



IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 55 of 2005

CHURCH ROAD DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.1ST DEFENDANT

DAVID MUTUKU2ND DEFENDANT

SAMUEL NJIHIA3RD DEFENDANT

RULING

I have before me a Notice of Motion under Sections 3A and 27 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. It is the application dated 6th September, 2006 seeking two prayers;

- (1) That the costs of the suit that was withdrawn be taxed on an Advocate/client basis in favour of the defendants.
- (2) That the costs of the application be awarded to the defendants in any event.

The grounds in support of the application are that the plaintiff is contractually obligated under the various legal charges that it executed to compensate the bank on an Advocate/client basis for all legal costs incurred in the realization process and in defending itself in any legal proceedings being the subject matter of the charged property. Secondly it contended that this court has jurisdiction to allow the application as prayed as both parties are bound by the terms of the various contracts that were executed. Thirdly it is alleged that the plaintiff has declined to consent to having the costs taxed on an Advocate/client basis despite the clear provisions of the contracts.

It is the position of the bank that the plaintiff is legally obligated under the various legal charges it executed to compensate the bank on an Advocate/client for all legal costs incurred in defending itself or commencing the realization process. This is evidenced in the debenture dated 27th September, 1996 at clause 8 and the further charge dated 14th August, 2001 at clause I that have been exhibited. By a letter dated 16th August, 2006 the bank's Advocates asked the plaintiff's Advocates to enter into a consent as regards to costs which would then be taxed on an Advocate/client basis. That was declined through a letter dated 17th August, 2006.

Mr. Allan Gichuhi learned counsel for the defendants submitted that the parties are contractually bound by the terms of the contracts, which allowed all costs to be paid by the plaintiff to be on

Advocate/client basis. He relied on **Milimani HCCC No.675/2003 Marie Wambui Thande vs Barclays Bank of Kenya Ltd.** where **Ochieng J** held;

“And the legal costs and disbursements paid or incurred by the bank under this security and falling within the definition of “expenses” herein before contained shall as against the chargor be deemed to include every sum which would be allowed to the advocates of the bank in a taxation as between advocate and own client to the intent that the chargor shall afford to the Bank a complete entitlement and unqualified indemnity in respect thereof”.

The legal charge went on to define the expression “expenses” to include all costs, charges, claims, damages, expenses and other moneys properly paid or incurred by the Bank under or in any action proceeding or claim brought by or against the bank for the enforcement, protection, preservation or improvement of the security. In the light of the provisions of the legal charge, I hold that the costs of this application and of the suit be awarded to the defendant and that the same be taxed on an Advocate/client basis”.

Mr. Simiyu learned counsel for the plaintiff submitted that since the present suit was withdrawn and another one filed, the issues between the parties are yet to be fully canvassed and determined. And that the present application is premature as the costs to be contemplated upon withdrawal is the costs under Order 24 Rule 3 of the Civil Procedure Rules. He submitted that the present suit was withdrawn pursuant to Order 24 Rule 3 and parties are bound by that provision, hence the costs contemplated and payable is party/party costs.

It is clear in my mind that a party is entitled to withdraw and/or discontinue its case any time but the consequence for such an action is the payment of fees and expenses incurred by the opposite party. In this case there is no dispute that the plaintiff exercised its right under Order 24 Rule 3 by withdrawing its claim against the defendants herein. The costs incurred by the defendants in the prosecution and/or defending the present suit must be borne by the party who instigated and thereafter discontinued without the knowledge of the defendants. No doubt the defendants are entitled to costs for the withdrawal of the suit, which the plaintiff does not discount. The point of departure is whether the costs are party/party costs or Advocate/client costs.

The applicant says that it is entitled to costs on Advocate/client since that is what the contractual document provides while the plaintiff says that it is not entitled to costs on Advocate/client but on a party/party costs. Under Section 2 of the Advocates Act, client is defined;

“includes any person who, as a principal or on behalf of another or as a trustee or personal representative or in any other capacity has power, express or implied to retain or employ and retains or employs or is about to retain or employ an Advocate and any person who is or may be liable to pay to an Advocate any costs”.

It is clear in mind beyond doubt that the applicant had not been employed or retained by the respondent in the prosecution or defence of this matter, whether as a principal or otherwise. The power to employ or retain an Advocate is either express or implied and the purpose is to defend or enhance the rights and interest of the instructing client. In this case the plaintiff cannot be said to have expressly or impliedly employed the Advocates on record for the defendants. The plaintiff sued the defendants in order to protect, preserve and/or safeguard what he perceives to be his infringed rights in respect of the suit property.

The defendants have engaged Advocates to counter the case of the plaintiff which is contrary to the interests of the plaintiff in that the defendants are not acting on behalf of the plaintiff either as trustees, personal representative or in any other capacity. The defendants have appointed the present Advocates in their own capacity with no reference to the plaintiff. In my view the charge in so far as it puts an obligation on the plaintiff to shoulder the costs incurred by the bank in defending a suit or otherwise an Advocate/client is invalid and unenforceable. A clause in the charge which contains provisions contrary to the legal provisions under Cap 16 Laws of Kenya is void *abinitio*. Such a clause in my view falls

within Section 46 of the Advocates Act which prohibits the acceptance of an Advocate of certain responsibilities.

It is my position the foundation upon which the relationship of Advocate/client rests is retainer and without retainer the relationship cannot come into operation. In simple terms retainer is the method in which an Advocate accepts the offer of employment by the client. The act of employment of the Advocate is what constitutes retainer. Here the applicants want to enforce a contractual relationship which stipulates that the plaintiff would be liable to pay all costs and expenses incurred by it on Advocate/client basis. That is not the correct position of the law and in my view a clause that puts an obligation contrary to the express provision of the Advocates Act and Advocates Remuneration Order is invalid, void and unenforceable to say the least.

It is my judgement that Advocate/client relationship is grounded on a retainer, which should be in conformity with the Advocates Act Cap 16 Laws of Kenya. My position is that a contract cannot be used to override the provisions of the law. And when there is a conflict, the law is supreme. A party cannot seek an immunity from an Act of Parliament through an agreement which is in contravention of the said Act. Here again I can add that the charge document is a contract which must be in conformity with the law at all times and when there is a conflict or contradiction, the point of reference would be the substantive law or procedure. I entertain no doubt at all that the clause in the charge contract which puts an illusory legal obligation on the plaintiff is void and has no force of the law. All agreements or contracts on payment of fees and expenses must be framed in a manner in conformity or agreement with the Advocates Act or Advocates Remuneration Order.

It would be absurd to suggest that a borrower whose security is being sold and who comes to court to safeguard his interest would always have to shoulder the costs of the Advocates appointed to displace his cause of action on Advocate/client basis. In my view an agreement which contains such a provision is illegal and inequitable. Such an attempt is a complete luster or exclusion of the Advocates Act or Advocates Remuneration Order. If such an agreement was allowed to be enforced the ordinary person with no legal background would frown at the sense of justice of this animal called courts. They would think that we have no sense of justice and no brains to think.

I agree with **Mr. Allan Gichuhi** Advocate that parties are bound by their contractual documents/agreements which restricts their dealings but I hasten to add that such documents/agreements must be in conformity with the law and in particular substantive justice. I think the subject agreement and in particular the clauses that puts an obligation on the plaintiff is an affront to the law governing the engagement between Advocates and client.

It is therefore my decision that the applicant is entitled to costs on party and party costs in so far as this dispute is concerned. In the premises, I make a finding that the relationship between the plaintiff and the Advocates on record for the defendants is not Advocate/client relationship.

In the light of what I have said, the application is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 8th day of June, 2007.

M. A. WARSAME

JUDGE