



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 57 OF 2020

J.M. NJENGA & CO ADVOCATES.....APPLICANT

VERSUS

1. MONICA WAMBUI KAMAU

2. ZACHARIA NJENGA

3. JANE NJERI

4. JOSEPH NYINGI KAMAU(Suing in their capacity as administrators of the Estate of

JAMES KAMAU THIONG'O alias KAMAU THIONG'O (Deceased)

5. JACOB KAMAU KAHIU.....RESPONDENTS

RULING

1. By a Notice of Motion dated 5th August, 2020, made under Sections 2 and 50(1) of the Advocates Act and Order 51 Rule 1 of the Civil Procedure Rules, the Advocate/Applicant seeks for orders:

1. That Jacob Kamau Kahiu be deemed as a client in terms of the provisions of Section 2 of the Advocates Act for purposes of taxation of the subject bill of costs and therefore liable jointly and severally together with the 1st respondents to satisfy whatever costs that shall be taxed and certified as due and payable to the advocate/applicant herein.

2. That consequent to granting of prayer 1, the said Jacob Kamau Kahiu be enjoined and/or deemed as a properly enjoined as a client/respondent for purposes of taxation of the bill of costs herein.

3. That the costs of this application be provided for.

2. The application is supported by the affidavit of Jeremy Njenga sworn on 5th August 2020 and is premised on the grounds that:

a. The instructions to the advocate/applicant to prosecute the suit in the parent file on behalf of the plaintiffs (1st respondents herein) emanated from Jacob Kamau Kahiu and who undertook to pay the advocate/applicant fees.

b. The said Jacob Kamau Kahiu in turn had an interest over the subject of the main suit and he undertook to be part and parcel in settlement of the Advocate/Applicant fees and was even given a power of attorney by the 1st respondent in respect of prosecution of the said main suit.

c. The said Jacob Kamau Kahiu has in fact in the past paid sum paltry disbursements and court fees to the advocate/applicant thus for all intent and purposes, he is the client and/or one of the clients as defined under Section 2 of the Advocates Act and should thus be enjoined as a co-respondent for purposes of taxation of the bill of costs herein.

d. The interests of justice dictate that the orders sought herein be granted as the advocate/applicant stands prejudiced if the orders sought are not granted.

3. In his affidavit Mr. Jeremy Njenga deposes that the Advocate/Applicant herein received instructions jointly from the 1st and 2nd respondents herein as the intended 2nd respondent though not a party in the main suit had an interest in the subject matter of the said suit. He further deposes that they started acting for the 1st respondent in the parent file, MOMBASA ELC CONSTITUTIONAL PETITION 171 OF 2016, AFRICAN & OIL COMPANY LIMITED VERSUS ATTORNEY GENERAL, KENYA RAILWAYS CORPORATION AND MONICA WAMBUI KAMAU, ZACHARIA NJENGA, JANE NJERI AND JOSEPH NYINGI KAMAU (sued in their capacity as the Administrators of the Estate of JAMES KAMAU THIONG'O) courtesy of the intended 2nd respondent herein, Jacob Kamau Kahi as the said 1st interested party did not then have immediate funds to meet their fees while the intended 2nd respondent had an interest in the suit property in the parent file, MN/VI/755 and which interest he wanted protected by the Advocate/Applicant. That as his (2nd respondent's) commitment to settle the Advocate/Applicant's fees in the matter, a formal agreement was reached between the applicant and the said intended 2nd respondent. A copy of the agreement has been annexed. Also annexed are copies of a Power of Attorney and Memorandum of Understanding between the 2nd respondent and the 1st respondents and which is said obligated the 2nd respondent to cater for legal costs in prosecuting among other matters, the parent matter giving rise to the current bill of costs. Correspondences between the advocate/applicant and the 2nd respondent have also been annexed. Mr. Njenga further deposes that thereafter and after they had prosecuted significantly the parent matter, the advocate/client relationship irretrievably broke down. That in any event, the said parent matter had at the time of the breakdown of the relationship been concluded and all that remains is payment of the advocates/applicant's fees hence the filing of the bill of costs herein to determine the quantum thereof. That for all intents and purposes, the intended 2nd respondent is a client as defined under Section 2 of the Advocates Act and therefore jointly and severally liable to settle the advocates/applicant's fees as shall be taxed by the court and that he should thus be enjoined as a co-defendant herein and/or his inclusion as a co-respondent validated. The application is said to be ex-parte.

4. I have considered the application. On 13th August, 2020, the applicants filed an advocate/client bill of costs seeking to recover Kshs.20,503,169.80 in costs from the 1st respondents and the intended 2nd respondent. It is not in dispute that the intended 2nd respondent was not a party in the parent file. However, the 2nd intended respondent is said to have had an interest in the suit property in the parent files, MN/VI/755 and had even given commitment to settle the applicant's fees in that matter. The applicant has also annexed agreements between them and the 2nd intended respondent.

5. Section 2 of the Advocates Act (Cap 16) defines a "client" to include –

“Any person who, as a principal or on behalf of another, or a trustee or personal representative, or in any other capacity, has power, expressed or implied, to retain or employ, and retains or employs or is about to retain or employ, an advocate and any person who is or may be liable to pay an advocate any costs.”

6. In the case of **Kamau Kuria & Company Advocates –v- Lucy Nyambura Kinyanjui & 2 Others (2019)eKLR**, Muchelue J stated:

“The basic principle is that under a contract of retainer only the client is liable to pay fees to an advocate whom he has retained, hired or employed. The 3rd respondents to act for her in the succession proceedings. The contract was directly between her and the applicants. She was under the contract obliged to pay the applicants' fees, unless there was a court order to the contrary. The applicants sought to rely on Section 50 of the Advocates Act to say that this was one of the circumstances under which the estate, and not the instructing client, was liable to pay. They relied also on the case of Roy Dean –v- Allin and Watts (A Firm) (2001) EWCA Civ. 758 to argue that the assumption of responsibility by an adviser (in that case a solicitor) may extend beyond the client to those whom the client intended to benefit; this leads to an implied retainer such as in this case where they assumed responsibility to ensure the due administration of the estate....”

7. In this case, the applicant herein is also relying on Section 50 of the Advocates Act. Section 50 (1) provides as follows:

“(1). Where a person other than the person who is the party chargeable with a bill of costs is liable to pay the bill either to the advocate or to the party chargeable with the bill, or where a person is interested in any property in the hands or under the control of a trustee, executor or administrator, out of which property the trustee, executor or administrator has paid or is liable to pay the bill, that person or his administrators, executors or assignees may apply to the court for an order for taxation of the bill as if he were the party chargeable therewith, and the court, having regard to the extent and nature of the interest of the person, may make any order thereon which it would have been competent to make if the application had been made by that party:

Provided that no order for taxation of a bill shall be made under this section in any case where-

i. The bill has previously been taxed; or

ii. The application is made more than six months after the date on which the bill was rendered to the party chargeable therewith or three months after the date on which the bill was paid , or the date when the party making the application became entitled to do so, whichever is earliest.

(2) if an applicant under Subsection (1) pays or has paid any money to the advocate in respect of a bill of costs payable out of property in the hands or under the control, of a trustee, executor or administrator he shall have the same right to be paid that money by the trustee, executor or administrator chargeable with the bill as the advocate had.

(3) The court may, if it orders taxation of the bill under this section, order the advocate to deliver to the applicant a copy of the bill upon payment of the costs of that copy”

8. In the case of Kamau Kuria & Company Advocates (supra), Muchelule J again stated:

“My understanding of this section is that, if the 3rd respondent sought that the applicants’ fees be borne by the estate she had to apply to the court for an order in that regard. Similarly, the applicant ought to have obtained an order in the Succession cause that their costs be borne by the estate. (emphasis mine)”

9 The question then that arises is whether Section 50 is available to assist the applicant in the instant case who had not obtained an order of the court in the parent matter that they be paid costs by the intended 2nd respondent. In my view, and being persuaded by the above decision, the applicant herein ought to have obtained an order in ELC Constitutional Petition No.171 of 2016 that their costs be borne by Jacob Kamau Kahi, the intended 2nd respondent. Further, the application herein seeks to have Jacob Kamua Kahi enjoined and/or deemed as properly enjoined as a client/respondent for purposes of taxation of the bill of cost herein. Again, my view is that the application for joinder in the circumstances of this case ought to have been made in the parent matter in accordance with the provisions of Order 1 of the Civil Procedure Rules. Similarly I am aware that under section 27 of the Civil Procedure Act the costs of and incidental to all suits is at the discretion of the court or judge and the court or judge had full power to determine by whom and out of what property and to what extent costs are to be paid, and to give necessary directions. I do not think that this court in exercising its jurisdiction over taxation is competent to grant the orders sought.

10. In conclusion therefore, I find that the application herein is improperly before this court. The same is struck out with no

11. order as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of November, 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE