IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 17 OF 2013

BETWEEN

NTOITHA M'MITHIARU ……. APPELLANT

AND

P.M. WAMAE & CO. ADVOCATES ……RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Meru (Lesiit, J.)

dated 17th January, 2013

in

H.C Misc. Applic. No. 62 of 2009)

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JUDGMENT OF THE COURT

1. The respondent filed an advocate/client bill of costs claiming Kshs. 8,731,711.14/= for services rendered to the appellant. The bill of costs arose from an Election Petition filed by the appellant challenging the election results in respect of the position of Member of Parliament for Ntonyiri Constituency in the 2002 general elections.

2. In opposing the bill of costs, the appellant filed a replying affidavit. The appellant deposed that the applicant had volunteered its professional services to the National Rainbow Coalition (NARC) in the 2002 general elections. The appellant maintained that he did not appoint the applicant directly; it was his sponsoring party, NARC, which appointed the respondent on his behalf. By a letter dated 20th March, 2003, the respondent confirmed that it was offering its services on a voluntary basis; the appellant would only be required to pay a concessionary fee of Kshs. 400,000/=. The appellant paid the aforementioned sum and met the respondent's out of pocket expenses. The appellant deposed that he later learnt from Honourable Kiraitu Murungi, the then chairman of the legal affairs committee of NARC, that individual candidates were not required to pay any legal fees to the volunteer advocates; instead the party would pay each volunteer a sum of money as a token of appreciation. The respondent failed to discount the amount paid by both the appellant and his party in the aforementioned bill of costs.

3. According to the appellant, the respondent was estopped by its conduct and the agreement contained in the letter dated 20th March, 2003 from seeking any further payment. The appellant contended that the bill of costs as drawn was excessive and not commensurate with the services rendered.

4. The respondent in response filed an affidavit sworn by Mr. Paul Matheri Wamae, a partner in the said firm. It was the respondent's contention that it was the appellant who appointed the firm to institute the suit and not NARC. Mr. Wamae deposed that the respondent having acted for the appellant was entitled to charge for the services rendered under ***Section 51*** of the ***Advocates Act,*** Chapter 16, laws of Kenya. Under ***Rule 13(1)*** of the ***Advocates Remuneration Order*** the letter dated 20th March, 2003 could not limit the costs charged to the appellant. In any event to charge fees on the terms stated in the said letter would be invalid and contrary to ***Section 46 (c)*** of the ***Advocates Act.*** According to the respondent, the bill of costs as drawn was reasonable taking into consideration the complexity and the importance of an Election Petition.

5. On 24th August, 2012 the bill of costs was taxed at Kshs. 3,236,343.68/=. The appellant filed a reference from the taxation under ***Rule 11 (2)*** of the ***Advocates (Remuneration) Order***. By a ruling dated 17th January, 2013 the learned Judge (Lesiit, J.) dismissed the reference with costs to the respondent. It is against that decision that the appellant filed this appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in failing to hold and find that the respondent was bound by its written representation to the appellant in the letter dated 20th March, 2003, that he was acting as a volunteer and the agreed legal fee would be Kshs. 400,000/=.***

- ***The learned Judge erred in law and in fact in failing to find and hold there was a valid agreement on the legal fees in the sum of Kshs. 400,000/= and that the respondent was estopped by both conduct and record from submitting a bill of costs for taxation.***

- ***The learned Judge erred in law and fact in holding that the applicant had not established that an agreement on fees existed between the parties.***

- ***The learned Judge erred in law and fact in holding that there was no proof that the appellant had made a payment of Kshs. 80,000/= to the respondent.***

6. Mr. Kairaria, learned counsel for the appellant, submitted that the respondent was estopped by the letter dated 20th March, 2003 from charging or claiming further fees. It was unconscionable for the respondent to claim further payment from the appellant. He argued that the issue of estoppel was never considered by both the taxing officer and the learned Judge despite being raised. He submitted that under the ***Remuneration Order*** the prescribed minimum fee payable at the time was Kshs. 42,000/=. Therefore, the fee set out in letter dated 20th March, 2003 was not illegal. Mr. Kairaria submitted that the learned Judge erred in holding that there was no proof that the appellant had paid Kshs. 80,000/- to the respondent. He urged the Court to allow the appeal.

7. Mr. Wamae, learned counsel for the respondent, submitted that none of the grounds of appeal invoked the doctrine of estoppel. He argued that in estoppel, the promise applies to the future; the letter dated 20th March, 2003 was written after receipt of instructions and filing of the petition. Therefore, estoppel was not applicable. According to Mr.Wamae the said letter did not amount to an agreement of fees payable because it was not signed by the appellant as required under ***Section 45 (1)*** of the ***Advocates Act.*** He submitted that this Court should not interfere with the taxation on a second appeal. Mr. Wamae urged the Court to dismiss the appeal.

8. We have considered the grounds of appeal, the record, submissions by counsel and the law. The issue that falls for our determination is whether the learned Judge erred in dismissing the reference. In determining the reference the learned Judge exercised her judicial discretion. In ***Kipkorir Titoo & Kiara Advocates –vs- Deposit Protection Fund Board- Civil Appeal No. 220 of 2004,*** this Court expressed itself as follows:-

"The learned Judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned Judge acted on the wrong principles of law. The appeal to this Court from the decision of a Judge on reference from a taxing officer is akin to a second appeal and should be governed by Section 72(1) of the Civil Procedure Act. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72(1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of the law, or the decision has failed to determine some issue(s) of law or usage having the force of the law or where there is substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits."

The predecessor of this Court in ***Arthur –vs- Nyeri Electricity Undertaking (1961) EA 496*** held:-

"Where there has been an error in principle the Court will interfere; but questions solely on quantum are regarded as matters which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases."

9. It is the appellant's contention that based on the letter dated 20th March, 2003 the respondent was estopped from claiming further fees and filing the bill of costs. The said letter was written by the respondent and is set out below:-

Date: 20th March, 2003

Mr. N. M'Mithiaru

Nairobi.

Dear Sir,

Re: Election Petition No. 20 of 2003

We refer to the above mentioned.

As we have advised you in the office, the advocates conducting the petition on your behalf are volunteers who have offered themselves to support the party and for this reason have agreed to take a concessionary fee for conducting the hearing.

The amount that has been agreed upon for conducting the petition is Kshs. 400,000/= on condition that in the event of the petition succeeding they will be entitled to recover the balance of their fees from the costs to be recovered. In addition you will pay the disbursements.

Kindly do the needful and let us have the sum of Kshs. 400,000/= by 31st March, 2003.

Yours faithfully,

P.M WAMAE & CO. ADVOCATES

10. The learned Judge held that the said letter was not an agreement on fees envisaged under ***Section 45 (1)*** of the ***Advocates Act. Section 45(1)*** provides that an agreement fixing the amount of an advocate's remuneration is only binding if it is in writing and executed by the client or by his agent.

11. Without prejudice to the provisions of ***Section 45 (1)*** of the ***Advocates Act***, the respondent through the letter made representations to the appellant that he would only be required to pay Kshs. 400,000/= plus disbursements and that in the event the petition succeeded, further fees would be recovered from the costs which may be awarded to the appellant. We note that there are several receipts of payment on record

issued by the respondent to the appellant. We find that it was upon the aforementioned representations that the appellant made the said payments to the respondent. This Court in ***First Assurance Co. Ltd. –vs- Seascapes Ltd- Civil Appeal No. 243& 246 of 2002*** held,

"But for there to be estoppel there has to be a representation which is acted upon by the opposite side to its detriment."

12. The minimum prescribed fees for prosecuting an Election Petition under the then 1997 ***Advocates (Remuneration) Order*** was Kshs. 30,000/=. Therefore, the fee of Kshs. 400, 000/= charged in the said letter was legal. We find that the respondent was bound by the representations made in its letter dated 20th March, 2003 and was estopped from seeking further fees. This is because the Petition was struck out on the ground that the parties therein were not served with the pleadings. In ***Seascapes Ltd –vs- Development Finance Co. of Kenya Ltd. – Civil Appeal No. 247 of 2002,*** held,

" The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what was implied by a previous action or statement of that person.."

In ***Nurdin Bandali –vs- Lombank Tanganyika Ltd. (1963) EA 304*** at page 314 the court expressed itself as herein under:-

" ..Estoppel on the other hand, is primarily a rule of evidence where a party to litigation is, in certain circumstances prevented from denying something which he had previously asserted to be true."

We find that the learned Judge erred by not appreciating that the respondent was bound by the representation he had made to the appellant.

13. The upshot of the foregoing is that we set aside the decision of the learned Judge on the reference and the decision of the taxing officer wherein the costs payable were assessed at Kshs. 3,236,343.68/=. We order the respondent's bill of costs be placed before another taxing officer and taxed in accordance with the letter dated 20th March, 2003. For avoidance of doubt the fees shall be taxed at a maximum of Kshs. 400,000/=. The taxing officer will also assess the disbursements payable by the appellant. The appellant shall have costs of the appeal and costs in the High Court.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR