



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISC. APPLI. 739 OF 2007

MACHARIA NJORE & CO. ADVOCATES.....APPLICANT

VERSUS

VOI SISAL ESTATE LTD.....RESPONDENT

RULING

1. This ruling concerns a Preliminary Objection dated 2/04/2008 filed by the Respondent against the Applicants Bill of Costs on the grounds:-

1. *THAT there was no privity of contract for legal service between the Applicant and Respondent.*
2. *THAT the contract for legal services in HCCC No.2437 of 1996 is purely between the Applicant and one John Kori an independent contractor who alone is responsible for payment of legal fees if any due.*
3. *THAT the bill of costs against the Respondent herein should be dismissed.*

2. According to the Respondent the issue for determination is whether there is a contract for provision of legal services to the Respondent Company as between the Applicant Advocate and the Respondent Voi Sisal Estate and whether the Respondent is liable to pay legal fee to the Applicant Advocate.

3. The objection herein relates to the Advocate-Client Bill of Costs dated 30/01/2007 and filed in court on 7/02/2007 relating to HCCC No.2547 of 1996. The Applicant says that he filed the said civil suit against the Hon. the AG on the instructions of the Defendant/Respondent. It was alleged in the plaint dated 27/08/1996 that at all times material to this suit, the Plaintiff were the owners of LR No.1956/1/1 and LR No.1956/1/2 and that as a result of some agreement between the Plaintiff and the Commissioner of Lands the Plaintiff agreed to surrender a portion of the said two parcels of land (the suit property) for the purpose of enabling the Voi Municipal Council to create and upgrade a Residential Estate and that towards that end the Plaintiff allowed the excision of 2.43 hectares of its land for the said development. It is also averred that by a letter dated 25/08/1994 the Commissioner of Lands allotted an unsurveyed residential plot of 2.43 hectares to the Plaintiff but that as it turned out later, the allotted portion of land was a fully developed slum with deep vested political interests. The Plaintiff averred that because of the situation on the ground it was unable to take possession and therefore that the Commissioner of Lands was in breach of contract by failing to avail to the Plaintiff an alternative piece of land in exchange for the 2.43 hectares and prayed for judgment against the Defendant for:-

- (a) *An order directing the Defendant to specifically perform his part of the exchange by*

providing the Plaintiff with a suitable plot of equal value to the Plaintiff's plot already surrendered to the Commissioner of Lands IN THE ALTERNATIVE: the Defendant to pay such sum as it is the market value of the Plaintiff's plot.

IN THE ALTERNATIVE: An order canceling the said surrender, transfer, possession and all documents executed to vest the Plaintiff's land unto the Commissioner of Land and/or his agent.

(b) Costs of this suit.

4. In his Statement of Defence dated 20/03/1997, the Defendants denied the Plaintiff's allegations but admitted that the Plaintiff had been allotted an alternative portion. The Defendant denied that the said parcel of land was full of squatters as alleged by the Plaintiff. In his affidavit sworn in support of an application brought by the Plaintiff seeking to strike out the defence and to enter judgment as prayed in the plaint, Mr. Rustimah Gulamali Visram stated that the Defendant purported to allocate the Plaintiff a parcel of land that was occupied by squatters and was surrounded by local and political acrimony as a result of which the Plaintiff had been unable to take possession of. The Defendant was represented by the firm of Macharia Njore & Co. Advocates, the Applicant herein. The Applicants filed their Bill of Costs in court on 7/02/2007.

5. The Respondent avers that according to the letter dated 23/07/1996 (Respondents EXH RG-1) written by the Applicants herein to one John Kori the following facts come out:-

(a) THAT instructions to the Advocate to act in the subject suit were given by the said John Kori the addressee of the said letter.

(b) THAT the said Mr. Kori's clients (Voi Sisal Estate Ltd.) were not to pay the Applicant Advocates the Advocates fee.

(c) THAT Voi Sisal Estates Ltd. were to pay the Applicants Advocates disbursements only.

(d) THAT Voi Sisal Estates paid the said disbursements vide the cheque acknowledged by the Advocate in his said letter of 23/7/96.

6. The letter referred to by the to by the Respondent emanated from Macharia Njore & Company advocates on 23/07/1996 and reads

"John Kori

P.O. Box 1658

THIKA.

Dear Sir,

RE: _ VOI SISAL ESTATE

Thank you for the instructions herein given alongside with the cheque which we have credited direct into the account of Voi Sisal Estate.

We wish to draw attention only of two issues:- the final payment due to us was agreed at 15% of net. Secondly your client was not to pay us our fees other than disbursement, if and when they may arise. You may clarify these two points with your principals.

In the meantime we enclose the statutory notice which is a prerequisite before action starts. We will keep you posted after its expiry.

Yours faithfully

Signed

For: MACHARIA NJORE & CO. ADVOCATES”

7. It is contended on behalf of the Respondent herein that as stated in the Applicants letter of 23/07/1996, the Respondent was to pay disbursements only which the Respondents say have been paid. The Respondent urges this court to find that there is no privity of contract for providing of legal services between the Applicant and the Respondent.

8. The Applicants through Mr. James Macharia Njore filed their affidavits and in the Further Affidavit filed on 15/05/2008 Mr. Njore says that the instructions to act in HCCC No.2457 of 1996 – Voi Sisal Estates Limited –vs- Attorney General – were received from the Respondent and not from one Mr. John Kori as alleged by the Respondent. He also depones that during the hearing of the said case he represented the Respondent. To support this contention Mr. Njore exhibited a copy of the judgment by Shaikh Amin J (as he then was). It is shown therein that Mr. Visram was a witness for the Respondent herein as PW1. The judgment also shows that Mr. Njore appeared as counsel for the (the Respondent herein). During the hearing of that case, Mr. Visram made certain concessions on behalf of the Respondent one of which was that the land the subject matter of the suit was yet to be transferred though it had been taken over by the Defendant therein. Mr. Njore also argued that according to annexure marked “RG-1” there was privity of contract between the Applicants and the Respondents. According to the said annexure which is the Applicant’s letter dated 23/07/1996, reproduced hereinabove, there was a final payment agreed at 15% of the net, and secondly that Mr. John Kori’s client was responsible only for payment of disbursements only if and when they may arise. The Applicants then requested Mr. John Kori to clarify those two issues with his principals.

9. The issue that arises is whether there was indeed privity of contract between the Applicants herein and the Respondent. The Applicants say yes while the Respondent’s say no. I have considered the application as filed, the various affidavits and the submissions made to me in the course of the hearing of the Preliminary Objection. I have also considered all the authorities cited to me by both counsel. I feel greatly indebted to both counsel for their indepth research. I have been duly guided by Nakuru Court of Appeal Civil Appeal No. 295 of 2001 – CMC Motors Group Ltd. and Another –vs- Evans Kageche Bro. where the court said the following at page 5 of the judgment:-

“In law the terms of a contract which has been reduced to the form of a document can only be proved by the document itself (see section 97 of the Evidence Act) and once the terms of the contract have been ascertained from the document no evidence of any oral agreement for purposes of contradicting, varying, adding or subtracting from its terms is admissible; only if it is within the ambit of the proviso to section 98 of the Evidence Act.”

10. I have also considered the authorities cited to me by counsel for the Applicant namely Nderitu & Partners Advocates –vs- Mamuka Valuers (Management) Ltd. [2006] e KLR; Owino Okeyo & Company Advocates –vs- Pelican Engineering Construction Co. Ltd. [2006]e KLR. In the Nderitu & Partners case, the court said that

“the party chargeable with the bill of costs, it is also the party liable to pay it. It can always claim a reimbursement from its principal. As far as the advocate is concerned, he must look to the client for payment of his costs as it is the client who instructed him to act in the matter.”

11. In the instant case, the Applicants’ letter of 23/07/1996 specifically thanks Mr. John Kori for the instructions given in the matter and goes onto say that *“your client was not to pay us our fees other than disbursement, if and when they may arise. You may clarify these two points with your principals.”* There is thus no doubt that it was Mr. John Kori that the Applicants were looking to for payment of fees and that it was Mr. John Kori who gave the instructions in the matter.

12. In light of the above findings, I am persuaded that the Respondents Preliminary Objection has merit and I accordingly find that there was no privity of contract for provision of legal services between the Applicants and the Respondents and that the contract for legal services in HCCC No.2437 of 1996 was between the Applicants and the said Mr. John Kori who alone was and is still responsible for the payment of the Applicant's fees.

13. In the circumstances, I do hereby strike out and dismiss the Applicants Bill of Costs with costs to the Respondents.

It is so ordered.

Dated and delivered at Nairobi this 17th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

Miss Mambiri (present) for the Plaintiff/Applicant

Mr. Luseno (absent) for the Defendant/Respondent