



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO. 181 OF 2012

A.K. WAHOME & COMPANY, ADVOCATES.....ADVOCATE

VERSUS

ALI HUSSEINCLIENT

RULING

1. On 20th June 2012 the Advocate's **bill of costs dated 21st March 2012** (in connection with work done in **Nairobi HCCC No. 197 of 2011**) was taxed at KShs 393,709/30.
2. The Client has now applied by chambers summons dated 18th September 2012 seeking three main orders -
 - (i) **That the Court be pleased to extend time to the Client to file a notice of objection to the taxation.**
 - (ii) **That the Court do grant leave to the Client to file a reference against the taxation.**
 - (iii) **That the court be pleased to set aside the taxation and consequently strike out the Advocate's bill of costs.**
3. The application is stated to be brought under **paragraph 11(2) and (4) of the Advocates (Remuneration) Order** and is supported by the Client's own affidavit annexed thereto. The main ground for the application is that the Client never instructed the Advocate to act for him in connection with Nairobi HCC No. 197 of 2011.
4. The Advocate has opposed the application by **replying affidavit filed on 11th October 2012**. It is sworn by the Advocate. The main ground of opposition is that there was retainer by implication and conduct, and that therefore the application has no merit.
5. The Client filed a **supplementary affidavit on 21st January 2013** in response to the replying affidavit. He denied ever signing the affidavit sworn in verification of the plaint and the witness statement in his name; he alleged forgery of his signature.
6. In his turn the Advocate filed a **further replying affidavit on 11th February 2013**. It does not add anything new to the state of facts.

7. The application was canvassed by way of written submissions. Those of the Client were filed on 24th January 2013 while the Advocates submissions were filed on 11th February 2013. I have considered those submissions, together with the cases cited.

8. The third prayer sought cannot be granted in this application. It would be the subject of the reference against taxation in the event that one is filed (should the court grant the first prayer). As for the second prayer, the same is not necessary. If the first prayer is granted a time-table as provided in paragraph 11 of the Advocates (Remuneration) Order would have been set in motion that would govern the filing of a reference against taxation. The only prayer that the Court will consider is thus the first one.

9. When the Client moved to change his advocates in Nairobi HCCC No. 197 of 2011 from **A K Wahome & Company** to **Hassan N Lakicha & Company**, he had the first formal opportunity to loudly complain that A K Wahome & Company never had his instructions in the first place to institute or act for him in the suit. He did not. There is not even a suggestion that this is the reason for seeking to change advocates.

10. The second formal opportunity arose when the Advocate's bill of costs was served upon him. I have not seen any complaint in the material now before the Court that he was never served with the bill of costs or notice of taxation. Not only did he not file anything in response to the bill of costs, he did not even attend taxation, personally or by counsel! He gives no reason at all for this conduct.

11. The preponderance of the evidence before the court is that the suit was filed for his benefit, a verifying affidavit apparently sworn by him and a witness statement, apparently signed by him, were filed together with the plaint; filing fees in the sum of KShs 70,000/00 was provided by him (he does not deny this); a compromise judgment was entered in his favour; and the judgment sum was paid into a bank account that he provided.

12. The Client may not have directly instructed the Advocate. The Advocate says that he was instructed by the Client's then advocates who could not themselves have filed the suit because of a possible conflict of interest. Advocates pass on briefs to their colleagues all the time where for whatever reason they cannot act in the matter. In the present case the Client clearly acquiesced by conduct, if not expressly, to the brief being passed on to the Advocate. It is unconscionable for him to want to avoid payment of the Advocate's costs after he has enjoyed the fruits of the Advocate's professional labours.

13. I am satisfied from the material now before the court that there was a retainer by implication and conduct of the Client.

14. The application lacks merit. It must be refused. It is dismissed with costs to the Advocate. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2013