



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
MISC. APPLICATION NO. 127 OF 2016

NZIOKA & COMPANY ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

SARABJIT SINGH SEHMI.....RESPONDENT/APPLICANT

RULING

1. The Application which is the subject of this ruling is a Chamber Summons Application dated 4th October 2016. It is filed under the Provisions of Section 45 of the Advocates Act, and order 50 of the Civil Procedure Rules 2010.
2. The Applicant is seeking for orders that;
 - (i) *The Court do stay the taxation of the Applicant's Bill of Costs dated 11th March 2016 pending the hearing and determination of this Application;*
 - (ii) *That the Application be admitted and deemed to be filed within the prescribed under Section 45 sub-section 2A of the Advocates Act;*
 - (iii) *That the Agreement dated 12th August 2014 annexed on the Applicant's Bill of Costs be and is hereby set aside on the grounds that it is a fraud, harsh and unconscionable, exorbitant and unreasonable;*
 - (iv) *That the Court do give any other or further orders as necessary in the interest of justice.*
3. The Application is based on the grounds on the face of it and the Affidavit dated 4th October 2016 sworn by Sarabjit Singh Sehmi, the Respondent in this matter. He avers that, the Applicant's Company known as Agro Exim Ltd, was interested in buying his property sometime in the year 2011. The Applicant convinced him to give out the original certificate of Title so that he could use it to borrow money to purchase the property.
4. That the Applicant showed him a letter dated 16th August 2011, on the letterhead of Kenya Commercial Bank, confirming the Bank had approved a loan of Kshs. 250,000.00.
5. That upon release of the Title documents, the Applicant issued him with a cheque for Kshs. 975,000 from Equity Bank, however upon presentation thereof, it was returned on the ground of insufficient funds. Once the cheque bounced, he demanded the return of the Title document turned around and claimed that, the Respondent owed him fees for the sale of his property. He further demanded that, the Respondent execute an agreement admitting that he owed him fees. He then drafted one and gave the Respondent to sign, but the Respondent declined to sign.
6. The Respondent/Applicant avers that, he was surprised when he saw a Bill of Costs apparently signed by him. He categorically denies that the signature on the said Bill is his. That he does not know one Jason N. Namasoke Advocate and he has never appeared before him; and in any case, his property is not L.R. No. 209/8889.
7. The Applicant argued that the Law firm has never acted for him in the sale of his property. That as regards the Judicial Review fees, they agreed on Kshs. 75,000 and the agreement to that effect reduced into writing. That the Bill of costs herein is defective as it combines fees for different matters, for which the Advocate has not given the particulars; and the claim of fees on the agreement should not be brought through

the Bill of Costs. That, all the cases listed under item 1 are still on-going and not ready for Taxation.

8. In response to the Application, the Counsel Joseph Muisyo Nzioka averred that the Respondent got into various sale agreements with Agro Exim Ltd, one such agreement was entered into on 15th February 2011.

9. That, the Respondent agreed that, the fees payable should be reduced into writing between the parties, and the Respondent executed an agreement witnessed by Jason N. Namasoke Advocate. That the signature thereon belongs to the Respondent.

10. Mr. Nzioka deposed that, the Respondent's property is L.R. No. 209/8999 as opposed to L.R. No. 209/8889 in the Agreement. That it is a typographic error which should not be used as an excuse not to satisfy the agreement.

11. That Agro Exim Ltd is a different entity from Nzioka & Company Advocates, the latter acted for the parties and the former was purchasing the subject property. He argued that, the Bill of Costs herein is buttressed by the agreement between the parties, and there is nothing in statutes that prevent the Bill of Costs from being filed with an agreement attached to it. The same can be filed once the Advocate-client relationship comes to an end.

12. The parties agreed to dispose of the Application by filing submissions, which they did and I have considered the same herein. I find that several issues arise in this matter namely;

(i) *Whether the Respondent signed the impugned agreement;*

(ii) *Whether the applicant has lumped into Bill fees in respect of several and different matters;*

(iii) *Whether it is premature to fill the Bill of Costs*

13. I shall however, first consider the issues raised in the submissions of the Applicant that the Application is incompetent, as it was filed out of time contrary to section 45(2A) of the Advocates Act. That it should have been filed within one year. In this case, it was filed after one year of the Agreement dated 12th August 2018 and after three months of the Bill of Costs, dated 11th March 2016, and the Notice of Taxation dated 7th April 2016.

14. However, I note that the Respondent is seeking for an order for extension of time and admission of the Application out of time. He argues that, he only got to know of the agreement allegedly signed by him for the first time when it was served with the Bill of Costs. He describes the Agreement as a fraud and states that, even then, the sum of Kshs. 15,350,000 claimed is harsh, unreasonable, unconscionable and exorbitant for the services alleged to have been provided by the Advocate.

15. I have considered the rival submissions and I find that if it is true that the Respondent did not sign the alleged agreement, (and that fact ought to be investigated), then he would not have known of the Agreement, and filed the Application within the stipulated time. However, the law is clear he who alleges proves. If the Applicant alleges and disputes the purported signature on the impugned agreement, he needs to prove the same. Why hasn't he reported the matter to the police for investigation? All I can gather from the Affidavit in support is a denial. At paragraph 7 of the Affidavit in support of the Application, he merely avers;

“that the signature on the agreement is not mine”

16. In the same vein, the Applicant avers at paragraph 9 of the Affidavit sworn by Mr. Nzioka and filed in Court on 10th May 2018 that;

“that the signature in the above agreement is the Respondent's signature”.

If that is so, where is the evidence? Why hasn't he subjected it to the document examiner for verification?

17. The entire matter here rests on whether or not, the Applicant's firm acted for the Respondent in the transaction of the sale of the Applicant's land to a company known as Agro Exim Ltd. The investigation of the disputed agreement and the purported signature of the Respondent is crucial to unlock the matter.

18. However, it does occur that the Applicant acted for the Respondent in other matters. As to whether the Bill of Costs filed is competent or not, is a matter for the Taxing officer to determine alongside the reasonableness of the amount claimed.

19. In that regard, and in the interest of justice, I make the following orders;

(a) *The said disputed signature be subjected to forensic examination and the results thereof be availed in Court within 2 weeks of this order, each party is at liberty to do so. However, for the purpose of objectivity and impartiality, the Hon. Deputy Registrar shall oversee the same as the matter is already in Court;*

(b) *The alleged Jason Namasoke be summoned for cross-examination on the commissioning of the impugned agreement. That will be done on the date agreed on by the parties;*

(c) *In the meantime, there be a stay of the proceeding relating to the Bill of Costs till this matter is determined.*

20. It is so ordered.

Dated, delivered and signed in an open Court this 3rd day of July 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Onyango for Mr. Nzioka for the Applicant

No appearance for the Respondent

Fred.....Court Assistant