



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 382 OF 2018

PATRICK KIMATHI MUCHENA T/A

ARIMI KIMATHI & COMPANY ADVOCATES.....APPLICANT

- VERSUS -

EVANS ITHIRA.....RESPONDENT

RULING

1. **PATRICK KIMATHI MUCHENA t/a ARIMI KIMATHI & CO. ADVOCATES** (hereinafter referred to as the advocate) filed an Advocate/Client Bill of Costs on 31st 2018. That bill of costs was taxed against **EVANS ITHIRIA** (hereinafter referred to as Evans). The taxing master delivered her Ruling on the taxation of that bill of costs on 25th January 2019. By that Ruling the taxing master found that the advocate did not provide any legal service to Evans. Consequently the taxing master dismissed the bill of costs.

2. The advocate being aggrieved by that dismissal filed a chamber summons, brought under paragraph 11(1) and (2) of the Advocates (Remuneration) Order (hereinafter the Order) which was dated 23rd May 2019. The advocate sought an order for the setting aside of that dismissal of the bill of costs and the re-assessment of the fees due.

3. Evans opposed that application by way of affidavit by which he stated the advocate did not act for him, as alleged in the bill of costs because he had not retaining him to so act. Evans additionally opposed the advocate's chamber summons by filing a preliminary objection dated 3rd July 2019. By that objection Evans stated the advocate's application contravened paragraph 11(1) and (2) of the order.

4. By this court's Ruling dated 6th November 2019, it was found that the advocate failed to abide by the time-lines of paragraph 11(1) and (2) of the Order and therefore the Chamber Summons was struck out with costs.

5. The advocate has once more approached this court by Notice of Motion dated 26th November 2019. By it he seeks review of this court's Ruling of 6th November 2019. In support of the application the advocate annexed his letter dated 29th January 2019 and filed in court on 31st January 2019. That letter, in compliance with paragraph 11(1) of the Order, sought the taxing master's reasons for her decision to enable the advocate file a reference before a judge. That letter was filed within the period set out in paragraph 11(1) of the Order, that is fourteen days after the taxing masters' decision.

6. It needs to be stated that when Evans filed his replying affidavit dated 3rd July 2019 and preliminary objection, alluding to his argument that the advocate had failed to follow the time-lines set by paragraph 11(1) and (2) of the Order, the advocate did not respond to refute the same. It is only later by the Notice of Motion dated 26th November 2019 that the advocate refuted what Evans stated and further attached a copy of the letter dated 29th January 2019, by which he requested the taxing master to give her reasons for her decision. That letter of 29th January 2019 was not in the court file when this court delivered its Ruling of 6th November 2019. The copy of that letter filed by the advocate bears the court stamp of 31st January 2019 and on prima facie basis I will accept that the advocate met the conditions set under paragraph 11(1) of the Order. On prima facie basis also I do find that the advocate filed his chamber summons dated 23rd May 2019 within the period set out in paragraph 11(2) of the order. It therefore follows that the order sought to review the Ruling of 6th November 2019 is merited and is granted. It is granted with no orders as to costs because, firstly Evans did not oppose it, and most importantly because the advocate failed to respond to the allegations that his application was contrary to paragraph 11(1) and (2) of the Order when the objection in that regard was raised by Evans.

7. Having allowed the Notice of Motion dated 26th November 2019, and thereby having set aside the striking out of the Chamber Summons dated 23rd May 2019, It then follows that this court should proceed to consider that chamber summons on merit. It will be recalled that chamber summons sought the setting aside of the dismissal of the bill of costs by the taxing master.

8. The taxing master by her Ruling dated 25th January 2019 found that Evans verbally instructed the advocate to act for him in the transaction where Evans was purchasing a house on Title Ruiru East/Block 1/139. Having made that determination, however, the taxing master found that the advocate did not provide any legal service to Evans in that respect. The following is what the taxing master stated in her Ruling:

***“It is evident from the thread of the conversation above between the applicant and the Respondent, that the Applicant did not provide any legal service to the Respondent in respect to the transaction in question. It is also evident from the documents attached to the Respondent’s affidavit that he paid legal fees to other advocates who actually enabled the performance of the sale transaction. I need not go into the details of those engagements, suffice it to say that there is no work done on behalf of the Respondent by the Applicant which would be assessed by the Deputy Registrar by way of taxation.*”**

Consequently, I find that the Applicant’s bill of costs is unmerited. It is hereby dismissed with costs to the respondent.”

9. The advocate in faulting that finding deponed in his affidavit dated 23rd May 2019 that the taxing master misdirected herself on principles of law in disregarding the weight of the evidence on record, which, according to him, showed that Evans instructed him to engage the vendor’s advocate. The advocate further stated in his affidavit:

“That from a perusal of the supporting documents of the Applicant (the advocate) it is evident that the Respondent (Evans) instructed the Applicant and later constructively withdrew said instructions.”

10. The advocate by his written submissions submitted that Evans instructed him to act for him in the transaction and that he duly acted by engaging the vendor’s advocate.

11. Evans by his replying affidavit dated 3rd July 2019 deponed that the taxing master rightly found that the advocate failed to demonstrate the work done for him

ANALYSIS

12. The taxing master, by her Ruling, made a finding that Evans instructed the advocate to act for him in respect to a house he was purchasing. Retainer is defined in **Halsbury’s Law of England 5th Edition 2009 Vol 66** as :

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment.....”

13. The Court of Appeal in the case **OMULELE & TOLLO ADVOCATES MOUNT HOLDINGS LIMITED (2016) eKLR** had this to say on retainer:

“From the above definition, ‘retainer’ covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client (see. Halsbury’s Laws of England, (supra) at page 14 para 765).”

14. The issue for determination is: did the advocate provide legal service to Evans to justify the advocate/client bill of costs filed herein.

15. Evans deponed that the advocate was known to him since childhood. They were neighbours, it would seem, as they grew up. They met in a social function in May 2015 and as they conversed Evans requested the advocate to look at the letter of offer, of the purchase of the house. Evans deponed:

“That the applicant and I had a brief discussion after which gave he (sic) he gave me back the letter to follow up with the Developer’s lawyer N.K. Mugo & Co. Advocates. That to my utter shock, instead of the matter ending there, the applicant wrote to the Developer’s lawyers stating that I had instructed his firm to act on my behalf in this transaction.”

16. Evans went on to state that he informed the advocate that he did not intend to instruct another lawyer because he had engaged the Developer’s lawyer to act for him and he had already paid legal fees to that lawyer. Evan annexed a receipt of the fee he paid to the Developer’s lawyer on 26th May 2015 of Ksh 93,750.

17. The advocate indicated he obtained instructions to act for Evans on 10th May 2015. That day was on a Sunday. That would seem to support Evans contention that he met the advocate at a social function when he shared with him the letter of offer for purchase of the house.

18. The advocate by letter dated 11th May 2015, was addressed to N.K. Mugo & Company (the Developer’s lawyer). By that letter the advocate stated that he had been instructed by Evans to act for him for the purchase of House No. 6. By that letter the advocate also inquired of the Developer’s bank details for use of payment of deposit of the purchase price. Finally in that letter the advocate stated:

“We will return the letter of offer duly accepted thereafter.”

19. The advocate failed, by the documents he produced before court, to show that he did any further legal work toward assisting Evans in the purchase of the house.

20. Even the letter dated 29th May 2018, which was said to have erroneously been sent to the advocate by N. K. Mugo & Co. Advocates, did not support the status of the purchase of a house by Evans. I say so because the title of that letter refers to House No. 6. Yet by Deed of Variation of sale agreement dated 16th August 2018 Evans was offered another house for purchase, that is house no. 15.

21. Looking at instruction fee on the advocate/client bill of costs, it becomes very clear that the advocate was unaware that Evans was purchasing house No 15 and not 6 as stated in that bill of costs.

22. On the whole my reconsideration of the documents that were before the taxing master, I find that I am persuaded by her logic in reaching her decision. In that regard the taxing master had this to say:

“It is evident from the thread of the conversation above between the Applicant and the Respondent, that the applicant did not provide legal service to the Respondent in respect to the transaction in question.”

23. That conclusion reached by the taxing master is supported by various documents before court. For example if indeed the advocate acted for Evans why was it not him who witnesses Evans signature to the sale agreement dated 19th June 2015. Why is it he did not know that Evans had signed a Deed of variation. Why did he not witness spousal consent to the transaction. Most importantly the advocate did not seem to have received any fee from Evans yet Evans proved by receipt that on 26th May 2015 he paid to N.K. Mugo & Co. Advocates Ksh 93,750 in respect of legal fees for purchase of House No. 15.

24. On the whole I find that the finding of the taxing master cannot be faulted. It is for that reason that the chamber summons dated 23rd May 2019 fails.

CONCLUSION

25. The orders of the court are:

a. The Notice of Motion dated 26th November 2019 does succeed to the effect that the court does review and set aside the Ruling of 6th November 2019. Accordingly the chamber summons dated 23rd May 2019 is reinstated. There shall be no costs to the Notice of Motion dated 26th November 2019.

b. The Chamber Summons dated 23rd May 2019 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of JUNE 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **11th** day of **June, 2020**.

MARY KASANGO

JUDGE