



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
MISC. APPL. NO. 42 OF 2013
MUMA & KANJAMA ADVOCATESCLAIMANT
VERSUS
FRANCIS MWAURA RESPONDENT

Mr. Anyona for applicant

Mr. Kimani for respondent

RULING

1. The issue for determination is whether there is advocate/client relationship between the applicant Advocate and the respondent/claimant for the court to allow the taxing master to tax the bill of costs filed by Muma & Kanjama Advocates against Francis Mwaura.
2. The matter was referred to this court pursuant to a preliminary objection on the jurisdiction of the taxing master to determine this issue was upheld by the Deputy Registrar Wangeci Ngumi in a ruling dated 27th September 2016.
3. The preliminary objection before court is as follows:
 1. That there was no client/advocate relationship in respect of Petition No. 3 of 2014 and as such the Bill of costs is misplaced.
 2. That the applicant has failed to respond to the respondent's Advocate's efforts to resolve this matter amicably and as such the bill of costs is patently premature.
4. The applicants filed a replying affidavit to the preliminary objection dated 27th May 2016 and their response may be summarized as follows:
5. That respondent together with other employees of Essar Telecom Kenya Limited approached the applicant alleging intended illegal restructuring of the company to their loss and detriment. that The respondent with others nominated Stephen Kaapei to sign all court pleadings on their behalf through several signatures that were annexed to the authority.
6. The applicant proceeded to file a constitutional petition being Petition No. 5 of 2015 at the ELRC, at Nairobi where the respondent was also a petitioner.

7. The petition was filed on behalf of the respondent with 222 others. The applicant carried extensive research in the matter.
8. The firm attended court on several occasions being 31/1/14, 12/2/14, 26/2/14, 27/2/14, 11/3/14, 21/3/14, 28/3/14, 9/4/14 and 8/5/14 where the matter was settled through a consent order between Essar Telecom Kenya Limited and the Respondent together with others.
9. The applicant relies on documents annexed and worked 'VAI' which documents include, the petition itself, list of petitioners, supporting affidavit, list of signatures of the Employees, various emails and consent dated 8th April 2014.
10. That from the above, it is clear that there was an advocate client relationship between the applicant and the respondent and the objection be dismissed accordingly.
11. The respondent filed a replying affidavit sworn on 15th August, contents of which may be summarized as follows:-
12. Employees of Essar Telecom Limited met with Essar management in January 2014 in which it was resolved to appoint a committee of two people from each department to ventilate grievances by the employees with management.
13. That the respondent was part of the management team as head of Management, Reporting and Financial Operations.
14. That the appointments were done and signed by most of the staff including the respondent authorizing the representatives to discuss with the management on their behalf.
15. That the signatures obtained were purely for the purposes of data and to give the representatives the mandate to negotiate and initiate dialogue with the management. That the mandate given did not extend to taking the management to court. That at no time did the respondent approach the firm of advocates for any legal representation as stated at paragraph 4 of the applicant's affidavit or any other particular lawyer in the firm of advocates.
16. That the respondent did not nominate the said Stephen Kapei to sign any court documents or pleadings on his behalf and so authority to instruct advocates or plead on respondent's behalf has not been annexed in the suit.
17. That the names and signatures which appear in a document headed Essar Telecom employees cannot be used to confer any person the authority to plead on the respondent's behalf or to instruct any advocate on his behalf or for any advocate to use it as instructions to institute suit on his behalf.
18. The respondent therefore denies having given Mr. Stephen Kapei or any firm of advocates instructions to plead on his behalf or to instruct any advocate in any matter on his behalf.
19. That no correspondence has been attached between the respondent and the advocates and no judgment in favour of the respondent personally on settlement as a result of the suit has been annexed.
20. That the respondent was not privy to the petition and did not sign any pleadings to have his name included in the suit and the petition was not shared with him. That the respondent has seen the petition for the first time in this application.
21. That correspondence relied on relate to internal communication at work and did not relate to the said suit.
22. That with respect to the consent order annexed at paragraph 9 of the applicant's affidavit, the consent required each petitioner to authorize the employer by signing individual letters to deduct legal costs and

pay the advocates' firm the costs attendant thereto. This was the only document brought to the respondent's attention and he declined to sign it because he was not a party to the petition nor did the advocates inform him that they were litigating on his behalf. In any event the respondent was part of the senior management and was part of the process that was going on and was not impacted by the uncertainty that bothered the rest of the staff. That he participated to calm the situation and assure the staff that all issues would be taken care of and therefore could not have been a party to the petition.

23. That as a result of the court process, staff lost out on the settlement initially envisaged by management. That the respondent's settlement with the Essar Limited was not a result of the petition and the advocates have not in any way shown any evidence to that effect.

24. There existed no advocate/client relationship between the applicant and the respect and the bill of costs be dismissed accordingly.

25. In any event as per the consent order, settlement of the advocates costs was pegged on 2% of the redundancy package and the advocates have not annexed any redundancy package paid to him at all.

26. The bill be dismissed as prayed.

27. The applicant filed a supplementary affidavit sworn by Vincent Anyona Advocate on 8th September 2016 in which he reiterates that the respondent authorized the members of staff to negotiate with management on his behalf as per the attached list, which members of staff subsequently instructed the applicant firm of advocates on behalf of all employees listed including the respondent.

28. That, the respondent received communication on the status of the matter and execution of instructions by the applicant through the staff representatives and in particular Mr. Stephen Kaapei. That the respondent did not withdraw at any time, the instruction he had given to the staff representative after the suit was filed.

29. That the respondent was aware of the entire court proceedings and the settlement between the petitioner and Essar Telecom Kenya Limited.

30. That the respondent was a beneficiary of the out of court settlement aforesaid and ought to contribute to the advocate's costs as per the consent. That the objection be dismissed and the bill proceed to taxation.

Determination

31. All the 223 petitioners were named individually in the petition. The respondent is named as petitioner number 35.

32. The petitioner admits to have been a member of senior management involved in the resolution of this dispute before and after filing of the petition.

33. The respondent admits to have participated in the appointment of the staff representatives to negotiate with the management on behalf of all staff and admits to have appended his signature to the document that empowered the team of negotiators.

34. Furthermore, it is not in dispute that the team of staff negotiators relied on that authority, prior given, to then instruct one Stephen Kaapei to instruct the applicant firm of advocates to file a petition on behalf of all affected staff, including the respondent.

35. It is the court's finding from the facts before court that the applicant and the respondent fall squarely within the meaning of advocate/client relationship defined under section 2 of the Advocates Act, as follows:-

“Any person who, as a principal or on behalf of another or as trustee or personal representative, or on any other capacity has power express or implied to retain or employ and retains or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.”

(emphasis mine).

36. The court also relied on the decision by Warsame, J. in **Misc. Application 330 of 2005 Ochieng Onyango, Kibet & Ohaga Advocates Vs. Akiba Bank Limited [2003] eKLR** that:-

“The act of authorizing an advocate to act on behalf of a client constitutes the advocate’s retainer by the client. It is not the law that an advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client.”

In my view retainer is not more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it may be wide. And never the less it can be implied from the conduct of the client/advocate relationship.”

(emphasis mine)

37. In this matter the authority to act, on behalf of the respondent though not express, is implied from the facts deposed by the applicant and partly admitted by the respondent.

38. It cannot be doubted that the respondent must have been aware of the petition; followed its progress and benefitted from the out of court settlement that was reduced into a consent order filed in court.

39. It is without doubt that the consent by the parties made an order of the court dated 8th April 2014, clearly determined the issue of costs in the following terms:-

“costs: Each party to bear its own costs however, the petitioners will authorize the respondent by signing individual letters to this effect to deduct legal costs at 2% of the individual redundancy package and remit the same to the firm of Muma, Kanjama & Company Advocates on the date of payment and the petitioners will sign a letter discharging the respondent of all liability in respect of the deduction.”

40. The issue of costs was therefore resolved by the court in this consent order and the Deputy Registrar cannot entertain a bill of costs that contradicts the order of the court.

41. For this reason alone, the Advocate Bill of costs filed by the applicants on 11th September 2016, is misconceived and an abuse of court process and same is dismissed.

42. However, it is indigenous for the respondent having benefitted from the settlement arrived at through the efforts of the applicant advocate through the petition filed on behalf of all 223 members of staff to try and have his cake and eat it.

43. The respondent is bound by the terms of the consent order that settled the dispute between the staff and their employer Essar Telecom Limited.

44. To this extent, the respondent is directed to disclose to the applicant firm of advocates the actual “redundancy package” paid to him and pay costs due and owing from him to the applicant advocates calculated at 2% of the actual redundancy package paid to him.

45. Payment be made within thirty (30) days of this ruling, failing which, interest will commence to accrue on the amount payable from then till payment in full.

46. Each party to meet their own costs of the suit.

Dated, signed and delivered at Nairobi this 24th day of November 2017

MATHEWS NDERI NDUMA

JUDGE