



EMK Advocates v Rhombus Construction Company Limited (Miscellaneous Civil Application E1148 of 2020) [2021] KEHC 5668 (KLR) (Commercial and Tax) (5 July 2021) (Ruling)

EMK Advocates v Rhombus Construction Company Limited [2021] eKLR

Neutral citation: [2021] KEHC 5668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E1148 OF 2020**

DAS MAJANJA, J

JULY 5, 2021

BETWEEN

EMK ADVOCATES ADVOCATE

AND

RHOMBUS CONSTRUCTION COMPANY LIMITED CLIENT

RULING

1. On 16th December 2020, the Deputy Registrar delivered a ruling on a preliminary objection dated 5th November 2020 filed by the Respondent against the Applicant's ("Advocates") Bill of Costs dated 15th October 2020. The Deputy Registrar allowed the preliminary objection to the extent of holding that the Advocates had no instructions to file a suit but awarded them Kshs 100,000.00 being fees for giving a legal opinion to the Respondent. The Deputy Registrar thereafter issued a Certificate of Taxation dated 20th January 2021. The Advocates have filed a Notice of Motion dated 26th January 2021 seeking judgment for the sum certified.
2. The Advocates have also approached the court by the Notice of Motion dated 1st March 2021 seeking to leave to amend, rectify and/or correct the name EMK Advocates to read EMK Advocates ("EMK Advocates") or in the alternative, an order be granted for substitution, addition or joinder with EMK, Advocate. The Advocates also seek an order directing Safaricom Kenya PLC to produce call data records and text messages for subscriber telephone number +254726XXXX092 belonging to EK from September 2020 to December 2020.
3. The application is supported by the affidavit of EMK, an advocate, sworn on 1st March 2021. It is opposed by the Respondent through the Grounds of Opposition dated 19th May 2021. The parties have filed written submissions in support of their respective positions.



4. The Respondent claims that the Advocates are a non-existent entity whereas the Advocates contend that this is a case of misdescription caused by an honest mistake. The Advocates have annexed their Certificate of Business Registration which indicates that they are trading in the name of 'EMK Advocates' and not EMK Advocates. On the basis of this evidence I am satisfied that the Advocates are not a non-existent entity as has been claimed by the Respondent.
5. Further, I find that the Respondent never raised this issue before the Deputy Registrar in the taxation proceedings considering that it had raised a preliminary objection on the basis that there was no advocate/client relationship. In the ruling dated 16th December 2020, the Deputy Registrar expressed the view that, "The Respondent has admitted that the Applicant had instruction(s) vide a legal opinion which is somehow supported by the contents of the emails supplied."
6. I can only conclude that raising the issue that the Advocates are a non-existent entity is an afterthought. I find that from the onset, the Respondent knew that it was dealing with EMK, Advocate under the name and style of 'EMK Advocates'. The correspondence and dealings show that the Respondent was not in any way confused or misled by EMK, Advocate that it was dealing with another party or entity.
7. I am therefore in agreement with the Advocates that the use of EMK Advocates and not EMK is a misdescription and an honest mistake capable of rectification. It will not prejudice the Respondent in any way, is not fatal to the proceedings and does not defeat their claim. In *Fubeco China Fushun v Naiposha Company Limited and 11 others* ML HCCC No 222 of 2012 [2014] eKLR, Gikonyo J., expressed the following view which I agree with:

The use of Fubeco China Fushun as the Plaintiff, at worst, is a misdescription of the party, that is, China Fushun No 1 Building Engineering Company Limited. Such misdescription of the Plaintiff is not fatal to the proceedings and does not defeat a party's cause of action. In taking this decision, the Court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the Court. Under that power, the Court would still allow the amendment to correct the misdescription. I so order for the avoidance of doubt. I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued. It is a case of pure misdescription of a party and is governed by the same law on misdescription of parties in a contract.

8. This Court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the Court. Under that power, the Court would still allow the amendment to correct a misdescription. I therefore allow the Advocates' application to amend and/or rectify the name EMK Advocates to read EMK Advocates. Having reached this conclusion, it is not necessary to grant the prayer directed at Safaricom Kenya PLC to produce call data records and text messages for subscriber telephone number +254726XXXX092 belonging to EK from September 2020 to December 2020 to prove that the Advocates were instructed to file suit on behalf of the Respondent. I shall of course return to this issue later as I deal with the second application to which I now turn.
9. The Advocates filed the Notice of Motion dated 26th January 2021 under sections 44 and 51(2) of the *Advocates Act* (Chapter 16 of the Laws of Kenya) seeking inter alia, judgment for Kshs 100,000.00 based on the Certificate of Taxation dated 20th January 2021. The application is supported by the affidavit of



EK sworn on 26th January 2021. It is opposed by the replying affidavit of Evanson Kithinji Kinyanjui sworn on 29th January 2021.

10. The Advocates have based their plea for judgment on the Certificate of taxation on section 51(2) of the Advocates Act which states that:

51 (2) The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

11. As I understand, the Respondent contests the retainer. It urges the position that it never instructed the Advocates. It further argues, in the alternative, that the Advocates did not prepare an opinion or do any work to warrant the award of Kshs 100,000.00. I reject this line of argument for two reasons. First, the Deputy Registrar made a finding on the issue of the retainer in so far as he found that there were instructions to the Advocates to prepare the opinion. The Court of Appeal in Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited NRB CA Civil Appeal No 154 of 2014 [2017] eKLR held that the Deputy Registrar had jurisdiction to determine, as a preliminary issue, whether an advocate/client relationship existed as a prelude to taxation as follows:

As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.

12. The Deputy Registrar's finding that the Respondent instructed the Advocates can only be challenged by way of a reference. In so far as the issue of a retainer is concerned, it has been settled by the decision of the Deputy Registrar. It is for this reason that I have rejected the Advocates' application to call for records from Safaricom in order to establish a retainer.
13. Second and as regards the quantum of costs, the Certificate of Costs is conclusive as to the amount unless set aside by way of a reference under Rule 11 of the Advocates Remuneration Order. The Respondent has not filed any reference from the decision hence I cannot comment on the quantum of costs assessed by the Deputy Registrar.
14. The net result of my findings is that I allow the Notice of Motion dated 26th January 2021 and the Notice of Motion dated 1st March 2021 on the following terms:
- (a) Leave be and is hereby granted to the Applicant/Advocates to rectify and or correct the proceedings herein including the Certificate of Taxation to reflect EMK Advocates in place of EMK Advocates as the Applicant/Advocates.
 - (b) Judgment be and is hereby entered for the Applicant/Advocates against the Respondent/Client for the sum of Kshs 100,000.00 only.
 - (c) The Advocates is awarded costs of Kshs 10,000.00 as costs for both applications.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2021.

D.S. MAJANJA

JUDGE



Court Assistant: Mr M. Onyango

Mr Khayota instructed by EMK Advocates for the Applicant/Advocates.

Mr Omollo instructed by Sigano & Omollo LLP Advocates for the Respondent/Client.

