565/-) from the date of taxation as above.

3. THAT the costs of the application be borne by the respondent”.

3. The application is predicated upon the grounds that the Respondent filed its Bill of Costs dated 18th July, 2012 and the same was taxed and certified by the taxing master, with a Certificate of Taxation being issued on 25th June, 2013. It is averred that the Bill was taxed in the presence of the Applicant’s advocate, and despite requests for payment, it has refused, neglected and or failed to pay the Respondent its taxed costs.
4. In the Affidavit in support of the application sworn by **Lewis Ndemo Osero** on even date, it is deponed that the Applicant instructed the Respondent to act for it as the vendor in the sale and purchase of Apartment No. B11, Block B situate on L.R No. 12715/552 from which legal fees would accrue. The deponent further contended that the Applicant failed to pay its legal costs, and further taxed costs as ordered by the Court. The Respondent’s claim to this end is for Kenya Shillings Ninety Six Thousand, Five Hundred and Sixty Five (Kshs. 96,565/-). The Respondent also cited the cases of **Owino Okeyo & Co. Advocates v Fuelex Kenya Ltd (2005) eKLR, Akide & Co. Advocates v Julia Akello Kunguru (2007) eKLR and Ochanda Onguru t/a Ochanda Onguru & Co. Advocates v Joseph Njuguna Ngae (2005) eKLR** to buttress its application.
5. In opposing the application by the Respondent, the Applicant filed its Grounds of Opposition dated 24th July, 2013. It contended that the application is bad in law, untenable, incurably defective and an abuse of the process of this Court, and should thus be dismissed.
6. With regard to the Application by the Applicant dated 8th April, 2013 seeking the setting aside of the Court Orders of 25th March, 2013, the submissions thereto were filed on 17th October, 2013. It was submitted that the Registrar erred in principle by failing to exercise her discretion appropriately and dismissing the application for joinder dated 21st September, 2012. Further it was submitted that the sale agreement clearly stated at paragraph 16 that payment of the vendor’s advocates’ legal fees was to be facilitated by the purchaser, in this instance being one **Agnes Wanjiku Muchoki**. It was further submitted that the Applicant Company was used as a conduit to convey and transmit any monies received from the purchaser to the advocates but, in the same breath, denied that there was no evidence that the same was paid to it by the purchaser. On submitting as to the enjoinder of the purchaser in the taxation matter, the Applicant referred to Section 2 of the Advocates Act and the powers of the taxing officer as espoused under paragraph 13A of the Advocates (Remuneration) Order. Further, the Applicant submitted that no prejudice would be occasioned upon the Respondent should the application be allowed, and that it should be accorded an opportunity to challenge the taxation.
7. On its part, the Respondent submitted that the application by the Applicant was an afterthought brought purely to frustrate the Respondent and deny it the fruits of its judgment, as per the Ruling on taxation on 25th March, 2013. It was submitted that judgment was entered with both parties present at the time and that the Applicant only sought to have the purchasers enjoined during the execution of the judgment. Further, it was submitted that the Applicant failed to execute its application dated 21st September, 2012 until the filing of the application by the Respondent for judgment.
8. I have carefully perused and considered the application dated 8th April, 2013 by the Applicant and the affidavit annexed thereto. The Applicant’s contention is that it should be allowed an opportunity to enjoin the purchasers of the said apartment so as to effectively and conclusively determine the issue as pertains to the payment of the Respondent advocates’ legal fees as per the sale agreement. Paragraph 16 of the aforementioned sale agreement reads as;

“16. The Purchaser shall pay to Easy Properties Ltd (emphasis own) charges in connection with this transaction as follows, payable on or before the execution of the sale agreement. The costs are made up as follows;

- a. Legal fees for preparing the lease Kshs. 60,000/-
- b.
- c.
- d.
- e.
- f.
- g.

Total.....”.

It is evident from the sale agreement at paragraph 16 that the payment of legal fees was indeed to be made by the purchasers of the said apartment and that the same were to be paid to the Applicant. In its submissions, the Applicant also admits that indeed it was the conduit through which the money was to be transmitted to the Respondent. At page 2, paragraph 11 of the Applicant’s submissions, it submitted that:

“My Lord, the Respondent submits that Easy Properties Ltd was used as a conduit for transmitting monies from the purchaser to the advocate (emphasis own) as described under paragraph 16 of the sale agreement”.

However, in a swift and somewhat strange turn of circumstances, the Applicant at paragraph 12 submits that the Respondent has failed to show any evidence that the purchaser paid any money for onward transmission to them! The aforementioned paragraph reads:

“In the circumstances, the Applicant has failed to show any evidence that Easy Properties was paid by the purchaser for onward transmission to the Advocate/Applicant herein”.

By its own volition, the Applicant admits that it was indeed the conduit from which monies were to be received for legal fees for onward transmission to the Respondent advocates. The Applicant further contended that the legal fees agreed upon by the parties and in accordance with the sale Agreement were Kshs. 60,000/- and not the amount taxed in the Bill of Costs dated 18th July, 2012.

9. The Applicant did not challenge the Ruling delivered by the Deputy Registrar/Taxing Master dated 25th March, 2013, especially with regards to the instructing client being the Applicant and that there was no privity of contract between the Respondent and the purchasers. The Applicant failed in honouring its obligation to the Respondent by not transmitting Kshs. 60,000/- as per the sale agreement at paragraph 16 thereof. The Respondent therefore, being aggrieved by the actions of the Applicant, filed the instant application to have the Court sanction the Applicant in order to recover its fees. The Deputy Registrar having therefore determined that there was no privity of contract between the Respondent and the purchasers, the Applicant was therefore, in my view, liable for payment of legal fees accruing from the apartment sale transaction. The Applicant’s Application dated 8th April 2013 is brought pursuant to **Rule 11(1) and (2)** of the *Advocates (Remuneration) Orders*. Therein, it was adduced that the Taxing Master failed to give reasons for her ruling on the Bill of Costs dated 18th July, 2012. On 3rd May, 2013, the Taxing Master delivered her ruling on the Bill of Costs, taxing the same at Kshs. 96,565/-. On 25th March, 2013 the Taxing Master gave her reasons as to her dismissal of the application dated 21st September, 2012 by the Applicant. I find that reasons were given as to how the Taxing Master arrived at her decision. The Applicant, in its instant application, has tried to have its application reinstated under a provision of the *Advocates (Remuneration) Order* that allows for the filing of a reference. This Court will not allow any party to capriciously and without due regard to Court process, abuse its powers and privileges in the determination of matters as eschewed under **Section 1A, 1B and 3A**

of the *Civil Procedure Act* and Article 159 of the Constitution. The Applicant seeks the Court's discretion in allowing its application. In doing so, it must be ready and willing to come before Court with clean hands, and not unnecessarily bog the Court down with unmeritorious and frivolous applications. As it stands, the provisions in the Sale Agreement are crystal clear, and the onus is not upon the Respondent, but on the Applicant, to prove that it did not receive any money from the purchasers for onward transmission to the Respondent to cover its legal fees.

10. Further, the Applicant has shown, on several occasions, that it had engaged the Respondent as its advocate in the various transactions that were carried out. It is also not in dispute that the Applicant was the conduit of monies received from such transactions and was therefore under an obligation and duty to transmit what was due thereunder to the Respondent. By its own admission, it agreed and submitted that the monies were to be handled by and through it, and the amount as stated in the sale contract between it and the apartments' purchasers, was to be forwarded for each transaction. The Applicant has failed and neglected to honour its part of the agreement, hence the Respondent seeking redress from this Court. As a result, the application by the Applicant dated 8th April, 2013 is hereby dismissed with costs awarded to the Respondent.
11. Conversely, the application by the Respondent dated 4th July, 2013 is allowed. That application, brought under **Section 51 (2)** of the *Advocates Act*, empowers this Court to make orders and enter judgment on any reference that has not been set aside. In **Owino Okeyo & Co. Advocates v Fuelex Kenya Ltd** (supra), Ochieng, J in allowing an application in which the assertions contained in the application were not disputed, held *inter alia*:

“I would therefore go along with the decision of Waweru, J in Misc. App No. 698 of 2004 A.N Ndambiri & Co. Advocates v Mwea Rice Growers Multi-Purpose Co-operative Ltd that since a retainer need not be in writing, there was no obligation by the advocate to exhibit it when applying for judgment under Section 51(2) of the Advocates Act...[I] hold that there is no dispute as to the applicants retainer by the respondent”.

Lesiit, J in **Akide & Co. Advocates v Julia Akello Kunguru** (supra) followed the interpretation of Njagi, J of Section 51(2) and determined thus:

“I agree with the interpretation of Section 51(2) of the Advocates Act by my brother Njagi, J in Macharia Njeru v Communications Commission of Kenya No. 1029 of 2002 (U.R), where the learned judge held that the words of the said section were very clear that where a certificate of taxation had neither been set aside nor altered by the Court, and where there was no order for stay, the certificate was final as to amount of costs covered thereby and to allege a dispute at the summary judgment stage would amount to a contradiction of the express and mandatory statutory obligations.”

12. The Taxing Master issued a certificate of costs on 25th June, 2013 as against the Applicant in the sum of Kshs. 96, 565/-. This certificate has neither been set aside or altered as per **Owino Okeyo & Co. Advocates v Fuelex Kenya Ltd** and **Akide & Co. Advocates v Julia Akello Kunguru** (both supra). This Court, in exercise of its powers conferred upon it vide **Section 51 (2)** of the *Advocates Act*, and in exercise of its inherent jurisdiction under **Section 3A** and obligations under **Sections 1A and 1B** of the *Civil Procedure Act* and *Article 159* of the *Constitution*, hereby allows the application by the Respondent dated 4th July, 2013. Further, and in consideration of the circumstances herein and in pursuance of *Regulation 7* of the *Advocates (Remuneration) Orders*, I award interest to the Respondent, pegged at 9% per annum from 3rd May, 2013 until payment in full. Costs, in any event, are awarded to the Respondent.

DATED and delivered at Nairobi this 25th day of March, 2014.

J. B. HAVELOCK

JUDGE