



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Civil Application 272 of 2008

**DORCAS A. NAJERO.....APPLICANT
VERSUS
MICAH HADYN MITOKO.....1ST RESPONDENT
GRACE JANE ADIKINYI OHAYO-MITOKO.2ND RESPONDENT**

RULING

1. What is before me is a notice of motion dated 4th August, 2009 brought under Rule 13A of the Advocates Remuneration Order and Section 3A of the Civil Procedure Act. The motion has been brought by Micah Hadyn Mitoko and Grace Jane Adikinyi Ohayo-Mitoko (hereinafter referred to as the clients). They have moved the court for the following orders:
 - (i) That at all material times, no advocate/client relationship existed between the applicant/advocate and the 1st respondent.
 - (ii) That consequently the applicant/advocate is not entitled to recover any costs or fees from the 1st respondent.
2. The motion was precipitated by a direction given by the Taxing Master to an objection raised by the clients/respondents to the advocate/client bill of costs filed by the advocate/applicant for taxation. The 1st respondent has sworn an affidavit in support of the application in which he swears that he only facilitated the transactions in question, but that the advocate/applicant was actually retained by the second respondent.
3. In response to the application Dorcas Ayuma Nanjero the advocate has sworn a replying affidavit. The advocate swears that the instructions given to her were to transfer the property known as Nairobi Block 90/270 from the 1st respondent to the joint ownership of 1st respondent and his wife the 2nd respondent. The advocate raised a fee note of Kshs.50,000/= which the respondents failed to settle. As a result the advocate decided to draw his fees in accordance with the Advocates Remuneration Order.
4. The respondents also instructed the advocate to effect transfer of property LR No.12533 (Original No.1159/38) from the 1st respondent to joint ownership of 1st respondent and 2nd respondent. The advocate carried out the transaction and had the transfer registered at the Lands Office on 19th June, 2007. The advocate swore that she had instructions from both respondents who are husband and wife, and therefore did not need to communicate with each respondent individually.
5. Following an agreement by the parties, written submissions have been duly exchanged and filed and the court is now called upon to determine the application based on those submissions.
6. I have carefully considered the application, the affidavit in support and in reply as well as the annexures thereto. I have also considered the submissions filed by both parties and the authorities relied upon. I find the issues standing out for determination to be whether there is a client/advocate relationship existing between the advocate and the 1st respondent. If the answer is in the affirmative, then the next question is, whether the advocate is entitled to recover any costs or fees from the 1st respondent.
7. In her replying affidavit, the advocate has maintained that she received instructions through both the 1st respondent and the 2nd respondent. The instructions were to transfer the two properties i.e. Nairobi Block 90/270 and LR No.12533 (Original No.1159/38) from the 1st respondent to both the 1st respondent and the 2nd respondent. The letters annexed to the advocate's affidavit show that she had communication from the 1st and 2nd respondents concerning the transactions.
8. With regard to Nairobi Block 90/270, the 1st respondent has attempted to limit the instructions which were given to the advocate as merely writing a letter to the Chief Land Registrar to rectify the title. From the letter dated 6th December, 2006, which was signed by both the 1st and 2nd respondents, it is evident that they wanted to have the ownership of the property changed to reflect the two as joint tenants and a new lease certificate issued reflecting the joint ownership. It is not clear whether this was necessitated by a mistake which was on the record or a change in ownership. Be that as it may, the instructions were apparently carried out and a certificate of lease dated 16th July, 2007 issued. I find that instructions relating to Nairobi Block 90/270 were given to the advocate by both the respondents.
9. In respect to LR No.12533 (Original No.1159/38) Nairobi, similar changes were also required. With regard to this land parcel, there is evidence that the changes were carried out through a conveyance of part of the 1st respondent's interest in the property to the 2nd

respondent. The transfer document was duly signed by both the 1st and the 2nd respondents in the presence of the advocate. The transfer was duly registered. The 2nd respondent in her email to the advocates dated 16th July, 2007 confirms that the 1st respondent gave the instructions for the changes to be made. Although the 1st respondent now denies having given instructions to the advocate, it is evident that he signed the transfer document.

10. A letter dated 2nd November, 2006 signed by the 1st respondent also confirms his dealings with the advocates. Moreover, the 1st and 2nd respondents being spouses, the 1st respondent cannot distance himself from this transaction. This is because the 2nd respondent had ostensible authority to enter into a contractual relationship on her own behalf and on behalf of her husband. I find that the instructions given to the advocate were from both the 1st and 2nd respondents. There was therefore a client/advocate relationship existing between the advocate and the respondents.

11. It was submitted by the respondent's counsel that the advocate Bill related to three transactions of two properties and an intended purchase of property namely 12533 and Nairobi/Block 90/270 and an intended purchase in Muhoroni. However, neither the advocate's affidavit nor the respondents' affidavit made any reference to instructions concerning a transaction involving purchase of LR No. 12533 or Nairobi Block 90/270 or an intended purchase in Muhoroni. I find therefore that there were no instructions established relating to any such transaction. The instructions given to the advocate which have been established were only with regard to change of ownership of the two properties to include the 2nd respondent as a joint owner.

12. It was submitted that the applicant is precluded from recovering her fees from the respondent as no notice has been served upon the respondents in accordance with Section 48(1) of the Advocates Act. In this regard, I concur with the submissions of the advocate that Section 48(1) of the Advocates Act only comes into play to bar the filing of a suit where no bill has been served upon the client. In this case, the parties appear to have disagreed on the amount due as advocate's fees. The advocate has now approached this court for assessment of her fees. What is before the court is a miscellaneous application for assessment of the advocate's fees. It is not a suit for the recovery of the advocate's fees. That will come after the advocate's fees has been assessed.

13. I find that the advocate is entitled to recover her fees for the work done for the respondents in accordance with the respondents' instructions. As to the actual amount payable, that is a matter to be resolved by the taxing master. For the above reasons, I dismiss the notice of motion dated 4th August, 2009. I award costs to the advocate.

Those shall be the orders of this court.

Dated and delivered this 1st day of October, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Bubi for the applicant/advocate

Makori for the respondents/clients

Kosgei - Court clerk