



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC. APPLICATION NO. 10/2020

(FORMERLY HCC. MISC APPLICATION NO. 65 OF 2018)

STANLEY K. M. WANDAKA T/A

KINUTHIA WANDAKA & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

NAOMI KANYUA MUSYOKI.....RESPONDENT

RULING

What is before Court for determination is the Respondent's Application dated the 27th June, 2019 brought pursuant to section 3 and 3A of the Civil Procedure Act as well as Paragraph 2, 10 including 13 of the Advocates (Remuneration Order). In the said application, the Respondent seeks the following orders:

1. Spent.
2. That there be stay of any further proceedings in this matter.
3. That the Bill of Costs dated 1st November, 2018 be struck out.
4. That costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of NAOMI KANYUA MUSYOKI where she deposes that messrs Kinuthia Wandaka & Co. Advocates were never her advocates in Kajiado ELC No. 184 of 2017 (formerly Machakos HCC No. 299 of 2012) but were acting for her husband Silvanus Musyoka the 1st Plaintiff. She contends that due to the fact that she had proprietary/ beneficial interest in a suit property Kajiado/ Kaputiei / 839 and in order for the suit to be competently lodged in court, Mr, Kinuthia Wandaka Advocate convinced her that despite their matrimonial differences with the husband, she should sign an authority to allow her husband to represent her interests in the said matter. She denies instructing Mr. Kinuthia Wandaka Advocate to represent her in the said suit as he was instructed by her husband whose interests he is representing. She explains that when she filed a High Court Cause No. 21 of 2015 against her husband, seeking protection of matrimonial property, Mr. Kinuthia Wandaka filed a replying affidavit on behalf of her husband. Further, in the said cause Mr. Kinuthia Wandaka was prohibited from representing her husband due to conflict of interest. She avers that on 10th June, 2019, the Taxing Master directed that she does file a replying affidavit to the Bill of Costs and fixed the matter for ruling on the 29th July, 2019. Further, that on 18th June, 2019, she filed a Notice of Preliminary Objection and Replying Affidavit. She reiterates that the Taxing Officer lacks jurisdiction to determine the Bill of Costs in view of the matters raised in the Preliminary Objection, Replying Affidavit and the Affidavit herein.

To oppose the instant application the Applicant filed a Replying Affidavit sworn by Stanley K M Wandaka where he deposes that the Respondent was a party/ Plaintiff in a case giving rise to this application and documents attached to her affidavit are diversionary. He avers that the Notice of Motion filed herein has no legal basis as the law recognizes only a reference to the Judge in Chambers after taxation as set out in paragraph 11 (2) of the Advocates Remuneration Order. Further, the Bill of Costs is pending Ruling on 29th July, 2019 and this application intends to scuttle the Ruling. He contends that the Applicant instructed him jointly with her estranged husband to represent her in this matter but authorized her husband who was more conversant with the issues to represent her in the case until she filed a Notice of Change through messrs E. K. Mutua & Co. Advocates. He denies persuading the Respondent to sign any document but insists it was an agreement between her and the husband. He insists they filed the suit on behalf of the Respondent and her husband relating to thirty (30) acres they bought from one Kaposhi Ole Njoroge Nakumana. Further, the Respondent authorized her husband Silvanus Musyoki Muli to represent her in the said suit. He avers that after the Respondent's marriage to the husband broke down, she became uncomfortable with them

representing her and appointed her present advocates. He reiterates that the Respondent admits in her exhibit 'NK 3' at paragraph 7 that he was indeed acting for her in Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012). Further, that she was a party to the said suit from the initial stages and cannot claim she never instructed them. He refers to the Respondent's Notice of Change of Advocates dated the 6th May, 2018 indicating she instructed messrs E K Mutua & Co. Advocates to act for her in place of messrs Kinuthia Wandaka & Co. Advocates and claims her assertion to the contrary is dishonest.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Respondent's Application dated the 27th June, 2019, including the rivalling affidavits and respective submissions, the only issue for determination is whether the Bill of Costs dated the 1st November, 2018 should be struck off with costs. The Respondent in her submissions reiterated her claim and insisted that a Taxing Master may only tax a Bill of Costs where there is no dispute as to retainer or where the costs have been awarded by the court. She insisted she never gave any written instructions to the Advocate in relation to Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012). Further, that the Advocate may rely on oral instructions which is contested. She confirms that the letter dated 19th October, 2017 only sought information on the progress of the case on the basis of the Authority to Act and hence does not amount to Client/ Advocate relationship. She relied on the following decisions: **Mugambi & Company Advocates V John Okal Ogwayo & Another (2013) eKLR; Erickson Mogusu t/a Mogusu & Associates V Mash East Africa Limited (2017) eKLR; and Ochieng Onyango Kibet & Ohaga Advocates V Akiba Bank Limited (2007) eKLR** to buttress her averments.

The Advocate/ Applicant submitted that the firm of messrs Kinuthia Wandaka & Co. Advocates had express and implied instructions to act for the Respondent. They insisted the Respondent has not shown what law confirms jurisdiction to the High Court to entertain this application. To buttress their argument, they relied on the case of **Mereka & Company Advocates V Zakhem Construction (Kenya)**.

It is not in dispute that the Respondent is the 2nd Plaintiff in Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012). It is further not in dispute that the Advocate/ Applicant acted for the two Plaintiffs' in the said matter until the firm of messrs E K Mutua & Co. Advocates filed a Notice of Change of Advocates dated the 6th May, 2018 to act for the Respondent. This culminated in the firm of messrs Kinuthia Wandaka & Co. Advocates filing the Bill of Costs which is the point of contention herein. The Respondent insists she never instructed the said firm to act for her nor was there a retainer. She has hence sought for the said Bill of Costs to be struck out.

In the case of **Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited [2008] 1 EA 380**, the court held that; **[I]t is not the law that an advocate must obtain a written authority from client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it maybe wide. And nevertheless, it can be implied from the conduct of the Client/Advocate "relationship".**

The court further held that;

It is the position of the law that if there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission... the burden of proof to establish the retainer is always on the shoulders of the advocates. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yard stick for such proof is not beyond reasonable doubt. In fact it is in the normal parameters of balance of probability.'

See the case of Zakhem Construction (Kenya) Ltd V Mereka & Company Advocates (2017) eKLR

Since the Respondent has denied ever having instructed the aforementioned firm to act for her, it is incumbent upon this court to assess the evidence presented by the respective parties to confirm if there was indeed an Advocate/Client relationship. From the annexures, I note the Respondent actually granted the 1st Plaintiff the Authority to Act on her behalf on the aforementioned matter. In the proceedings in respect to matrimonial property which have been annexed to the supporting affidavit, the Respondent admitted therein that the Advocate/ Applicant herein were acting for her in the Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012) and this resulted in the said advocates being ordered to cease acting for the Respondent's husband as it amounted to conflict of interest. I further note that in the Notice of Change of Advocates, messrs E K Mutua & Co. Advocates took over the matter to act for the Respondent who was the 2nd Plaintiff in the Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012) in 2018 which matter had been in court for 6 years before the said Respondent hired her own lawyer. To my mind, from this piece of evidence, it is clear that there was indeed an implied advocate/ client relationship between the Advocate/Applicant and the Respondent. I opine that the Respondent is not being candid in these proceedings as for six (6) years, the firm of messrs Kinuthia Wandaka & Co. Advocates were acting for her in a matter, which she has confirmed she has stakes over the suit land. Further, annexure 'NK3' which are proceedings in Nairobi H C Family Division Civil Appeal No. 21 of 2015 at paragraph 7, she indeed admitted that the Advocate/ Applicant was acting for her together with her husband in Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012). I further wish to reproduce the contents of a letter dated the 19th October, 2017 which the Respondent addressed to Advocate/ Applicant where she stated as follows: **'In the year 2012, I signed a document authorizing you to represent us in a case relating to our piece of land in Kajiado. To date you have not provided me with the update on the progress of the same. I am kindly requesting you to furnish me with information on the progress of the case.** ' From the averments in the said letter it is evident, the Respondent admitted that the said advocate was acted for both of them.

Insofar as there was expressly no written retainer between the Advocate/ Applicant and Respondent, however, based on the evidence before me including my analysis above while associating myself with the decisions cited above, I find that an advocate/ client relationship between the Advocate/Applicant and the Respondent was indeed established when the Respondent allowed the Advocate/Applicant to continue acting for her. It is my considered view that the Respondent is indeed estopped from denying that it did not instruct the Advocate/ Applicant to act for her in the Kajiado ELC 184 of 2017 (formerly Machakos HCC No. 299 of 2012). In the circumstance, I will decline to strike out the Bill

of Costs dated the 1st November, 2018.

It is against the foregoing that I find the Respondent's Application dated the 27th June, 2019 unmerited and will proceed to dismiss it with costs to the Advocate/ Applicant.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF APRIL, 2021

CHRISTINE OCHIENG

JUDGE