



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE MISC. APPLICATION NO.15'A' OF 2017

MURI MWANIKI & WAMITI ADVOCATES.....APPLICANT/ADVOCATE

-VERSUS-

WINGS ENGINEERING SERVICES LIMITED.....RESPONDENT/CLIENT

RULING

The matter for determination is **Notice of Preliminary Objection** dated **20th April 2017** by the Respondent/Client herein as against the Advocate/ Applicant. The **Preliminary Objection** is based on the grounds that:-

- 1. The Firm of the Advocates have never had a Client/ Advocate relationship with the Respondent.**
- 2. There is no privity of contract between the Firm and the Respondent.**
- 3. The Advocates Firm was contracted by Eco Bank Kenya Limited and not the Respondent. The said taxation and/or demand for payment should be directed to the said Financial institution.**
- 4. The application for the taxation as against the Respondent herein is bad in law, incompetent and misconceived and should be struck out and dismissed.**

The Application is supported by the **Replying Affidavit** of **Charles Ng'ang'a**, the **Managing Director** of the Respondent who averred that the Advocates Firm was contracted by **Eco Bank Kenya Limited** and not the Respondent/Company and the said demand for payment should be directed to them.

The Application was canvassed by way of written submissions and the Respondent through the **Law Firm of Jesse Kariuki & Co. Advocates**, filed their submissions on the **31st July 2018**. It was submitted that during the whole of the transaction, the Advocate was acting for and on behalf of the bank but not on behalf of the client. They further submitted that a party who is not party to a contract cannot seek to benefit from that contract or have a right to enforce it and this being the case in the bill of costs, the Advocate should therefore seek his fees from the bank, and if the bank feels that its customer owes it any money, then it can deal with the matter as provided by the law

The Advocates/Applicants through the **Law Firm of Muri Mwaniki & Wamiti Advocates**, filed their submissions on **22nd October 2018** and submitted that the Respondent did not have to instruct the Advocates for them to be their clients as by retaining the Advocates to handle the transaction to perfect the charge, then Advocate client relationship arose. It was further submitted that the issue is not who instructed the Advocates but who is liable. The court was therefore urged to dismiss the **Preliminary Objection** as it is an abuse of the court process and only meant to delay the Advocates from realizing the fruits of their work.

The Court has now carefully considered the Application and the rival submissions of the parties. In my view the only issue for determination is **whether or not an Advocate Client relationship existed between the parties**. **Section 2** of the **Advocates Act** defines a 'Client' as also defined by the court in **Omulele & Tollo Advocates...Vs...Mount Holdings Limited(2016) eKLR** as follows:-

Client includes any person who has a principal or on behalf of another or as a trustee or personal representative or in any other capacity, has power express 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 cost."

The question then that arises is whether in line with the definition of a client, the Respondent fits the description. Did the Respondent employ the Advocates? Did they retain their services of the Applicant or did any of their representatives do? The answers to these questions are certainly **No**. What the Advocate/Applicant is relying on to put forth their bill of costs is the letter of offer between the Bank and the Respondent which stated that:-

“All legal charges including Advocates fees, valuation, stamp duties or other fees costs and expenses incurred by the bank in connection with administration of the facility herein, perfection or securities with respect to the facilities herein and any proceedings for recovery shall be borne by the borrower . The services shall be rendered by the Bank’s approved service providers and the fees shall be recovered by debiting the borrowers Account.”

In my opinion the letter of offer enumerated how the bank would

recover the legal costs that it would incur and from my understanding the bank was to deduct the legal fees itself from the borrowers account and then, it would in return pay their Advocates. It would therefore not be the borrower to pay the Advocates but the bank itself as it is the bank that instructed the Advocates.

From the Bill of Costs, it is clear that it is the bank that gave instructions to the Advocates and not the Respondent/Client and therefore it is this Court’s opinion that it is the bank that was liable to pay and not the Respondent. See the case *Desai Sarvia & Pallan Advocates...Vs...Tausi Assurance Company Limited (2017)eKLR*, where the Court of Appeal held that:-

“It is not in dispute that instructions to defend the defendants emanated from the Respondent. As such the respondent was the appellants client. Accordingly it is the Respondent and not the defendants that is liable to meet the appellants fees.”

This Court therefore finds that no Advocate Client relationship existed between the Applicant and the Respondent as such the Bill of cost hold no water and cannot stand. See the case of *Wilfred N. Konosi t/a Konosi & Co. Advocates...Vs...Flamco Limited (2017)eKLR*, where the Court of Appeal cited the Lower Court Judge who stated:-

“On taxing a bill of costs, it must be established that there exists an Advocate/ Client relationship and that the Advocate was instructed as per law provided. Since the Applicant failed to demonstrate the above, I find that there is no basis for varying or setting aside the taxing officer’s orders. Even if the bill went to another taxing officer, it would suffer the same fate. For this reason, I dismiss the Application with costs to the Respondent.”

Without an Advocate/Client relationship, the taxing officer has no jurisdiction to tax the bill and with no jurisdiction therefore the taxing master has to down his/her tools. See the case of *Wilfred N.Konosi t/a Konosi & Co Advocates...Vs...Flamco Limited (supra)*, in which the Court stated that:-

“The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.”

In the case of *Owners of the Motor Vessel “Lillian S” ...Vs....Caltex Oil (Kenya) Ltd [1989] KLR 1*, where the Court of Appeal held as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

Consequently, the Court finds that Advocate has failed to establish an Advocate/Client relationship and therefore the **Preliminary Objection** is merited.

The upshot of the above is that the **Preliminary objection** is upheld

and the **Bill of Costs** is dismissed with costs to the Respondent/Client.

It is so ordered.

Dated, Signed and Delivered at Thika this 26th day of April 2019.

L. GACHERU

JUDGE

26/4/2019

In the presence of

Mr. Adera holding brief for Jesse Kariuki for the Respondent/Client

Mr. Mwangi holding brief for M/S Kageni for the Advocate/Applicant

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

26/4/2019