



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL CASE 61 OF 2007

IN THE MATTER OF THE ADVOCATES AG. CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATES (REMUNERATION AMENDMENT ORDERS)

AND

IN THE MATTER OF TAXATION OF ADVOCATE CLIENT COSTS

AND

**IN THE MATTER OF ELDORET CM. CRIMINAL CASE NO.3274 OF 2005 BETWEEN
REPUBLIC THROUGH N.S.S.F.V.S.KITALE MUNICIPAL COUNCIL. WILLIAM
WABULWENYI,WILBERFOCE WAMBULWA AND RICHARD ROTICH**

BETWEEN

NICHOLAS GITUHU KARIRA

T/A M/S KARIRA & COMPANY ADVOCATE.....ADVOCATE/RESPONDENT

VERSUS

KITALE MUNCIPIAL COUNCILCLIENT/APPLICANT

R U L I N G

The Application is brought under the Provisions of Section 12(3) and 143 of the Local Government Act Cap 265 of the Laws of Kenya and Sections 3A and 63(e) of the Civil procedure Act Cap 21 of the Laws of Kenya, Section 45(1) (c) of the Advocates Act Cap 16 of the Laws of Kenya, order VI Rule 13(1) (b) (b) and (d) of the Civil Procedure Rules and all other enabling provisions of the law praying that there be stay of taxation of the Bill of Costs pending the hearing and determination of the application and that the Bill of costs be struck out on the grounds that the applicant was never instructed by the respondent and that the taxing officer has no jurisdiction to tax a bill of costs from criminal proceedings in the absence of an order for costs by the trial court in criminal proceedings. The application also prays for costs. It is based on the grounds that the Client/Applicant never instructed the Advocate/Respondent to represent him in Eldoret Criminal case number 3274 of 2005 and other grounds the court does not consider relevant for its consideration, some of them having been abandoned at the hearing of the application.

There are filed in support of the application two affidavits sworn by William Gilbert Nandwa and by Henry O. Wanyundi described as town clerk of the Client/Applicant herein at different times material to the application herein. The main gist of the affidavits is that the Advocate/Applicant was never instructed to act for the client/Respondent but merely held brief for the Advocate for the client/respondent.

In opposition to the application there is filed a Replying Affidavit sworn by the Advocate who represented the client/respondent in Eldoret Criminal Case No. 3272/2006 in which he swears that he was instructed by the then town clerk one Wilberforce Wambulwa to appear for the client/respondent and the town clerk as well as the Town Treasurer one Richard Rotich in the criminal case stated above.

It was argued for the client/respondent that the bill of costs be struck out as there were no instructions to the Advocate/Applicant to act and hence there was no basis for billing the client/respondent. For the Advocate it was argued that a retainer by the Town Clerk bound the council. It was denied that the Advocate merely held brief for some other Advocate.

I have carefully considered this application. I find as a fact from the annexure marked "KI" that on 23-11-2005 Mr. Karira Advocate appeared in court representing the Tow Clerk and Town Treasurer of the client/respondent. On that date he did not say that he was holding brief for Mr. Kidiavai who had acted for the client/respondent previously. Mr. Karira successfully applied for the warrants of arrest that had been issued against the two officers to be lifted. Mr. Karira appeared in court again on 7-12-2005. On that date the record reads "Mr. Kidiavai and Mr. Karira for accused. All accused present." Mr. Karira was again in court on 7/2/2006 and is recorded as appearing for the client/respondent. He was in court again on 28-2-2006 and so were the accused persons. Mr. Kidiavai was not in court on the last two days above. On the latter date the plea was taken. The record reads as follows;

"Charge read and explained to accused person in English language which they understand. They reply;

2nd accused – Not true

3rd accused – Not true

Mr. Karira; I wish to enter a plea of not guilty for Kitale Municipal Council.

Court; Plea of not guilty entered for all the 3 accused persons.

Mr. Karira; I apply that the 2nd and 3rd accused be released on free bond. They are employees of Ministry of Local Government the 2nd accused is the Town clerk and the 3rd accused is the Treasurer of Kitale Municipal Council.

Mr. Mastamet; No objection

Court; The 2nd and 3rd accused are released on their own bonds of Kshs.50, 000/-. Hearing date be taken in court 4.

Mr. Karira; I apply that mentions be dispensed with. The two accused are very peopled and work in Kitale. The mentions may be a bit tedious. And may distract them from their duties in the office."

On 11-5-2006 Mrs Wambua advocate was in court holding brief for Karira for accused. She informed the court of the transfer of the 2nd and 3rd accused persons and applied that they be substituted by the new officers who had replaced them and successfully opposed an application for a warrant of arrest to issue against the 2nd and 3rd accused for not attending court on the said date.

I have considered it necessary to quote the proceedings with a view to establishing whether or not the Advocate rendered legal services for the client/respondent. The argument taken that if he acted then he did so without instructions must be looked at, in my view, from the stand point of whom he was representing in court. It was the advocate himself who pleaded not guilty for the Municipal Council of Kitale. He says he was instructed by the 2nd accused who is the Town clerk. It is the Town clerk who ought to have known the procedures of the client/respondent of appointing counsel. It was not the advocate. And the Advocate did not attend court once or twice so that the Municipal Council of Kitale can be heard to say that they did not know that he was acting for them. The council acts through its officers and the Town clerk is its chief administrator. In my considered view it is too late in the day to seek to evade responsibility. If the Town clerk acted wrongly in instructing the advocate to represent them, then the council's recourse is from their officer the Town clerk not the advocate who dutifully attended court and effectively represented them. He earned his keep. He is entitled to it. It is only fair. I refuse to accept that because the advocate was not procured through the Council's tendering procedures then he does not deserve his pay. That argument in light of services rendered over time and which services secured the lifting of arrest warrants and favourable bond terms defeats simple logic. The officers of the council are its agents and they bind the council. In this case the Town clerk bound the Kitale Municipal Council. See **Equip Agencies Ltd. V. The Attorney General Nrb. HCCC. No. 1459 of 1999.**

Earlier in this Ruling I said I do not consider it necessary to address my mind to matters that are irrelevant to the matter in issue. Suffice it to note though that any taxing master indeed has jurisdiction to tax bills drawn pursuant to representation in criminal cases. To say otherwise is to be frivolous, scandalous, vexatious and most embarrassing.

In the end I find and hold that the application under consideration is without merit and the same is for dismissal and it is so dismissed with costs to the advocate/applicant.

Those are the orders of the court.

DATED AND DELIVERED IN ELDORET THIS 17TH DAY OF JUNE 2009.

P.M. MWILU

JUDGE

In the presence of;

Clerk.....

Advocate for the client/Respondent.....

Advocate for the Advocate/Applicant.....