



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appeal 71 of 2006**

**IN THE MATTER OF: HCC MISC.163 OF 2005 NGOIRI NJOROGE ADVOCATE –VS-  
INVESCO ASSURANCE**

**AND**

**IN THE MATTER OF: ADVOCATES/CLIENTS BILL OF COSTS**

**BETWEEN**

**OGOLA & OCHWA.....ADVOCATES/APPLICANTS**

**VERSUS**

**INVESCO ASSURANCE CO. LTD. ....CLIENT/RESPONDENT**

**R U L I N G**

The history of this dispute began on the 4<sup>th</sup> day of May 2005 when Invesco Assurance Co. Ltd., client/Respondent herein, instructed the firm of Ogola & Ochwa Advocates, Advocate/Applicant herein to defend it in a client/advocate bill of costs expressed in Mombasa H.C. Misc. C. Application No. 163 of 2005 between **Ngoiri Njoroge =vs= Invesco Assurance Co. Ltd.** It would appear that the firm of Ogola & Ochwa Advocates acted upon the instructions of Invesco Assurance Co. Ltd. and had the matter finalized. Thereafter the firm of Ogola & Ochwa Advocates filed its Advocate/Client bill of costs vide Mombasa H.C. Misc. civil application No. 71 of 2006. The application plus a taxation notice for 17/2/2006 was served upon the client/Respondent which then instructed the firm of Omido Mkutu & Adera Advocates to act for it in the matter. The record shows that the advocate/client bill of cost was taxed by consent in the sum of Kshs. 57,615/80 on 17.2.2006. The firm of Ogola & Ochwa Advocates served a demand notice for the settlement of the taxed costs but the client/Respondent failed to satisfy the demand. The advocate/applicant was then prompted to file a suit for the recovery of the taxed costs vide Mombasa S.R.M.C.C. No. 1759 of 2006. When served with the summons and the plaint the client/Respondent filed a defence to oppose the Advocate/applicant suit. The plaintiff did not see anything that should go for trial in the aforesaid pending before the senior Resident Magistrate's court. The advocate/applicant filed an application for the striking of the Client/Respondent's defence and prayed for an order for the entry of summary judgment. The turn of events appear to have stung the client/respondent. In an attempt to forestall the matter, Invesco Assurance Co. Ltd took out a motion pursuant sections 3 and 3A of the Civil Procedure Act and under Order XXXVII rule 1 of the Civil Procedure Rules. The motion is dated 3<sup>rd</sup> August 2006 and it is the subject matter of this ruling.

In this motion the client/respondent sought for the following orders:-

- (a) an order staying proceedings in Mombasa S.R.M.C.C. No. 1759 of 2005 pending the hearing and determination of this application.
- (b) An order setting aside the consent order of 17.2.2006 with an order directing the bill to be re-taxed.
- (c) An order directing this application to be a test suit/application with respect to the other matters between the parties herein and in respect of matters listed in the schedule attached to the affidavit in support of the motion.
- (d) An order of stay of proceedings in the respective enforcing suit set out in schedule stated (c) above pending the hearing and determination of this test suit/application.
- (e) Costs

The motion is supported by the affidavit of S.B. Ole Nkoyo

sworn on 3<sup>rd</sup> August 2006.

The motion is seriously contested by the Advocate/applicant on the basis of the replying affidavit of Patrick Okoth Ochwa sworn on 11<sup>th</sup> August 2006.

It is the contention of Invesco Assurance Co. Ltd. That it never gave the firm of Omido Mkutu & Adera advocates instructions to compromise the advocate/client bill, hence the aforesaid firm acted outside the client's authority. The client/respondent also claimed that its advocate i.e. Omido Mkutu & Adera Advocates colluded with their erstwhile advocates i.e. Ogola & Ochwa Advocates to fleece it by recording a consent without its authority.

In response to these serious allegations the firm of Ogola & Ochwa Advocates averred that it had no notice of limited instructions given to the firm of Omido Mkutu & Adera Advocates when recording the consent. The Advocate/applicant challenged the client/Respondent to table evidence to show that there was evidence of collusion between their respective advocates when recording the consent. As far as I can discern, these were the main issues which were argued before me.

What is clear to me is that the issue in dispute is the order of consent recorded on 17<sup>th</sup> February 2006 in which the advocate's bill due to the firm of Ogola & Ochwa Advocates was fixed at Kshs.57,615/80. It is the believe and argument of Invesco Assurance Co. Ltd that it did not give express instructions to the firm of Omido Mkutu & Adera advocates to record such a consent. The client/Respondent admits having instructed vide a letter dated 16<sup>th</sup> February 2006. The motion seeks to set aside a consent order. There are ample authorities over this issue which were cited by both sides and at this juncture I wish to thank the advocates appearing for both parties for their industry in their research. Let me refer to the following decided cases in matters analogous to this. In the case of **Hansraj Ranmal Shah =vs= Westlands General Stores Properties Ltd. & Another [1965] 542**, the court of Appeal for E.A., when dealing with a near similar dispute held interalia:

**That the appellant had not withdrawn his instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action, accordingly the advocate had necessary authority to agree to the fixing of mesne profits as appellant's counsel and agent.**

Our Kenyan court of Appeal adopted as its judgment the decision of Harris J in **Nairobi H.C.C.C. No. 1728 1979** reported in **[1982] K.L.R. P.485 between Kenya Commercial Bank Ltd. And Specialized Engineering Co. Ltd.**

In aforesaid case Harris J held interalia that:

**(a) A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of court or where the consent was given without sufficient material facts in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.**

**(b) A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.**

It is clear from the above decisions that it is extremely difficult to

upstage a consent judgment or order unless the above conditions are met. I have been told that the firm of Omido Mkutu & Adera advocates was given limited instructions. That is to say that the advocate was not allowed to compromise the matter the way it did. That may be the position but I regret to state that no such evidence was laid bare before this court. Even if there was such evidence, still my position will not change because the client/respondent must show that it communicated to the opposite party (Advocate/Applicant) that its advocates had limited instructions. On this ground the consent order cannot be interfered with. I hold that the consent order was a matter which was within the apparent general authority of Counsel and was binding on the client/respondent. As early as 1902 in the case of Neale vs= Lady Gordon Lennox [1902] 1 K.B. 838.

It was held interalia:

**“that, the limitation of Counsel’s ostensible authority having been unknown to the other side, the mere fact that the plaintiff’s counsel had, in agreeing to the reference, exceeded the authority actually given to him did not in the absence of mistake or anything analogous thereto, afford any ground for setting aside the order of reference.”**

On my part I think the client/respondent if well advised may seek for recourse as against its advocate for damages for compromising the suit against instructions.

It has also been alleged that the firm of Omido Mkutu & Adera advocates conduct of recording such a consent order without seeking further instructions from the client was irregular and constituted a misrepresentation. I have carefully considered the submissions over this issue and I am unable to agree that there was any proof of misrepresentation. It is not enough to allege that the erstwhile firm of advocate committed acts which constituted a misrepresentation of facts. One must establish the ingredients of misrepresentation, that is to say that a false statement of fact was made with intent to influence the other party and did in fact induce him to act.

This court has been urged to make an order directing this decision to be a test case for the other cases involving the parties herein namely:

Mombasa S.R.M.C.C.C. No. 1753 of 2006

Mombasa S.R.M.C.C.C. No. 1763 of 2006

Mombasa S.R.M.C.C.C. No. 1761 of 2006

Mombasa S.R.M.C.C.C. No. 1767 of 2006

Mombasa S.R.M.C.C.C. No. 1751 of 2006

Mombasa S.R.M.C.C.C. No. 1768 of 2006

Mombasa S.R.M.C.C.C. No. 1764 of 2006

Mombasa S.R.M.C.C.C. No. 1756 of 2006

Mombasa S.R.M. C.C.C. No.1749 of 2006

Mombasa S.R.M.C.C.C. No.1758 of 2006

Mombasa S.R.M.C.C.C. No 1762 of 2006

Mombasa S.R.M.C.C.C. No. 1770 of 2006

Mombasa S.R.M. C.C.C. No.1769 of 2006

Mombasa S.R.M.C.C.C. No. 1752 of 2006

Mombasa S.R.M.C.C.C. No. 1760 of 2006

Mombasa S.R.M.C.C.C. No. 1750 of 2006

Mombasa S.R.M.C.C.C. No. 1766 of 2006

Mombasa S.R.M.C.C.C. No. 1755 of 2006

Mombasa S.R.M.C.C.C. No. 1765 of 2006

This prayer is opposed in the sense that the client/Respondent has only similar applications in respect of Mombasa H.C. Misc. applications No.133, 136 and 137 of 2006. This submission is not controverted by the client/Respondent.

In the end and for the above reasons the motion dated 3/8/2006 is ordered dismissed with costs to the Advocate/applicant. This decision shall apply to Mombasa H.C. Misc. Applications No. 133,136 and 137 of 2006.

**Dated and Delivered at Mombasa this 9<sup>th</sup> day of February 2007.**

J.K. SERGON

J U D G E

In open court in the presence of Mr. Omwenga for the plaintiff and Mr. Onjoro h/b Muriu Mungai Adv. for the Defendants