



**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**  
**JUDGEMENT**

**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.

3. 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. The said application had sought orders for a stay of the proceedings in this court pending:-

a. **The taxation of the Respondent's Bill of Costs against the Applicants herein in Voi SPMCC No 36 of 2009 Hanif Mansoor & Zaheera Khan versus John Aringo & Jessika Enterprises Ltd(sic).**

b. **The hearing and determination of an application in Voi SPMCC No 36 of 2009 Hanif Mansoor & Zaheera Khan versus John Aringo & Jessika Enterprises Ltd(sic) for apportionment and investment of the monies due to minors namely (a) Tabasum Hanif Khan (b) Javed Hanif Khan.**

c. **The In-House dispute resolution proceedings before the Advocates Complaints Commission pursuant to the Applicants/ clients complaint in Voi SPMCC No 36 of 2009.dated 18<sup>th</sup> July 2016 in Voi SPMCC No 36 of 2009 Hanif Mansoor & Zaheera Khan versus John Aringo & Jessika Enterprises Ltd.**

4. This court dismissed the said application and rendered itself as follows:-

**“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....**

**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.”**

5. On 13<sup>th</sup> February 2017, the Respondent filed her submissions dated 9<sup>th</sup> February 2017 in which she detailed what had transpired from the date judgment was delivered in the lower court for the sum of Kshs 1,478,250/= plus costs and interest giving a total of Kshs 1,662,451/=.

6. She stated that the Defendant's advocates indicated that they were appealing against the said judgment but they were open to out of court negotiations. She said that she was unable to trace the Applicants as a result of which she agreed with the Defendant's advocates that the decretal sum could be reduced to Kshs 1,100,000/= all- inclusive which was to be paid in instalments.However, the payments were sporadic.

7. She stated that she received two (2) cheques for Kshs 200,000/= each. She gave the Applicants one (1) cheque and she retained the other and the same was evidence by a Discharge Voucher. Both the Applicants and the Respondent fell out when the former, through a new firm of advocates, indicated that they would recover the balance of Kshs 700,000/= but she subsequently recovered the same.

8. She further explained that the Applicants then refused to swear an affidavit in support of an application for the apportionment of the monies for the minors which application was still pending in court. She pointed out that a dispute also arose regarding how much money the Respondent was to retain as her fees which saw the Applicants lodge a complaint at the Advocates Complaints Commission. The Respondent set out the details of what transpired both in her Written Submissions and her Replying Affidavit that she swore and filed on 26<sup>th</sup> July 2016.

9. It appeared to this court that the Respondent's concern was to safeguard the interests of the minors as she stated that the 2<sup>nd</sup> Applicant herein had expressly intimated her intention to apply for the monies to pay school fees for her children. The Respondent therefore urged this court to dismiss the present Originating Summons and allow her Bill of Costs to be taxed and the application for apportionment of monies for the minors be heard and determined first.

10. This court noted the contents of the Respondent's Bill of Costs that was attached to her Supplementary Affidavit that she swore on 9<sup>th</sup> February 2017 and filed on 13<sup>th</sup> February 2017. It also noted the Applicant's submissions that they already had an agreement with the Respondent on how her fees were to be paid. The Respondent did not deny that there was any other agreement to the contrary.

11. A perusal of the Authority letter marked "ZK 3" in the 2<sup>nd</sup> Applicant's Supporting Affidavit sworn on 22<sup>nd</sup> April 2016 and filed on 22<sup>nd</sup> June 2016 showed that the 1<sup>st</sup> Applicant, who had also signed the said Authority Letter on behalf of the 2<sup>nd</sup> Applicant herein, had authorised the Respondent to calculate her legal fees at one third (1/3) of Kshs 1,100,000/=.

12. This Authority Letter was self-evident on what fees the Respondent was entitled to and what the decretal sum was. This court was therefore unable to comprehend the need for the Respondent's to file a Bill of Costs for taxation as shown hereinbelow.

13. It is important to note that the Advocates Remuneration Order does not provide for the taxation of costs in matters that had been determined by the lower court. It provides for assessment of costs. This was an issue that was addressed by this very court in the case of **John Nyariki v British – American Insurance Company (Kenya) Limited [2015] eKLR** and by Kasango J in the case of **Angelo Gitonga V Angelo Gitonga & Another [2010] e KLR** where she held as follows:-

**“.....there is no provision on the Advocates Remuneration Order for taxation of subordinate courts costs. A practice is however arising, where parties in the subordinate court file laborious and detailed bills of costs, and then engage the magistrate in taxation. That in my view is uncalled for and should be discouraged subordinate court's party and party costs should be assessed following the provisions of Schedule VII of the order....”**

14. In the case of **Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company Limited & another [2016] eKLR**, Aburili J also stated as follows:-

**“...The successful parties before a subordinate court are not expected to draw an elaborate itemized bill of costs... I uphold the Deputy Registrar /taxing officer's finding that she had no jurisdiction to tax a bill of costs in a matter determined by the subordinate court.**

15. In addition, Section 45(1) of the Advocates Act recognises that there can be agreement between advocates and their clients on fees and that Section 45 (6) prohibits a taxing master from taxing an advocates-clients' bill where there is such an agreement. These were issues that were dealt with in the cases of **Adopt a Light vs Ochieng', Onyango, Onyango & Kibet Advocates [2016] eKLR**, **Omulele & Co Advocates vs Synresins Limited [2013] eKLR** and **D. Njogu & Co Advocates vs National Bank of Kenya Limited [2009] eKLR** that were relied upon by the Applicants herein.

16. Notably, Section 45 (1) of the Advocates Act Cap 16 (Laws of Kenya) provides as follows:-

**“Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-**

**a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof.**

**And such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”**

17. Section 45(6) of the Advocates Act provides as follows-

**“Subject to this section, costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.”**

18. It was therefore correct as the Applicant submitted that an advocate cannot purport to file an elaborate bill of costs if he or she has entered into an agreement of how his or her fees will be paid. The question of the competency of the Respondent’s Bill of Costs pending before the Deputy Registrar was therefore relevant in the circumstances of the case herein.

19. Turning to the issue of the pending application for the apportionment of monies for the minors, namely, Tabasum Hanif Khan and Javed Hanif Khan who were aged seven (7) and three (3) years of age, this court noted that Yunas Khan was the 1<sup>st</sup> Applicant’s son and a brother to the two(2) minors.

20. Evidently, Section (4) (1) of the Fatal Accidents Act Cap 32 (Laws of Kenya) stipulates as follows:-

**“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child(emphasis court) of the person whose death was so caused, and shall, subject to the provisions of [section 7](#), be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:**

**Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”**

21. It is clear from the aforesaid Section that the only dependants for whose benefit a claim under Section 4(1) of the Fatal Accidents Act can be brought are a wife, husband, parent or child, a position that Asike-Makhandia J (as he then was) articulated very well in the case of **Multiple Hauliers Co Limited vs David Lusa[2012] eKLR**. This very court also addressed the same issue in the case of **Kenya Power Limited vs James Matata & 3 Others [2016] eKLR**.

22. It was the firm belief of this court that as the two (2) aforementioned minors on whose behalf an application for apportionment of monies had been filed were the deceased’s siblings, they were not and could not be regarded as the deceased’s dependants within the meaning of the Fatal Accident Act. The competence of the application seeking apportionment of the monies pending before the lower court was also a pertinent issue. It was the considered view of this court that whereas the Respondent was concerned about the welfare of the aforesaid minors, her misapprehension appeared to have been misplaced.

23. Accordingly, having considered the Applicants’ Originating Summons, 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 just as it had found in its Ruling of 30<sup>th</sup> March 2017.

24. Notably, it was therefore not this court’s intention to address its mind to the two (2) issues pending before the lower court to wit, taxation of the Respondent’s Bill of Costs and the application for apportionment of the decretal sum before they were articulated and determined. However, the said issues were raised by the Respondent as reasons why she was objecting to the orders the Applicants had sought herein being granted hence this court’s observations on the same. In view of the observations that were

made by this court on the said pending issues, the Respondent may consider re-assessing her position regarding the said two (2) pending issues.

### **DISPOSITION**

25. For the foregoing reasons, the upshot of this court's judgment was that the Applicants herein Originating Summons dated 22<sup>nd</sup> April 2016 filed on 25<sup>th</sup> June 2016 was merited and the same is hereby allowed as follows:-

**1. THAT the Respondent do render to the 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 Applicants' 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 Respondent shall bear the costs of this Originating Summons.**

26. It is so ordered.

**DATED and DELIVERED at VOI this 27<sup>TH</sup> day of JUNE 2017**

**J. KAMAU**

**JUDGE**