



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & KANTAL, J.J.A.)

CIVIL APPEAL NO. 651 OF 2019

BETWEEN

NYACHOTI & COMPANY ADVOCATES.....APPELLANT

AND

MUGA APONDI ADVOCATE.....RESPONDENT

(Being an appeal from the Ruling of the Constitutional and Human Rights Court

at Milimani (W. Korir, J.) delivered on 31st October, 2019

in HC. Election Petition No. 5 of 2017)

JUDGMENT OF THE COURT

Neither the appellant, **Nyachoti & Company Advocates** nor the respondent, **Muga Apondi Advocate**, were parties in **Election Petition No. 5 of 2017** filed at the High Court of Kenya, Nairobi. The appellant was instructed by the petitioner in that petition which was heard and determined. We note from the record that following that result the appellant filed an Advocate-Client Bill of Costs in High Court of Kenya being Miscellaneous Application No. 1 of 2018 dated 2nd July, 2018 which has been taxed by the Taxing Master of that Court.

We note from the various averments in the documents on record that the appellant in the course of hearing of that petition (or after filing that petition) engaged the respondent, amongst other advocates, to assist in the prosecution of that and other petitions. The respondent was not paid his fees by the appellant in respect of that petition even after demanding the same. This prompted him, on 12th June, 2019 to file in the said Election Petition No. 5 of 2017 a document titled “**MUGA APONDI, ADVOCATE PARTY AND PHILIP NYACHOTI PARTY BILL OF COSTS**”. That action led the appellant to file a Motion, ruling of which is subject of this appeal, which was taken under various provisions of law – **Section 3A of the Civil Procedure Act, Order 51 Rule 1 Civil Procedure Rules**, the inherent powers of the Court – where it was prayed in the main that a temporary stay of taxation of the said bill by the respondent be stayed; that the undated bill be struck out or in the alternative, that bill be stayed pending taxation of the bill of costs filed by the appellant against the petitioner in the said election petition. In grounds in support of the Motion and in a supporting affidavit of Philip Nyachoti, the Advocate practicing in the name and style of the appellant it was stated amongst other things that the respondent had filed a bill of costs against the appellant for Ksh.2,590,000; that neither the appellant nor the respondent was a party in the said election petition; that in those circumstances the respondent could not file a bill of costs against the appellant; that the respondent had in September, 2017 approached the appellant and volunteered to assist in prosecuting some of the election petitions filed on behalf of various parties by the appellant; that the appellant accepted the offer by the respondent on the understanding that the respondent could be paid some fees by petitioners; that such fees had not been agreed; that there were other (named) lawyers who were also instructed in the petitions; that the respondent, alongside those other lawyers, had been introduced to the petitioner in Election Petition No. 5 of 2017 and had received direct instructions from the petitioner in

that petition. Further, that in those circumstances **Rule 7** of the **Advocates (Practice) Rules** was not applicable as there was no Advocate/Client relationship between the appellant and the respondent and a bill of costs could not lie against the appellant. The appellant deposed that in such circumstances the appellant became indebted to the respondent where a bill of costs could not be filed; the debt be collected through a plaint. The appellant also took the position that the respondent's fees await taxation of the Advocate/Client bill of costs filed by the appellant against the petitioner in Election Petition No. 5 of 2017.

The respondent did not agree. In the replying affidavit in opposition to the Motion he denied that he had volunteered any services in the election petition stating firmly that he had his own law firm; he was a free-lance lecturer in various institutions of higher learning; that there was no arrangement where his fees would be paid directly by the said petitioner in Election Petition No. 5 of 2017. The respondent decried what he saw as technicalities being taken by the appellant "... to deny the Respondent access to legal fees that have been claimed almost two years after the trial Judge had given judgment and restricted what was due to each Counsel".

Both parties filed written submissions in the High Court and the respondent attached to his submissions various documents including a summary of election petitions being handled by various lawyers in different courts; letters from the appellant to the respondent including a letter dated 24th July, 2018 where it was proposed by the appellant that the respondent be paid a sum of Ksh.800,000 "..... full and final settlement of the outstanding amount.

This will be in addition to the payments already made to your firm"

The Motion was heard by **W. Korir, J.**, who in a considered ruling delivered on 31st October, 2019 found that **Rule 7(1)** of the **Advocates (Practice) Rules, 1966** applied to the relationship between the appellant and the respondent. The Judge dismissed the application ordering that the bill of costs filed by the respondent against the appellant proceed for taxation notwithstanding the Advocate/Client bill of costs filed by the appellant against the petitioner in Election Petition No. 5 of 2017. Those findings provoked this appeal through Memorandum of Appeal by the appellant where 13 grounds of appeal are taken. These can be summed up as: that the Judge erred in law and fact in holding that there existed an Advocate – Client relationship between the appellant and the respondent as regards representation in the said Election Petition No. 5 of 2017; that the Judge "... lost sight of the fact that the bill of costs filed in the Superior Court on 13th June 2019 in **Milimani HC Election Petition No. 5 of 2017; Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 Others** by the respondent against the Appellant was a Party and Party bill of costs and not Advocate-Client bill of costs as held in the Ruling". The Judge is faulted for finding that there was an Advocate-Client relationship between the appellant and the respondent and at the same time directing that the Party and Party bill of costs filed by the respondent be taxed by the Deputy Registrar; he is faulted for his reading and appreciation of **Rule 7** of the **Advocates (Practice) Rules, 1966**; for not appreciating that the appellant was not a party in the said Election Petition No. 5 of 2017; that the Judge should have stayed taxation of the respondent's bill of costs to await taxation of the Advocate/Client bill of costs in the said election petition. It is also stated in the Memorandum of Appeal that the Judge should have found that there was no formal letter of engagement or any proof of engagement by the appellant to the respondent for or on behalf of the petitioner in the said election petition. For all that we are asked to allow the appeal, set aside the said ruling and allow the Motion that was dismissed by the Judge, the subject of this appeal.

We have considered the whole record and written submissions filed by both sides.

The appeal came up for hearing on 15th February, 2021 through the "Go-to-Meeting" platform. In highlighting written submissions Mr. Philip Nyachoti, learned counsel for the appellant, submitted that instructions in an election petition are personal; that the respondent had not received instructions from the petitioner in the said election petition. In what appears to be a submission in the alternative counsel submitted that it was only after the respondent failed to collect fees from the petitioner in the said election petition that he filed bill of costs against the appellant. According to counsel the Advocate/Client bill of costs filed by the appellant had been taxed in a sum of about Ksh.7,000,000 and it was those taxed costs that should apply to meet the fees for all lawyers involved in the said election petition.

Mr. Muga Apondi, the respondent, submitted that the petitioner in the said election petition had not agreed to pay him professional fees directly but that he had always dealt with the matter through the appellant. According to him each lawyer involved in the election petition was entitled to file a bill of costs to recover professional fees.

The central issue that traverses all the grounds of appeal and the submissions made is whether the respondent, who was not on record in the said election petition, was entitled to file a "party and party" bill of costs in that election petition.

The learned Judge analysed the rival positions taken by the parties and made findings that from correspondence exchanged by the appellant and the respondent there was a specific agreement where the appellant had given the respondent instructions to prosecute the petition. The Judge further found that the appellant had admitted that the delay in paying the respondent's fees was caused by the fact that the petitioner in the said election petition had not paid the appellant their fees which had led to the filing of an Advocate/Client bill of costs by the appellant against the petitioner in the said election petition. The Judge dismissed the argument by the appellant that the respondent had an agreement with the said petitioner on payment of his professional fees. Looking at the record we agree with these findings reached by the Judge that the applicant instructed the respondent to handle the 2nd election petition.

On the issue of remuneration under the Advocates (Remuneration) Order this is how the Judge navigates the issue at paragraph 22 of the ruling:

“22. The Advocates Remuneration Order contemplates two instances where a bill of costs may be filed, that is, a party and party bill of costs or an advocate-client bill of costs. A party and party bill of costs is one filed by a successful litigant against the other side. An advocate-client bill of costs is one filed by an advocate against his/her client. Rule 7 of the Advocates (Practice) Rules merely states that the instructing advocate becomes personally liable to pay the professional fees of the other advocate but it is silent on how such an advocate may recover the debt. In my view, an advocate who instructs another advocate creates an advocate-client relationship and as such, the instructed advocate can sue his “client” so to speak to recover his legal fees. Where there is no agreement on the fees payable from a client to an advocate, the only way of determining the fees owed to the advocate is through the taxation of the bill of costs. I therefore find and hold that the Respondent is entitled to recover fees from the Applicant just as much as the Applicant is entitled to recover his legal fees from the Petitioner.”

Rule 7 of the Advocates (Practice) Rules, 1966 provides as follows:

“7.(1) Subject to specific agreement, an advocate who briefs, instructs or consults another advocate is personally responsible for the payment to such other advocate of his proper professional remuneration in respect thereof.”

Black’s Law Dictionary (Revised) 4th Edition has the following definition of “Advocate” and “Client”:

“Advocate. One who assists, defends, or pleads for another; one who renders legal advice and aid and pleads the cause of another before a court or a tribunal, a counselor. *Haverty Furniture Co. v. Foust*, 174 Tenn. 203, 124 S.W.2d 694, 697.

A person learned in the law, and duly admitted to practice, who assists his client with advice, and pleads for him in open court. *Holthouse*.

An assistant; adviser; a pleader of causes.”

“Client. A person who employs or retains an attorney, or counsellor, to appear for him in courts, advise, assist, and defend him in legal proceedings, and to act for him in any legal business. *McCreary v. Hoopes*, 25 Miss. 428; *McFarland v. Cray*, 6 Wend., N.Y., 297; *Cross v. Riggins*, 50 Mo. 335. It should include one who disclosed confidential matters to attorney while seeking professional aid, whether attorney was employed or not. *Sitton v. Peyree*, 117 Or. 107, 241 P. 62, 64.”

Order 9 Civil Procedure Rules on “Recognized Agents and Advocates” provides for who may appear as an advocate or agent for a party in civil proceedings. It provides for how service of process is to be effected and process served on an advocate or agent is as effectual as if it was served on the party in person. There is procedure on how an advocate appointed by a Party is to file a Notice of Appointment and how an advocate can withdraw from representing a client in a case and how the advocate may be removed from representing a party in a case.

The Judge identified, correctly, we think, that there are two instances where a bill of costs may be filed – either a Party and Party bill of costs or an Advocate/Client bill of costs. In the first instance that will be where a successful party in civil litigation moves to collect costs from the adverse (or defeated) party while in the latter case an advocate who has represented a party or client in either contentious or non-contentious matter may file a bill of costs against his client to recover his costs.

The Judge found as fact that the respondent was instructed by the appellant to act in the election petition that was filed by the appellant as advocates for the petitioner. The firm on record in that petition was the appellant and there is no contention by the respondent that he at any time became the lawyer on record in the manner contemplated by **Order 9 Civil Procedure Rules**. Although the respondent is an “advocate” within the definition in Black’s Law Dictionary (supra) and within the meaning ascribed by the Advocates Act he was not the advocate on record for the petitioner in the said election petition. There was no relationship of “advocate/client” between the respondent and the petitioner in that election petition as “advocate/client” relationship belonged to the appellant and the petitioner.

With respect, we do not agree with the learned Judge on the conclusion that he reached that the respondent could, within the said election petition in which he was not on record, file a bill of costs against his “client”, i.e. the appellant, which was the law firm on record.

This position is fortified by a number of factors.

One of the documents filed by the respondent is a schedule showing various election petitions that had been filed by the appellant for various parties. In Election Petition No. 5 of 2017 four lawyers are listed as handling that petition – Muga Apondi, Stanley Manduku (his name is underlined in bold to show that he was the lead advocate), Moses Chelang’a and Bosire Nyamori. Could it be said that each of these advocates could file a bill of costs to recover professional fees in the said election petition? We do not think so.

It is evident from the document filed by the respondent that he had difficulties in the way he would approach the court. It is filed in the said Election petition (No. 5 of 2017) and is headed “MUGA APONDI, ADVOCATE PARTY AND PHILIP NYACHOTI PARTY BILL OF COSTS”. As we have already seen there are two ways that bill of costs are drawn – Party and Party bill of costs or Advocate/Client bill of costs. It is difficult to understand the document that the respondent presented before the court. Firstly, the document is filed in the said election petition where the petitioner is named as Elizabeth Ongoro Amolo. As we have seen the petitioner in that petition did not give instructions to the respondent and the respondent was not the lawyer on record as contemplated in law. He could not file a bill of costs against the petitioner. Secondly, the bill is by “Muga Apondi Advocate” against “Philip Nyachoti”. It is immediately obvious that the latter was not a party in that petition and the respondent could not take the action that he did. **Rule 7 of the Advocates (Practice) Rules, 1966** dictates that where an advocate instructs or consults another, or asks him to hold his brief (this is the usual parlance in our jurisdiction) is

personally liable to pay that (other) advocate's fees. This is to say that the instructing advocate is duty bound to pay that other lawyer's fees and if he fails to do so, the fee becomes a debt which the instructed advocate may sue and recover as a debt in normal civil proceedings. The instructing advocate does not become a client at all.

In the persuasive case of **Obaga & Company Advocates v Kipkebe Limited [2009] eKLR** the applicant law firm was instructed by another law firm (**Timamy & Company Advocates**) to act for their client, the respondent, in about 25 matters. Upon finalization of the matters the applicant would send their fee notes to the instructing law firm which would in turn draw fee notes to their client and would then pay the applicant. The High Court (Musinga, J – as he then was) held that the applicant (Obaga & Company Advocates) did not have a retainer with the respondent and their cause of action lay with the law firm that instructed them.

In the premises we hold that the learned Judge erred in the conclusions that he reached. The appeal has merit and is allowed. We set aside the ruling delivered on 30th October, 2019 in Milimani HC Election Petition No. 5 of 2017 and allow the Motion dated 3rd July, 2019. In the circumstances of the case let each party meet their costs, here and below.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR