



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 4 OF 2017

AMINA MOHAMED MOHAMUD.....APPLICANT

VERSUS

JURJEN GERMAN DRAAIJER.....DEFENDANT

RULING

1. The application before me for determination is a Chamber Summons dated 20th June, 2017 but filed in court on 30th June, 2017 under certificate of urgency seeking orders as follows:

(a) That leave be granted to the applicant to proceed on priority basis dispensing with service of summons under the preceding certificate of urgency for a grant of interim orders herein sought.

(b) That the firm of Ocholla & Company Advocates be granted leave by this honourable court to cease acting for the petitioner herein.

(c) That the honourable court do issue an order compelling the petitioner to deposit security before the court pending taxation of the advocate's bill of costs in the sum of 5,000,000/= within seven days.

(d) That the petitioner be ordered to deposit 6,520,000/=, upon the applicant filing his bill of costs within seven days.

2. Application which is filed under Order 9 rule 13 and Order 52 of the Civil Procedure Rules 2010, Sections 1, 1A, 3, 3A of the Civil Procedure Act, is premised on grounds on the face of it and affidavit in support sworn by John Ochola on 30th June, 2017 and a further affidavit sworn on 11th July, 2017 but filed on even date.

3. In response to the applicant's application, the respondent filed a replying affidavit deposed by Amina Mohamed Mohamud on the 11th July, 2017 and filed on 12th July, 2017 together with grounds of opposition.

4. Briefly, the applicant herein Mr. John Ochola is a counsel representing the respondent/plaintiff who has filed Originating Summons before this court (HCC 4/17) against her former husband for division of matrimonial property and divorce proceedings in respect of Milimani CMCC No. 225/2015.

5. That during the pendency of the proceedings in respect of the Originating Summons, the respondent/petitioner (Amina Mohamed Mohamud) and her counsel (John Ochola) the applicant in

respect of the instant application, entered into a client/advocate agreement at a legal fees of 5,000,000/= in which the applicant (John Ochola) was to pursue an out of court settlement in respect of the Originating Summons on division of matrimonial property between Amina Mohamed Mohamud (respondent) and her former husband Jursden German Draaijer and the Milimani Chief Magistrate's Divorce Cause No. 255/2015.

6. Pursuant to the said agreement, the applicant undertook the process on

7. To the applicant's surprise, on 21st June, 2017, he was served with a letter from the firm of E.K. Mutua Advocates indicating that they had been instructed by the respondent/plaintiff (Amina Mohamed) to take over the matter from him. The said message hit the applicant as a shocker thereby reading mischief on the part of the respondent/petitioner whom he accused of malicious intentions thereby running away from honoring the agreement in payment of his legal fees.

8. It was a term of the agreement that, the respondent/plaintiff was to make a down payment of 3,000,000/= upon receiving the settlement with the balance of 2,000,000/= payable within six months upon the sale of property LR Group/V/759 Kilifi township.

9. That despite securing a settlement agreement and forwarding the same to the respondent/plaintiff together with his advocate, the plaintiff went off communication thereby switching off her mobile phone and to make matters worse, appointed another advocate to take over.

10. It is on the basis of the respondent/plaintiff's refusal to honour the payment of the legal fees agreement and the fear that the plaintiff is planning to move out of court's jurisdiction to South African that this application has been brought.

11. However, the applicant attached to his further affidavit, a copy of a bill of costs in respect of Misc. Application No. 91/2017filed on 4th July, 2017 in which he is seeking same amount thereby calling for taxation of advocate's and client bill of costs against the respondent/plaintiff.

12. In response, the respondent opposed the application on the basis that the same amounted to an abuse of the court process, scandalous, frivolous and vexatious as it sought payment of 11,520,000/= which by far exceeds the settlement sum of 5,000,000/= claimed by the applicant and that the same infringed on her constitutional right to change legal representation.

13. Secondly, the respondent/plaintiff, denied ever signing a professional settlement of legal fees in the sum claimed and that the claim is unreasonable, unconscionable and exorbitant.

14. Lastly, the respondent/plaintiff averred that the claim herein is misplaced and intended to delay the main proceedings and that the same ought to have been filed in a separate file under the advocates' remuneration order.

15. In his submission, Mr. Ochola submitted that, he was forced to file the instant application under this file due to time pressure and that Sections 45 and 48 of the advocates Act allows filing of similar application in the main file.He admitted that he has since filed a separate suit being Misc. Application No. 91/2017 and that there is no harm in the court making orders as prayed.

16. Mr. Musyoki counsel for the respondent/plaintiff urged the court to dismiss the application as the same ought to have been filed separately for taxation of Bill of costs and that Sections 45 and 48 are not applicable in the circumstances.

17. I have considered application herein, supporting affidavit, further affidavit, replying affidavit and submissions by both counsels. There is no dispute that the applicant was initially instructed by the respondent/plaintiff to represent her in divorce proceedings in respect of Milimani CMCC No. 255/15 and division of matrimonial property HCC No. 4/2017.

18. The key question for determination is, can the court determine and tax a bill of costs in the client's file. Alternatively, how is the Advocates and clients bill of costs taxed and or legal fees realized from a client. It is trite law that taxation of a bill of costs between an advocate and a client is provided for under the Advocates remuneration order.

19. Section 45 of the Advocates Act provides on procedures on signing agreement in respect of remuneration and Section 48 provides on when an advocate is supposed to file a bill of costs for realization or recovery of costs. The two provisions do not require that an advocate files his or her bill of costs in a client's main file.

20. An advocate cannot be a party in client's file for purposes of taxation. I do agree with Mr. Musyoki that the applicant herein ought to have filed a separate Misc. application for taxation of bill of costs. He cannot forcefully stop his client from being represented by an advocate of her choice. I do not see any justifications for filing this application. Time pressure is a lame excuse because the same way the applicant filed the application herein is what he would have done by filing Misc. application which he has since filed.

21. I have looked at several authorities quoted by the applicant and I find the same irrelevant to the subject beforehand. I will not make reference to any of them. In a nutshell, the application herein is a nonstarter and an abuse of the court process. The applicant should concentrate on the Misc. application for taxation of his bill. It is after the bill is taxed, that the applicant can seek for execution.

22. For the above reasons stated, application is allowed only in respect of prayer 2 being leave for the firm of John Ochola to cease acting for the respondent/plaintiff. The rest of the prayers are hereby disallowed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2017.

J. N. ONYIEGO (JUDGE)

In the presence of:

..... counsel for appellant

..... counsel for respondent