



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. APP NO. 16 OF 2014 (OS)

IN THE MATTER OF THE LIMITATION OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE ADVOCATE/CLIENT RELATIONSHIP

SALAMA BEACH HOTEL LTD.....1ST PLAINTIFF

ACCREDO AG.....2ND PLAINTIFF

TOURISTIC AND TECHNOLOGY GMBH

**(TOUR AND TECH GMBH).....3RD
PLAINTIFF**

=VERSUS=

KENYARIRI & ASSOCIATES ADVOCATES.....DEFENDANT

RULING

Introduction:

1. This matter is closely related to Malindi Miscellaneous Application number 16 of 2013. In the said matter, the taxing officer re-taxed the Advocates Bill of costs in accordance with the directions of this court.
2. The current Originating Summons has been filed pursuant to Order 51 and 52 of the Civil Procedure Rules. The Clients/Applicants are seeking for the following orders;

(a) The Honorable court be pleased to order the Defendant to produce bank papers and documents, a cash account, receipts and/or any other papers and documents for any and all monies received from the Plaintiffs jointly and/or severally.

(b) The Honourable court be pleased to order the Defendant to produce bank papers and documents, a cash account, receipt and/or any other papers and documents for any and all monies received from the 3rd Plaintiff from its account at Freisinger Bank to the Defendant's account held at First Community Bank-Account number 0010381501.

(e) Coasts of this application be provided for.

The Plaintiffs'/Applicants' case

3. According to affidavit of the 1st Applicant's managing director, Hens Juergen Lenger, he reiterates the contents of his Replying Affidavit dated 30th August 2013 and the Supplementary Affidavit dated 21st March 2014 and filed in Malindi Miscellaneous Application Number 16 of 2013.
4. It is the Applicant's deposition that in those affidavits, he entered into an agreement with the Defendant for the provision of legal fees wherein he paid over Kshs.2.4 million for a motor vehicle that the Defendant was importing and the agreement also covered the issue of legal fees; that the Respondent acknowledged the agreement in Miscellaneous Application Number 16 of 2013 and that the Defendant has not denied that there was an agreement for the purchase of the motor vehicle.
5. It is the Applicants' deposition that the Deputy Registrar erred in the computation of the money already paid by the client and assessed it at Kshs.5,134,550; that he managed to trace all the documents that relates to the payments and that they are consistent with the statements that was made in Miscellaneous Application No. 16 of 2013.
6. The Applicants' have computed the amount paid to the Respondent to be Kshs.13,972,665 and not 5,134,550 as assessed by the taxing officer.
7. It is the Applicants' contention that the Respondent should issue to them an account of all the monies that he has ever received from them together with a receipt for legal services in the matters that have already been taxed.

The Defendant's/Respondents' case

8. In response, the Respondent/Advocate filed a Notice of Preliminary Objection and Grounds of Opposition dated 16th July 2014 and 7th July 2014 respectively.
9. According to the Respondent, Order 52 (4) of the Civil Procedure Rules as read together with paragraph 13(A) of the Advocates Remuneration Order vests jurisdiction with the taxing officer and not this court; that this Application should have been made during the taxation; that the Respondents failed to file their documents by 1st April 2014 as directed by the taxing officer in Miscellaneous Application Number 16 of 2013 and that the issue being raised in the current Application is *res judicata*.
10. The parties filed their respective submissions and reiterated the above averments.

Analysis and findings

11. As I have already stated in my Ruling of even date in Malindi Miscellaneous Application Number 16 of 2013, the taxing officer allowed the Applicants herein to file documents in support of their claim that they had paid to the advocate over and above what they had agreed upon as legal fees or as taxed.
12. The directive by the taxing officer was in tandem with the Ruling of this court of 20th February 2014 and Rules 13 A of the Advocates Remuneration Order. The said Rule provides as follows:

“For the purpose of any proceedings before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

13. After analysing the documents that were provided by the clients, the taxing officer found that indeed the clients had paid to the advocate Kshs.5,784,550 which she set off against the taxed amount. However, she rejected to admit in evidence an agreement showing that the Applicants had paid for and imported for the advocate a land cruiser VX limited costing JPY 2,320,000.
14. In my Ruling of even date, I agreed with the taxing officer that she could not have relied on the

- said agreement because it was not signed by both parties and there was no other evidence that indeed JPY 2,320,000 had been paid by the client.
15. The current suit seems to be a continuation of the proceedings in Miscellaneous Application Number 16 of 2013 because it would appear that the Applicants'/clients now have evidence from T & T Tours & Tech Company that indeed the advocate obtained a car worthy Kshs.7,874,799 which was paid for by the client.
16. The Applicants have annexed the schedule of the payments that were made by Salama Beach Hotel to T&T Tour & Tech company for the importation of the said car. The Applicants' have also annexed numerous e-mails showing that indeed the advocate was aware of the agreement relating to the purchase and importation of the said car by the clients on his behalf. Some of these documents were not availed to the taxing officer in Misc. Application number 16 of 2013.
17. In one of the email dated 20th December 2011, the advocate is said to have written as follows:-

“Hans find attached the Ruling. Urgently send the funds to Japan so that I don’t lose the unit.”

18. The email was in response to the client’s email in which the client had stated that for him to send the funds for the car, he needed a copy of the Ruling showing the success of the case in Mombasa.
19. In another e-mail dated 4th February, 2012, the advocate is said to have written as follows:

“The money you sent to Japan for my car (1,100,000) is part of the 1,500,000 for HCCC 106....”

20. The Advocate/Respondent has not responded to these allegations. Instead, he has stated that those are issues which are in the province of the taxing officer and not this court and that the issues are *res judicata*.
21. This court has jurisdiction to deal with suits/applications filed pursuant to Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 and 52 of the Civil Procedure Rules.
22. Order 52 Rule 4(1) of the Civil Procedure Rules grants to the Applicants/Clients the right to be given the advocates' cash account, the payment or delivery up of money or securities which the advocate has in his possession on behalf of the client and the delivery of papers and documents which the client is entitled to.
23. The client’s right to the money and documents held by his advocate under Order 52 Rule 4 (1) is distinct from the taxation of the Bill of Costs. However, Order 52 Rule 4 (3) allows the advocate to hold onto such moneys or document as lien pending the taxation of his costs. After such taxation, the balance of the money held by the advocate, in my view, ought to revert to the client.
24. For the court to make an order for the delivery by the advocate of a cash account or to produce bank papers and documents, or money, the client has to show that indeed the money being claimed was actually paid to the advocate.
25. The taxing officer of this court has already determined, on the basis of the documents that were produced by the clients/Applicant’s, the amount of money that was paid to the advocate. It might be true that as at the time of taxation, the Applicants/clients were not in possession of all the documents to prove their claim, but that is water under the bridge, unless an application for review is done and allowed by the taxing officer.
26. Looking at summary of payments on the letter head of the 3rd Plaintiff purportedly made by the 1st Plaintiff for the purchase of a car on behalf of the advocate, it would appear that the contentious amount of Kshs.7,874,799 was paid by the client directly to T&T Tour & Tech Company of Germany and not to the Advocates account. I do not see how relevant an order for the production of the advocate’s cash account and bank will be for the court to say with certainty that the advocate received the said money.
27. Furthermore, there is no evidence that the said vehicle was ever imported and registered in the name of the Defendant/advocate after the client paid for it.
28. In the circumstances, the order being sought by the Applicants cannot be granted at this stage. The Applicants may consider pursuing their claim against the Defendant in an ordinary suit, if they so wish once they have their document together. The Application dated 25th June, 2014 is therefore dismissed with costs.

Dated and delivered in Malindi this 26th day of September, 2014.

O. A. Angote

Judge