



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 172 OF 2018

OTIENO OKEYO & CO. ADVOCATES.....APPLICANT

VERSUS

MOMBASA WATER SUPPLY &

SANITATION CO. LTD..... RESPONDENT

RULING

1. The Applicant, MOMBASA WATER SUPPLY & SANITATION COMPANY LIMITED has by way of Notice of Motion application dated 5th September, 2018 sought grant of the following orders;

(a) spent;

(b) that this Honourable Court do stay the proceedings in respect of the BILL OF COSTS dated 18th June, 2018 pending the hearing and determination of this application;

(c) that the Honourable Court be pleased to join the County of Mombasa, The Ministry of Water & Irrigation and The Hon. Attorney General as Respondents in this matter;

(d) costs be provided for.

2. The application is premised on 14 following grounds and an eighteen (18) paragraph supporting affidavit, where the most important allegation is that the agreement in which the Applicant was instructed by the Respondent to act is alien to the office of the County Attorney and that the final agreement was negotiated by the National Government and therefore the Attorney General being the chief Government Advisor be enjoined.

3. The application is opposed by Respondent/Applicant vide grounds of opposition filed on 23rd October, 2018, citing eight (8) grounds. The Respondent simultaneously filed his submissions dated 22nd October, 2018 on even date and relied on the authority in the case of **Otieno Ragot & Company Advocates –versus- Kenya Airports Authority (2015) eKLR.**

4. The Applicant filed his submissions on 23rd October, 2018 and a further affidavit in response to the grounds of opposition on 26th November, 2018.

5. I have read through the pleadings, submissions by both parties and the authorities and documents they have filed on record. It is trite law that only parties to an agreement are affected by it and Third parties cannot seek to derive any benefit from it. The decisions in the case of **AFC –VERSUS- LENGETIA** is instructive on this matter.

6. The Bill of Costs between Advocate-client was filed by the firm of M/s **Otieno Okeyo & Co. Advocates** and is dated 18th June, 2018. The subject matter is exposed in a single claim to be fixed. The same being an agreement for the construction of “**The Mwache Multi-Purpose Dam**” whereby several stakeholders were involved in the negotiations.

7. The Applicant contends that he was instructed by **Mombasa Water Supply and Sanitation Company Ltd**, from whom he claims his legal fees. It appears that the company opted to instruct the office of County Attorney to represent it, and on the 30th July, 2018, one **Mtalaki Mwashimba** filed a memorandum of appearance dated 30th July, 2018, to act for the Respondent.

8. On the face of it, the same is drawn and filed by the office of the **County Attorney, Mombasa County, Bima Towers, next to Posta, Post Office Number 84569-80100, Mombasa** and it was served upon the Applicant firm of Advocates. The Respondent, through the same office filed a replying affidavit in which it denied instructing the Applicant and at the same time admitted payment to the advocate of Kshs232,000/=. This is disputed in an affidavit sworn by one Mr Munyi Mugo who is also an advocate and claims to be conversant with the matter.

9. The Applicant filed a replying affidavit dated 15th August, 2015 and supplied some documents indicating his dealings with the respondent. The Respondent, through its legal officer filed a further statement vide further affidavit dated 5th September, 2018. It is worth noting that these documents emanate from the same office of the County Attorney General.

10. The service level agreement is signed between the advocate and the Respondent and is annexed vide the Respondent's further affidavit dated 26th November, 2018. The same service level agreement is dated 10th October, 2012.

11. The Respondent is a company established by law and has a separate and distinct legal capacity to sue and be sued. It thus has a right to appoint an advocate to act for it in either way.

12. In the present case, I find there is no nexus that has been shown between the Respondent and the County of Mombasa and National Government or the prejudice the Respondent is likely to suffer if the Ministry or the Attorney General are not enjoined to the proceedings.

13. In my end analysis of the facts presented before this court, the application dated 5th September, 2018 be and is hereby dismissed with costs.

I proceed to order that taxation of the Bill of Costs dated 18th June, 2018 to proceed before the taxing master.

DELIVERED, DATED and SIGNED this 3rd day of April, 2019.

D. CHEPKWONY.

JUDGE.