



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPLICATION NO.139 OF 2013

ANDREW MUKITE MUSANGI T/A

MUKITE MUSANGI & CO. ADVOCATES.....APPLICANT

VERSUS

NAOMI WANGUI MAINA.....1ST RESPONDENT

BERNARD MUGO MAINA.....2ND RESPONDENT

GOLDEN FLAMINGO ENTERPRISES LIMITED.....3RD RESPONDENT

RULING

1. This is a ruling on **Notice of Motion** dated **19th February 2021** seeking the following orders: -

i. THAT the Applicant's Advocate — Client Bill of Costs filed herein dated 3rd April, 2013 be struck since the Respondents have never instructed the Applicants to act for them.

ii. THAT prima facie from the heading of the said Bill of Costs, the Applicants were clearly instructed Kenya Commercial Bank Ltd and thus their Advocate — Client Bill of Costs must be directed to their said Client and not the Respondents.

iii. THAT the costs herein be borne by the Applicants.

2. Grounds on the face of the application are that the Respondents never instructed the Applicants to act for them to prepare a charge over NAKURU MUNICIPALITY BLOCK 2/970 & 971. That they were instead instructed by Kenya Commercial Bank Ltd to prepare the said charge, thus the instructing Client should be KCB Bank Ltd and the Advocate Client Bill of costs should have been directed to them and not to the Respondents.

3. The application is supported by the affidavit sworn by **Bernard Mugo Maina** and filed on 22nd February 2021. He averred that sometime in April, 2013, he was surprised to be served with the Applicant's bill of costs that is clearly headed as an Advocate Client Bill of Costs yet they never instructed the Applicant Advocates to prepare any charge over our properties being Titles No. NAKURU MUNICIPALITY BLOCK 2/970 and 971.

4. He averred further that the Applicants' Clients are clearly stated on the heading of their Bill of Costs to be Kenya Commercial Bank Ltd and the same must be directed to their stated Client and not to them. That in his affidavit dated 1st December, 2020, he stated that they had approached M/s Kenya Commercial Bank Limited to grant them mortgage facilities which they approved and thereafter, without their knowledge nor consent they allegedly unilaterally instructed the Applicant's law firm to act for them in the transaction. He added that the said properties by then were charged to M/s Transnational Bank and the Advocates had to first request the said Chargees to agree to the takeover of liabilities by KCB Ltd and the said Advocates wrote to Transnational Bank Limited by a letter dated 14th December, 2012 where they clearly stated that they act for KCB Ltd.

5. He averred that clause 18 of the Letter of Offer from KCB Ltd stated that the Bank (KCB Ltd) will pay all the legal expenses relating to preparation and registration of the security and the Borrowers were to reimburse the bank on demand. That therefore, the said Bank at all times remained the Client of the Applicant and were responsible for paying all their fees and expenses.

6. He averred that he was aware of and had also been advised by his Advocates on record that they had the right under the Constitution of Kenya and the Advocates Act to freely choose an Advocate of their choice to represent them in any legal matter and they never took any financial facilities from Kenya Commercial Bank Ltd at all.

7. Further, that the Applicants' law firm never prepared any charge for them to sign. He stated that this Court should put a stop to this oppression orchestrated between the Applicants' law firm and their client KCB Ltd against them by striking out the misplaced bill of costs.

8. In response, the respondent filed replying affidavit sworn by **Getenga Harriet Moraa Advocate** sworn on 18th March 2021. She averred that the 1st and 2nd Respondents trading as the 3rd Respondent herein approached Kenya Commercial Bank for a loan facility of KShs. 50,000,000 by a letter of offer dated 5th December, 2012 and the Respondents accepted in no uncertain terms and duly executed the letter offer.

9. She averred further that the Applicant was instructed by Kenya Commercial Bank Limited and the Respondents to register a charge in favor of the bank over Nakuru Municipality Block 2/97 and 971 belonging to the 1st Respondent to secure advances to the 3rd Respondent which the Applicant did. That upon issuance of the said instructions, it was clear that the Respondents were the paying clients and were liable to settle all the legal expenses incurred in connection with the preparation and registration of the security in accordance with Clause 18 of the letter of offer.

10. She averred that the 2nd Respondent informed the Applicant of his intention to back out of the transaction after the Applicant had done all that was legally expected of, thus it was entitled to full legal costs and a refund of all the expenses incurred from the Respondents as envisaged under Clause 18 of the facility letter. She stated that the Respondents' application is therefore devoid of merits and should be dismissed with costs to the Applicant.

ANALYSIS AND DETERMINATION

11. I have considered averments and submissions herein and what I consider to be in issue is whether Advocate/Client relationship there existed between the Applicant/Respondent and the Respondents/Applicants.

12. From the averments by the respondents, the bank was to instruct an Advocate to prepare charge instrument and the borrower to meet the Advocate's expenses being or as captured in paragraph 5 above. The bank instructed the applicant herein to facilitate processing of the response's loan which required charging of security, and under clause 18 the paying party is the borrower.

13. In my view, it is in order for the applicant to tax the respondent's expenses resulting from securing the loan borrowed. I see no merit in the application herein.

14. FINAL ORDERS

1) Application dated 19th February 2021 is hereby dismissed.

2) Costs to the Respondent.

Ruling dated, signed and delivered via zoom at Nakuru This **15th day of July, 2021**

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Ms Getenga for Applicant

No appearances for Respondents