REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

HCCC CASE NO 723 OF 2012

NJERU NYAGA & CO. ADVOCATES .....APPLICANT

Versus

GEORGE NGURE KARIUKI.....DEFENDANTS

RULING

Stay of taxation of advocate-client bill of costs

[1] I am called upon to determine the application dated 9th October, 2013 which is expressed to be brought under Article 159 of the Constitution, the Advocates Act, sections 1, 1B, 3A of the Civil Procedure Act (hereafter the CPA) and Order 51(1) of the Civil Procedure Rules (hereafter the CPR). The application carries 4 prayers but prayers No 1 and 2 were granted ex parte by Havelock J on 10.10.2013. What are left for my decision are, therefore, prayers No 3 and 4 of the application. Prayer No 3 has mixed up the parties and I believe that is the basis of the technical objection on misdescription of the parties which has been taken by the Respondent. The mix-up in the said prayer 3 arises from the fact that it talks of ‘’Applicants bill of costs’’ and ‘’suit to be filed by the Applicant in the same vein. But I should think, there is doubt that the Application before me is the one dated 9th October, 2013 filed on behalf of GEORGE NGURE KARIUKI and is seeking to stay the taxation of the bill of costs filed by Njeru Nyaga & Co Advocates. Accordingly, the Applicant should be GEORGE NGURE KARIUKI, and the Respondent is Njeru Nyaga & Co Advocates. I will also refer to those parties as such. That way, the confusion which prayer No 4 has introduced will be avoided; I do not also think it causes any prejudice to any party. And by that rendition, the objection on misdescription of parties is resolved in favour of substantive justice. The application is competent and proper.

What the Applicant said

[2] The Applicant seeks for stay of taxation proceedings of the Respondent’s Bill of costs dated 9th August, 2012 pending a suit to be filed by the Applicant within 30 days from the date hereof to determine inter alia; the retainer, nature, scope and extent of services rendered and payments effected (if any) for legal services prior to filing of the bill of costs. He also seeks for costs of the application. The said application is supported by the affidavit of the Applicant, the grounds on the face of the application, the submission by the Applicant and the judicial authorities he filed in court through his counsel M/S GATHERU GATHEMIA & CO ADVOCATES. The major ground for the application is that there is a dispute on the retainer of the Respondent as his advocates, the nature, extent and scope of services allegedly rendered by the Respondent. He,

however, contends that he has fully paid the Respondent for all the legal services that were rendered by the Respondent. He gives a brief account of their relation; that he was the plaintiff in NBI HCCC NO 145 OF 2008 which was filed by the Respondent upon his instructions to file suit against EQUITY BANK LIMITED to discharge and release his title that he had deposited as a guarantor to a 3rd party on the basis that the guarantee was limited to a specified amount which he was ready to pay up to the bank. Contrary to the said comprehensive instructions, the Respondent drew a plaint that was limited in scope and extent and which merely asked for injunctive orders against the bank. The advocate therefore went of a frolic of his own. Being aggrieved by that failure to follow instructions, the Applicant engaged another advocate who filed the amended plaint. Both the plaint and the amended plaint are annexed.

[3] The Applicant submitted that the Respondent filed a bill pegged on the value of the property, i.e. Kshs. 19,000,000 which is not true. The bill should have been confined to the suit in which only injunctive orders have been sought. The Applicant further averred that he was advised by numerous counsels that the suit as initially drawn by the Respondent stood the risk of being struck out or dismissed as it did not disclose any known cause of action. Despite these failures, during the retainer of the Respondent, the Applicant paid to the Respondent a substantial amount of fees equal to Kshs. 635,000 and he attached copies of the cheques, receipts and schedule of payment. As the Respondent did not follow instructions by the Applicant, therefore, there is a dispute on the retainer- a matter which is outside the province of the Deputy Registrar. There is also a dispute on the scope and extent of the legal services rendered by the Respondent. Therefore, the bill of costs as drawn is not justified. According to the Applicant, on the advice by his counsel, the Respondent ought to file a suit for determination of the disputed retainer and the nature, scope and extent of the professional legal services. Meanwhile, the taxation should be stayed.

The Respondent opposed the application

[4] The Respondent opposed the application and filed grounds of opposition and submissions. The Respondent contends that; 1) the application herein is wholly incompetent and void ab ignition as it offends Civil Procedure Rules on institution of suit; 2) it suffers from a fatal misdescription of parties; 3) that the Applicant signed a verifying affidavit to the plaint and cannot deny instructions; and 4) in the circumstances, the only way the scope and extent of services can be determined is through taxation of costs.

[5] The Respondent amplified the above grounds in his submissions. According to him, although this file is allocated a High Court Number, it remains exclusively under the Deputy Registrar's jurisdiction until taxation after which parties are free to file a reference to the High Court if dissatisfied with the taxation ruling. The application herein is, therefore, a gross abuse of the process of the court and amounts to a delaying tactic. The Applicant has not even filed the suit contemplated in prayer 3 of his Motion.

[6] The Respondent insists that as the plaintiff signed the verifying affidavit he endorsed the contents of the plaint and as the instructing client; he was liable to pay the legal fee. In any case, he hired advocates to take over after the suit had already been filed by the Respondent. His claim on that basis is, therefore, frivolous.

[7] The Respondent took issue with the alleged payments of fees; the Applicant has not annexed a single cheque or receipt to prove any payment to the Respondent and the figure of Kshs. 635,000 is a figment of his imagination.

[8] The Respondent did not stop there; he argues that judicial authorities filed by the Applicant relate to suits filed after taxation and refusal by the client to pay up the taxed costs. They do not, therefore, apply in this case. For those reasons, the application dated 9th October, 2013 should be dismissed.

COURT'S RENDITION

[9] I see two issues which I should determine;

> ***a) Whether there is a dispute on the retainer; and***
>
> ***b) Whether the Respondent should file a separate suit to resolve the dispute on the retainer.***

I propose to invert the order in which the issues appear and start with the second one. My reasons for taking that course will be clear after I have made my decision.

Necessity to file a separate suit

[10] I have formulated as an issue, whether there is any necessity to file a separate suit to determine a dispute on the retainer where a bill of costs has already been filed. The Applicant suggests that since a dispute has arisen on the retainer, the Respondent should file a substantive suit for that issue to be resolved. The Respondent seems to suggest in the submissions that the Applicant should file the suit he has alluded to in his application on the dispute. Those arguments add to an already hard situation which exists in the jurisprudence on this question. I consider it a kind of a legal squirm. The Applicant does not at all in the application or the submissions identify the particular sections of the Advocates Act which he relies upon in making the submission that the Respondent should file a substantive suit to have the dispute on the retainer resolved. Indeed Havelock J, made similar observations and expressed his fear that the application could be a non-application in the following manner:

> ***The Notice of Motion before the court dated 9th October, 2013 gives no detail other than the general status of the application, as to which provisions of the Advocates Act, it is brought under. As a result it could be considered as a non-application.***

It is not possible to tell whether the Applicant could be relying on section 48 or 51 of the Advocates Act as his arguments are not grounded on any specific provisions of law. He has only cited case law, which largely dealt with section 51(2) of the Advocates Act. That section relates to entry of judgment after taxation of costs. The section may not be called into play, in a substantive way at this stage where the bill of costs is yet to be taxed. However, although Waweru J in the case of **MENYEE & KIRIMA ADVOCATES v KCB LIMITED [2005] eKLR** was dealing with section 51(2) of the Advocates Act, I find the following passage in his Ruling thereto to be quite useful:

> ***Having said that, however, it is clear that the Client herein has raised serious issues with regard to accounts as between it and the Advocate. The Advocate has admitted that he has retained money belonging to the client. The Client asserts that it is entitled to raise a set-off on account of this money. In my view the Client is so entitled, and it can do so only in a substantive suit commenced by plaint. Where it appears to the court that issues have been raised that ought to be investigated and ventilated in a proper trial, then the Court ought to refuse to enter judgment under subsection (2) of section 51 of the Advocates Act, even if there is no dispute as to retainer. The present is such case.***

[11] I associate myself fully with that observation by Waweru J. Except I wish to unpack the said statement the way I understand it and relate it to the current proceedings in which taxation of the bill of costs is yet to be done. But before I do that, let me consider some important matter. Looking at the provisions of section 48(3) of the Advocates Act and Paragraph 13 of the Advocates (Remuneration) Order, there is no statutory bar to the filing and taxation of a bill of costs without a substantive suit for recovery of costs. Such application for taxation of a bill of costs may be filed with or without the leave of the court. That dichotomy in approach by the courts was well captured by Odunga J in the case of **EVANS THIGA GATURU ADVOCATE v KCB LIMITED NBI HC MISC APP NO 343 OF 2011.** Accordingly, the taxation application is in order. a complete dichotomy of approach by our courts.

[12] Going back to what Waweru J stated, and I see the same argument had been urged in the EVANS THIGA GATURU CASE, it is only ***Where it appears to the court that issues have been raised that ought to be investigated and ventilated in a proper trial,*** that there could be the necessity of filing a substantive suit. Even in the present cause where taxation of the bill of costs is pending, I should think that a simple issue on the retainer, unless it is convoluted or obscured by other serious matters which would need a careful and deep examination in a proper trial, should be determined by the court within the same cause. There would be no need for a separate suit to be filed in that behalf. That kind of exercise of jurisdiction is appropriate. Courts that were faced with similar dilemma went ahead and determined whether there was a dispute on the retainer on the basis of the evidence before them. The course I have adopted will also attain just and expeditious disposal of cases in line with the overriding objective of the court. The present case is a case where retainer is being disputed. I move to the other penultimate issue; whether on the material before me, there is any dispute on the retainer.

IS THERE A DISPUTE ON THE RETAINER?

The retainer: what it entails

[13] This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the Advocates Act, probably because of the special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the Advocates Act, the innumerable previous courts' rendition on the phraseology...***where the retainer is not disputed...***provide the content of the term ''retainer''**.** **''**Retainer'' in the wider sense entails the instructions by a client or a client's authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the **BLACK'S LAW DICTIONARY, 9TH EDITION.** The appropriate sense of the word ''retainer'' as used in the Advocates Act and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of **NBI HC MISC APP NO 698 OF 2004 A.N. NDAMBIRI & CO ADVOCATES v MWEA RICE GROWERS MULTIPURPOSE C-OOP LIMTED,** and **OWINO OKEYO & CO ADVOCATES v FUELEX KENYA LIMITED [2005] eKLR,** respectively. Let me quote what Waweru J said in the former case that;

> ***My understanding of the term ''retainer'' as used in section 51(2) aforesaid [read...of the Advocates Act] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that ''retainer'' means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer.***

[14] In the present case, the Applicant agrees that he gave the Respondent instruction to file a suit against EQUITY BANK LIMITED to have his title discharged; he be declared to have been a guarantor for a specified amount of money advance to a third party; and his willingness to pay such specified amount for which the guarantee was given. The Applicant further avers that contrary to these comprehensive instructions, the Respondent filed a suit for injunctive orders only. He then takes the view that the Respondent's bill of costs should be restricted to the suit ''as filed'' by the Respondent and not pegged to the value of the subject matter. The Applicant also admits that he paid all the fees due to the Respondent in the sum of Kshs. 635,000.

[15] All that I am able to discern from the submissions by the Applicant is that; on one hand he admits to have given instructions to the Respondent and paid all the fees due; while on the other hand, he seems to suggest that the retainer is in dispute because the Respondent acted contrary to the instructions he had given. That is problematic. By that approach, the Applicant seemingly creates a legal quagmire; but which I am persuaded creates a false impression that there is serious dispute on the retainer. Any court of law, acting intuitively on such powerful claims by the Applicant, may think that a dispute on the retainer exists and probably a stay of the taxation is

meritorious. But, the retainer herein is not in dispute at all; the Applicant duly instructed the Respondent to file suit against EQUITY BANK LIMTED; the Respondent prepared and filed a plaint which was verified by the affidavit of the Applicant. It seems the Applicant does not appreciate the requirement and importance of a verifying affidavit under Order 4 rule 2 of the CPR within the process of civil cases. The deponent in the verifying affidavit verifies, under oath, the correctness of the averments in the plaint, and most important in relation to this matter... ***that the cause of action relates to the plaintiff named in the plaint***. See Order 4 Rule 1(1) (f) of the CPR. That is a substantial matter of law which is not a simple technicality that can be diminished by Article 159(2) (d) of the Constitution. The Applicant may not disown the verifying affidavit or the contents of the plaint without the attendant consequences on the person of the plaintiff and to the suit as well. Admirably, the Applicant has not gone that way; instead the he has admitted, and suggested that the bill of costs herein should be restricted to the type of case the Respondent filed. That is not a declaration of a dispute on the retainer in the sense of the Advocates Act, but a matter which ought to guide taxation under the regime of the Advocates (Remuneration) Order; indeed it falls within the power and jurisdiction of the taxing master and should be raised in the taxation. The scope and extent of instructions is also a matter which will be delineated in the taxation by looking at the nature of the case filed and relief sought.

[16] Another important issue: Any payments made to the advocate are usually taxed off by the taxing master during the taxation. And any dispute thereof does not constitute a dispute on the retainer; such disputes on the payments are to be determined by the taxing officer under the powers in Paragraph 13A of the Advocates (Remuneration) Order which provides as follows:

> ***13A For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.***

[17] Accordingly, I find and hold that the Respondent was duly instructed to act in the matter to which the bill herein relates; was duly retained and there is, therefore, no dispute on the retainer.

[18] The upshot is that the application dated 9th October, 2013 is dismissed with costs. As I have found that there is no dispute on the retainer, I order that taxation of the bill of costs filed herein by the Respondent to proceed to taxation in accordance with the Advocates Act and the applicable subsidiary legislation made under the said Act governing taxation of advocate-client bill of costs.

Dated, signed and delivered in open court at Nairobi this 21st day of May, 2014

F. GIKONYO

JUDGE