



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL MISC. NO. 59 OF 2013**

**DAVID MUKARE..... PLAINTIFF**

**VERSUS**

**MURIU MUNGAI & CO. ADVOCATES..... DEFENDANT**

**RULING**

By a Notice of Motion application dated 15<sup>th</sup> august 2013 expressed to be brought under sections 1A &B, 3, 3A and 80 of the Civil Procedure Act, order XLIV Rules 1, 2 and 3 (2) of the Civil Procedure Rules the Applicant seeks the following orders:-

- i. That the respondent advocates, in the matter of the recovery of a debt Kshs.4,165,228.80 be ordered to file their itemised bill of costs for taxation by the taxing master of this honourable court.
- ii. That the respondent does bear the costs of this application and the taxation of the bill.

The application is grounded on the grounds set out on the face of the application and on the grounds contained in the applicant's affidavit sworn in support of the application dated 15/8/2013. Principally the applicant's complaint is that the aggregate charges and costs of Kshs.2,172,362/- purported to be the Advocates costs for the recovery and the auctioneers costs for the recovery of Kshs.4,165,288.80 owing by the applicant to the Barclays Bank of Kenya Limited was manifestly excessive and that the Respondent Advocates firm as the agents of the Bank in the recovery process ought to be ordered to account by way of filing a bill of costs for taxation by the taxing master of the court.

Mr. Peter Munge, Managing Partner of the Respondent firm has sworn a replying affidavit dated 30<sup>th</sup> September 2013 in opposition to the applicant's application filed simultaneously in court on 3/10/2013 together with a preliminary objection on the part of the applicant's application. The grounds of the preliminary objection are indicated as follows:-

1. The Respondent is non-suited in this matter as there is no nexus between the Respondent and the Applicant.
2. The entire cause discloses no cause of action against the respondent.
3. The instructions in Malindi, **CMCC NO. 356 of 2012** where the Plaintiff/Applicant's suit thereto was struck out resulting to the sale of the **L.R. NO. 771 Malindi**, in exercise of the Bank's statutory power of sale, by Barclays Bank of Kenya Limited out of a contractual relationship between the Bank and the applicant herein. The Respondent herein was not privy to the primary instruments and/or contracts and hence there is no cause of action against the Bank's advocates

- and/or the Respondent herein.
4. The remedies the applicant is seeking, if available, lies with the Bank and the orders sought cannot be granted against the Respondent and/or a law firm for a charge.
  5. There are no provisions under the Advocates Act or any other law for grant of remedies sought by the Applicant. The entire cause is thus incompetent, vexatious and an abuse of the court's process.

The court directed that the applicant's application and the Respondent's preliminary objection be heard together and invited the parties to canvass the matter by way of written submissions. The applicant filed his submissions on 17/10/2013 and the Respondent filed theirs on 15/11/2013.

The applicant by his filed submissions has set out in some detail the history of the matter giving rise to the disputed charges which the applicant wishes to be submitted to taxation as he claims the charges levied by the Respondent, the Bank and the auctioneers are grossly exaggerated. The applicant states that the Respondent firm has charged the applicant an aggregate sum of Kshs.1,518,312/- as legal fees to recover a debt of Kshs.4,165,288/-. It is in respect of these legal charges that the applicant seeks an order for the Respondent to be compelled to file an itemized bill of costs for taxation.

Faced with the contention that there is no privity of contract or agency relationship between the applicant and the Respondent firm for the applicant to bring these proceedings against the Respondent, the applicant argues that the relationship between the applicant and the respondent should be viewed against the respondent's professional obligations. The applicant argues that the Respondent is rendering services within a sector where charges for services such as the Respondent rendered are regulated and would be expected to charge fees that are commensurate with the regulated charges for the specific or particular professional services.

The applicant's argument is that the Respondent cannot confine themselves to the narrow definition of Principal – Agent relationship with the bank such that the applicant is excluded from any consideration when the Bank and the Respondent engage and enter into arrangements that in some way affect and impact the applicant. The applicant avers that to the extent that the charges of the respondent and the auctioneers are debited and/or charged to the account of the applicant and the applicant is expected to meet them then the respondent should render an account of his charges and that such charges should be in conformity with the regulated charges under the Advocates Act Cap 16 Laws of Kenya. The applicant in support of his arguments referred the court to an Article by **Debroh A Demott** titled, **"The lawyer as Agent"** published in volume 67 **Fordham Law Review** at **page 301**.

The Respondent for their part have vehemently opposed the applicant's application and maintain that the applicant is non suited as against the respondent for he lacks any locus stand to bring the action against the respondent. The Respondent contends that the contract they had was with Barclays Bank of Kenya Limited and the applicant was not a party to the agreement and likewise the applicant had a contract with the bank in respect of which the respondent was not a party. The Respondent contends that it was acting for and on behalf of its client, the Bank and was performing its obligations as per the agreement between itself and its client and that the applicant has sued the Respondent in respect of the costs that it charged its client arising from the agreement that it had with its client which the applicant was not a party to.

The Respondent submits that the Applicant has wrongly sued them and to the extent that proper parties are not before the court, the court lacks the jurisdiction to deal with the matter and in support of the submission the Respondent places reliance on the decision in the case of **R. – VS- Chairman Matungu Land disputes Tribunal ex parte Electina Wangona (2012) Eklr where Gikonyo Judge** held that the tribunal lacked jurisdiction partially because there was a misjoinder of parties to the suit. The Respondent further submits that under section 45 (6) of the Advocates Act (Cap 16 Laws of Kenya) costs between an advocate and a client resultant from an agreement cannot be the subject of taxation of a bill of costs.

Section 45(6) provides thus:

**“ 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”.**

The respondent further submit there being no contract express or implied between them and the Applicant there cannot be any basis for the Respondent to be compelled to file a bill of costs for taxation as sought by the applicant and thus the applicant lacks the locus standi to seek the prayers they seek against the Respondent in the instant application.

The Respondent also submitted that the Applicants suit does not in terms of order 2 rule 15 (i) (a) of the Civil Procedure Rules disclose any reasonable cause of action against the respondent because the costs the applicant refers to in the present application arise from a contact between the applicant and the Bank and the Respondent was not party to that contract.

I have carefully reviewed and considered the application and the affidavit in support and in response and the parties written submissions and the issues that stand to be determined is whether the applicant can by virtue of section 45(6) of the Advocates Act Cap 16 Laws of Kenya sustain this action against the Respondent and whether the Applicant has locus standi to bring this action against the Defendant/Respondent.

The applicant argued that the agency doctrine can be expanded to include situations such as the instant one where the acts of a party impact another with whom they have no direct contractual relationship. With respect I do not consider there can be any rational basis to extend the Principal agency relationship in such a manner. A principal/Agent relationship envisages reciprocal duties, obligations and rights between the parties such that either party knows what is expected of him vis-avis the other party. In the instant case the applicant cannot show what relationship existed between him and the respondent firm and/or what duties and/or obligations were owed by the respondent to him and where such duties or obligations arose from. I do not therefore find any principal agency relationship existed as between the Applicant and the respondent so as to invite any duties or obligations between them.

As it is not denied that the Respondent and its client, Barclays Bank of Kenya Ltd, had a contract to govern their Advocate/client relationship including a fees agreement under section 45(6) of the Advocates Act to which the Applicant was not a party I hold that the applicant cannot properly seek to compel the respondent to file an itemized bill of costs for taxation. At any rate the Applicant was not the Respondent's client and cannot therefore properly call for a bill of costs from the Respondent's client and cannot therefore properly call for a bill of costs from the Respondent. The Applicant had a contract (Mortgage) with the Bank and if anything arose out of that contract the proper respondent or party to sue would be the Bank. I therefore hold that the Applicant cannot have a locus standi to bring a suit such as the instant one against the Respondent since there is simply no privity of contract between the Applicant and the Respondent. There cannot in my view be a competent suit questioning the charges debited against the applicant's account with the Bank if the Bank is not a party to such suit. At any rate it is the Bank who made or authorized the transactions complained of by the Respondent and if any payment of costs/charges was paid to the Respondent the same were paid to them by the Bank.

As I have found there was no principal-agency relationship between the Applicant and the Respondent and that the Applicant has no locus standi to bring this action against the Respondent it follows that the applicants action discloses no reasonable cause of action against the Respondent. The application is thus incompetent and amounts to an abuse of the process of the court.

In the premises I uphold the preliminary objection taken by the Respondent and I hereby order the Applicant's application dated 15<sup>th</sup> august 2013 struck out with costs to the Respondent.

Ruling dated and delivered this 7<sup>th</sup> day of February 2014.

**J.M. MUTUNGI**

**JUDGE**

In presence of:

..... PLAINTIFF

..... DEFENDANT