

TANZANIA / JUDGMENT

ojiambo and company advocates v eashri taxation cause 2 of 2014 2016 eacj 125 26 may 2016

COURT
EACJDECIDED
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... I IN THE EAST AFRICAN COURT OF JUSTICE-FIRST INSTANCE DIVISION AT ARUSHA
TAXATION CAUSE NUMBER2 OF 2015 (Arising from Application No. 20 of 2014) OJIAMBO &
COMPANY ADVOCATES APPLICANT/RESPONDENT VERSUS UHAI
EASHRI RESPONDENT/APPLICANT

RULING

DATE: 26TH MAY, 2016 GERALDINE UMUGWANEZA-TAXING OFFICER This ruling is in respect of an application filed by the Respondent represented by V. A. Nyamodi & Company Advocates in this Taxation Cause seeking orders that the Bill of Costs dated 9th June 2015 be struck out and that costs of the application and Bill of Costs be awarded to the Applicant in the application. The application was based on the grounds that there was no Advocate- Client relationship between the Applicant and the Respondent. That the agreement envisaged by Rule 113(2) of the East African Court of Justice Rules of Procedure existed between one Milka Wahu Kuria and UHAI - East Africa Sexual Health and Rights Initiative and that UHAI had fulfilled its obligation under the said agreement and that there are no outstanding fees from the said agreement. The application was supported by an Affidavit sworn by Mukami Marete on 5th 11: November, 2015. The Respondent/Applicant in the Taxation Cause filed an Affidavit in Reply sworn on 10th November, 2015 by Aldrine Were Ojiambo. The background to the Taxation Cause is that on 1st October, 2014 UHAI EASHRI, a corporation incorporated in Kenya as a company limited by guarantee and represented by Ojiambo & Company Advocates, filed with this Honorable Court a Notice of Motion Application Number 20 of 2014 dated 28th September, 2014 and supported by an Affidavit sworn on 28th September, 2014 by the Rachael Wanja Muguongo the Director of the Applicant. The Application sought leave to be enjoined as an Amicus Curiae in Reference No. 6 of 2014 between Human Rights Awareness & Promotion Forum (HRAPF) and Attorney General of Uganda. The Application was subsequently consolidated with Application No. 21 of 2014 filed by Health Development Initiative- Rwanda represented by the same advocates Ojiambo & Company Advocates and also seeking leave to be enjoined as Amicus Curiae in the same Reference No. 6 of 2014. The two applications were heard together and a ruling delivered by the Court on 17th

February, 2015 dismissing the consolidated applications with costs to the Respondent. On 1st June 2015 M/s Ojiambo & Company Advocates filed with this Honorable Court an Advocate - Client Bill of Costs dated 9th June, 2015 that arose from Application No. 20 of 2014 against UHAI EASHRI. This Court fixed the Advocate - Client Bill of Costs for taxation hearing on 11th November, 2015, but on 5th November, 2015 before the taxation hearing could take off the Respondent/Applicant represented by V. A. Nyamodi filed the aforementioned application seeking to strike the Bill of Costs that was responded to by a Replying Affidavit sworn by Aldrin Were Ojiambo on 9th November, 2015 and filed in this Court on 10th November 2015. At the taxation hearing on 11th November, 2015 I directed that the application to strike off the Bill of Costs be heard and disposed of first so that its outcome determines whether the taxation hearing will go on or not. Mr. Nyamodi submitted that by a written agreement, copy of which is annexure 1 to the Affidavit sworn by Mukami Marete in support of Notice of Motion Application dated 5th November, 2015, the Respondent retained an advocate known as Milka Wahu Kuria for professional services to represent them in this Court in Application No. 20 of 2014 and that the agreement was as envisaged by Rule 113(2) of the Rules of the Court. That it was the responsibility of Milka Wahu Kuria to retain a lead Counsel and therefore there was no relationship between his client and Ojiambo & Company Advocates. He argued that his submission was fortified by averments in paragraph 2(a) of Aldrin Were Ojiambo's affidavit that states: "That sometime in September 2014, I was approached by Milka Wahu Kuria with a request that I consider a brief at the East Africa Court of Justice, Arusha arising from the Anti-Homosexual Act passed in the Republic of Uganda". He submitted that his client did not instruct Ojiambo & Company Advocates to file an application for amicus curiae but instructed Milka Wahu Kuria who had discretion to engage a lead counsel and in this case the lead counsel engaged by Milka Wahu Kuria was Ojiambo & Company Advocates. That it was the responsibility of Milka Wahu to pay any counsel that she engaged as a lead counsel. I posed a question to Counsel Nyamodi on whether his clients were aware that they were being represented in Court by an advocate and who the advocate was. Mr. Nyamodi's answer was an emphatic yes and that it was Ojiambo & Company Advocates, an advocate who did not have instructions from his client. I also asked him who the advocate representing his client should file the Client Advocate bill of costs against and he answered that it should be against Milka Wahu Kuria. That if the consideration agreed between Milka Wahu and his client had not been paid then Milka was entitled to file a Bill against UHAI as envisaged by Rule 113(2). Mr. Colbet Ojiambo in response submitted that Ojiambo & Company Advocates were the advocates on record as appearing for UHAI EASHRI in the application for amicus curiae and that there was no other advocate who appeared for UHAI in the matter. He further submitted that their firm was approached by one Milka Wahu Kuria seeking or asking for their legal services in a case that was before this court and that at that it was brought to their attention that they were to represent UHAI EASHRI who were the applicants. That in preparation to file the application he held meetings with officers of UHAI in their firm of Ojiambo & Company Advocates where further information was provided. That the firm prepared an Application that indicated the address for service to for the Applicant to be care Ojiambo & Company Advocates and that it was the advocate for the intended amicus/applicant. The application was supported by an affidavit sworn by a Director of the Applicant who

swore that the information given was the 3 truth. He argued that it had not been denied that the Director swore the affidavit. He contended that at the hearing of the application the officials of the Applicant attended court with him and they never challenged that they were represented by the firm of Ojiambo & Company Advocates. He pointed out to the court the evidence on the facilitation of the advocates travel and subsistence to Arusha by the Applicant UHAI for the hearing of the application was annexed to the Affidavit in Reply to the Application. With regard to the agreement between UHAI EASHRI and Milka Wahu Kuria annexed to the Affidavit in support of the Application, Counsel Colbert Ojiambo submitted that they were not aware of the agreement. He argued that the agreement indicates it was for consultancy and that the agreement between UHAI and Ojiambo & Company Advocates was for legal representation. He argued that according to the agreement the authority given to Milka Wahu was to find legal service/representation which she was acting within. He contended that the alleged full payment of consultancy fee upon satisfactory performance of contract did not include fee for filing of the application for amicus curiae and so the agreement does not in any way make reference to the agreement mentioned in Rule 113 on agreement between an advocate and his client on fees. In rejoinder Mr. Nyamodi submitted that the travel facilitation was made by a contractual obligation between his client and Milka Wahu Kuria. She facilitated the participation of the lead counsel and she was facilitated at a stated consideration that was paid. He submitted that the evidence given by Counsel from the bar that officials of UHAI came to court and that they drew documents did not amount to instructions. Having carefully considered the Notice of Motion application, the Affidavit in Support thereto, the Affidavit in Reply and having considered submissions by both Counsels for the Applicant and the Respondent, it is an agreed fact that in Application No. 20 of 2015 filed in the First Instance Division of this Court for leave to be enjoined as Amicus Curiae in Reference No. 6 of 2014 UHAI EASHRI were represented by Ojiambo & Company Advocates. What is in dispute is whether M/s Ojiambo & Company Advocates received instructions from UHAI EASHRI to represent them and whether they had any agreement with UHAI on the advocates remuneration. 4 (U The Applicant UHAI EASHRI has relied on a written agreement between them and Milka Wahu Kuria who is not on record as representing the Applicant in the subject of this taxation cause, that is, Application No. 20 of 2014:-The agreement was signed by Milka Wahu Kuria (the consultant) on 3rd July, 2014 and a person whose name was not disclosed signed for Wanja Muguongo the Executive Director UHAI EASHRI. This agreement is for the engagement of a consultant and it is my view that a consultant is a person who is qualified to give expert advice. The definition of a consultant according to Wikipedia "is a professional who provides professional or expert advice in a particular area such as security or any of many other specialized fields". I have scrutinized the agreement and observed that among others, some of the specific duties of the consultant were "preparatory work to file the amici before the EACJ in Arusha; facilitating the service of the filed amici to the parties to the reference; travel to Arusha with lead counsel. The extent of the involvement of the lead counsel will be at the discretion of the consultant and; attendance of court in Arusha with lead counsel. The extent of the involvement of the lead counsel will be at the discretion of the consultant." From the above, it is evident that Applicants engaged a consultant in Milka Wahu Kuria. The other argument that the said Milka Wahu was to involve a lead counsel does not hold water. In the Black's Law Dictionary,

lead counsel is defined as "the more highly ranked lawyer if two or more are retained; the lawyer who manages or controls the case or cases ". According to the Applicants argument Milka Wahu was engaged or retained as the advocate to represent them in the Application for amicus and was to involve a lead counsel at her own discretion. If the argument of a lead counsel is maintained here then it would mean that the Applicant retained two counsels and the most senior would lead. But this does not appear to be the case in this matter I have perused the Court record and confirmed that Ojiambo & Company Advocates are on record as advocates representing UHAI EASHRI, the Applicant in Application Number 20 of 2014 that was filed on 1st October, 2014. Annexed to the Notice of Motion is a Supporting Affidavit sworn before a Commissioner of oaths on 28th September, 2014 by Rachael Wanja Muguongo, a Director of UHAI EASHRI. In the Affidavit, Rachael swears that the affidavit is in support of a Notice of Motion signed by Ojiambo & Company Advocates for the Intended 5 Amicus Curiae/Applicant. The Notice of Motion and the Supporting Affidavit are also sworn by the same Ojiambo & Company Advocates. Below the jurat of attestation where Rachael signed there appears the name of Ojiambo & Company Advocates indicating that he had drawn and filed the Affidavit. From the above it is evident that although there does not seem to be express instructions by the Applicants, the Applicants conduct implies that he had retained or agreed that Ojiambo & Company Advocates represent them in the application for amicus curiae. By the Director signing the affidavit, the applicant appears to have consented or agreed to being represented by the said firm of advocates. Evidence also adduced to herein show that the Applicants continued to buy air tickets for the said advocates to travel and even directly paid per diem to the advocates for their upkeep in Arusha when attending the hearing of their case. Rule 17(5) of this Court's Rules of Procedure provide that "The advocate for a party shall file with the Registrar a certificate that he or she is entitled to appear before a superior court of a Partner State". In compliance with this rule, the firm of Ojiambo & Company Advocates filed Practicing Certificates of Aldrin Were Ojiambo Serial Number JUD/3890/98 and Colbet Ouma Ojiambo Serial Number JUD/6344/06 all dated and signed by the Chief Registrar of the Judiciary of Kenya on 1st January 2014. At the hearings of the Application for amicus curiae on 5th November 2014 and 4th February, 2015 and delivery of ruling on 17th February, 2015, the Applicants UHAI EASHRI was represented by Aldrin Ojiambo and Colbet Ojiambo and at no stage was this representation challenged. The applicants UHAI EASHRI admitted that they were represented by Ojiambo & Company Advocates but their only contention is that they did not instruct Ojiambo & Company Advocates, a denial that has come only after the ruling of the court dismissing their application for amicus and the claim by Ojiambo & Company to be paid its legal fees for conducting the matter. In my view and from the court records the applicants were represented in this Court by one law firm that is Ojiambo & Company Advocates and there was no lead counsel in the proceedings. The applicant did not retain more than one counsel to represent them in the proceedings. At all 6 the hearings there was only one counsel representing the Applicant, and the Counsel was from the firm of Ojiambo & Company Advocates. The advocate that has been brought in picture after the conclusion of the matter does not feature anywhere in the proceedings and the Court cannot entertain an agreement for consultancy that is not subject to this proceedings where Ojiambo & Company Advocates is a party. With regard to Rule 113(2) relied upon by the Applicant I will start

by considering Rule 113(1) that gives the Registrar powers to tax costs of or arising out of any claim or reference as between parties. The emphasis here is mine and the registrar's powers are as provided in that rule. The agreement signed between Milka Wahu Kuria and UHAI for consultancy is not an agreement envisaged under Rule 113(2) of the rules of this Court, which is an agreement between client and advocate for representation in this court and not consultancy matters. The applicant herein was represented by Ojiambo & Company Advocates and in that case I can only tax costs of parties. I do not have powers to tax costs in relation to Milka Wahu Kuria who did not feature anywhere in this proceedings. The Court awarded costs in Application Number 20 of 2014 to the Second Respondent and in that case if a bill were to be lodged under Rule 113(3), The Third Schedule, Rule 2(1), then the advocate to be served under the rule would be the advocate for the party liable, that is, Ojiambo & Company Advocates because under Rule 17 of the Courts Rules, UHAI EASHRI were represented in this Court in Application No. 20 of 2014 by Ojiambo & Company Advocates. In the event that UHAI EASHRI wants to change advocates then they can only do so under Rule 18(2), that is, considering that a ruling has been delivered, apply to the court for orders to change advocate or act in person. In this case UHAI EASHRI would have to give notice or apply to change Ojiambo & Company Advocates which they have not done. In all this, Milka Wahu Kuria could not have been party. Rule 113(2) of the Rules of Procedure does not actually refer to agreements giving instructions to advocate but relates to an agreement in relation to remuneration. This means an agreement in respect to the amount and manner of payment. Where there is none as it were in this case then 7, r: either party can refer the matter before the Registrar for taxation. The rule is not relevant to instructions given to an advocate for representation neither does it provide that it be in writing. In

- this particular case no written agreement has been provided to prove instructions to represent the Applicant but Ojiambo & Company Advocates has made an effort to prove that he had instructions to represent UHAI while UHAI has relied on an agreement engaging a consultant, which they use as proof of instructions to Milka Wahu Kuria. From all the above, it is my view that the Applicant's conduct leads to a conclusion that they actually, by implication, retained Ojiambo & Company Advocates for legal services in a matter before this court for leave to be enjoined as an amicus curiae in Reference No. 6 of 2014 and the instructions can be inferred. It is also my view, that, there having been no agreement on remuneration of Ojiambo & Company Advocates by UHAI EASHRI, Ojiambo & Company Advocates have properly filed a bill of costs and referred the matter to me for taxation as provided under Rule 113(2) of the Rules of Procedure of this Court. I therefore conclude and rule that the Application by UHAI EASHRI to strike out the Bill of Costs is hereby dismissed and I award the Respondent the sum of USD 200 as instructions to defend the application, drawing an affidavit in reply and attendance before me for hearing and delivery of this ruling be added to the bill in this taxation cause. Costs of travel and subsistence for the hearing and ruling of this application to strike out the bill will be included in this taxation cause and taxed upon production of receipts by the Respondent. It is so ordered. Dated at Arusha this 9th day of July 2016 = ~ \ ~ :. GERALDINE UMUGWANEZA TAXING OFFICER 8

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