



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. MISCELLANEOUS APPLICATION NO. 198 OF 2016**

**WAIYAKI WARUHIU & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**BONGO DEVELOPMENT COMPANY LIMITED.....RESPONDENT**

**RULING**

The Respondent raised a preliminary objection to the taxation of the Advocates' Bill of Costs filed in court on 19/4/2016 against Bongo Development Company Limited. The issue in contention is retainer. The client maintains that Bongo Development Company Limited never gave instructions to the advocates and that the instructions were given by Costa International. The client maintains that there is no nexus between Bongo Development Limited and Costa International. It also argues that there was no agency-principal relationship between Bongo Development Company Limited and Costa International.

The Applicant, Messrs Waiyaki Waruhiu and Company Advocates maintain that it was instructed by Costa International and that those instructions were confirmed by Bongo Development. The Advocates relied on correspondence it sent to Bongo Development Company Limited and the fact that it received documents forwarded by the directors of Bongo Development Company Limited.

The court has looked at the documents relied on by the advocates. Costa International wrote to the advocates on 27/3/2014 under the reference: Proposed Bongo Court Development on Nanyuki Municipality Block 6/131. In the letter, they confirmed the appointment of these advocates as the sole advocates regarding the sale and transfer of the development under reference. The letter stated that the development comprised 56 holiday home apartments 14 of which would be sold at Kshs. 7.5 million and the other 42 would be sold at Kshs. 9.5 million each. It stated that the advocates' fees were payable based on the advocates scale.

The Advocates wrote to Bongo Development Company Limited on 28/3/2014. The letter is addressed to Bongo Development Company Limited, C/O James Ndegwa, Costa International. The letter mentions the need to transfer the title from the current registered owner to Bongo Development Company and sought various documents from this company. It is stated in the letter that the advocate's fees in the matter would be Kshs. 78,000/=. The letter requested for the cheque together with the documents sought to enable the advocates to proceed. The letter dated 28/4/2014 from the advocates sought exemption from the collector of stamp duty. The advocates annexed a copy of the certificate of lease in the name of Stephen Muthami Mbau together with the transfer of land. This shows that the advocates were given instructions to transfer the property in question to Bongo Developers and the legal fees payable for this work was Kshs. 78,000/-. It is not clear whether this sum was paid or not.

The advocates sent out a letter to prospective purchasers dated 26/5/2014 stating that they were acting for Costa International and Bongo Development Company Limited. The letter asked the prospective

purchasers to get in touch with these advocates who had in their custody the original title and were in the process of transferring the title to Bongo Development Company Limited. On 21/5/2014 Costa International issued a notice titled “*To Whom It May Concern*” confirming that the advocates had been tasked with all legal and conveyance work in the proposed development of 56 apartments in Nanyuki town known as Bongo Court. The letter stated that these were holiday homes, and a project of its own kind under Costa International.

The court has also looked at the letters of offer dated 8/9/2014 and 18/9//2014 issued by Bongo Court, Nanyuki to purchasers of the units in Bongo Court. The advocates argue that these letters were signed by James Ndegwa who gave the advocates instructions. However, the court notes that the letters were signed for and on behalf of Bongo Development Company by a director whose name is not given. The letter is copied to Waiyaki Waruhiu and Company Limited. Clause 2B of that letter of offer states that the legal fees and disbursements payable by the purchaser are 1.25% of the purchase price plus 16% VAT. The advocates also annexed a draft sale agreement over apartment number B2 – 2B erected on Nanyuki Municipality Block 6/131. The agreement is not executed. The advocates relied on the letter dated 18/2/2015 in which the firm of Muriu Mungai and Company Advocates sought the release of the original certificate of lease from the Advocates to enable that firm register a charge over the land since its client, Housing Finance Company of Kenya had agreed to grant banking facilities to Bongo Development Company Limited. Having been instructed to transfer the land in question to Bongo Development Company Limited it is expected that the advocate would have had the certificate of lease that was issued to Bongo Development Company when the transfer was registered. The advocates sent a fee note dated 10/4/2015 to Bongo Development Company Limited demanding payment of Kshs. 4,740,734 as legal fees for instructions to handle the conveyance of 56 apartments. The advocates’ letter of 30/12/2015 refers to a meeting that was held between the advocates and Mr. Stephen Mbau as the representative of Bongo Development Company Limited. The letter states that it was agreed at the meeting that the advocates to reduce their fee note to Kshs. 3 million to be paid in three instalments of Kshs. 1 million each on 21/12/2015, 1/2016 and 3/2016.

The court has considered the application, the replying affidavit and the submissions of counsels. The court agrees with the Respondent that the advocate has not shown the nexus between Costa International and Bongo Development Company Limited. The authorities relied on by the Respondent show that a retainer is essentially an agreement through which the client engages the advocate to render professional service and that such an engagement can be formalised in a written document or simply be an oral one. Instructions must not necessarily be in writing, they can be inferred from the conduct of parties (See **Muema Kitulu & Co Advocates V. Kenya Deposit Insurance Corporation** [2016] eKLR and **Mbugua & Mbugua Advocates V. Kenindia Insurance Limited** [2015] eKLR).

The court agrees with the finding by Hatari Waweru J. in **Nderitu & Partners Advocates V. Mamuka Valuers (Management) Limited** [2006]eKLR that where the instructions are given on behalf of someone else, the person giving the instructions is the party liable to pay the bill of costs. That party can always claim a reimbursement from its principal. As far as the advocate is concerned he must look to the client, who in this case is Costa International, for payment of its costs as this is the client who instructed the Advocates to act in the matter. The Judge stated that the advocate cannot look to the principal for payment of his costs as he was not instructed by the principal.

It is not in dispute that the advocates did not undertake the conveyance of the 56 units. They only undertook the transfer of the lease to Bongo Development Company Limited. This can be inferred from the conduct of the parties. The court is unable to find any action that would support an inference that Bongo Development Company Limited instructed the advocates to deal with the conveyance of the 56 units of Bongo Court.

The court upholds the preliminary objection.

Dated and delivered at Nairobi this 9<sup>th</sup> day of October 2017

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Keya for the Applicant

No appearance for the Respondent

Mr. V. Owuor- Court Assistant