



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Suit 179 of 2008

JAMES GITAU SINGH T/A SINGH GITAU ADVOCATES.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....RESPONDENT

RULING

The applicant, James Gitau Singh is an advocate of the High Court of Kenya. He practices as such under the name and style of Singh Gitau Advocates. He alleges that he was retained by the respondent bank to act on its behalf in two cases involving a company known as Mbo-I-Kamiti Farmers Company Ltd. The two cases were respectively Nairobi HCCC No.288 of 2003 National Bank of Kenya Ltd vs Mbo-I-Kamiti Farmers Company Ltd and Nairobi HCCC No.139 of 2003 Mbo-I-Kamiti Farmers Company Ltd vs National Bank of Kenya Ltd & Garam Investments Ltd. According to the applicant, a disagreement in regard to the payment of his legal fees arose between himself and the bank. The disagreement resulted in the bank withdrawing instructions from the advocate. The applicant filed his advocate-client bill of costs in court with a view to having the same assessed.

The respondent filed notice of preliminary objection to the said taxation alleging that the applicant and the respondent had entered into an agreement in regard to the legal fees that the advocate was to be paid pursuant to the provisions of **Section 45** of the **Advocates Act**. The preliminary objection was heard by the taxing officer of this court. In her considered ruling, she found that there existed no agreement between the applicant and the respondent in regard to the said advocate's fees to be paid at the time the respondent instructed the applicant. She therefore dismissed the preliminary objection. The dismissal of the preliminary objection provoked the filing by the respondent of a reference to this court pursuant to the provisions of **paragraph 11** of the **Advocates Remuneration Order**. The said reference was filed in court on 2<sup>nd</sup> July 2009. In the reference, the respondent seeks to have the said decision of the taxing officer delivered on 8<sup>th</sup> October 2008 overruled and substituted by a decision of this court upholding the preliminary objection and as a result of which the advocate-client bill of costs filed by the advocate on 25<sup>th</sup> February 2008 would be struck out with costs to the respondent. The applicant filed a replying affidavit in opposition to the reference.

I will return to this aspect of the reference after briefly setting out the events that transpired after the dismissal of the preliminary objection. On 14<sup>th</sup> November 2008, Mr. James Singh, acting for the applicant and Mr. Ojiambo acting for the respondent, agreed to file written submissions in regard to the items in the bill of costs that the applicant had presented to the court for taxation. On 21<sup>st</sup> November

2008, the record of the court reflected that the said advocates had duly complied with the requirement that they file their respective written submissions, in support and in opposition of the various items in the advocate-client bill of costs. On 4<sup>th</sup> February 2009, the taxing officer assessed the advocate's bill of costs at Kshs.13,998,298.26. The respondent was aggrieved by the said assessment of the advocate's costs. It immediately sought to be given reasons for the decision by the taxing officer. After considerable delay, the respondent was informed that the reasons for the taxation were contained in the ruling.

Meanwhile, on 12<sup>th</sup> June 2009, the advocate filed a notice of motion pursuant to **Section 51(2)** of the **Advocates Act** seeking entry of judgment for the sum of Kshs.14,068,148.26 the sum that was taxed in his favour by the taxing officer. The above amount, according to the applicant, included interest which had accrued from the date of the taxation of the advocate's costs. Zipporah Mogaka, the respondent's general manager in charge of legal and remedial department swore a replying affidavit in opposition to the application. The respondent further filed an application dated 25<sup>th</sup> June 2009 seeking the striking out of the said application filed by the advocate seeking summary judgment pending the hearing and determination of the intended reference.

On 3<sup>rd</sup> July 2009, the advocates for the parties to this suit agreed by consent to have the applicant's notice of motion filed in court on 12<sup>th</sup> June 2009 and the respondent's reference filed on 2<sup>nd</sup> July 2009 be heard together and a single ruling be delivered by the court. The parties further agreed to file written submissions in support of their respective opposing positions. This ruling is therefore delivered on the basis of the written submissions filed respectively by the applicant, acting for himself, and Mr. Ojiambo, acting for the respondent. I have carefully read the pleadings filed by the parties herein in support of their respective divergent positions. I have evaluated the written submissions filed in this suit. I have also considered the authorities cited by counsel in support of their respective clients' cases. For the sake of clarity, I will first address the issues raised by the respondent in its reference to this court. Upon perusing the record of the court, I hold that the said reference was filed within the stipulated period and therefore the objection by the applicant to the reference on technical procedural grounds is without foundation.

According to the respondent, it had entered into an agreement with the applicant in regard to the payment of the applicant's legal fees. The respondent annexed copies of agreements it alleges the applicant executed when he was included in the panel of advocates appointed by the bank to act on its behalf in various matters pending in court. On perusal of the said agreements, it was evident that the respondent made it a requirement for any advocate who was appointed to its panel of advocates to execute an agreement by which such an advocate accepted to be paid legal fees other than that provided for under the **Advocates Remuneration Order**. The applicant was included in the respondent's panel of advocates after he had applied, by his letter dated 12<sup>th</sup> February 2001, requesting to be so included. The applicant was appointed in the panel of the external advocates of the respondent on 28<sup>th</sup> February 2001. The applicant accepted the terms of his appointment. It was apparent that the said appointment was to last for a period of one (1) year from the date of appointment.

On 31<sup>st</sup> January 2002, the applicant was re-appointed to the panel of advocates of the respondent for the year 2002. The applicant accepted his appointment subject to the conditions set out in the said letter of appointment. Again, the appointment lasted for a period of twelve (12) months. Similarly on 31<sup>st</sup> January 2003 and 22<sup>nd</sup> April 2004, the applicant was again re-appointed as an external advocate of the respondent for the years 2003 and 2004. Crucially for the purpose of this reference, the applicant did not execute the two re-appointment letters accepting to be bound by the terms of retainer imposed by the respondent. It was during this period, in 2003, that the respondent instructed the applicant to act on its behalf in the two cases that are the subject of this reference. There is no dispute that the respondent instructed the applicant to act on its behalf in a suit filed by Mbo-I-Kamiti Farmers Company Ltd against the respondent (i.e. **HCCC No.139 of 2003**).

The respondent justifiably complained that it had not given written instructions to the applicant to file **Nairobi HCCC No.288 of 2003**. The applicant however insisted that he was given verbal instructions by the respondent to file a separate suit against the said Mbo-I-Kamiti Farmers Company Ltd. It appears that when the respondent's head office were made aware of the subsequent suit filed by the applicant, they, at

first instructed the applicant to withhold further action in the matter because in their view, the respondent had substantial security from the said company that could easily be disposed off to settle the outstanding loan amounts. The letter is dated 16<sup>th</sup> July 2003. Subsequently thereafter, the respondent withdrew instructions from the applicant and instructed the firm of Rachuonyo & Rachuonyo Advocates to take over the conduct of the case.

The respondent denied giving written instructions to the applicant to file the subsequent suit. There is no evidence that the applicant was given written instructions by the respondent to file the said suit. However, in subsequent communication between the applicant and the respondent, the respondent confirmed the instructions. For instance, on 27<sup>th</sup> April 2005, the respondent wrote to the applicant addressing pertinent issues in the case. I therefore find that the claim by the respondent that it had not given instructions to the applicant to file the suit in question is not supported by evidence. The applicant was retained by the respondent to file the suit. The initial instructions were verbal. The verbal instructions were later confirmed in the subsequent correspondence that were exchanged between the applicant and the respondent. The respondent cannot in the circumstances deny retaining the applicant to act on its behalf in the said suit. I hold that the respondent's conduct manifestly established that it had instructed the applicant to act on its behalf in the said suit.

As regard whether the applicant was bound by the agreement entered between himself and the respondent in respect of the legal fees that he was entitled to be paid, having perused the agreements that were annexed to the supporting affidavit sworn on behalf of the respondent, it was evident to the court that by the time the applicant was instructed to act on behalf of the respondent in the two suits that are the subject of this reference, the agreement regarding the payment of the agreed legal fees had expired. The applicant could only be bound by the agreement entered between itself and the respondent up to the 31<sup>st</sup> January 2003. Under **Section 45(1) of the Advocates Act**, an advocate and a client may enter into an agreement fixing the amount of the advocate's remuneration. Such an agreement may be entered before, in the course or after the advocate has been instructed. For such an agreement to be valid and binding on the parties, it must be in writing and signed by the advocate and the client. As stated earlier in this ruling, at the time the applicant was instructed to act in the two suits by the respondent, there was no agreement in writing duly signed by the advocate acknowledging or agreeing that he would be bound by the terms imposed by the respondent regarding payment of his remuneration.

I therefore hold and find that there was no agreement between the applicant and the respondent regarding the nature and the quantum of his legal fees. This court cannot allude to the existence of such agreement regarding the mode of payment of legal fees on the basis of a previous agreement that had expired. The said agreements must be strictly interpretation against the respondent, the author of the same. The limitation period of twelve (12) months in the previous agreement was fixed by the respondent itself. It cannot blame the applicant for taking advantage of such limitation. In the absence of any agreement between the applicant and the respondent regarding the fees to be paid, such fees can only be determined by the taxing officer of this court. The taxing officer of this court, correctly in my view, reached the proper finding that there was no agreement between the applicant and the respondent in respect of the legal fees to be paid. She was justified in dismissing the preliminary objection as having no merits. I similarly find the issues raised in the preliminary objection to be without merit and proceed to dismiss the reference with costs to the applicant.

As regards the applicant's application seeking entry of judgment on the amount taxed, I hold that the applicant cannot obtain judgment in the miscellaneous cause that the advocate-client bill of costs was taxed. The purpose of filing the miscellaneous cause is to have the advocate-client bill of costs taxed. It is for nothing else. The applicant is required to file suit by way of plaint if it desire to enforce payment of the amount that has been taxed in his favour. This position was clearly explained by Akiwumi JA in the Court of Appeal decision of **Sharma –vs- Uhuru Highway Development Limited [2001] 2EA 530**. At page 540 he held that:

*“And now, if I may go back to **Section 48(1) of the Act**, it is clear from its wording, that it only relates to proceedings for the recovery of costs. Paragraph 13 of the Order on the other hand, does not deal with the recovery of costs, but only with the taxation of costs the result of which could be the basis of a suit for*

*the recovery of costs. And nowhere does **Section 48** of the **Act** forbid the taxation of costs before any action for the recovery of costs can be instituted; and in any case, the taxation of costs under **paragraph 13** of the Order does not by itself amount to a judgment. ... Indeed, all that **Section 48(1)** of the **Act** requires to be done before a suit for the recovery of costs, is instituted, relates to the prior service of the Bill of Costs and not its taxation, on the client by advocate, and not at all, to the taxation of his bill of costs. This interpretation of **Section 48** of the **Act**, applies with equal force to **Section 49** of **Act** which is derived from **Section 48** of the **Act**, and which comes into play only where suit has already been brought by way of a plaint, by an advocate for the recovery of any costs and a defence is filed disputing its reasonableness or quantum.”*

This court cited the above holding with approval in its decision in **Nairobi Misc. Civil Application No.1010 of 2006 Peter Ngoge t/a O.P. Ngoge & Associates vs Linet Ongenche** (unreported). The respondent’s objection to the said applicant’s application is therefore upheld on this ground alone. The said application was filed without jurisdiction and is hereby struck out with costs to the respondent. However, the applicant is at liberty to file an appropriate ordinary suit for the recovery of the said amount that was taxed in his favour.

It is so ordered.

DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF NOVEMBER 2009.

**L. KIMARU**

**JUDGE**