REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 21 of 2005

D NJOGU & COMPANY ADVOCATES…….....…….APPLICANT

VERSUS

KENYA NATIONAL CAPITAL CORPORATION….....…RESPONDENT

R U L I N G

This is an application pursuant to the provisions of Section 51(2) of the Advocates Act. Through it, the applicant seeks judgement in accordance with the certificate of taxation.

The application is supported by the affidavit of Mr. David Njogu, advocate. In the said affidavit, Mr. Njogu stated that he is an advocate of the High Court of Kenya, who practices as such, in the name and style of D. Njogu & Company Advocates, who is the applicant.

He also states that on 5th March 1999, his firm was instructed by the respondent, to act for it in the case, **Milimani HCCC No. 299 of 2003, Kenya National Capital Corporation Limited Vs Intergrated Wood Complex & Hosea Kiplagat**. A copy of the letter dated 5th March 1999 was exhibited, and it confirms that the applicant was instructed to recover from Intergrated Wood Complex Limited the then outstanding loan of KShs. 58,712,660/35, together with interest thereon.

Also annexed to the supporting affidavit was a Decree, which shows that as at 4th November 2004, the interest that had accrued on the debt, amounted to KShs. 106,473,177/=. Therefore, the decretal sum, as at 4th November 2004 was KShs. 189,179,585/60.

Another annexture was of a Certificate of Taxation dated 26th November 2004, which showed that the defendants were to pay to the plaintiff, costs amounting to KShs. 2,875,145/50. The said costs were taxed, by consent of the parties.

Shortly after the party and party costs were taxed, the applicant wrote a letter dated 2nd December 2004, through which it sent its own bill, which was for KShs. 4,948,946/95.

It is not clear what exactly transpired thereafter, but the applicant was paid the sum of KShs. 1.2 million in June 2005. That payment was made after the applicant's Bill-of Costs had been taxed, on the first occasion. However, the applicant did thereafter successfully challenge the decision, which had awarded him KShs. 1,974,136/=

Following the setting aside of the first decision on taxation, the applicant's Bill of Costs was taxed afresh, by a new taxing officer, who then awarded him KShs. 4,097,458/75.

Having given credit to the respondent for the sum of KShs. 1.2 million which he had already received, the applicant now asks that he be granted judgement for KShs. 2,897,458/75. He also asks for interest at 9% per annum from 3rd January 2005 until payment in full. And finally, the applicant seeks costs of the application.

However, the respondent holds the view that the applicant is not deserving of the judgement. The main reason for that position, which has been taken by the respondent, is that the applicant had identified a party other than the respondent as being responsible for the payment of costs. The said third party is the National Bank of Kenya, to whom the applicant sent feenotes, and from whom the applicant received previous payment.

A perusal of the record reveals that the feenote dated 2nd December 2004 was addressed to "**The Chief Branch Manager, NBK – Harambee Avenue",** Nairobi. It is also not in dispute that when the applicant received payment, the same was from the same said Chief Branch Manager of NBK, Harambee – Avenue, Nairobi. And, when, on 7th February 2006, the applicant made a demand for payment of the taxed costs, the said demand was also addressed to the Chief Branch Manager, NBK, Harambee Avenue, Nairobi.

Why did the applicant communicate with the National Bank of Kenya (NBK) on the issue of his taxed costs, if the same were payable by the respondent?

According to the respondent, the answer lies in the fact that from as early as 25th June 1999, which was just over a month from the date when the respondent had given written instructions to the applicant, the business of the respondent was taken over by the National Bank of Kenya.

It is common ground that the business of the respondent, Kenya National Capital Corporation Limited, was taken over, as a going concern, by the National Bank of Kenya, in June 1999. However, as is conceded by the respondent the fact of it being taken over did not, by itself, mean that the respondent ceased to exist.

It is the respondent's case that although it continues to exist as a legal entity, it was no longer capable of meeting the fees claimed by the applicant.

In that regard, the respondent posed the question as to whether or not it could be construed as the client to the applicant. If I understood the respondent correctly, it's submission was to the effect that the applicant had recognised National Bank of Kenya as the client, in place of the respondent. The reason for that submission was the respondent's contention that "**the liability to pay Costs to an advocate is primary to the definition of a client"**

Pursuant to the provisions of Section 2 of the Advocates Act:

"'**Client" 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 an advocate and any person who is or may be liable to pay an advocate any costs."**

Clearly, as expressly stated in the definition, it is not deemed to be restrictive, so as to exclude all persons who would not otherwise fit within the strict confines thereof. The definition is said to "**include"** any person who, as principal or an agent of another, has power to retain or employ an advocate, and who may be liable to pay costs to the advocate.

In this case, there is absolutely no doubt that the applicant was duly instructed to act as an advocate. The written instructions were given to the applicant, by the respondent. In effect, there cannot be any

dispute as to retainer.

Secondly, the respondent has at no time asserted that, as at the time it gave instructions to the applicant, it lacked the requisite power and authority to give such instructions.

Given the fact that the respondent concedes that it has not ceased to exist, I hold the considered view that it continues to be liable, in law, for the payment of costs payable to the applicant, for the services which the applicant had rendered pursuant to the initial instructions.

I cannot comprehend how the respondent would like to be the beneficiary of the judgement in its favour, which judgement was granted on 4th November 2004; yet avoid liability for costs payable to the advocate who rendered the services which gave rise to that same judgement.

If the respondent considered itself as incapable of being liable to pay costs to the advocate it had earlier instructed, and who made it possible for it to get judgement in its favour, the respondent would also have been obliged to have opted to amend the pleadings so that the National Bank of Kenya should have become the plaintiff, instead of the respondent.

Incidentally, the ability or otherwise of a person to pay costs to the advocate who had rendered services to him, at his request, is not the determinant in an application under Section 51(2) of the Advocates Act. Even if the client would have become financially incapacitated, subsequent to the moment he had instructed his advocate, in law, he would remain liable to pay costs of the advocate.

In this case, the applicant did address his bills and demand notice to National Bank of Kenya. Insofar as the said National Bank of Kenya had taken over the day to day business operations of the respondent, it is my considered view that from a practical point of view, it made sense to act in the manner in which the applicant did. It would have made little sense, if any at all, to have sent written communication to the respondent in its own name, whilst the applicant well knew that the operations were being carried out by the National Bank of Kenya.

In the case of **Uhuru Highway Development Limited V Central Bank of Kenya (2) [2002] 2 E.A. 654 at page 658,** the Court of Appeal held as follows:

"**whether the plaintiffs were the counsel's client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course, required."**

In that case, there had been an application to have the firm of Oraro & Company Advocates restrained from acting for the 1st and 2nd Defendants, on the grounds that they had previously acted for the plaintiff as well as the defendants in the preparation of a charge document.

Given the nature of the correspondence exchanged, and the feenote which the firm of advocates had sent directly to the plaintiff, instead of through D V Kapila & Co. Advocates, the Court of Appeal came to the conclusion that there was raised a strong presumption that Oraro & Company Advocates were acting for the 1st plaintiff.

In this case, however, the applicant was expressly instructed by the respondent. The instructions were in writing, and the respondent has at no time contended that it ever countermanded or withdrew the instructions. Therefore, there would be no need for any presumption, as there is real evidence to prove that the respondent was the client of the applicant.

It must also be emphasized that the mere fact of settling a bill raised by an advocate does not necessarily make the person who made the payment a client of the advocate. Therefore, just because the National Bank of Kenya paid a part of the feenote raised by the applicant, did not necessarily render the said bank a client of the applicant. However, this should not be construed to imply that National Bank of Kenya was not a client of the applicant, as that issue has not fallen for consideration before me.

As regards the issues which were before me, I am satisfied that there is no dispute as to retainer, for it is evident that the respondent had expressly instructed the applicant. I am also satisfied that the certificate of taxation dated 26th November 2004 has not been set aside or altered by the court. The said certificate is thus final as to the amount of the costs covered thereby.

Accordingly, in exercise of the authority conferred upon this court by the provisions of Section 51 (2) of the Advocates Act, I find that the applicant is entitled to, and is therefore granted judgement in the sum of KShs. 2,897,458/75. The said sum shall attract interest at 9% per annum from 8th March 2006, which is one month from the date when the applicant sent the bill to the Chief Branch Manager, NBK Harambee Avenue Nairobi.

The reason why interest was not awarded as from 3rd January 2005 is because the bill dated 2nd December 2004 was later found to be much higher than that to which the applicant is entitled. In other words, the respondent was eventually found to have been right in declining to settle the feenote dated 2nd December 2004, as the sum which the taxing officer allowed after taxation was lower.

In my considered view, it would be wrong to calculate interest from the date when the bill was sent to the client, regardless of the fact that such a bill was then watered down through taxation. If clients had to pay interest regardless of subsequent reductions on their bill, advocates would not have the incentive to charge the correct feenotes on the first occasion. It is for that reason that I hold, that the date from when interest should be calculable should be pegged to the date when the advocate sends the correct feenote. And by the "**correct feenote"** I mean the bill which is in accordance with the terms upon which the advocate had contracted with the client, or the bill which the client does not dispute, or the bill which is in accordance with the sums awarded by either the taxing officer or by the deputy registrar in a certificate of costs.

Finally, the costs of the application are also awarded to the applicant.

Dated and Delivered at Nairobi, this 5th day of October 2006.

FRED A. OCHIENG

JUDGE