



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION NUMBER E6 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF**

**ENFORCEMENT OF A PROFESSIONAL UNDERSTANDING**

**BETWEEN**

**MUKITE MUSANGI & COMPANY ADVOCATES.....PLAINTIFF**

**VERSUS**

**RAJINDER BILLING P/A BILLING & CO. ADVOCATES.....DEFENDANT**

**R U L I N G**

1. On 23<sup>rd</sup> July 2020, the firm of R. Billing & Company Advocates gave

*“an irrevocable professional understanding to Messrs. Mukite Musangi & Co. Advocates acting for and on behalf of Mrs. Hardev Kaur Dhanoa to release and deposit the sum of Kshs. Thirteen Million Six Hundred Forty-Three Thousand Two Hundred and Ninety (Kshs. 13,643, 290.05) to the firm of Messrs. Mukite Musangi & Company Advocates by 22<sup>nd</sup> August 2020.”*

2. The account details were given, there was a provision that the complaint at the Advocates Complaints Commission, would be marked as settled upon receipt of the full amount by the firm of Mukite Musangi. The breakdown of what was due was set down as follows;

<i>“Outstanding net award</i>	-	<i>Kshs. 8,734,036.00</i>
<i>Interest accrued</i>	-	<i>Kshs. 4,584,253.25</i>
<i>Debt Collection Fees</i>	-	<i><u>Kshs. 325,000.00</u></i>

**Kshs. 13,643,290.05”**

3. On 1<sup>st</sup> October 2020, the firm of Mukite Musangi filed an Originating Summons dated 28<sup>th</sup> September 2020 seeking orders to enforce the professional undertaking issued by “Mr. Rajinder Billing, an advocate of the High Court of Kenya practicing in the name and style of R. Billing & Company Advocates by issuing an execution order against the defendant.”

4. According to the Originating Summons the sum owing as at 23<sup>rd</sup> July 2020 was Kshs. 11,143,290 and had accrued interest from 23<sup>rd</sup> July 2020 at commercial rates plus costs and interest.

5. The Originating Summons was supported by the Affidavit of Hardev Kaur Dhanoa sworn on 28<sup>th</sup> September 2020. In the affidavit she lays the background to the matter, that the matter arose out of **Nakuru High Court Civil Case Number 4 of 2013** where counsel ( R. Billing & Co Advocates ) had represented her. That judgment was rendered on 27<sup>th</sup> April 2017, and when the decretal sum was paid, counsel paid her the sum of Kshs. 6,500,000/= with a promise to pay the balance later, and when the money was not paid, she instructed Messrs. Mukite Musangi & Co Advocates on 19<sup>th</sup> March 2020 to pursue the balance. That he paid a sum of Kshs. 2,500,000/= and then, gave the professional undertaking.

6. Mr. Billing was served with Summons to Enter Appearance dated 19<sup>th</sup> October 2020.
7. He did so, under protest citing **Order 6 rule 1 and Order 6 rule 3 of the Civil Procedure Rules 2010**.
8. He proceeded to file his statement of defence on 18<sup>th</sup> November 2020 in which he stated that on or about 12<sup>th</sup> November 2020 he had paid the full amount of Kshs. 11,143,290/= by way of RTGS.
9. That he was not liable to pay any further costs in the matter because, on or about 24<sup>th</sup> August 2020 he tried to settle the Account by offering to the plaintiff, a property worth 8.5 million, he also stated that he had been anticipating judgment in a legal matter which was to be paid in July and August, in which his professional fee was substantial and which payment would have enabled him to pay the undertaking.
10. That in any event he had all the intentions of paying the money, save for the prevailing circumstances, difficult circumstances including effects of the Covid 19 Pandemic, made it difficult for him, and pushing him to seek plaintiff's indulgence for more time which indulgence was not granted. He sought to have the suit marked as settled with not orders as to costs.
11. On 13<sup>th</sup> May 2021, the defendant filed a Preliminary Objection to have the affidavit sworn by Hardev Kaur Dhanoa struck out with costs for abuse of the court process. In addition, that the Originating Summons did not comply with procedural requirements and therefor was fatally incompetent and defective.
12. Parties filed written submissions, and made oral arguments in support of the rival positions.
13. The defendant set out the issues for determination;

***i. Whether the Preliminary Objection was merited to warrant the striking out of the Originating Summons in limine for being fatally and incurably defective.***

***ii. Whether the plaintiff was entitled to the costs and interest sought.***

14. The plaintiff set out one issue;

***i. Whether the defendants Preliminary Objection dated 13<sup>th</sup> May 2021 was merited.***

15. I have considered the affidavits, annexures, submissions and authorities cited.

16. **On whether the Preliminary Objection was merited;**

The classic authority on what constitutes a Preliminary Objection is the case of **Mukisa Biscuit Manufacturer Limited vs West End Distributors Limited (1969) EA 696**, further illustrated in **Kenya Breweries Limited & Another vs Keroche Breweries Limited [2020] eKLR** where it is stated;

*“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court, or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... it raises a pure point of law which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of discretion.”*

17. It is argued for the defendant that this court lacks jurisdiction to deal with a pleading that is fatally and incurably defective *ab initio*. He relies on **Patrick Lutta T/A Lutta & Company Advocates vs Ishvinder Kaur Kalso Marwa T/a Ishi Kaur & Co. Advocates [2019] eKLR**.

18. It is submitted for the defendant that the Supporting Affidavit to the Originating Summons is incompetent for want of compliance with the law to wit **order 19 rule 6 of the Civil Procedure Rules, Order 19 rule 3(1) of the Civil Procedure Rules**. That this matter involves the two (2) law firms only and not the deponent of that affidavit. It is argued that the professional undertaking is between two (2) law firms and the affidavit introduces a third party who is not a party to the undertaking and that by itself renders the Originating Summons fatally defective.

19. For the plaintiff it is argued that the defendant has not provided material to demonstrate how the affidavit is incompetent.

**Order 19 rule 3(1)** provides;

*“Affidavits shall be confined of such facts as the deponent is able of his knowledge to prove:*

*Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”*

**Order 19 rule 6** provides;

***“The Court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.”***

20. It is argued that the defendant has not demonstrated that the facts deponed to in the affidavit are not in the knowledge of the deponent, neither has he demonstrated that any specific thing needs to be struck out from the affidavit. The Plaintiff relied on **Anarwali Limited vs Joseph Wambua Kanini (suing as the Administrator of the Estate of Kioko Kanini Mulungeje [2018] eKLR.**

21. For the defendant it is further argued that there is no privity of contract between the two (2) law firms and the Third Party on the professional undertaking.

22. From what I see in the affidavit the deponent has deponed to the matters leading to the professional undertaking, matters which are within her knowledge. In my view that does not render her a third party to the suit. Further the defendant has not demonstrated that the swearing of her affidavit has in any way prejudiced him, if anything it clarifies the position as to how the matter came to the professional undertaking. She is the beneficiary of the payment and holding this affidavit against the cited provisions of **Order 19 of the Civil Procedure Rules**, I find that there is nothing placed before me to demonstrate the alleged incompetence.

23. The defendant argued that the Originating Summons is fatally defective and discloses no cause of action, that the plaintiff missed the correct and initial procedural step that should have been followed. He made reference to **Order 52 rule 7** which states;

***“(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made-***

***(a) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or***

***(b) In any other case, by originating summons in the High Court.***

***(2) Save for special reasons to be recorded by the judge, the orders shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made.”***

It clearly provides that the procedure to enforce a professional undertaking shall be either by summons in chambers in the suit, if the suit was in the High Court, or any other case, by Originating Summons in the High Court. What this is saying is that the plaintiff ought to have filed a summons in chambers in **Nakuru High Court Civil Case Number 4 of 2013.**

24. For the plaintiff it is conceded that **Order 52 rule 7** applies, and that the plaintiff is simply pursuing the enforcement of the professional undertaking.

25. I have looked at the provisions of **Order 52 rule 7**. The only question is, where was the suit in which this undertaking was made? The cited case is **High Court of Kenya at Nakuru Civil Suit Number 4 of 2013 Hardev Kaur suing as the legal representative of the Estate of Harminder Singh Dhanoa (Deceased) vs Multiple Hauliers [EA] Limited.** Clearly this matter fell within the ambit of **order 52 rule 7 (1) (a)**, for the reason that the undertaking was given in a suit in the High Court, and the plaintiff was required to file a Summons in Chambers in “that suit” i.e. in **Nakuru High Court Civil Case Number 4 of 2013.** What did the plaintiff do? The plaintiff filed an Originating Summons (**Miscellaneous E6 of 2020**). This clearly renders the Originating Summons defective for want of procedure.

26. This begs the question, is that defect fatal? Counsel for the plaintiff, other than acknowledging the applicability of this provision of the law, avoided to address this issue of the fact that the application to enforce the undertaking was required to be filed by way of Chamber Summons in the same suit.

27. Be that as it may, to determine the question the court will only need to answer the next question: whether this requirement to file the application in the suit from where the professional underrating arose is a technicality. I am alive to Article **159(2) (d)** of the Constitution which prohibits the undue regard to procedural technicalities. It is noteworthy that **Order 52 rule 7** is couched in mandatory terms; it proceeds to provide for two modes of raising the enforcement of the professional undertaking; one, where the High Court is already seized of the matter, the applicant is required to move the court in the same file, and not to start fresh proceedings. The plaintiff herein ignored that clear mandatory provision that separates matters where the High Court is already seized of the matter, and matters which the High Court is not already seized of the matter. This does not present as a mere technicality as it is the mode of filing here that confers jurisdiction to the court to deal with the matter. The plaintiff ought to have filed a Chamber Summons and to that end the Originating Summons is fatally defective and stands to be struck out.

28. In the event that I may be wrong, I look at the other issues;

#### **Whether the Originating Summons is merited**

The defendant contends that he paid the outstanding amount on or about 12<sup>th</sup> November 2020, and had been trying to settle the matter even through other means. This he deponed in his affidavit and pointed to the same in his defence. These averments were not contested by the plaintiff, that the total outstanding amount had been settled. It is therefore my finding that the outstanding amount of Kshs. 11,143,290/= was paid.

29. The other issue is;

#### **Whether the plaintiff is entitled to interest, and costs of the Originating Summons**

The defendant argues that the plaintiff is not entitled to any costs because she did not have to file this Originating Summons in the first place, because, though the time for payment lapsed, he tried to get an extension, and also tried to settle through other means.

30. For the plaintiff it is argued that the plaintiff is entitled to an award of costs to the tune of Kshs. 2,090,000/= incidental to the filing, institution and prosecution of this Originating Summons.

31. I have carefully perused the record. There is no explanation anywhere in the record as to how the plaintiff arrived at the costs and /or interest of Kshs. 2,090,000/= other than the claim that they are incidental to the filing of the Originating Summons following the default by the defendant.

32. It is argued for the defendant that issue of costs is regulated by **Section 27 of the Civil Procedure Act**, where the court is given the discretion to determine costs and, by whom they are to be borne. The defendant relied on the following cases;

**Republic vs Rosemary Wairimu Munene ex parte Applicant vs Ihururu Dairy Farmers Cooperative Society Limited Judicial Review Application No. 6 of 2014, Cecilia Karuru Nganyu vs Barclays Bank of Kenya [2016] eKLR, and Halsbury's Laws of England**, to the effect that costs follow the event, and it is in the discretion of the court to award costs.

33. It is further argued that the principal sum, together with the accrued interest and legal costs had been paid in satisfaction of the amount paid in the professional undertaking.

34. The professional undertaking is not denied. The delay in settling the same is not denied. It was settled about 2 ½ months late. The defendant tried to explain the delay, the only concern for this court is whether the delay is excusable. The defendant waited until the 24<sup>th</sup> August 2020 to make counter offers on how to settle the account. It is also then that he sought an extension, and made some deposits, towards part payment. The defendant ought to have done so early enough to avert the filing of any enforcement procedures.

35. The Originating Summons was filed on 1<sup>st</sup> October 2020. He settled the account on 12<sup>th</sup> November 2020. Clearly therefore there was no need to *prosecute* the application because the sums were already settled.

36. On that ground of delay by the defendant to either seek an extension, settle by other means, I would have awarded costs to be assessed. However, in this case I did find that the Originating Summons was fatally defective.

37. In the end the Preliminary Objection is sustained. The Originating Summons is struck out.

38. Taking into consideration the circumstances of this matter each party will bear its own costs.

39. Orders accordingly

**DATED, SIGNED AND DELIVERED VIA EMAIL BY CONSENT OF COUNSEL THIS 28TH DAY OF OCTOBER 2021.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

Edna Court Assistant

R. Billing & Co Advocates

M/S Mukite Musangi & Co Advocates