



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1242 of 2005

KENYA PIPELINE COMPANY LIMITED PLAINTIFF

VERSUS

NYAMOGO & NYAMOGO ADVOCATES DEFENDANT

RULING

In this application, dated 8th August, 2006, the Defendant wants the Plaintiff's suit dismissed under O.6 R 13(1) (b),(c), and (d) on the following four grounds:

- (a) *The suit is scandalous, frivolous and vexatious.***
- (b) *The suit may prejudice, embarrass or delay the fair trial of HC. MISC. APPLICATION NO. 1156 OF 2005.***
- (c) *The suit is otherwise an abuse of the process of the court.***
- (d) *The Plaintiff/Respondent has failed to set down the suit for hearing.***

Essentially, the Defendant's argument is that the suit is the subject matter of a "taxation" that is presently pending before the Taxing Officer; that the suit violates Section 45 of the Advocates Act; that there was indeed no agreement on fees but that there was an agreement to tax the bill; that the Court's jurisdiction in taxation matters is restricted to hearing a "Reference" from the Taxing Officer's decision; that a suit cannot stay the proceedings of taxation; that none of the prayers sought in the Plaint can be granted and accordingly the suit should be struck out. He relied on the cases of **J.P. Machira v. Wangethi Mwangi & Anor** C.A No. 179 of 1997, **M.G. Sharma v. Uhuru Highway Development Limited** C.A No. 133 of 2000, **Kasamani & Company Advocates v. United Insurance Company Limited** Misc. Case No. 130 of 2004, **J.P. Machira & Company Advocates v. Magugu** Civil Case No. 358 of 2001 and **Kenya Pipeline Company Limited v. Nyamogo & Nyamogo Advocates** Civil Case No. 1142 of 2005.

Mr. Lilan, Counsel for the Plaintiff, has submitted that Section 27 of the Civil Procedure Act gives the Court unlimited discretion to deal with costs; that the crux of this matter relates to the "impeachment" of "the Agreement" to pay costs – a matter that cannot be heard and determined by the Registrar; that Section 45 of the Advocates Act allowed the filing of this suit; and that there has been no unreasonable delay in prosecuting this suit. He relied on the cases of **Board of Trustees National Hospital Insurance Fund v. Kipkorir, Titoo & Kiara Advocates** Civil Case No. 154 of 2004, **Ochieng, Onyango, Kibet and Ohaga Advocates v. Kenya Pipeline Company Limited** Misc. Application No. 507 of 2005, **Ivita v.**

Kyumbu Civil Suit No. 340 of 1971, and Nyamogo & Nyamogo Advocates v. Kenya Pipeline Company Limited Misc. Civil Case No. 995 of 2004.

In this dispute between an advocate and client, **the issue is simple: can the client file a suit to impeach the agreement which is the basis of a taxation presently pending before the Taxing Officer?** The answer, to me, is a very emphatic “yes”. How else is the client supposed to ventilate his grievance relating to the alleged agreement with the Advocate? The Defendant/Applicant here says that those matters should be ventilated before the Taxing Officer. With due respect, the Taxing Officer has no such jurisdiction. His role is limited to taxing the bill, no more, no less. Here, the very fundamentals giving rise to the bill are challenged. Oral evidence will need to be presented, and tested, and arguments will have to be advanced by both sides. It is a full-fledged trial. That is not something the Registrar can deal with, at taxation.

Mr. Nyamogo, for the Applicant, says that this suit violates Section 45 of the Advocates Act. Lets see how. The Section states:

45: (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may –

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof;

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

(2) A client may, apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years’ standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order -

(a) that the agreement be upheld; or

(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or

(c) that the agreement be set aside; or

(d) that the costs in question be taxed by the Registrar;

and that the costs of the application be paid by such party as it thinks fit.”

As we can see, the purpose of Section 45(2) is to enable an aggrieved client to file suit to impeach the Agreement. Counsel’s argument is that the Section applies to a situation where there is an Agreement between the Client and Advocate, and here there is none.

Isn’t that precisely what the suit is intended to test? The Plaintiff says in his suit that “the Agreement”, if any, was varied; that it was entered into by a person who lacked capacity; that in any event it was harsh

and oppressive, and so forth. Mr. Nyamogo, on the other hand, says that there was **no** agreement, hence Section 45 is inapplicable. But curiously enough his Bill of Costs (item 1) talks of “**Agreed** Instruction Fees.” (emphasis mine). He cannot approbate and reprobate. He cannot claim that there is **no** agreement, and yet claim fees “based on an agreement.”

I am satisfied that this suit is properly before this Court. I have read all the cases cited to me, and would particularly wish to associate myself with the sentiments expressed by Azangalala, J. when faced with a similar situation in ***The Board of Trustees National Hospital Insurance Fund v. Kipkorir, Titoo & Kiara Advocates*** Civil Case No. 154 of 2004. This is what he said:

“There is yet another allegation made by the Plaintiff against the Defendant that an agreement regarding fees made between the Plaintiff and the Defendant offends the provisions of Section 46(c) of the Advocates Act (Cap. 16 Laws of Kenya) and the same is not legally valid or enforceable.

The merits or the demerits of the Plaintiff’s allegations cannot be determined in this application. That will be left for the Judge who will try the action. I am however certain that the said allegations cannot be determined by the Deputy Registrar during Taxation of the Defendant’s Bill of Costs. Which way then should my discretion be exercised? Should I let the taxation to proceed where the very basis of the Bill of Costs is being challenged or should I stay the taxation to await an adjudication over the complaints made by the Plaintiff? In my view the interests of justice lean in favour of granting a stay of the taxation. The reason is that taxation determines the quantum payable. It does not address the issue of whether or not any fees has been earned. Taxation can therefore wait. The main adverse consequence is that the Defendant will be delayed in realizing the fruits of its labour. On the other hand if taxation proceeds and subsequently the Plaintiff succeeds in this action it would have in the meantime been burdened with an unnecessary huge financial liability.”

As I said, I agree with those sentiments, and apply the reasoning to the matter before me. I am also of the view that the Plaintiff has not unduly delayed the prosecution of his case, as alleged by the Defendant.

Accordingly, and for reasons outlined, I dismiss the Defendant’s application dated 8th August, 2006 with costs.

Dated and delivered at Nairobi this 10th day of July, 2007

ALNASHIR VISRAM

JUDGE