



REPUBLIC OF KENYA

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

Misc Appli 1156 Of 2006

NYAMOGO & NYAMOGO ADVOCATES.....APPLICANT/ADVOCATES

VERSUS

KENYA PIPELINE COMPANY LTD.....RESPONDENT/CLIENT

RULING

The respondent in this application was acting for the applicant *in CRIMINAL CASE NO.393 of 2003 – REPUBLIC VS. DR. L. CHERUIYOTAND OTHERS* and the dispute herein concerns Advocate/Client Bill of Costs. On 12th August 2003 the respondent met with the Managing Director of the applicant where it was agreed that the advocate be paid Sh.13,000,000/= to act in watching brief in criminal case. The same day the applicant wrote the respondent/advocate as follows:

M/S NYAMOGO & NYAMOGO ADVOCATE

P.O. BOX 14181 – 00800

NAIROBI

Dear Sir,

RE: CRIMINAL CASE NO 393 OF 2003

REPUBLIC VS. DR. L. CHERUIYOT & OTHERS

We refer to your meeting with our Managing Director during which it was agreed that your fee would be Shs.13,000,000/=. Therefore resubmit your fee note taking into account what was agreed during the said meeting.

Yours faithfully,

Mary Kiptui (mrs)

For: Managing Director

On 13th August 2005 Nyamogo & Nyamogo Advocates wrote back as follows:

THE MANAGING DIRECTOR

KENYA PIPELINE CO. LTD

HARAMBEE AVENUE

NAIROBI

Dear Sir,

RE: CRIMINAL CASE NO.393 OF 2003

REPUBLIC VS. DR. L. CHERUIYO & OTHERS

We confirm this position and request that you do kindly let us have your cheque before the next court date (25th August 2003).

Yours faithfully

Nyamogo & Nyamogo Advocates

When the advocates went to tax the bill, the client filed this application on 17th October 2005 seeking stay of taxation and/or any further proceedings herein pending the hearing and determination of HCC NO. 1242 OF 2005.

The application is supported by sworn affidavit by John Muindi in which he avers that the Respondent/Client did not instruct the Applicant/Advocate. Client admits that there was an agreement to pay the advocate instruction fees of Shs.13,000,000/= but submits that that agreement was entered into between the advocate and the company's representative who had no capacity nor authority to enter into the same on behalf of the company/client.

On 12th August 2003 the Applicant/Client wrote the Respondent/Advocate as follows:

M/S Nyamogo & Nyamogo Advocates

P.O. Box 14181 – 00800

NAIROBI.

Dear Sir,

RE: CRIMINAL CASE NO. 393 OF 2003

REPUBLIC VS. DR. L. CHERUIYOT AND OTHERS

We refer to your meeting with our Managing Director during which it was agreed that your fee would be Shs.13,000,000/=. Therefore resubmit your fee note taking into account what was agreed during the said meeting.

Yours faithfully

Mary Kiptui (Mrs)

For: Managing Director

On 13th August, 2005 Nyamogo & Nyamogo Advocates wrote back as follows:

The Managing Director

Kenya Pipeline Co. Ltd

Harambee Avenue

NAIROBI.

Dear Sir,

RE: CRIMINAL CASE NO 393 OF 2003

REPUBLIC VS. DR. L. CHERUIYOT & OTHERS

We confirm this position and request that you do kindly let us have your cheque before the next court date (25th August 2003).

Yours faithfully

Nyamogo Nyamogo & Advocates

On 29th July 2005 the Advocate Client filed his bill of costs of Shs. 20,573,893.70. On 17th October 2005 the client filed a suit being HCCC 1242 OF 2005 challenging the basis of the payment of Shs.13,000,000/= to the advocate being legal fee for watching brief in Criminal No. 1693 of 2003 where the client's employees had been charged with a criminal offence. The instructions in CM CRIMINAL CASE NO. 1693 OF 2003 were limited to watching brief only the client being the complainant in the said criminal case. In the plaint it is averred that the instruction by the client were limited to provisions of professional services to the plaintiff by watching brief on its behalf in CRIMINAL CASE NO. 1693 OF 2003, liaising with the state counsel and/or the court prosecutor from the Attorney Generals Chamber, keeping the plaintiff informed and update at all times of the progress of the case, attending court at all times during the hearing of the CRIMINAL CASE NO. 1693 OF 2003, advising the plaintiff and ensuring its interests were protected at all times and assisting the plaintiff in witness preparation and pretrial briefings.

On 17th October 2005 the client filed an application by way of Notice of Motion seeking orders that there be stay of taxation and/or any further proceedings herein pending the hearing and determination of HCCC NO. 1242 OF 2005.

The application is based on the grounds that the client did not instruct the advocate applicant to act for it in a claim for Shs.339,318,941.23 and did not enter into contract to pay instruction fees of Shs.13,000,000/=, that while the Respondent/Client admits having instructed the Applicant to watch brief in Criminal Case No. 1693 of 2003 there is no valid agreement fixing the Applicant/Advocates instruction fees at Shs.13,000,000/= and the engagement was terminated before conclusion of the said criminal case.

On 1st February 2006 the Advocate filed Notice of Preliminary Objection to client's Notice of Motion dated 17th October 2005 on point of law in respect of the jurisdiction of this Honourable Court to entertain this application and the competence of the said Notice of Motion.

Nyamogo in his Preliminary Objection submitted that the court has no jurisdiction to grant the orders sought. The courts jurisdiction to deal with taxation matters is donated by Rule 11 and 12 of the Advocate's Remuneration Order. Those rules restrict the court's jurisdiction to reference after taxation.

Further that the court has no jurisdiction to make a fresh agreement for the parties where the same parties already have an agreement in writing. He referred the court to annexure J. M. 2 the minutes of the meeting held between Client and the Advocate on 6th April 2004 whereby it was agreed that amount of Shs.3,000,000/= paid to the Advocate earlier was to be treated as a deposit on the Advocates fees and that any other fees the Advocates may be entitled to will be subjected to taxation taking into account the Shs.3,000,000/= deposit. The issue of taxation was agreed upon and the advocate has filed a bill of costs. Where a bill of costs is agreed upon between the parties the court has no jurisdiction to interfere. The meeting of 6th April 2004 was attended by:

- (1) DR. Shem J. Ochuodho – M. D. Chairman
- (2) (2) Mr. John Muindi – Ag CS – Taking Minutes
- (3) Mr. Donald Kapten – SLO (L & C) for the client and Mr. Nyamodi Ochieng Nyamogo for the Advocate.

The Preliminary Objection is opposed by Mr. Lilan counsel for the client who submitted that the court has jurisdiction to entertain the Notice of Motion dated 17th October 2005. he concedes that a letter dated 12th August 2005 was written to this Advocate in which their fees was allowed at Shs.13,000,000/= but submits that the committee which had earlier sat on 6th April 2004 did not sit to authorize the fee. The writer Mary Kiptui had no authority to commit the client to such large amount of money for services not done when this was discovered a meeting was held on 17th October 2003 in which the said sum was reduced to Shs.3,000,000/=

The client contends that the purported agreement to pay the Advocate Shs.13,000,000/= to watch brief in a criminal case was made by the clients representative who lacked the requisite capacity and/or authority to enter into the same as internal company regulations were yet to be complied with, that the purported agreement contravenes the Advocates Act, that the purported agreement is exorbitant oppressive as against the plaintiff, that the purported agreement smacks of fraud, that the purported agreement is way above the reasonable remuneration for services of an advocate in the circumstances and that the purported agreement is against public policy Section 45 (2) of the Advocates Act provides that a client may apply by Chamber Summons to the client 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 shall 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.

The client should have come to court by virtue of this Section 45 (2) of the Advocates Act but the client contends that there was no valid agreement between the client and the Advocate.

The letter communicating the agreed instructions fee between the Client and the Advocate was written by One Mary Kiptui (Mrs) referring to what was agreed at the meeting between the Advocate and the Clients Managing Director during which it was agreed that the fee would be Shs.13,000,000/=.

The letter does not indicate the date of the meeting and who attended not does it attach the minutes of the alleged meeting nor is there an indication that the writer of the said letter has the authority of the Client to

commit the client to such a large amount of money. Because it is alleged by the Client that the representative who entered into the said agreement on behalf of the Client lacks capacity to do so and also there is fraud alleged. I agree with Gitau that such agreement for Sh.20,573,893.70 has to be proved by evidence and be subjected to the test of cross examination before any payment is made.

For the above reason the Preliminary Objection to the clients application dated 17th October 2005 is dismissed and it is hereby ordered that the Client's Notice of Motion dated 17th October 2005 be set down for hearing. Let the costs be in the cause.

Dated and delivered at Nairobi this 20th day of March, 2006.

J.L.A. OSIEMO

JUDGE