



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 37 OF 2010

AGNES MUTHONI & 34 OTHERS.....CLAIMANT

-VERSUS-

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT

UNION OF NATIONAL RESEARCH & ALLIED

INSTITUTES STAFF OF KENYA (UNRISK).....INTERESTED PARTY

RULING

1. The application before me is the Notice of Motion dated 14.5.2019 brought by the former advocates for the claimants. It is brought under section 1A, 1B and 3A of the Civil Procedure Act and Order 23 Rule 1,2,3,4 & 5 of the Civil Procedure Rules and it seeks the following orders:

(a) The firm of Wachakana & Co. Advocates be joined as a third party.

(b) The respondent be ordered to immediately pay to the applicant firm taxed and certified costs of Kshs. 759,566 plus interest.

2. The application is opposed by the claimant, the respondent and the interested party (trade union) on grounds that the application is incompetent and not in tune with the procedure of recovering advocates legal fees set out under the Civil Procedure Rules and the Advocates Act.

3. The applicant's case is that she acted for the claimants in this suit and obtained a judgment after which the claimants appointed another firm of advocates to execute the decree. As a result the applicant drew two Advocate-client Bills of Costs which were taxed and certified at a total of Kshs. 759,566 plus interest which sum has not yet been paid despite several reminders. She now prays for an order to enjoin her as a third party and compel the respondent to pay her the said taxed and certified costs of Kshs. 759,566 plus interest.

4. The applicant acknowledges that the genesis of the said sum is the instructions given to her by the 35 claimants herein to file suit against the respondent on 22.12.2009. To support her case the applicant relies on **Khan & Katiku Advocates v Shabbir Motors Spares Ltd [2005]eKLR** and **Ragot & company Advocates v West Kenya Wholesalers Ltd [2006]eKLR** where the court entered judgment for the law firms for taxed and certified costs against their clients.

5. The claimants admit that they instructed the applicant to represent them in this suit against the respondent but later they replaced the counsel with another. They further admit that the applicant filed her Bill of Costs and it was taxed. They however contend that the application is incompetent and the court lacks jurisdiction to entertain the same since there is no employer-employee relationship between the applicant and them. They further contend that the joinder sought is overtaken by events because the suit is already concluded. They relied on **C. Masinde & Co. Advocates v Panal freighters Ltd [2019]eKLR** where the court held that it is only after obtaining a decree on taxed costs that an Advocate can execute against the client.

6. The respondent agreed with the claimants that the suit is incompetent and the court lacks jurisdiction to grant the order sought because there is no employment relationship between her and the applicants. She further averred that the application is incompetent, misconceived and an abuse of court process because the taxed costs sought concerns the applicant and the claimants at her exclusion. To support her case, the respondent relied on several precedents including **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989]eKLR**, **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd. & 2 Others [2012]eKLR** where it was held that a court's jurisdiction flows from the constitution or statute or both and the court must down its tools once it realizes that it has no jurisdiction. She further relied on **Nyabena Alfred t/a Nyabena Nyakundi & Company Advocates v Tourism Promotion Limited t/a Serena Hotel [2018] eKLR** where the court held that after costs are taxed, the Advocate must apply for judgment before executing against the client.

7. The interested party opposed the application basically on the same reason of being incompetent. She contended that an application for

joinder of third party should come from the defendant and not the third party himself. She therefore prayed for the application to be dismissed as it is also an abuse of the court process.

Analysis and determination

8. There is no dispute that the applicant acted for the claimants herein and has since obtained a certificate of costs against the claimants after successful of taxation Advocate-Client Bills of Costs. The issues for determination are:

- (a) Whether the court lacks jurisdiction to determine the application.
- (b) Whether the application is incompetent
- (c) Whether the application has merits and should be allowed.

Jurisdiction

9. The claimant and the respondent contend that the court lacks jurisdiction to grant the application because there is no employment relationship between them and the applicant. That contention has not been controverted by the applicant. She has admitted in her application that the genesis of the claim for Kshs. 759,566 is the instructions given to her by the 35 claimants to file this suit against the respondent.

10. The foregoing relationship was not one of contract of services but contract for services by an independent contractor. It does not therefore fall within the jurisdiction of this court. Article 162 (2) (a) contemplates that this court's jurisdiction is to deal with employment and labour relations disputes. In the "*Lilians*" case, *supra*, the Court of Appeal held that :

“Jurisdiction is everything without it, a court has no power to make one step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it's without jurisdiction.”

11. Having found that the court lacks jurisdiction to entertain the claim by the applicant law firm, I must down my tools in line with the foregoing binding precedent from the Court of Appeal. The applicant must therefore first seek judgment from the relevant forum and then execute it under the Civil Procedure Rules. The reason for the foregoing is that in view of the cited precedent it is now settled that an advocate cannot execute for taxed costs before obtaining a judgment under section 48 or 51 of the Advocates Act.

12. Having found that the court lacks jurisdiction I proceed to strike out the application with costs.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE