REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MSC. APPL NO. 130 OF 2018

KAMONJO KIBURI

T/A KAMONJO KIBURI & CO ADVOCATES.....APPLICANT

VERSUS

UAP INSURANCE CO LTD.....RESPONDENT

RULING

1. **Nakuru High Court Civil Appeal No. 155 of 2017** arose from the subordinate court case No. Nakuru CMCC No. 589 of 2013 Samuel Gachuhi Maina & Another -vs- UAP Insurance Co. Ltd. Kamonjo Kiburi & Co**.** Advocates acted for the defendant UAP Insurance Co. Ltd at the subordinate court.

2. Before conclusion of the case the said law firm, by a letter dated 13th September 2017, informed the instructing client, UAP that it had resolved to cease acting on its behalf and advised the client to appoint other advocates to take over the matters.

The suit was later dismissed in favour of the client, UAP on the 19th October 2017 without involvement of the Advocates.

3. The plaintiff preferred an appeal against the dismissal of the suit vide **this Appeal.** By a Chamber Summons application brought under **Order 9 Rule 13 CPR**, M/S Kamonjo Kiburi & Co. Advocates formally applied to cease from acting for UAP the respondent in the Appeal, on grounds that they are unable to proceed with prosecution of the Appeal on their behalf for lack of instructions. It is dated 17th May 2018. It is not clear whether the said application was prosecuted or not.

4. In the meantime, on the 22nd May 2018 the advocates filed an Advocate-Client bill of costs in this Appeal, HCCA No. 155 of 2017.

It is this bill of costs that the Respondent, UAP represented by Mirugi Kariuki & Co Advocates have challenged.

5. By a Replying affidavit sworn by the senior legal officer of UAP Joseph Mwai on the 8th February 2019, it is avered that the said legal firm having ceased acting for UAP by its **letter dated 13th September 2017** before the primary suit was concluded, it was and cannot be deemed that the advocates acted or were on record for the defendant thereafter, instructions having been terminated vide the said letter.

6. What is in issue is whether M/S Kamonjo Kiburi & Co. advocates were on record acting for its former client UAP in the Appeal to necessitate it earn legal fees, after the 13th September 2017 when it terminated its services to the client.

7. The defendant (UAP) in the subordinate court had the option of appointing another counsel to represent it or not after its advocates terminated their instructions. This is confirmed by Mr. Kiburi Advocate in his affidavit in support of the Bill of costs Paragraph 7 when Mr. Kiburi, Advocate advised them (UAP) to instruct another advocate to continue with the matter.

8. In that clear and plain disposition, it cannot be taken that UAP had continued to retain the advocates despite their termination of instructions. No such intention has been demonstrated by either party.

9. **Order 9 rule 5 CPR** empowers parties to change advocates with or without a court order and continues to state that unless and until a change of advocate is filed in court and served the advocate is deemed to be the parties advocate, until conclusion of the matter including any review or appeal.

It is evident that neither the advocates nor their former client (UAP) filed the necessary notices pursuant to **Order 9 Rule 5 CPR**.

10. The court record shows that it was after nine (9) months, on the 22nd May 2018, that the advocates filed an application seeking leave to cease acting for the client in the appeal and on even date filed the Advocate-client bill of costs.

Considering the circumstances of this matter should the advocates tax a bill of costs and earn fees for work not done on the appeal when in fact they were not acting for the respondent upon their termination of instructions?

11. **Article 159 (2) (d)** of the **Constitution of Kenya** though not a pernesia for all failures and inadequacies in procedural matters, I am persuaded that the provisions thereto shall come to play in this application. The question is, should failure to file a notice of change of advocates or application to cease from acting by an advocate be used to the disadvantage of the client, to somewhat unfairly enrich an advocate for services not rendered because **Rule 13 of order 9 of CPR** states so?

12. In the case **Githere B. Kimungu (1976-1985)** cited by the **Court of Appeal in Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 6 Others (2013) e KLR,** rendered that

> ***"… the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice as to be compelled to do that which will cause injustice in a particular case."***

13. Further the Court of Appeal in **Abdirahman Abdi** also known as **Abdirahman Muhud Abdi -vs- Safi Petroleum Product Ltd & 6 Others Civil Appeal No.Nai 173 of 2010** (Omolo, Bosire and Nyamu JJA) observed, in respect of **Section 3A and 3 B** of the Appellate jurisdiction Act (Cap 9) and Article 159 (2) of the Constitution of Kenya that

> ***"…. The court has to weigh one thing against another for the interests of justice before coming to a decision one way or another … that the court has to do justice between parties without undue regard to technicalities of procedure…."***

14. In my view and upon considering the learned Judges of Appeal observations, and circumstances hereto, it would be against the rules of justice if the advocates are allowed to earn fees without rendering any services to their client on the Appeal, as they could not do so after they terminated their instructions from their client long before the primary suit was concluded.

The intention of the Advocates by their conduct and letter terminating their services to the client was clear and plain. No services to the client from the date of the letter, the 13th September 2017. To that effect, any fees demanded thereafter, and specifically for the Appeal that was filed long after they terminated their services cannot be paid for as no justice would be met by such an order.

15. Further, in the case **Shashishkant C. Patel –vs- Oriental Commercial Bank (2005) e KLR**, Maraga J(as he then was) rendered that

> ***"---we should never loose sight of the fact that rules of procedure, though they may be followed are handmaids of justice.***
>
> ***They should not be given a pedative interpretation which at the end of the day denies parties justice"***

See also **Inland Beach Enterprises Ltd –vs-** Sammy Chege & 15 Others (2012) e KLR where similar sediments were expressed.

16. I therefore find that the Advocates M/S Kiburi Kamonjo and Co. Advocate Bill of Costs dated 21st May 2018 and filed on the 22nd May 2018 in respect of the Appeal hereof to have been filed in bad faith, and prejudicial to the Respondent's interests and justice in the Appeal. I proceed to declare that the Advocates-Client Bill of costs dated the 22nd May 2018 incompetent and vexatious.

17. It cannot be taxed as to do so would be to unjustly enrich the advocates for work not done. It is my further finding that the advocates are not entitled to any costs on the Appeal having terminated their services to the Respondent before conclusion of the subordinate court case upon which the Appeal is grounded. The Advocate-Client Bill of Costs is thus dismissed with no orders as to costs.

It is so ordered.

Dated, signed and delivered this 9th day of May 2019.

J.N. MULWA

JUDGE