Gachengo v Francis Mwangi Njuguna t/a Frank Mwangi & Company Advocates (Miscellaneous Application E046 of 2022) [2024] KEHC 11863 (KLR) (1 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11863 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS APPLICATION E046 OF 2022

SM MOHOCHI, J

OCTOBER 1, 2024

BETWEEN

HANNA MUTHONI GACHENGO ..... APPLICANT

AND

FRANCIS MWANGI NJUGUNA T/A FRANK MWANGI & COMPANY ADVOCATES ..... RESPONDENT

RULING

1. Before the court is a notice of under certificate of urgency and an affidavit in support of the application sworn on 18th December 2023, where the Applicant sought orders that.
    a. Spent
    b. Thatthe honorable court be pleased to stay execution of the decree dated 21st November, 2023 pending hearing and determination of this application
    c. Thatthe honorable court do allow the applicant to be served and participate in the taxation
    d. The costs of the application be provided for.
2. The Court had on the 20th December 2023, 30th January 2024 and 25th May 2024 given directions upon the parties on disposal of the Application.
3. Despite the Applicant's Counsel verbally notifying the court of having filed its written submissions on the morning of 18th July 2024, no such pleadings are on file, the Respondent-Advocate on his part had complied and filed his written submissions on the 19th April 2024.

The Applicants Case

4. The Applicant submits on two issues as to Whether the applicant herein represented the respondent in Nakuru High Court adoption Cause 2 of 2014 and whether the respondent/applicants' application is merited.

5. With regards to the 1st issue the Applicant contends that she never instructed the Respondent/ Advocate to institute a suit being high court adoption cause no. 2 of 2014. At the time of the instructions

6. Respondent/ Advocate filed his replying affidavit and stated that indeed the Applicant had sought legal representation from Ikua Mwangi & Co Advocates. The Respondent/ Advocate states that the partnership between him and N. Ikua was dissolved and that when sharing out the matters acquired during their partnership, he took up this matter and proceeded to represent the respondent/applicant herein.

7. The Respondent/ Advocate filed an application to cease acting for the Applicant after due to lack of proper instructions in Court Adoption Cause No. 2 of 2014. At the time of the instructions.

8. The applicant filed his replying affidavit and stated that indeed the respondent had sought legal representation from Ikua Mwangi & Co. Advocates. The applicant states that the partnership between him and N. Ikua was dissolved and that when sharing out the matters acquired during their partnership, he took up this matter and proceeded to represent the respondent/applicant herein.

9. The Advocate /respondent herein filed an application to cease acting for the Applicant herein after due to lack of proper instructions.

10. In Thomas K'bahati & Peter Kaluma t/a Lumumba Mumma & Kaluria Advocates v Kenya Union of Commercial Food and Allied Workers [2017] eKLR G.V. ODUNGA J stated that;

> " From the definition of the word "Client" in Section 2 of the *Advocates Act*, it is clear that the Union fell squarely within that definition. I agree with the decision of Waweru, J in Nderitu & Partners Advocates vs. Mamuka Valuers (Management) Ltd (supra) that a person who gives instructions in a suit is the client and not the person on whose behalf he purports to act. | also agree with the decision in *Ochieng Onyango Kibet & Ohaga Advocates vs. Adopt A Light Ltd (Misc. App. No. 729 of 2006)*, where the court held that:
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> "The burden of establishing the existence of retainer is always and primarily on the Advocate. However, the burden can sometimes shift to the client to demonstrate that he/ she did not instruct the Advocate in a particular matter, or that the instruction though given was withdrawn without the Advocate offering any service... The participation and/ or instruction of an Advocate can either (be) expressed or implied. And it need not be in writing even where the instruction is expressly given."

11. This was the view adopted by Lesiit, J in *Alex S. Masika & Co Advocates vs. Syner-Med Pharmaceuticals Kenya Limited Nairobi (Milimani) HCCC No. 959 of 2006* where the learned Judge expressed herself as hereunder:

> " The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by a client. A retainer need not be in writing. Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case... There is evidence that the client instructed the advocate to act for it

because during the hearing of the application/appeal, the client was present as the advocate made representation on its behalf before the Board and during those proceedings the client did not object to the advocates appearing for it. Therefore the client instructed the advocate to act for it and the retainer can be inferred from the conduct of the parties since the retainer need not be in writing."

12. The Advocate Respondent later filed a bill of cost dated 25th July 2022 which was served upon the respondent as well as the taxation notice and affidavit of service were filed as well. The respondent never entered appearance or filed any documents in ret 'ds to the bill of costs and the taxing master taxed the bill of costs at Kshs.301,883. The taxing master prior to taxing the bill of costs she perused the parent fil being High Court Adopt Cause No. 2 of 2014 and confirmed that indeed the respondent gave the applicant instructions to represent her.

13. That the allegations by the Applicant that's she did not instruct the firm of M/s Ikua Mwangi& Co. Advocates and or M/s Frank Mwangi & Co. Advocates is unfortunate and untrue as the evidence on record clearly shows that indeed the applicant herein was in personal conduct of that matter.

14. That this application by the Applicant dated 18th December, 2023 was indeed a non-starter and was filed in bad faith in order to defeat the applicants decree. There is no justifiable and or valid ground that has been shown by the applicant to justify the orders sought.

15. That the Advocate Respondent will suffer irreparable loss and damage if the orders sought by the Applicant are granted and the Advocate will never recover his legal fees.

16. In Namachanja & Mbugua Advocates v Igainya Limited [2015] eKLR E. K. O. OGOLA J stated that;

> " | have carefully considered the Taxing Master's decision which in my finding I uphold. In the case of First American Bank of Kenya v Shah and Others [2002]1EA64, the Court held that "The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer's decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle..."
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> At paragraph g/h, the Court continued that, "Though the High Court had the jurisdiction and the discretion to reassess the bill itself, the normal practice where the Taxing Officer's decision disclosed errors Was to remit it back to the Taxing Officer for reassessment unless the court was satisfied that the error did not materially affect the assessment."

17. In this particular case, the error complained of, if any, does not relate to the actual taxing of the bill of costs and the amount awarded to the Advocates. This is a proper case for this Court to consider the Bill of Costs without remitting it back to the Taxing Officer.

18. In the case of Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory [1970] EA 141, the Court of Appeal held at paragraph G that;

> " where a judge has a discretion to retax a bill himself, where a fee has to be reassessed on different principles it should generally be remitted to the same or a different taxing officer."

19. That the Bill herein does not call for reassessment at all, and if it does, then it has nothing to do with the fact that the Taxing Officer applied different principles in making the assessment. And then in the case of Thomas James Arthur v Nyeri Electricity Undertaking [1961] EA 492, it was held that

> " where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases." No question has been raised by Igainya that the amount of the Bill is excessive. And I have already found that the Taxing Master had the jurisdiction to tax the Bill.
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> 33. The upshot of the above is that the Applicants Notice of Motion herein is dismissed with the following further orders: -
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> This Court upholds the Order of the Principal Deputy Registrar (Taxing Master) that the Applicant herein do pay the Respondent's herein Advocates Kshs.3, 351, 723.18 and the said amount which is held in an account in the joint names of the Advocates in Commercial Bank of Africa shall be released to the Respondent herein within 7 days from the date of this Ruling.
>
> Costs of this application shall be for the Respondent/Advocates herein.
>
> Orders accordingly."

20. That the Applicant did not state that there was an error in the taxation of the applicants' bill of cost nor did she seek for reassessment of the bill of costs and or have the bill of costs filed herein taxed by another taxing master.

21. That the ruling by the Honorable Deputy Registrar taxed off the bill of costs accordingly as per the scale provided in the Advocates Remuneration.

22. It is the Advocate/Respondent submissions that the court dismiss the application dated 18th October 2023 with costs.

23. As to Whether the Respondent/Applicants' Application is Merited? The Advocate/Respondent submits that prior to filing of the bill of costs the Applicant was issued with an invoice but she failed to honour the same and the applicant, was forced institute these legal proceedings by filing the bill of costs.

24. The applicant was duly served with the bill of costs; taxation notice as well as the application that sought the certificate of taxation to be adopted as a decree. There are duly filed affidavits of service showing that the respondent/applicant herein was duly served but she ignored to participate with the proceedings.

25. That the Applicant waited until the decree was executed that's when she filed this application and its clear that the Application is meant to deny the Advocate from enjoying his decree and labour from actively representing the respondent.

26. That the Advocate deserves to recover his legal fees. It is therefore the Advocate's submissions that this application is not merited but a waste of courts precious time and pray that the application dated 18th December 2023 be dismissed with costs to the applicant.

Disposition

27. Upon considering the Notice of Motion dated 18th December, 2023 together with the supporting affidavit noting that the Applicant never filed any written submission despite indicating filing the same

on the 18th July, 2024. And upon considering the response filed by the Advocate Respondent I can persuaded that the Applicant has not satisfied the condition for grant of stay of execution.

28. That the taxation has been concluded and no hearing opportunity exists and that stay against execution cannot be granted in the absence of stay.

29. No reference was filed following the taxation on 14th March, 2023 or the issuance of certificate of taxation issued on 13th April, 2023.

30. The execution is ongoing and in the absence of an appeal this Court is unable to allow this application.

31. I accordingly find the Application dated 18th December, 2023 to be without merit and the same is dismissed.

32. Costs of the application are awarded to the respondent.

RULING SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 1 ST DAY OF OCTOBER, 2024

MOHOCHI S.M

JUDGE