



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 33 OF 2017

MWADUMBO & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

SARAH NYIVA HILLMAN.....RESPONDENT/APPLICANT

RULING

1. In the Notice of Motion dated 23rd October, 2019, the Applicant has prayed for the following orders:

a) That the Respondent/Advocates did not have instructions to act for Sarah Nyiva Hillman in Machakos High Court ELC Case No. 115 of 2015.

b) That the Advocate/Client Bill of Costs dated 28th March 2017 by the Respondent/Advocates be and is hereby dismissed with costs.

c) That the Respondent/Advocates bears the costs of this Application.

2. The Application is supported by the Affidavit of the Applicant/Client who has deponed that the basis of item 1 of the Bill of Costs is premised on a false basis that the Advocate was retained to act on her behalf in Machakos ELC No. 115 of 2015; that the primary suit shows that it is the firm of Kabaka & Associates Advocates that was on record for herself and two other Defendants and that all the pleadings up to 12th September, 2017 were drawn and filed by the firm of Kabaka & Associates Advocates.

3. According to the Client, as at the time the instructions were given to the Respondent/Advocate, her advocate on record had filed and served an Application dated 19th June, 2016 to strike out the suit; that her advocate appeared before court on 30th June, 2016 and 8th July, 2016 and that on 1st November, 2016, the Respondent purported to argue an Application to cease acting.

4. According to the Applicant, inquiries from the firm of Advocates on record as to the Respondent's purported attempt to take over and act in the suit purportedly on her instructions did not elicit any response and that the only service that the advocate rendered was to draw a letter to the Chairman of the National Land Commission and that she paid the advocate for the said service.

5. The Applicant/Client further deponed that the Respondent/Client extorted money from him totaling to Kshs. 210,000; that he met Mr. Mwadumbo advocate informally and discussed many matters and that although she mentioned to him about ELC No. 113 of 2015, she informed him that it is Mr. Kabaka Advocate who was handling the matter.

6. The Applicant deponed that upon his request, she gave to the Respondent/Advocate her file copy of ELC No. 133 of 2015 for purposes of familiarizing himself with the matter; that the file was then to be returned to her and that the Advocate informed her that he was to file a separate suit in response to the letter that he had received from the National Land Commission viz-a-viz whether there was a public road passing through her land.

7. The Applicant deponed that she later met the Advocate in his offices; that the advocate showed her the *jurat* of the Affidavit for the intended suit in the Chief Magistrate's Court; that she signed several copies of the Affidavit although she never kept the copies of the Affidavit and that the advocate asked her to pay Kshs. 60,000 and a further sum of Kshs. 100,000 to facilitate the filing of the claim in the lower court.

8. According to the Applicant, the following day, the Respondent called her and informed her that he could not file a suit in the lower court because the court did not have jurisdiction; that the Respondent agreed to refund her the Kshs. 100, 000 that she had paid him and that on 16th August, 2016, Mr. Mwadumbo Advocate visited her at her home and insisted that he wanted to join in ELC No. 113 of 2015.

9. After declining to sign documents to allow the advocate join ELC No. 113 of 2015, the Applicant deponed that on 14th September, 2016, the Advocate send to her a fee note of Kshs. 1,037,040; that from the fee note, it is clear that the advocate's instructions were limited to pursuing a letter from the National Land Commission and filing a suit in the lower court and that such work cannot metamorphosis into what the Bill of Costs is purporting to have been the scope of the work rendered by the Respondent/Advocate.
10. In response, the Respondent/Advocate deponed that the Applicant/Client was introduced to him by a Mrs. Rose Wahito; that he met the Applicant/Client on 8th August, 2016 and that in the said meeting, the Client was categorical that she wanted to change advocates since her then advocates were not giving her good legal services having failed to secure audience for her at the National Land Commission.
11. According to the Respondent/Advocate, the Client instructed his law firm to take over the matter that was pending in court from the firm of Kabaka & Associates and handle it both in court and at the National Land Commission, in addition to filing a suit in the subordinate court, and that she signed an instruction note to that effect. It was the deposition of the Advocate that he prepared an Application that was to be filed in the subordinate court together of the Affidavit that was duly signed by the Applicant.
12. The Advocate deponed that the Application to cease acting for the Client was premised on the fact that the Client had withdrawn the instructions that she had previously issued; that instruction fees is payable upon receipt of instructions and that the payment of Kshs. 50,000 was in respect of the deposit of his legal fees.
13. The Applicant's/Client's submissions are not on record. The Respondent/Advocate submitted that from the Client's Affidavit, it is clear that she instructed him to act for her in Machakos ELC No. 133 of 2015; that the client only withdrew the instructions after seeing his fee note and that the Application should be dismissed.
14. The Applicant/Client is challenging the Advocate/Client Bill of Costs that was filed by the advocate in this matter. According to the said Bill of Costs dated 28th March, 2017, the Advocate is seeking for instructions fees *"for acting for and on behalf of the Respondent and take over conduct of the defence of the 1st, 2nd and 3rd Defendants in Machakos ELC. No. 115 of 2015 from the firm of Kabaka & Associates Advocates wherein the subject matter relates to whether a road commonly known as 39 Quarry Road is a public or private road which road cuts through 3 parcels of Land Reference numbers 1338/91, 92 and 93..."*
15. It is trite that retainer and instructions by a client to an advocate can either be in writing or implied from the conduct of parties. In the case of *Ohaga vs. Akiba Bank Limited (2008) 1 EA 300*, the court held as follows:
- "A retainer may be implied where: i) the client acquiesces in and adopts the proceedings; or ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or iii) the client has by his conduct performed part of the contract; or iv) the client has consented to a consolidation order."***
16. According to the Client, she never instructed the Advocate to take over the conduct of ELC No. 115 of 2015 from the firm of Kabaka & Associates. The Client stated that the advocate was only supposed to liaise with the National Land Commission (NLC) to find out why National Land Commission (NLC) had revoked its earlier decision in which it had found that the impugned road was a private and not a public road.
17. The Advocate annexed on his Affidavit an instruction note dated 8th August, 2016 which was duly signed by the Applicant/Client. The said note instructed the Respondent/Advocate to *"... act for and on my behalf in all matters concerning 39 Quarry Road and Land Reference Numbers 1339/90 – 1338/94 including but not limited to pursuing the matter in court and at the National Land Commission."*
18. The Applicant/Client has not denied that he signed the instruction note of 8th August, 2016. The Applicant has also not denied that the parcels of land mentioned in the instruction note are the ones in contention in Machakos ELC No. 115 of 2015. Furthermore, the Applicant deponed in her Affidavit that she discussed the contents of the suit with the Advocate and even gave the Advocate her file in respect of the suit.
19. Other than the express instructions that the Applicant gave to the Respondent to represent her in all matters concerning 39 Quarry Road and L.R Nos. 1338/90 – 1338/94 including pursuing the matter in court and at the National Land Commission (NLC), the actions of the Client of giving to the Advocate her original file in respect to Machakos ELC No. 115 of 2015 and discussing the suit with the Advocate estops her from denying that she never instructed the Advocate to take over the conduct of the proceedings from the firm of Kabaka & Associates.
20. The issue of whether the amount indicated in the Bill of Costs is commensurate with the work done can only be determined after the said Bill of Costs has been taxed by the Taxing officer, and not by this court. Indeed, it is the Taxing officer, after hearing the Client and the Advocate, who will determine the amount payable to the Advocate.
21. For those reasons, the Notice of Motion dated 23rd October, 2019 is dismissed with costs. The Bill of Costs herein to be placed before the Taxing officer of the court for Taxation.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE