REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPL. CASE NO. 884 OF 2007

PETER NGOGE T/A O.P. NGOGE & ASSOCIATES.....PLAINTIFF

- VERSUS -

ERIC BARARE ORINA.....1ST RESPONDENT

KENYA UNION OF JOURNALISTS.....2ND RESPONDENT

RULING

The application dated 26th May, 2021 is supported by the affidavit of Eric Oduor sworn on the same date and seeks the following orders:-

> **1. That leave of this Honourable Court be and is hereby granted to IBRAHIM ODUOR, Esq, to come on record on behalf of Kenya Union of Journalists, the Respondent herein.**
>
> **2. That the applicant Union be struck out of the instant proceedings.**
>
> **3. That this Honourable Court be and is hereby pleased to set aside the consent order dated 15th October 2010.**
>
> **4. That in the alternative, this Honourable court be and is hereby pleased to issue an order that the consent order dated 15 th October 2010 be varied so as to exclude Kenya Union of Journalists from the said consent order.**

The respondent filed a Notice of Preliminary Objection to the application dated 23rd June, 2021 as well as a replying affidavit sworn by the respondent on 22nd June, 2021. The Notice of Preliminary Objection and the application were heard together.

Counsel for the applicant (Kenya Union of Journalists) submitted in his written submissions dated 20th July, 2021 that the application raises several issues one of them being whether there was a valid Client-Advocate relationship between the applicant and the respondent (advocate). It was submitted that a valid contractual advocate-client relationship must exist before a bill of costs can be taxed. Counsel referred to the case of **WILFRED N KONOSI T/A KONOSI & CO. ADVOCATES –V- FAMCO LIMITED (2017) eKLR** where the Court of Appeal held:-

> **"The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in Taparn vs Roitei [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The Advocates Act and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered."**

It was further submitted that an advocate-client relationship is created only when lawful instructions are issued by the client and for the benefit of the client. Counsel argued that there were no instructions issued to the respondent by the Executive Committee of the applicant that had the mandate of overseeing the overall functions of the union as per its constitution. According to Counsel, the respondent was instructed by the 1st plaintiff in the original suit number 480 of 2006, Mr. Eric Barare Orina who had no power or ability to issue instructions on behalf of the union. Further, that on 27th March, 2007, Justice Emukule in Judicial Review case number 245 of 2006 found that the group of officials led by Mr. Ezekiel Mutua were the lawful officials of the union.

Counsel for the applicant further contend that by the time the respondent filed the bill of costs in November 2007, he already knew that

whoever instructed him was never an official of the union. All the documents filed in Civil Case number 480 of 2006 were signed by Mr. Eric Orina who was not an official of the Union. It was also submitted that the bill of costs was not served on the applicant.

Counsel for the applicant maintain that there were no instructions given to the respondent to act as its advocate and any alleged advocate-client relationship is a nullity. Counsel relies on the case of **MACFOY –V- UNITED AFRICA LIMITED (1961)3 ALL E.R. 1169** where it was held:-

> **"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

It was further submitted that the other issue for determination is whether the applicant (Union) should be struck out of the proceedings. On this issue, it was argued that since there was no advocate-client relationship from the beginning, then the applicant should be struck out from the case. Counsel referred to the case of **MOHAMED AND SAMNAKEY –V- DILSHAD MOHAMED (2020) eKLR** where Kimaru J. held;_

> **"In the present application, it was clear to this court that the Applicant did not establish to the satisfaction of this court that they had been given instructions by the client to prepare the pleadings in the case. The paucity of any written instructions made it difficult for this court to reach a finding, as sought by the Applicant, that such instructions were given. This court holds that the Applicant failed to establish the existence of retainer in the case and therefore they are not entitled to file an Advocate-Client bill of cost for taxation by the Deputy Registrar of this court."**

Another issue raised is whether the consent order of 18th October, 2010 is binding upon the applicant. It is argued that the consent order lacked a valid advocate-client relationship. Due to lack of instructions, the applicant was not a necessary party to the proceedings in the first place, therefore the consent had no legs to stand on. The court, *ab-initio*, did not have the jurisdiction to order for payment of costs of Advocate-client under a bill of costs. Parties could not confer jurisdiction on the court to record the consent. According to counsel, the consent can be equited to a gratuitous promise which is not enforceable in law. The applicant was not a party to the consent and the 1st plaintiff who was the first respondent in the bill of costs assumed personal responsibility for the bill.

Counsel for the applicant consequently argued that there is no valid debt between the applicant and the respondent capable of enforcement. Counsel urged the court to condemn the respondent to pay costs of the application. On the Preliminary Objection, it was submitted that the objection is replete with averments of fact and cannot qualify to be considered as a Preliminary Objection.

The respondent filed written submissions dated 30th June, 2021. It was submitted that he rendered legal services to the applicants in Nairobi HCCC No. 480 of 2006. Due to failure to pay his fees, he filed a bill of costs that was taxed on 18th March, 2008 at Kshs. 242,604. On 18th May 2010, the taxed costs were adopted as a judgment of the court by lady Justice Rawal. Attempts to execute were met with an application for stay of execution through the applicant's advocate, M/s S. Ogeto Ongori & Co. Advocates. The application was certified as urgent and interim orders were granted on condition that the applicant deposit Kshs.120,000 in court.

The respondent maintain that the applicant deposited Kshs.120,000 and parties entered into negotiations leading to the signing of a consent on 18th October, 2018. The sum of Kshs.120,000 was released to him as part payment and the balance was to be paid by instalments of Kshs.20,000. It was further submitted that the applicant failed to pay the instalments and he initiated execution process involving notices to show cause why the applicant's officials should not be committed to civil jail. According to counsel, the applicant is estopped from alleging that the consent was obtained fraudulently, is illegal or untenable. The firm of S. Ogeto & Ongori was legally on record. Further, on 13th July, 2018 the applicant's new advocates made a proposal to pay the decretal sum by way of instalments. Counsel urged the court to dismiss the application.

The main issues being raised by the applicant is whether the union was properly enjoined in the first suit namely HCCC 480 of 2006, whether the applicant should be struck off the subsequent miscellaneous Civil application number 884 o 2007 which led to the taxation of the bill of costs and whether the consent entered on 15th October, 2010 should be set aside.

The background to the dispute is that members of the Kenya Union of Journalists conducted their national elections on 7th May, 2006. A group led by Mr. Eric Barare Orina was declared the winners while another group led by Mr. Ezekiel Mutua that was in office opposed the results. The elections were presided over by the Ministry of Labour and Human Resource Officials. Mr. J.W. Kimani from that Ministry in his letter dated 7th May 2006 addressed to the Registrar of Trade Unions did confirm the results of the elections. On 9th May, 2006 W.K. Langat from the registrar of trade unions wrote to the applicant's secretary General confirming that changes of its officials had been effected as per the elections of 7th May, 2006.

This suit was filed on 11th May 2006 by the newly elected Secretary General. The main prayer in the claim was an order of injunction against the old officials to vacate offices of the union. On their part, the old officials filed Miscellaneous Application No. 245 of 2006 seeking orders of certiorari and mandamus. There was also HCCC No. 258 of 2005 filed by the union applicant against four of the new officials and interim orders of injunction were granted by Justice P. Ransley on 8th March 2005. This was before the elections of 7th May 2006. Meanwhile, the High Court did grant the old officials leave to seek Judicial Review orders and the leave was to operate as stay. Subsequently, the court delivered its judgment in the Judicial Review case on 23rd March, 2007 and recognized the old officials as the lawful office bearers.

There is no dispute that an election was held on 7th May, 2006 with the intention of getting officials with fresh mandate from the members.

Eric Barare was elected as the new Secretary General. He filed Civil Suit number 480 of 2006 with a view to effect the results of the elections. The respondent herein was instructed to file the case. Eric was claiming the position of Secretary General of the Association having been elected by the members. He had all the right to include the union as a party in the suit. Order 1 Rule 1 of the Civil Procedure Rules states as follows:-

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

The above rule was also in place in 2006 and it was proper for the newly elected Secretary General to have joined the union as the second plaintiff since the relief that was being sought was going to affect the union. I do therefore find that the union was a necessary party in HCCC No. 480 of 2006 and that the respondent herein was properly instructed to act for both the union and Eric Barare Orina.

Counsel for the applicant seeks to have the applicant struck out of Miscellaneous Civil application number 884 of 2007 which led to the taxation of the bill of costs. The main reason behind this contention is that the advocate had no instructions from the union. The record shows that apart from the respondent, other advocates namely S. Ogeto & Ongori Advocates, Oduor Henry John and Company Advocates and now Oduor Ibrahim Advocates were instructed by the union in this matter. There are no resolutions of the union that were filed indicating that the subsequent advocates were appointed by the Managing Committee. It is established that these advocates got their instructions from the union and properly came on record for them.

Counsel for the applicant made reference to Order 1 Rule 10(2) of the Civil Procedure Rules which states as follows:-

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

My reading of Order 1 Rule 10(2) is that it empowers the court to struck out a party or join a party in a suit so as to determine all questions in dispute effectively. The order cannot be applied retrospectively where a judgment has already been entered. The court cannot order a party to be enjoined as one of the defendants where Judgment has already been granted in favour of the plaintiff. If the court makes such an order, the enjoined defendant would automatically become a judgment debtor and he would have been condemned unheard. Similarly, the court cannot strike out from a case a defendant who has fully participated in a case and judgment made against him. At that stage such a defendant can only appeal the court decision or seek review of the judgment if there is new evidence that was not availed during the hearing.

The applicant was properly enjoined in both HCCC No. 480 of 2006 and miscellaneous application number 884 of 2007. The certificate of costs was adopted as a judgment of the court and execution proceedings have been ongoing.

The applicant also contend that it was not served with the bill of cost and that the bill was against the first plaintiff only, Mr. Eric Barare Orina. The record shows that the applicant became aware of the taxed certificate of costs and filed an application dated 20th July, 2010 seeking orders of stay of execution. That application was dismissed for non-attendance. A subsequent application dated 23rd September, 2010 seeking to reinstate the application of 20th July 2010 by way of review of the earlier orders was equally dismissed. It is therefore clear that the applicant has been aware of the taxed bill of costs for over ten (10) years now. The Bill was drawn at Kshs.1,077,816 but was taxed at Kshs. 242,604 on 7th August, 2008. I do find that having been aware of the matter for over a period of ten (10) yeas, the applicant's prayer seeking to be struck out the proceedings is just but an afterthought.

The other issue relates to the consent entered into between the parties on 15th October, 2010. The consent reads as follows:-

> **"RE: CONSENT IN HCCC MISC. APPLICATION NO. 884 OF 2007.**
>
> **PETER NGOGE-VS-ERIC ORINA & 15 OTHERS.**
>
> **The parties herein wish to record the above.**
>
> **By Consent.**
>
> **1. The judgement herein obtained against the respondent to adjusted to Kshs. 220,000/= all inclusive.**
>
> **2. The sum of Kshs. 120,000/= deposited in by the Respondents be released to Peter O. Ngoge Advocate immediately on signing this consent.**
>
> **3. The balance of Kshs. 100,000/= be paid to Peter O. Ngoge Advocate by way of monthly installments of Kshs. 10,000/= commencing on 30th November 2010, and on or before the 30th of each subsequent month till completion.**

4. Each party to bear its own costs.

5. In default of payment as agreed above, Peter O. Ngoge Advocate be at liberty to execute for the balance outstanding then.

Dated this 15th day of October 2010.

Peter O. Ngoge

Advocate **For the applicant**

S. Ogeto

Advocate **For the Respondent"**

It was submitted that the consent only referred to one respondent. Paragraph one of the consent makes reference to "respondent" while paragraph 2 refers to "respondents". Apart from that, the consent was entered into by the firm of S. Ogeto Ongori Advocates who were on record for the union. The said Advocates were acting on the instructions of the union and the consent was entered into without any fraudulent misrepresentation on the part of the advocate. Indeed, soon after the consent was recorded the sum of Kshs.120,000 that had been deposited in court by the applicant was released as per order two(2) of the consent. The balance of Kshs.100,000 was to be paid by way of monthly installments of Kshs.10,000 with effect from 30th November, 2010.

Given the above background, it is established that the applicant did sanction its advocates to enter into the consent and went ahead to make a payment of Kshs.120,000 towards settlement of the debt. The consent is therefore lawful and M/s S. Ogeto & Ongori Advocates cannot be faulted for having recorded the consent. It's the same advocates who made the earlier two applications for stay of execution as well as review of the orders dismissing the application dated 20th July 2010.

The applicant appointed the firm of Oduor Henry John & Company Advocates. On 13th July, 2018 that firm wrote to the respondent as follows:-

"RE:- PETER O. NGOGE T/A O.P NGOGE & ASSOCIATES-VS-KENYA UNION OF JOUNALISTS (MISC, APPL. NO. 884 OF 2007)

The above refers.

That we have instructions from our client to propose to you that our client is willing to liquidate the decretal amount of Kshs. 290,738/-in installments of Kshs. 20,000/= per month beginning end of August 2018.

Kindly do revert to us to enable us be able to inform our client in time.

O.J.Henry (Advocate)

Cc. Client"

The letter only makes reference to the Kenya Union of Journalists and does not mention the other party, Erick Barare Orina. The above letter made proposal to settle the legal fees debt by way of monthly instalments of Kshs.20,000 with effect from end of August, 2018. It appears that the applicant's proposal was accepted and on 4th October 2019, over one year later, the respondent notified Ms. Oduor Henry John Advocates that the monthly instalments were not paid and threatened to execute.

It is therefore clear that the applicant made two proposals to pay the debt by way of installments. The first one was made through the consent of 2010 while the second one was done eight years later vide the letter dated 13th July, 2018. The applicant cannot fault the consent or the letter from its advocate proposing the instalment mode of payment. The applicants have found it easy to change advocates whenever faced with the threat of execution.

From the record, I do find that the applicants have been litigating in piecemeal whenever execution against its officials was in place. There is no explanation as to why since 2010 the applicant has not settled the debt or has not made a similar application. Having promised to settle the debt by way of instalments, the applicant is estopped from seeking orders whose result is to enable the applicant walk scot-free. I do find that the application dated 26th May, 2021 lacks merit and is hereby dismissed with costs.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2021

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S. CHITEMBWE

JUDGE