



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALRY DIVISION

MISC CIVIL APPLICATION NO. 18 OF 2013

MAJANJA LUSENO & COMPANY

ADVOCATES APPLICANT/ADVOCATE

VERSUS

ANASTACIA WAGICHIENGO RESPONDENT/CLIENT

(Being legal fees assessed and taxed in)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

AT MILIMANI COMMERCIAL COURTS

MISC. CIVIL APPLICATION NO. 18 OF 2013

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF THE DEVELOPMENT OF EXECUTIVE RESIDENTIAL UNITS ON
ALL THAT PROPERTY KNOWN AS L.R. NUMBER 209/1701 KNOWN AS SHEPHERD
VILLAS**

AND

IN THE MATTER OF THE TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

MAJANJA LUSENO & COMPANY

ADVOCATES APPLICANT/ADVOCATE

VERSUS

ANASTACIA WAGICHIENGO RESPONDENT/CLIENT

R U L I N G

1. Before this Court is the Applicant/Advocates Notice of Motion dated 20 May 2013 brought under the provisions of **section 51 (2)** of the *Advocates Act* as well as **sections 1A and 3A** of the *Civil Procedure Act* and **Order 51 (1)** of the *Civil Procedure Rules, 2010*. The Application asks that this Court do enter judgement in the amount of Shs. 3,502,770/-together with interest at court rates from the 8th May 2013 as certified in the Certificate of Taxation dated that day, in favour of the Applicant. The grounds upon which the Application are based is that the Applicant having acted for the Respondent, the latter having not paid the advocates' fees, the same were taxed by the Deputy Registrar of this Court in the aforesaid amount. A Certificate of Taxation has been issued and the Applicant wishes to recover fees in good time. No prejudice would be caused to the Respondent who had not disputed retaining the Applicant's firm.
2. The Application was supported by the Affidavit of **Steve Luseno** sworn on 20th May 2013. The deponent maintained that the Respondent had engaged his firm to act for her in several matters which largely was to enable her interest in developing several prime properties situated within Kenya. After the Respondent's instructions had been substantially effected, such instructions had been withdrawn and the Respondent had declined to settle the legal fees demanded. The deponent went on to certify that the Applicant/Advocates had drawn up a Bill of Costs which had been taxed in the amount of Shs. 3,502,770/-. He further noted that the Respondent was in the process of changing the character of her property by entering into joint ventures with third parties, making it likely that she would place her assets beyond the reach of the Applicant/Advocates. It was for this reason that the deponent requested that Judgement be entered in his firm's favour as against the Respondent.
3. The Respondent/Client filed her Replying Affidavit on 21 June 2013. Paragraph 2 of that Affidavit straightforwardly declared that the Respondent had never engaged the applicant either as her advocates or agents to act on her behalf in any matter. There was no retainer as between the Respondent and the Applicant/Advocates at all. The Respondent was of the belief that the Applicant/Advocates should have annexed to their Application documentary evidence to show that she had retained the said firm to act for her. She continued by stating that she was introduced to the Applicant/Advocates by business partners known as Kings Developers Ltd (hereinafter "Kings"). It was the Respondent's belief that it was Kings who had retained the Applicant/Advocates to act for them in the Joint Venture business that was intended as between Kings and the Respondent to develop apartments on the Respondent's piece of land known as L. R. No. 209/1701 Nairobi. The Respondent went on to say that the joint-venture project never materialised and that she had withdrawn from the same after seeing the Joint Venture Agreement which she maintained was "lopsided and skewed" in favour of Kings. She said that having not instructed the Applicant/Advocates, she could not have been in a position to withdraw such instructions. Later, the Respondent had come to learn that a Bill of Costs had been taxed in the above cause, in the amount of Kenya shillings 3,502,770/-. The deponent maintained that it was not true that the said sum remains outstanding on her account as the Applicant/Advocates' clients were actually Kings and not her. Finally, the Respondent maintained that the Applicant/Advocates' Application had been brought in bad faith as they were seeking to recover fees from a party who had not retained the firm.
4. When the matter came before Court for the hearing of the Application on 24th June 2013, Mr. Luseno noted that the Replying Affidavit had detailed that his firm had never been instructed. This was the only objection raised to the Certificate of Taxation. He asked the Court to peruse the dossier attached to the Affidavit in support particularly page 1 thereof. He submitted that if the Court was satisfied as regards the retainer, then the Application ought to be allowed.
5. Paragraph 4 of the letter from Kings to the Respondent dated 22nd March 2012 it reads:

"We are pleased to note that Mr. Steve Luseno, whose Firm we have working relations with, is known to you. This is so because, as you will realise in the intended discussions, our ventures are based on utmost good faith and full disclosure by both parties."

From that paragraph, it would appear to be abundantly clear that the Applicant/Advocates were introduced to the Respondent by Kings. The Firm was never the Respondent's advocates which, as it transpired, turned out to be Sichangi Partners. However, once the introduction was effected, the

dossier being folios attached to the copy of the Bill of Costs submitted for taxation by the Applicant/Advocates, reveal exchanges of correspondence, particularly Emails which, in my opinion, clearly show that the Applicant/Advocates were acting on behalf of the Respondent herself as well as her family. For example, on 28th June 2012, Martha Wagichiengo sends an Email to Mr. Luseno asking him to comment upon a draft letter for Royal Developers. Then on 24th July 2012, Mr. Luseno sends an email addressed to two individuals at the Royal Group Kenya as well as to Martha Wagichiengo which reads:

“Dear All, We have managed to reserve the names shown in the letter attached. Shepard is the name proposed by Mrs. Wagichiengo. I shall be proceeding to prepare incorporation documents for the companies. @Martha... Kindly forward soft copies of your mom’s and brother’s ID and PIN. I also require their current passport pictures. Regards. Steve Luseno.”

Further on in the said dossier, the Applicant/Advocates detailed copies of documents that the firm had prepared for the Joint Venture for the development of L. R. No. 209/1701- Shepard Villas. In a letter to the Respondent dated 2nd August 2012, the Applicant/Advocates detailed 15 documents that the firm has prepared with regard to the Joint Venture. They had been forwarded to the Respondent for execution purposes. To my mind, there is no doubt that the work was done and carried out. Further, I am of the opinion, and so find, that the work was carried out upon the instruction of both the Respondent and her family as well as Kings. The Applicant/Advocates were acting for both parties in their joint-venture.

6. As a result of my above finding, I now refer this file back to the Taxing Officer in order for him to note that the Applicant/Advocates were acting for both parties – the Respondent and Kings. Accordingly, the Taxing Officer is directed to review the taxed costs in this matter in order to reflect the shared retainer as above. The Bill of Costs should now be re-taxed taking into account the provisions in relation to non-contentious matters as regards advocates’ remuneration being **Rules 18** through to **48** of the *Advocates (Remuneration) Order*. Orders accordingly.

DATED and delivered at Nairobi this 9th day of July, 2013.

J. B. HAVELOCK

JUDGE