



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC CAUSE NO. 86 OF 2014

ALDRIN OJIAMBO t/a

OJIAMBO & CO. ADVOCATES.....ADVOCATE/APPLICANT

• VERSUS -

NATIONAL BANK OF KENYA LTD.....1ST CLIENT/RESPONDENT

CORPORATION LTD.....2ND CLIENT/RESPONDENT

RULING

1. On 7th March 2014, the Law Firm of Ojiambo & Company Advocates filed an Advocate – Client Bill of Costs. The said Bill of Costs was in relation to services which the law firm said it had rendered on behalf of the client in the case of **BASIL CRITICOS VS. NATIONAL BANK OF KENYA LIMITED (As the successor in business to Kenya National Capital Corporation Limited (“KENYAC”) & Another, HCCC No. 757 of 2009.**
2. In response to that Bill of costs, the client filed an application seeking to have it struck out or dismissed.
3. Although the advocate felt that the application ought to be heard by the learned Taxing Master, the client expressed the view that the application should be heard by a Judge. On her part, the Taxing Master directed that the matter be heard by a Judge. Pursuant to those Directions, the application was placed before me.
4. In my understanding, the client is saying that the advocate had absolutely no basis upon which to found any Bill of Costs because the advocate;
 - a. *Was not given instructions by the client, to undertake the work which the advocate alleges to have undertaken;*
 - b. *Was instructed to undertake other work, for which the advocate had been duly paid.*
5. On the other hand, the advocate insists that he was duly instructed to undertake services in HCCC No. 757 of 2009; and that he carried out the requisite instructions.
6. Obviously, if the advocate was given instructions by the client, and if the advocate carried out the said instructions, he would be entitled to render a fee-note to the client, for the services which he had provided.
7. The Taxing Officer has the responsibility of determining the quantum of costs or fees payable. However, it is not the function of the Taxing Officer to establish, in principle, whether or not costs or fees should be payable by one person to another.

8. Ordinarily, the court determining a case would also make an order directing one party to pay the costs of the suit or of an application. The Taxing Officer would then tax the Bill of Costs to determine the quantum of the costs payable.
9. Meanwhile, when the dispute over fees is as between an advocate and his client, the role of the Taxing Officer would be determine the quantum of such fees. In such situations, the normal dispute between the client and the advocate is only in relation to the amount of money which is payable to the advocate for the work he had done.
10. But this case first raises the question as to whether or not the advocate was ever given instructions to do the work which he alleges to have done. Thus, the Taxing Officer cannot undertake his task before it is ascertained by the court, whether or not, in principle, the advocate was entitled to charge any fees.
11. If the court were to conclude either that the advocate was not given instructions, or that the advocate did not undertake the work pursuant to his client's instructions, then the Bill of Costs would have to be struck out.
12. I would also add that if the advocate was given specific instructions but thereafter proceeded to act contrary to or in excess of such instructions, he could not legitimately expect to be paid for services which were not in line with the instructions of his client.
13. At paragraph 11 of the advocates written submissions it is stated thus;

“THAT by a letter dated 26th April 2010, the Applicant herein instructed the Advocate to take the conduct of HCCC No. 1420 of 1997 Agro Development Company Limited & Another Vs Kenya National Capital Corporation Ltd from the firm of Kangethe & Company Advocates and specifically for purposes of opposing the Plaintiff's Application in HCCC 757 OF 2009, seeking consolidation of the aforesaid suits together with HCCC No. 132 of 2009. The other firms on record in the other related suits were informed of the appointment of the Advocate by separate letters dated April 26th 2010”.

14. Clearly therefore, the client wished to have the advocate *“specifically to oppose the plaintiff's application in HCCC No. 757 of 2009, seeking consolidation”*.
15. That fact is common ground between the parties herein.
16. In order to carry out those instructions, the advocate needed to understand the reasons informing the client's decision to oppose the consolidation of the suits.
17. My take is that although the advocate needed to understand the gist of the case in HCCC No. 757 of 2009, as well as the other cases, that fact did not imply that they were acting for the clients in that particular case.
18. Having given consideration to the pleadings and also to the proceedings in the six (6) cases, the Advocate advised the client that the client's interests would be better served through the proposed consolidation, rather than through the obstruction to the said consolidation.
19. Ultimately, the parties all agreed to the consolidation of three (3) suits, being;
 - a. *HCCC No. 757 of 2009;*
 - b. *HCCC No. 1420 of 1997; and*
 - c. *HCCC No. 132 of 2009.*
20. Meanwhile, HCCC No. 292 of 2001 was marked as withdrawn; and HCCC No. 108 of 2006 was stayed pending the hearing and determination of the consolidated suit.
21. A consent letter dated 16th June 2010 was signed by the advocates for all the parties, and that letter was filed in court on 9th July 2010.
22. In the consent letter, the Advocate (Ojiambo & Company Advocates) was described as representing the Defendant in HCCC No. 1420 of 1997.
23. By a letter dated 9th September 2011, the client's General Manager for the Legal & Remedial Management, Mrs Z.K Mogaka told Messrs Rachuonyo & Rachuonyo Advocates, as well as messrs Ojiambo & Co. Advocates that;

“Following the consolidation, our understanding is that:-

i) Ms. Rachuonyo & Rachuonyo Advocates are on record in NRB HCCC No. 757/2009 and 132/2009, while M/s Ojiambo & Company Advocates are on record in 1420/1997.

ii) Each firm will restrict itself to the issues arising from their respective suit (s).

iii) Each firm will up-date the Bank on the respective issues they are handling but the issues which are common, the firm in the lead suit will take charge”

24.The client invited those 2 law firms to confirm the said understanding.

25.The Advocate responded by a letter dated 23rd September 2011, indicating that the issues of fact and law were so closely intertwined that it would be difficult to separate them. The Advocate suggested to the client that the issues be left to the 2 law firms to agree upon, on the manner of handling them.

26.It appears that although there had been a consolidation of cases, the client still held the view that the cases in question were distinct and separate. The client therefore believed that the work being undertaken by each law firm could be easily distinguished and handled separately. On the other hand, the Advocate was of the view that the matters were too inter-twined to be separated.

27.But whether or not it was possible to distinguish the cases which had been consolidated, the fact remains that the client, as well as Messrs Rachuonyo & Rachuonyo Advocates acknowledged, in writing, that the Law firm of Ojiambo & Company Advocates was one of the two (2) firms handling the defendants’ case in the consolidated case.

28.Rachuonyo & Rachuonyo Advocates said so in their letter dated 5th December 2011, which was addressed to the National Bank, with a copy to Ojiambo & Company Advocates.

29.Meanwhile, on 25th October 2011, Mrs Z.K. Mogaka had written an internal Memo to the General Manager Finance, saying;

“Current Position

The three suits were consolidated in July 2010 for purposes of expediting the hearings. Case No. 1 is the main suit while case No.2 constitutes the Bank’s counter-claim. M/s Rachuonyo & Rachuonyo Advocates are on record on these two matters while Kenyac (3rd suit) is represented by M/s Ojiambo Advocates.

Opinion

While the claim of Kshs. 3 Billion is in our view fictitious, we have taken all the necessary steps to ensure that the Bank is adequately represented hence the two firms of Advocates being on record.

We have agreed that the two firms will work together and raise one combined feenote for all three (3) cases and the attendant applications”.

30.In the light of the foregoing, I find that the Advocate (Ojiambo & Company Advocates) was duly instructed.

31.The said instructions were received from Mrs. Z.K. Mogaka, who had hoped that the attempt by the plaintiff, to have several suits consolidated would be opposed. However, upon the advice of the Advocate, the Bank consented to the proposed consolidation, as that provided the most appropriate procedure for safeguarding the interests of the client.

32.Even though there had been consolidation, the Advocate was retained to continue acting for the **KENYA NATIONAL CAPITAL CORPORATION LIMITED**, whilst Rachuonyo &

- Rachuonyo Advocates looked after the **NATIONAL BANK OF KENYA LIMITED**.
- 33.The issues in contention were so intertwined that the Advocate made it clear that the said issues could not be separated. For that reason, the Advocate even suggested to the client that the two law firms be allowed to agree between themselves on how best to handle the matters.
- 34.But the client did not accept that suggestion. Instead, the client reiterated the need for each law firm to;

“Concentrate on handling the cases you each originally handled before consolidation”.

- 35.It is therefore clear that the client did instruct the Advocate, and that the Advocate carried out his instructions.
- 36.And whereas the Advocate may have been paid for the services he rendered in HCCC No. 1420 of 1997, there is nothing to show that he was paid for the services he continued to render for the Kenya National Capital Corporation Limited, after the consolidation of the suits.
- 37.The Advocate is therefore entitled to raise a fee note for the work he did after the suit was consolidated.
- 38.But it must also be reiterated that the work done by the Advocate was, (to use his own words);

“So closely intertwined that it may be difficult to separate them”.

- 39.That is why the Advocate confirmed that he consulted with the firm of Rachuonyo & Rachuonyo Advocates, in order to be able to have a more complete understanding of the cases.
- 40.The advocate even sent a draft application to both the client and Rachuonyo & Rachuonyo Advocates, for approval, before the application was filed.
- 41.By that conduct, the Advocate was confirming how he worked closely with Rachuonyo & Rachuonyo. But the same said conduct confirms that the Advocate actually rendered services in the consolidated suit.
- 42.I therefore reject the client’s invitation to the court, to strike out the Bill of Costs.
- 43.However, I do direct the learned Taxing Officer to bear in mind the following words of Kuloba J. in his book *“Judicial Hints on Civil Procedure”*;

“Where suits or appeals are consolidated there should be an apportionment of the costs, including the instruction fees. The advocates for the parties cannot expect to be paid twice over the same work because he has won three actions”.

- 44.In this case there are tasks which were wholly performed by the Advocate. But all the said tasks were ultimately calculated to be in the best interests of the client.
- 45.The client cannot be expected to pay two law firms who were acting for the said client in the consolidated case, a separate and independent fee for work which was so intertwined that it could not be separated.
- 46.Therefore, in arriving at the appropriate fees payable to the Advocate, the Taxing Officer is obliged to give due consideration to the fees already paid to the Advocate in HCCC No. 1420 of 1997; as well as to the fees already paid to Rachuonyo & Rachuonyo Advocates in HCCC No. 757 of 2009.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of September 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mwendu for the Advocate/Applicant.

.for the 1st Client/Respondent.

Miss Omolo for the 2nd Client/Respondent.

Mr. C. Odhiambo, Court clerk.