



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 436 OF 2010

KWENGU & CO. ADVOCATES..... APPLICANT

VERSUS

INVESCO ASSURANCE CO. LIMITED..... RESPONDENT/DEFENDANT

RULING

Notice of Motion seeking orders to stay the taxation of the bill of costs and that leave be granted to enjoin M/s Neptune Credit Management Ltd as a respondent in the bill of costs dated 17/9/2010 pending the hearing and determination of this petition and that the court do make a finding that there has never been advocate/client relation between the petitioner and respondent in relation to this petition. Application is based on 10 grounds stated in the application and supporting affidavit of Geoffrey Njenga who is Managing Director of the applicant in this matter.

The Petitioner purported to contract the company to recover owed petitioner by various parties on the basis "NO CURE NO PAY". The company was to engage any advocate or firm of advocates of its choice.

The company purported to instruct the firm of Kwengu & Co. Advocates to file this petition. The said advocate sought conservatory orders pending the hearing and determination of the petition.

The agreement was entered purely between it and said advocates. The contract being "No cure no pay" the petitioner was no obliged to settle any unsubstantiated claims. The Neptune Credit Management Ltd commenced winding up proceedings against the petitioner on a claim of Kshs.14,760,000/=. A consent was recorded by the petitioner and Neptune. The claim was recorded in

court. However the contract between the two parties was terminated.

There was no privity of contract between Kwengu & co. Advocates and the petitioner to file or proceed with this petition. The petitioner was not obliged to proceed with the petition on its behalf. If any fees are due to the said advocates the same is payable by instructing client namely Neptune.

The said advocates ought to have applied to be enjoined as creditor in the winding up proceedings. The petitioner instructed present advocate more than one year ago but the advocate never took any action.

The petition is not concluded and the taxation can await the conclusion of the same.

The applicant seeks to enjoin the company in the bill of costs. The applicant has discharged its obligation under agreement of 25th May 2007.

The application is opposed by the Respondent who states that the same is defective and an abuse of the court process. That the retainer is described as employment in the practice of law when a principal or on behalf of another has the power express and implied to retain or employ an advocate and any person is liable to pay an advocate any costs.

The retainer is the foundation upon which the relationship of advocate/client rests without which the relationship cannot come into being. The respondent refers to section 120 of evidence Act. It is sworn that there was retainer in this matter. there was a significant in the original arrangement put in place by the former advocates. The decision made by Invesco Assurance Co. Ltd made correct decision. The court cannot write contract for parties.

The case of **Nudrin –vs- Ombank Bank [1963] E A 304** is cited which was dealing with hire purchase agreement. Its sworn that the applicant wants to bite the hand that gave its substantial benefits. The applicant gave clear instructions that the respondent were its advocates and their attitude is clearly an afterthought.

Neptune Credit Management Ltd has been recognised agents of the applicant with instructions to solicit, lobby and appoint advocates on their behalf and as such qualified as a recognised agent. Authorities are cited namely

1. Wanga & Co. Advocates –vs-. A P A Insurance Co. Ltd HCC Misc. No.17, 18, 19 and 20 of 2006.
2. Adams –vs- London Improved Motor Coach Builders Ltd [1921] IKB 503.
3. Danish Mercantile Co. Ltd & Others –vs- Beaumont & Another [1951] IALLER 925.
4. Groom -vs- Cracker [1939] IKB 194.

This court is being asked for orders to stay taxation of bill of costs dated on 17/9/2010 by the form of Kwengu & Co. Advocates between the said advocates and applicant Invesco Assurance Co. Ltd.

The court is also requested to grant an order to enjoin M/s Neptune Credit Management Ltd as respondent in the said taxation of the bill of costs. Also that the court do made a finding that there is no and there has never been any advocate/client relation between the petitioner and respondent in relation to this petition.

Regarding stay of taxation of bill of costs this matter is the jurisdiction of Taxing Master of this court in HCC Misc. Civil Application No.1178 of 2007. There is procedure of raising the complaints against the decision relating taxation. In this matter it appears that the taxation has not yet been undertaken and this court is requested to stay the taxation.

On the issue of enjoining Neptune Credit Management Ltd as a party to the bill of costs, it is stated that bill filed is not payable by the applicant herein but by Neptune Credit Management Ltd under an agreement entered into by the applicant and the said Neptune Credit Management Ltd on 25th May 2007. By that agreement the Neptune Credit Management Ltd agreed to collect Kshs.19,513,359 plus interest on terms and conditions set forth thereon and fees payable was agreed upon. The agreement and its terms is marked 'GNI'.

The court is empowered to enjoin parties and substitute other parties under Order 1 rule 10 where the power is given at any stage of suit whether as plaintiff or defendant. In the circumstances of this case the prayer of the applicant is reasonable as it is supported by the contract. I therefore grant the order to enjoin M/s Neptune Credit Management Ltd as a defendant in this suit. On the bill of costs filed by M/s Kwengu & Co. Advocates against the applicant for the same reason is stayed pending the hearing and determination of this petition. The Petitioner shall proceed to prosecute the petition within the next 30 days. I am of the view that prayer 5 in the application is best heard and determined at the hearing of the petition.

These are the orders of this court.

Dated and delivered at Nairobi this 24th day of May, 2012.

J.N. KHAMINWA

JUDGE



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