



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 114 OF 2020

IN THE MATTER OF: ADVOCATE/CLIENT BILL OF COSTS

COOTOW & ASSOCIATES.....ADVOCATES/RESPONDENT

-VERSUS-

MBARUK AYUB ALI MBARUK.....CLIENT/ APPLICANT

RULING

1. Before this court for determination is a **Notice of Motion** application dated **3rd September, 2020** filed on **7th September, 2020** by **M/S Omondi Waweru & Company Advocates** on behalf of the Client/Applicant. By the application, the Client/Applicant seeks from this court orders that:-

a) Spent;

b) That this Honourable Court be pleased to strike out the Advocate-Client Bill of Costs dated 28th July, 2020 filed herein;

c) That in the alternative the Advocate-Client Bill of Costs dated 28th July, 2020 be stayed pending the hearing and determination of CMCC ELC No. 92 of 2020 Mbaruk Ayub Ali Mbaruk –vs- Cootow & Associates Advocates;

d) That the costs of this application be provided for.

2. The application is predicated on the grounds on its face and further supported by the supporting affidavit of **Mbaruk Ayub Ali Mbaruk**, the Client/Applicant sworn on **3rd September, 2020**. He deponed that the Advocates acted for him in respect of a property he bought and sub divided into **73 plots** in or about **2016**. That the agreed fees for the sale of the Plots was **Kshs.15,000/=** per plot. **Mr. Mbaruk** deposited that the advocates received the proceeds of sale for the property on his behalf and the transactions thereof concluded in or about 2017 but have failed to release the full proceeds of the sale.

3. According to the Client, he lodged complaints against his erstwhile advocates before the Advocates Complain Commission and the Directorate of Criminal Investigations but later at the request of the advocate withdrew the complaints in the hope of reaching an amicable settlement. However, the Advocates turned to avoid him and completely refused indulge in negotiations of reaching a conclusion.

4. **Mr. Mbaruk** further deponed that the Advocates have been holding the sum of **Kshs.6,6674,237/=** on account of proceeds of the sale due and payable to him. He was then compelled to file **CMCC ELC No.92 of 2020** to recover the said sum. It is also deponed that the advocates had never served the client with any fee note or demand for their fees and nothing would be easier for the advocates than offsetting the fee due from the amount it is holding on behalf of the Client/Applicant.

5. The advocate opposed the application vide the **Replying Affidavit** dated and filed on **11th September, 2020**. The same is sworn by **Job Juma Weloba** who describes himself as the managing partner of the Respondent's firm of Advocates. He deponed that the Client instructed the Respondent firm of advocate to represent him in the sale of **seventy three plots** but there was no agreement of fees at all. Given that that the dispute on between the firm and the client is majorly of fees chargeable it is imperative that the matter proceeds for taxation so that the fees payable to the advocates can be determined.

6. It is further deponed that while the firm received some of the proceeds on behalf of the client, the client received the purchase price directly from some purchasers. That the client is still under some illusions that the advocate is still holding some of its funds notwithstanding that the firm has accounted for all the money it received on behalf of the client. In any event, that is a matter to be litigated in **CMCC ELC No.92 of 2020** and should not be confused with the fees earned by the firm of advocates with regard to the transactions for the client. The advocate also laments that since the Client has filed a claim in respect of some money he claims to be due to him it is proper that the advocate-client bill of costs already lodged in court be taxed to resolve the dispute between the client and the firm at once.

7. The application was canvassed by way of oral submissions on 23rd November, 2020 but only Mr. Wafula appeared on behalf of the Advocates. The Client was unrepresented.

Analysis and Determination

8. I have carefully considered the application by the Client/Applicant the Affidavits sworn in support and rebuttal of the application as well as Mr. Wafula's oral submission on behalf of the Respondent's Firm of Advocates. The key issues which distil for determination are;

a) Whether or not there was an agreement on the fee payable, and

b) Whether the firm of advocate should be allowed to proceed with taxation or should the taxation be stayed awaiting determination of CMCC (E.L.C) 92 Of 2020.

9. If I find that there was an agreement on the fee payable, then I really do not need to make any determination on the other issues. I will therefore begin by considering Section 45 of the Advocate's Act, Cap 16 which provides for agreements in respect of the remuneration of an advocate. It reads as follows:-

45. Agreements with respect to remuneration

(1) Subject to Section 46 and whether or not an order is in force under Section 44, an advocate and his client may—

a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to Section 48.

10. A quick inference that can be drawn from the reading of Section 45 above, is that an advocate is at liberty to agree with his client on the remuneration payable for the services rendered or to be rendered. The agreement is binding, provided it is in writing, and is signed by the client or his agent.

11. In this case, the Client/Applicant alleged that there was an agreement to the effect that the fees payable to the firm of advocates would be Kshs.15,000/= per plot allegations which have been vehemently opposed by the Respondent firm of advocates. Despite the allegation that there was an agreement on the fees payable to the advocates, the Client/Applicant has not adduced any evidence to inform the court that indeed Kshs.15,000/= was the agreed fees chargeable per plot in respect of the transactions effected by the Advocate/Respondent. It is trite in law that he who alleges must prove it was incumbent upon the Client/Applicant to either attach a written agreement or a letter stipulating the facts of the agreement. Indeed, in the case of **D Njogu & Company Advocates...Vs...National Bank of Kenya Limited, Civil Appeal No.165 of 2007 (2016) eKLR**, the Court of Appeal upheld an agreement between an advocate and client, where the agreement was actually construed from a letter.

12. It is not enough to depose that this was the agreed fee. The law at Section 45 of the Advocates Act requires that there be proof in writing of the agreement, and in this instance, there is none. There is certainly no document before this court that says the agreed fee shall be Kshs.15,000/= per plot. My conclusion therefore is that there is no proof of any agreement that evidences that the two parties had agreed on what is payable as legal fees on transactions undertaken by the Respondents Firm of Advocates to warrant the dismissal of the Respondent/Advocates' Bill of Costs.

13. This now brings up the next point for determination, which is, whether the taxation herein be Stayed pending the hearing and determination of CMCC (E.L.C) No.92 of 2020?

14. In deciding whether to order a Stay of proceedings, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

15. It is a common ground that CMCC (E.L.C) No.92 of 2020 is entirely a distinct matter and the subject thereof is different from the issue of taxation. The process of taxation is aimed at ascertaining the fees payable to an advocate while in CMCC (E.L.C) No.92 of 2020 the Client/applicant seeks to recover proceeds of sale of his properties allegedly withheld by the Advocate/Respondent. I therefore see no nexus between the two matters to warrant the stay of one pending the determination of the other. In essence the two matters are distinct and can be determined separately. Indeed, if the taxation is concluded in the earliest time possible, it would be easier to offset the legal fees payable to the Advocates if the court finds that the amount claimed in CMCC (E.L.C) No.92 of 2020 is due to the Client. Having found that there was not valid agreement on the legal fees payable to the Advocates/Respondents, the matter would eventually proceed for taxation even if interim stay is granted. In furtherance of this court's overriding objectives and in the need of expeditious disposal of the dispute between the parties, I am inclined to allow the matter to proceed for taxation.

16. In the upshot and for the reasons stated above, I find no merit in the Client/Applicant's **Notice of Motion** application dated **3rd September, 2020**. However, I direct each party to bear its own costs with respect to the said application.

17. These orders shall apply mutatis mutandis in a series of files in which I believe the instant suit is the test suit. For avoidance of doubt, the orders shall apply to **Mombasa High Court Misc. Applications Nos. 115 of 2020, 116 of 2020, 117 of 2020, 118 of 2020, 119 of 2020, 120 of 2020, 121 of 2020, 122 of 2020, 123 of 2020, 124 of 2020, 125 of 2020, 126 of 2020, 127 of 2020, and 128 of 2020** all between the parties herein.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 2nd day of December, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE