



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CIVIL SUIT NO 5 OF 2016 (O.S)**

**IN THE MATTER OF: THE ADVOCATES ACT CAP 16 LAWS OF KENYA**

**1. HANIF MANSOOR**

**2. ZAHEER KHAN.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**SHARIFF MWANAISHA SAIDA**

**T/A M.S. SHARIFF & CO ADVOCATES.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. On 25<sup>th</sup> June 2016, the Applicants herein instituted an Originating Summons dated 22<sup>nd</sup> April 2016 in which they had sought the following reliefs:-

**1. THAT the Defendant/Respondent do render to the Plaintiffs/Applicants a just and true account of the decretal amount awarded by the Honourable Court to the Applicants in (Voi)SRMCC No 36 of 2009 (Hanif Mansoor & Zaheer Khan vs John Aringo & Jessikay Enterprises Limited) in which the Applicants herein were the Plaintiffs and the Respondent herein was the Applicant's (sic) Advocates.**

**2. THAT the Respondent do pay and/or deliver up to the Applicants all monies found to be lawfully due and owing from her to the Applicants plus interest at courts rates on the taking of accounts pursuant to prayer 1 above.**

**3. THAT the costs of this application be paid by the Defendant/Respondent.**

**4. THAT any other or further order be made as suits the circumstances of this case.**

2. In response to the said Originating Summons, the Respondent filed a Replying Affidavit sworn on 26<sup>th</sup> July 2016 on even date. The 2<sup>nd</sup> Applicant filed a Supplementary Affidavit on 1<sup>st</sup> September 2016. On 29<sup>th</sup> September 2016, this court directed both parties herein to file their respective Written Submissions. The Applicants complied and filed their Written Submissions dated 10<sup>th</sup> October 2016 on 11<sup>th</sup> October 2016. However, the Respondent did not comply with the time lines that had been given by the court to file her Written Submissions. Instead, she filed a Notice of Motion application dated 18<sup>th</sup> November 2016 on 21<sup>st</sup> November 2016.

3. The Respondent's said Notice of Motion application was brought pursuant to the provisions of Sections 1A, 1B, 3A,6, and 63 (e) of the Civil Procedure Act, Order 51 Rule 1, Rule 52 Rule 4(3) of the Civil Procedure Rules and Sections 53 of the Advocates Act and Articles 28, 47, 48, 50(1) and 159 (2) and 165 of the Constitution of Kenya. Prayer No (1) of the said application was spent. It had sought the following remaining orders:-

**1. Spent**

**2. THAT this Honourable Court be pleased to stay the proceedings herein pending the following:-**

**i. The taxation of the firm of M.S. Shariff & Company Advocates Bill of Costs dated 18<sup>th</sup> July 2016 in Voi SPMCC No 36 of 2009 Hanif Mansoor & Zaheera Khan versus John Aringo & Jessika Enterprises Ltd(sic).**

**ii. The hearing and determination of the notice of Motion (sic) dated 25<sup>th</sup> July 2016 for apportionment and investment of the monies due to minors namely (a) Tabasum Hanif Khan (b) Javed Hanif Khan in Voi SPMCC No 36 of 2009.**

**iii. The hearing and determination of the In-House dispute resolution proceedings before the Advocates Complaints Commission pursuant to the Applicants/ clients complaint currently pending before the said Commission.**

**3. THAT costs of this application and proceedings herein be borne provided for (sic).**

4. In view of the nature of the orders that had been sought in the Respondent's present application, this court found it prudent to hear and determine the same before rendering its Judgment in respect of the Originating Summons.

**THE RESPONDENT'S CASE**

5. The Respondent swore Supporting and Supplementary Affidavits on 18<sup>th</sup> November 2016 and 9<sup>th</sup> February 2017 respectively in respect of her present application. On 13<sup>th</sup> February 2017, she filed her Written Submissions dated 9<sup>th</sup> February 2017. The said submissions had been consolidated to address both the Applicant's Originating Summons and her present application.

6. She averred that the Applicants had misrepresented the status of their complaint at the Advocates Complaints Commission and that the institution of the proceedings herein had subjected her to double jeopardy. She contended that an advocate had a lien over her client's monies in respect of his or her legal fees.

7. She pointed out that a Bill of Costs she had filed was pending taxation, an application seeking the apportionment of the decretal sum as the claim involved minors was also pending hearing and determination by the Trial Court and that there were pending proceedings before the Advocates Complaints Commission In-House Dispute Resolution mechanism necessitating the stay of the proceedings herein.

8. She averred that the said Bill of Costs had been fixed for taxation before the Taxing Master on 19<sup>th</sup> January 2017 but was adjourned to 23<sup>rd</sup> February 2017 at the instance of the Applicants herein which showed that they did not want the issues resolved. Further, she said that she was not aware of the Applicants' withdrawal of the proceedings before the Advocates Complaints Commission as had been contended by the 2<sup>nd</sup> Applicants in her Replying Affidavit.

9. She stated that she had been unable to apply for jobs in several offices whenever vacancies arose such as in the Environment and Land Court, the High Court, the Supreme Court, the Deputy Chief Justice and

Chief Justice and that her political ambitions were being thwarted. She attributed these problems to proceedings that the Applicant instituted at the Advocates Complaints Commission.

10. She therefore urged this court to allow her application as prayed on the ground that the proceedings that were instituted by the Applicants herein were out rightly scandalous, malicious, obnoxious, vindictive, punitive and an abuse of the court process.

### **THE APPLICANTS' CASE**

11. In response to the said application, the 2<sup>nd</sup> Applicant filed a Replying Affidavit on her own behalf and that of the 1<sup>st</sup> Applicant on 15<sup>th</sup> December 2016. The said Replying Affidavit was sworn on even date. The Applicants relied on the Written Submissions dated 10<sup>th</sup> October 2016 they filed on 11<sup>th</sup> October 2016 that they had filed in respect of the Originating Summons in arguing against the Respondent's present application.

12. They contended that the High Court had both original and appellate jurisdiction on matters relating to disputes between advocates and their clients and consequently, there was no law barring this court from proceeding even where there were proceedings pending before the Advocates Complaints Commission.

13. They added that in any event, they had already withdrawn their complaint they had lodged against the Respondent herein at the said Commission and as a result the Respondent's assertion of suffering double jeopardy had collapsed. They were emphatic that there was no dispute relating to the fees they were to pay the Respondent, the same having been agreed previously, and consequently, there was no deed for the taxation of the said Bill of Costs.

14. They stated that the Respondent acted in bad faith when she filed the present application on the date this court was to reserve its Judgment in respect of its Originating Summons herein and therefore urged this court to dismiss the present application.

### **LEGAL ANALYSIS**

15. The Respondent's Written Submissions largely comprised of facts that were in both her Supporting and Supplementary Affidavits. There were more evidentiary facts that had not supported by any affidavit. Be that as it may, she had argued that there was a dispute as to whether her fees would be one third (1/3) or thirty (30%) per cent or one third (1/3) exclusive of disbursements which is what she contended, she had agreed upon with the Applicants.

16. She further argued that there was a dispute in respect of the actual monies she received and on the question of whether or not the Applicants had authorised her to consent to a sum of Kshs 1,100,000/= from Kshs 1,478,250/= that had been awarded by the Trial Court, issues she stated ought to be determined before the determination of the Originating Summons herein.

17. Notably, she was concerned that the application for apportionment of the decretal sum had not been determined to safeguard the interests of the minors. She was emphatic that the Applicants had declined to execute the affidavit in support of the said application and that the deceased's mother, who was married to the 1<sup>st</sup> Applicant herein, had been sidelined to the periphery. She was therefore apprehensive that the Applicants might misappropriate the decretal sum.

18. On their part, the Applicants submitted that it was not in dispute that judgment was entered in their favour for the sum of Kshs 1,478,250/= plus costs and interest in **SRMCC No 36 of 2009 Voi** but that there was no consensus if they authorised the Respondent to have the decretal sum reduced to Kshs 1,100,000/= as had been contended by the Respondent herein. They also pointed out that the consent letter purporting to have forwarded the decretal sum in instalments was not stamped at the Senior Principal Magistrate's Court at Voi.

19. They added that there was a valid and duly executed agreement on the fees the Respondent was entitled to and that the filing of the Bill of Costs for the sum of Kshs 800,000/= was an afterthought and consequently, the proceedings herein ought not to await the taxation of the said Bill of Taxation.

20. They placed reliance on the cases of **Adopt A Light Limited vs Ochieng' Onyango Kibet and Ohaga Advocates [2016] eKLR, Omulele & Co Advocates vs Synresins Limited [2013] eKLR** and **D. Njogu & Co Advocates vs National Bank of Kenya Ltd [2009] eKLR** where the common thread was that any written agreement on fees between an advocate and a client shall be valid and binding rendering a bill of costs in such a case immaterial.

21. It was evident from the said Judgment that the deceased was aged four and a half (4 ½) years at the time of his death which was as a result of a road traffic accident that occurred in Voi Town on 23<sup>rd</sup> November 2008. The Judgment that was delivered by Hon S. M. Wahome (SPM) on 17<sup>th</sup> March 2014 was for a sum of Kshs 1,478,250/= general damages plus costs and interest.

22. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants were the deceased's father and aunt respectively while the one Sajeda Merab Khan was the deceased's mother. The minors for whose benefit the application for apportionment was brought were the deceased's sister and brother. They were aged seven (7) and three (3) years respectively at the time of delivery of the said Judgment.

23. It was clear from the Respondent's Replying Affidavit that was filed on 26<sup>th</sup> July 2016 that the application for apportionment of the decretal sum shown to have been dated 2014 marked as "DM- 3" did not bear any stamp from the court as had rightly been pointed out by the Applicants herein. It was indicated to have been a draft apportionment application.

24. However, the said application for apportionment marked "G-i" attached to the Affidavit in support of the present application was shown to have been dated 26<sup>th</sup> July 2016 and filed on 26<sup>th</sup> July 2016, which was the same date the Respondent filed her Replying Affidavit. Notably, Exhibit marked "D-I" annexed to the Respondent's Supporting Affidavit that was sworn on 18<sup>th</sup> November 2016 also showed that the Bill of Costs dated 18<sup>th</sup> July 2016 was also filed on 26<sup>th</sup> July 2016.

25. Although the Respondent had contended that the Applicants refused to sign the Supporting Affidavit, there was no documentary evidence to show that they had indeed been recalcitrant in executing the said Affidavit. Assuming that she did in fact encounter the said reluctance by the Applicants, she still did not proffer any plausible explanation why she filed the said Bill of Costs and Consent letter slightly over two (2) years after delivery of the Judgment in 2014.

26. Bearing in mind the length of time that had lapsed between the time the judgment was delivered by the Trial Court and when the application of apportionment, Bill of Costs, the consent letter and the present application were all filed, this court came to firm conclusion that, in the absence of any plausible explanation, there had been inordinate delay on the part of the Respondent in resolving the dispute she had with the Applicants herein. The judgment herein was delivered on 17<sup>th</sup> March 2014 giving her sufficient time to have filed her pleadings. However, she only filed the said pleadings on 26<sup>th</sup> July 2016 making it seem as if she had been prompted to act by the Originating Summons that the Applicants filed in court on 25<sup>th</sup> June 2016.

27. It was not therefore difficult for this court to concur with the Applicants' arguments that the present application was not filed in good faith and was actually intended to derail the hearing of the Originating Summons that was ripe for delivery of the final judgment. It would be unfair and contrary to the interests of justice to accord the Respondent more time to have her Bill of Costs and application for apportionment of decretal sum heard and determined before the Originating Summons herein.

28. Indeed, nothing stops the Taxing Master from entertaining arguments relating to the taxation of the Bill of Costs and for the Trial Court to consider the merits or otherwise of the application of apportionment of the decretal sum as this court renders its decision in respect of the Originating

Summons herein. In fact, there is every possibility that the said decisions could all be rendered expeditiously with a view to finally concluding all the matters in question herein.

29. Appreciably, the account of the decretal sum was well within the knowledge of the Respondent. The rendering of a just and true account of the decretal sum and the ordering of the Respondent deliver what is due after taking of accounts had no relation whatsoever to the taxation of Bill of Costs. Indeed, both parties seemed to agree that the amount of fees that she was entitled to had been reduced in writing.

30. The dispute appeared to be in the interpretation of what really the Respondent was entitled to as her fees. There was also the question of whether or not the Applicants had consented to the reduction of the decretal sum as had been contended by the Respondent herein.

31. The fact that there was a dispute in the interpretation of an agreement on fees payable did not mean that the issue could only be resolved through taxation. Undoubtedly, the taxing master will never be able to resolve the said questions. These were matters that could adequately be dealt with in the Originating Summons and not in the taxation.

32. Further, an application for the apportionment of the decretal sum for the minors could also not hold this court from making its determination of the Originating Summons. Indeed, the orders of such application had no bearing whatsoever to the orders sought in the Originating Summons herein. Without considering at the merits of the said application, this court nonetheless wishes to request the parties herein to carefully look at the provisions of Section 4(2) of the Fatal Accidents Act Cap 32 (Laws of Kenya).

33. This court also wishes to point out that both the court and the Advocates Complaints Commission have different mandates and unless there is likelihood of a party suffering prejudice if the two (2) processes run alongside each other, no entity should stifle or gag the other in performing its statutory duties. Having said so, the Applicants had since withdrawn the complaint they had lodged against the Respondent at the Advocates Complaints Commission rendering her prayer No 2(ii) of her application obsolete. As the prayer had already been overtaken by events, the question of the Respondent suffering doubt jeopardy could not arise.

34. Accordingly, having considered the Respondent's application, affidavit evidence and written submissions that were relied upon by the parties herein, this court was not persuaded that this was a suitable case for it to stay the proceedings before it so that the taxing master and the Trial Court could first tax the Respondent's Bill of Costs and hear and determine the application for apportionment of the decretal sum respectively.

35. As there is no overlap in the mandates, each court must do its part and not be delayed by the other. The bottom line is that this court's hands cannot be tied and it cannot be stopped from performing its mandate merely because there are other proceedings pending before the Trial Court and the Taxing Master.

### **DISPOSITION**

36. For the foregoing reasons, the upshot of this court's ruling was that the Respondent's Notice of Motion application dated 18<sup>th</sup> November 2016 and filed on 21<sup>st</sup> November 2016 was not merited and the same is hereby dismissed with costs to the Applicants herein.

37. It is so ordered.

**DATED and DELIVERED at VOI this 30<sup>th</sup> day of March 2017**

**J. KAMAU**

**JUDGE**