REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 204 OF 2019

OWITI, OTIENO & RAGOT ADVOCATES.....APPLICANT

-VERSUS-

OGWEDHI PROPERTIES LIMITED.....RESPONDENT

RULING

The application dated 24th July 2020 was brought by the Law Firm of Messrs **OWITI, OTIENO & RAGOT ADVOCATES**, pursuant to **Section 51 (2)** of the **Advocates Act**. It is an application asking the Court to adopt as a Judgment of the Court, the Certificate of Costs dated 12th March 2020.

1. The Applicant also asked for interest on the taxed costs, to be awarded at court rates, with effect from 27th November 2019 until payment in full.

2. Finally, the Applicant asked the Court to award it the costs of the Application.

3. The application was supported by the affidavit of Ms **FAUSTINE OSEWE** Advocate.

4. Ms Osewe deponed that she had the personal conduct of the matter and that she was therefore conversant with all the issues of fact relating to the matter.

5. She deponed that the Client/Respondent had duly instructed the Law Firm in 2019, so that the said Law Firm could represent the Respondent in the case of **MOSES AGUMBA & ANOTHER Vs OGWEDHI PROPERTIES LIMITED & ANOTHER, HIGH COURT COMMERCIAL CASE NO. 4 OF 2019**.

6. Upon receipt of the instructions from the Respondent, the Law Firm asserts that it did, in fact, represent the Respondent in the said suit.

7. It was the Applicant's case that when the Respondent failed to settle the Applicant's Proforma Invoice dated 22nd October 2019, the Applicant filed its Advocate/Client Bill of Costs dated 29th November 2019.

8. The said Bill of Costs was taxed in the sum of Kshs 444,871.20. It is in respect to the taxed costs that the Applicant has come to Court to have it adopted as a Judgment of the Court.

9. In answer to the application, the Respondent filed a Replying Affidavit of **ANTONY MWANIKI**. Essentially, Mwaniki deponed that the Respondent had never engaged the Applicant to act for it in **KISUMU HIGH COURT COMMERCIAL CASE NO. 4 OF 2019**.

10. Secondly, the Respondent asserted that the Advocate/Client Bill of Costs was taxed without the knowledge of the Respondent.

11. Between the parties herein, there are very divergent statements on matters of fact and of law.

12. However, upon a close scrutiny of the affidavits I have come to the following conclusions;

> ***(a) Ogwedhi Properties Limited appears to have shareholders and directors who are drawn from OLTEPESI PROPERTIES LIMITED and KISUMU PARK VIEW RESORTS LIMITED.***

(b) It appears that the shareholders and directors are not reading from the same script. I say so because whereas a section of the Company appears to have embraced the Law Firm which is the Applicant herein, the other section of the Company embraced the Law Firm of MUSYIMI & COMPANY ADVOCATES.

(c) The Applicant first got oral instructions from one director, on the evening of 5th June 2019. Those instructions were received on phone from Mr. Charles Ogada, and later by email from Mr. Douglas Ochong.

(d) As disclosed by Mr. David Otieno Advocate, he received an email from Mr. Isaac Mungoma who informed him that there were some conflicts of interest within Ogwedhi Properties Limited. The question that would arise is whether or not that cautionary statement was sufficient to put the Applicant on their guard.

(e) But another question that arises is whether the instructions by one or two of the directors was sufficient, in the circumstances, to constitute instructions from the Company, regardless of their alleged internal arrangements.

13. In a nutshell, I find that there is a dispute about retainer.

14. Pursuant to **Section 51 (2)** of the **Advocates Act**, the Court may only proceed to order that Judgment be entered for the sum certified to be due, if the retainer was not disputed.

15. Accordingly, as there is a clear dispute herein, about whether or not the Applicant was duly instructed by the Respondent, it is not open to me to order that Judgment be entered summarily. I therefore reject the application.

16. However, that is not the end of the matter, as it would still be open to the Applicant to take appropriate steps to have the Court resolve the question concerning the disputed retainer. Therefore, I order that the costs of the application dated 24th July 2020 shall abide the final verdict between the Applicant and the Respondent. If the Applicant finally persuades the Court that it had been duly retained, the costs of the application shall be awarded to the Applicant.

17. But should the Applicant fail to prove that the Respondent had retained it, the costs of the application herein shall be awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF NOVEMBER 2021

FRED A. OCHIENG

JUDGE