



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 236 OF 2019

ACHOLA JAOKO & COMPANY ADVOCATES.....APPLICANT

VERSUS

SPEED CAPITAL LIMITED1ST RESPONDENT

JAMES KAREBE2ND RESPONDENT

GIDEON KYENGO3RD RESPONDENT

RULING

1. The applicant filed the advocates' – client bill of costs dated 5th March in the sum of Kshs. 139,150/= against the 1st, 2nd and 3rd respondents. The matter came for taxation before the deputy registrar on 13th October 2020 when it was agreed that the application be heard by way of written submissions. Parties complied and the deputy registrar delivered her ruling on 22nd April 2021. She directed that the parties be heard by a Judge to determine the issue of “instructions” to the applicant. That is why the parties are before this court.
2. In his supporting affidavit sworn on 7th October 2020 Mr. Caleb Odhiambo Jaoko the applicant's advocate gives a sequence of the happenings in this matter. He annexed documents COJ 1- 7B to put across his case. He avers that he received instructions from the three (3) respondents jointly and severally to act for them in recovery of Kshs. 3,000,000/= from M/s Eunice Kirehu. This was on 18th October 2018 (COJ-1).
3. He met with the said Eunice Kirehu on 19th October 2018 and thereafter forwarded a partial settlement agreement to the said debtor for execution and she responded (COJ 3 & 4.) He therefore sought for further instructions from the respondents vide a letter (COJ-5). He did a further letter to them dated 2nd November 2018 (COJ -6A and B) expressing his dissatisfaction together with a fee note for settlement.
4. The meeting called for by the respondents vide their email dated 7th November 2018 (COJ -7A) never took place. There was another letter dated 8th November 2018 (COJ- 7B) which was never responded to by the respondents hence the filing of the bill of costs.
5. He also averred that the advocate for M/s Eunice Kihuru did him a letter dated 25th October 2018. The firm is M/s Mutisya and company advocates (COJ-8)
6. In his supplementary affidavit sworn on 2nd June 2021 counsel averred that by an email dated 16th October 2018, the 2nd respondent (1st respondent's head of recoveries) instructed his law firm to recover Ksh. 4,120,667/26 from Eunice Kirehu (COJ- 9A) plus a letter dated 11th October 2018 from the 2nd and 3rd respondents (COJ-9B). That the email (COJ-9A) was in response to his letter dated 5th October 2018 seeking to be appointed to the 1st respondent's panel of advocates (COJ- 10). It is then that he accepted the instructions by his email of 18th October 2018 and drafted the settlement agreement (COJ -11 A).
7. An affidavit which I suppose to be a replying affidavit sworn on 30th June 2021 by the 2nd respondent was filed. He denied the averments in the applicant's supplementary affidavit. Referring to the applicant's annexure (COJ -10) he averred that the request in that letter could only be responded to by way of a letter of appointment. He deponed that the applicant was never appointed nor an appointment letter issued. He depones to having sought an opinion from the applicant but not giving instructions vide annexure COJ -9A.
8. In his submissions dated 27th July 2021 the applicant states that the respondents are indebted to him. He referred to the case of **Professor Tom Ojienda and Associate Advocates v National Lands Commission Eld. H. Court Misc. Appl. No 4 of 2018** where Justice S.M Kibunja held that:

“In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. The act of employment is called the retainer.”

9. He therefore contends that vide the respondent’s emails dated 16th and 18th October 2018, the applicant’s legal services were properly retained and he was instructed to act for the respondents.

10. Mr. Bariki for the respondents relied on the submissions dated 14th December 2020, in which he identified two issues namely:

i) Whether the respondents jointly or singularly instructed the applicant to do any work.

ii) Whether the applicant is entitled to any fees.

11. It is his submission that in the absence of any formal letter of instructions the court cannot establish what the applicant’s mandate was, and who instructed him. That there is no evidence to show that the 2nd and 3rd respondents had any personal debts to be recovered on their behalf. That there is also no evidence showing that the 2nd and 3rd respondents are directors of the 1st respondent.

12. Counsel argues that there was no settlement agreement annexed to his affidavit and neither has he demonstrated who gave him instructions to draft the said agreement. He submitted that annexure COJ -4 was not specific as to who the debtor was complaining about. He adds that from all the annexed documents there was none from the respondents confirming any specific instructions to the applicant. The value of the instructions can only be determined from them.

13. He cited the case of **Moronge and Company advocates v Kenya Airports Authority [2014 eKLR]** where the court of appeal in dismissing the appeal held that:

*“...the figure given therein was, in our view, plucked from the air..... we find and hold that the figure had absolutely no basis. It could not therefore be the value of the subject matter of the suit..... the value of the subject matter of the suit could not also be ascertained from the judgment or settlement as there was none..... (See **Joreth Limited vs Kigano & Associates [Court of Appeal, Civil Appeal No. 66 of 1999 Nairobi] (UR)**). “*

14. He also referred to the case of **M/s Lubulellah & Associates Advocates and N. K Brothers Limited [2014] eKLR** where Justice J. Kamau observed as follows:

“.....the value of the subject matter based on amounts claimed for liquidated pecuniary claim, declaration for breach of contract of the said sum and compound interest. This cannot form the basis of the subject matter as they could be allowed or disallowed. They are merely figures that a party claims in its pleadings and they can only be determined after hearing the case on merit. If the position of calculating the subject matter was to be based on sums claimed in a pleading, nothing would stop any rogue advocate from plucking figures from the air because he would know that his instruction fees would be based on figures indicated in the pleadings, despite knowing very well that he would not succeed in such a claim at the end of the day. This would be a travesty and miscarriage of justice.”

15. Counsel finally submits that if there is any remote claim against the 1st respondent, the bill as drawn presupposes that it is against the 2nd and 3rd respondents jointly.

Analysis and Determination

16. I have considered the bill of costs dated 5th March 2019, the affidavits, annexures and both submissions filed herein, and the cited cases.

17. Annexure COJ-9B is a letter to the debtor written by the 2nd and 3rd respondents in their official capacities as CEO and Head of Recovery, of the 1st respondent. The email forwarding COJ-9B is dated 16th October 2018 (COJ-9A). It states “

“As discussed on telephone, can we handle this matter? See attached the letter hope it shed some light.”

18. The letter dated 11th October 2018 (COJ-9B) is copied to the firm of Kinyanjui, Kirimi and company advocates. It is these letters (COJ-9A and B) which the applicant says contain the instructions for him to act for the three (3) respondents jointly and severally.

19. He did not respond to the question asked in annexure COJ -9B but instead looked for the debtor to do what is referred to as a “partial” settlement Agreement” which he did and sent a draft copy to the 1st respondent vide a letter dated 18th October 2018 (COJ-11A). I have also looked at other mail dated 18th October 2018 (COJ 2 and 6B). None of the documents annexed gave the applicant any instructions to do a partial settlement of the money owed by the debtor. He did not at any point respond to the inquiry in the letter dated 16th October 2018 (COJ-9A).

20. The applicant’s letter (COJ-2) asking for details to complete page 2 of the partial settlement agreement (COJ-11A) was never responded to by the 1st respondent. From the applicant’s affidavit its not clear when the 2nd and the 3rd respondents gave him instructions to recover the money from Eunice Kirehu. He is relying on annexure COJ-9A to make his claim. The 1st respondent is a limited liability company which is a separate legal entity from the 2nd and 3rd respondents who are its employees. Secondly, there is no evidence that the 1st respondent ever

responded to the applicant's request (annexture COJ -10) to be appointed to their panel of advocates. The 1st respondent being a company would only make such an appointment through a resolution which is lacking. The money being recovered was owed to the 1st respondent and not 2nd and 3rd respondents.

21. The applicant may have done some work but it's not clear what the instructions were and who gave him the instructions. Was it about recovery of Kshs. 4,120,667/26 or Kshs. 3,000,000/= ? The value of the subject matter of the instructions is key because that is what the instruction fee is based on.

22. The applicant has referred to annexture (COJ -8) which is a letter by the firm of Mutisya and company advocates dated 25th October 2018 who were purportedly acting for Eunice Kirehu. The Law firm to whom the document (COJ-9B) was copied is Kinyanjui, Kirimi and company who are the current respondents' advocates and must have been acting for them at that time. The letter was not copied to the applicant.

23. Nothing on record shows who referred the applicant to M/s Eunice Kirehu for purposes of drafting the document COJ-9A.

24. All in all I find that the applicant has failed to prove how the respondents jointly and severally instructed him to act for them. For that reason, I find the advocate/client bill dated 5th March 2019 to have no standing and I hereby dismiss it. Each party to bear his own costs.

Orders accordingly

**DELIVERED, SIGNED AND DATED THIS 8TH DAY OF OCTOBER 2021 IN OPEN COURT
AT MILIMANI NAIROBI.**

H. I. ONG'UDI

JUDGE