



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HMCA NO. 101 OF 2005

OBUTTU AND COMPANY

ADVOCATES.....APPLICANTS

=VERSUS=

LORNA JEBIWOTT

KIPLAGAT.....DEFENDANT

R U L I N G

I have before me an application by way of a Notice of Motion dated 18th January, 2010. It is by Lornah Jebiwott Kiplagat (**hereinafter “the client”**) who sought several orders of the court. When the motion on notice came up for hearing on 26th July, 2011, counsel agreed to canvass one prayer only namely, that **“the court do find that the advocate/applicant cannot tax a bill against the client/respondent for want of instructions to ... the advocate from the client/respondent”**. The taxing firm of advocates is **Obuttu & Co. Advocates**. As presented to the Court, the client’s complaint is that she did not instruct the advocates to act for her and therefore they had no basis upon which they lodged a bill of costs for taxation.

The applications is supported by the client’s affidavit sworn on 18th January, 2010 which affidavit substantiates the said complaint.

The application is opposed on the basis of grounds of opposition filed by the applicant’s advocates. Reliance was also placed upon an affidavit sworn by **Thomas Obutu** on 29th August, 2007. It is deponed in the said affidavit, *inter alia*, that the client instructed the advocates on 19th April, 2005 through one **Sylus Limo** to whom the client had donated a Power of Attorney; that acting on the said instructions, the advocates filed a plaint and an application under Certificate of Urgency among other documents; that **M/s Katwa and Co. Advocates** took over the conduct of the parent suit (**HCCC No. 32 of 2005 – Eldoret**) and proceeded to amend the plaint; and that the client’s application is without merit.

During his oral submissions in Court, Counsel for the Client argued that the client had denied instructing the advocates and that her signature on the verifying affidavit had been forged. He pointed out that at the time of instituting the parent suit, the client was not in Kenya and that the Power of Attorney upon which **Sylus Limo** purported to instruct the advocates had not been exhibited. It was contended that the basis of charging any fees had not been demonstrated, given that there was no advocate/client relationship between the advocates and the client.

The client's application was attacked by the advocates on the main ground that the suit the advocates filed is pending disposal. The client's new advocates **M/s Katwa & Kemboy** took over the same suit and amended the plaint lodged by the advocates. In counsel's view, the client has, in effect, despite her application, owned the said suit and cannot deny giving instructions. With regard to the failure to exhibit the Power of Attorney donated to **Sylus Limo** by the client, it was contended that the same had been admitted by the client in her affidavit sworn on 7th August, 2007 filed in support of her application for stay of execution.

I have considered the application, the affidavits filed, the grounds of opposition and the submissions of counsel. Having done so, I take the following view of the matter. The dispute between the advocates and the client is straight forward. It is whether the client instructed the advocates. There was no formal contract executed by the parties but in my view, that is not the only way an advocate/client relationship can come into existence. Indeed, most advocate/client relationships are not founded on a formal contract. The Advocates have argued, powerfully in my view, that the suit which was filed on behalf of the client is still pending disposal. The new advocates **M/s Katwa & Kemboy**, have infact amended the plaint lodged. The amendment must have been predicted on the existence of a valid plaint which in turn must have been accompanied by a valid verifying affidavit. The contention by the client that her signature on the verifying affidavit was forged would in effect vitiate the plaint. Indeed, the suit would be liable to be struck out as incompetent. But that is not what her conduct suggests. Her conduct suggests that the parent suit is competent-hence, her instructions that the plaint filed by the advocates be amended. If she had not given instructions to institute the parent suit, she would not have instructed her new advocates to amend the plaint filed by the advocates. She cannot allege forgery of her signature on the verifying affidavit and at the same time urge her claim in the parent suit. That, in my view, would suggest lack of candour.

The advocates have argued that instructions were received from **Sylus Limo** to whom the client had donated a Power of Attorney. The client on her part has argued, through her new advocates, that such Power of Attorney has not been exhibited. I have not traced any Power of Attorney in this record. However I was referred to the Client's own affidavit sworn on 7th August, 2007 in support of her application for stay of execution among other prayers. Paragraph 8 of the said affidavit reads:-

“That I wished to go to Court and I had explained to one Sylus Limo to whom I have donated a Power of Attorney, to cause a suit to be filed on my behalf; that he informs me that he did talk to one Mr. Birir Advocate explaining the nature of my case, and gave him available and relevant documents and Mr. Birir assured him he would proceed. Mr. Sylus Limo has informed me which information I verily believe to be true that he did not instruct the applicant/advocate herein and the verifying affidavit purporting to verify the case as drawn and lodged by the said applicant/advocate was not signed by myself.” (underlining mine)

The said deposition puts the issue of the Power of Attorney to rest. It is plain that the said **Sylus Limo** had power on behalf of the client to instruct counsel. The Advocates herein indeed state that they received instructions from the said **Sylus Limo** who was referred to them by **Mr. Birir Advocate**. The said **Sylus Limo** handed to the advocates all necessary and relevant documents and particulars of the

Defendants on the basis of which they filed a plaint on behalf of the client.

There is no suggestion that any other suit has been filed on behalf of the client by **Mr. Birir** based on the same instructions. The only suit which the client is urging is the one lodged by the advocates.

In the premises, I have come to the conclusion that the relief sought by the client in prayer 4 of her application is not available to her. The advocates are at liberty to tax their bill of costs against the client on the basis of instructions given by her to institute proceedings in the parent suit which suit is pending disposal. The client shall pay the advocates' costs of this application.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF OCTOBER, 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

(i) Mr. Kimani holding brief for Mr. Njuguna for the respondent.

F. AZANGALALA
JUDGE
3/10/2011