



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 15 OF 2013**

**IN THE MATTER OF: HCCC NO. 1232 OF 2001, NAIROBI**

**AND**

**IN THE MATTER OF: DELIVERY OF MONEY HELD BY AN ADVOCATE TO THE  
CLIENT BETWEEN**

**BROLLO KENYA LIMITED..... APPLICANT**

**-VERSUS-**

**DAVID OYATTA T/A OYATTA & ASSOCIATES..... RESPONDENT**

**RULING**

1. Before the Court is the Originating Summons dated **21<sup>st</sup> January 2013** and filed in Court on even date. It is expressed to be brought under **Order 9 rule 9, Order 52 rule 4 (1a), (1b), (1c), (1d)** and **rule 4 (2)** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**.
2. The application is seeking for orders that:-
  1. ***The Respondent render a cash account of the money paid by the Applicant and the money held on behalf of the Applicant.***
  2. ***The Respondent deliver to the Applicant a list of the money which the Respondent has in his possession or control on behalf of the Applicant.***
  3. ***The Respondent pay the Applicant any and all money held by the Respondent on behalf of the Applicant.***
  4. ***Costs of this application be borne by the Respondent.***
3. The application is based on the grounds stated therein and is supported by the affidavit of **Ketan Doshi** sworn on **21<sup>st</sup> January 2013**.
4. The background to the application is that on or about August 2008, the Applicant instructed the Respondent to take over the conduct of HCCC No. 1232 of 2001; Brollo Kenya Limited vs Kenya Commercial Bank Limited and Pamela A.M Tutui. On 11<sup>th</sup> November 2011, the Honourable Court gave judgment in favour of the Applicant for Kshs. 2,609,750/- together with interest at court rates and the Applicant's costs were to be borne by the Defendant. It is the Applicant's case that to date the Respondent has failed, neglected and/or refused to forward to them the decretal amount.

5. The Respondent, an Advocate of the High Court of Kenya, opposed the application. He swore a Replying affidavit on 18<sup>th</sup> July 2013 and filed it on the same day. The Respondent admits that the Applicant instructed his firm to represent them in HCCC No. 1232 of 2001. He however notes that together with the aforesaid instructions, the Applicant's director instructed his firm to act in three (3) other matters being HCCC No. 802, 803 and 804 all of 2002 (hereinafter referred to as "the other suits.") he avers that the Applicant's director, Ketan Doshi, is related to the Plaintiffs in the other suits. (*Attached to the Respondent's affidavits are copies of the letters of instructions signed by Mr. Ketan Doshi.*)
6. It is averred by the Respondent that Mr. Ketan Doshi, being a majority shareholder of the Applicant Company, assured him that either the Applicant or himself would settle the fees for the other suits. Subsequently, the Applicant fell out with the Respondent's firm and instructed the firm of M/s Wandabwa & Co. Advocates to take over all their suits from the Respondent. The Respondent notes that the other suits were dismissed for want of prosecution. The reason being the Plaintiffs therein failed to give his firm further instructions. The Advocate-Client Bill of costs for the said suits has since been taxed and certified in the Respondent's favour as itemized in paragraph 8 of the Replying affidavit. The costs are at a total of Kshs. 9,311,735.71.
7. With regard to the taxation of the said suits, the Applicant through the law firm of Wandabwa Advocates has filed references. The ruling of the said matters is pending to be delivered on Notice.
8. It is therefore the Respondent's case that his firm has not unlawfully held any money or refused to forward the decretal sum to the Applicant. It is averred by the Respondent that they hold the monies lawfully as lien towards part satisfaction of the taxed costs in the other suits. Therefore, the Respondent has retained the said monies awaiting the rulings in the references referred to above to facilitate a set-off or further action in recovery of any deficit. It is also the Respondent's case that it is not true that they have not accounted for the monies in their possession.
9. In response, the Applicant filed a further affidavit sworn by its director, Ketan Doshi on **18<sup>th</sup> September 2013** and filed on **27<sup>th</sup> September 2013**. The deponent denies the allegations that the Applicant instructed the Respondent to act in the other suits. He avers that the instructions were given in his individual capacity as son and brother to the Plaintiffs in the respective suits and not as a Director of the applicant. He further avers that the Applicant did not state that they would be liable for the fees in the other suits as alleged by the Respondent.
10. The Respondent filed a further affidavit on **10<sup>th</sup> June 2014** sworn by himself on **9<sup>th</sup> June 2014**. He reiterated the fact that Mr. Ketan Doshi was related to the Plaintiffs in the other suits, in which Mr. Ketan gave him instructions to act on the Plaintiffs' behalf. The Respondent avers that the firm of M/s Wandabwa & Company Advocates, currently acting for the Applicant, has since paid them **Kshs. 782,989.41** as was taxed by the Deputy registrar in **HCCC No. 802 of 2002** (Misc. Appl. No. 666 of 2012).
11. He further avers that the Advocate and Client bill of Costs in HCCC No. 1232 of 2001 was filed in Misc. Civil Suit No. 297 of 2012, served upon the Company and taxed at Kshs. 2,475,116 as drawn. Upon filing reference in HCCC 802 and 803 of 2002, the matters were deliberated upon before the High Court Judge and judgment entered for Kshs. 782,989.41 and 1,776,520.05 respectively. In HCCC 804 of 2002 there was no reference preferred and the figure stands at 5,117,245.98 plus interest at 14% per annum from 4<sup>th</sup> October 2012.
12. It is the Respondent's assertion that the balance payment outstanding is Kshs. 9,368,882.39 owed by the parties. The Respondent is holding 5,920,772/= being the decretal sum in the present suit. According to him, this leaves a balance of Kshs. 3,448,110 outstanding. It is the Respondent's position that since the matters have now been finalized in so far as taxation is concerned and the Respondent is holding Kshs. 5,920,772/=, the Applicant and Mr. Ketan should pay the balance of the taxed amount being Kshs. 3,448,110/=.
13. Mr. Ketan in another further affidavit sworn on **9<sup>th</sup> July 2014**, disputes the taxed costs in Misc. Application No. 297 of 2012. He avers that the Respondent has not placed any material to support the taxation of the said costs. He further avers that upon perusal of the Court file for Misc. Application No. 297 of 2012, it was discovered no proceedings were made and no taxation done.
14. The deponent also contends that no material has been placed before the Court to disclose the nexus between the Applicant and the parties in Misc. Application No. 666 of 2012 and 668 of 2012. The Respondent refuted this in his second further affidavit dated **18<sup>th</sup> August 2014**. On the

contrary, it is his assertion that Mr. Ketan Doshi who instructed him to take conduct of the other suits, asserted that he was the authorized representative of all the parties in the said suits. With regard to the missing records on Misc. application No. 297 of 2012, the Respondent confirmed that the ruling was missing. He however maintained that the Bill of costs was indeed taxed and the ruling delivered accordingly.

15. The Respondent also notes that the references that had been filed in Court have now been finalized. He is apprehensive that the Client (Doshi) now intends to run away from his obligations. He avers that the Respondent has given proper accounts in respect to the matters attendant herein.
16. The application was prosecuted by way of written submissions. The Applicant filed its submissions on **7<sup>th</sup> October 2014** while the Respondent filed their reply on **14<sup>th</sup> October 2014**.

### **ANALYSIS**

17. I have read the application, the several affidavits on record as well as the submissions by Counsel. Having done so I take the following view of the matter.
18. In my view, the only and main issue to be determined is whether the Respondent is unlawfully holding any monies belonging to the Applicant.
19. It is not in dispute that the Respondent acted for the Applicant in HCCC 1232 of 2001. The Applicant was awarded a sum of Kshs. 2,609,750 which plus accrued interest and costs amounted to Kshs. 5,920,772/=. The Respondent still holds the said amounts and hence the current application. The Respondent filed a Statement of Accounts dated 10<sup>th</sup> June 2014 indicating that he had received Kshs. 5,920,772/- in respect of HCCC No. 1232 of 2001. In the same statement the Respondent also indicates that the Applicant still owes them the sum of Kshs. 3,448,110/-.
20. In its submissions, the Applicant has disputed the taxed costs presented by the Respondent as neither plausible nor tenable. I will not delve much into this issue for the obvious reason that what is before me is not a reference application. The issues raised by the Applicant with regard to the taxed costs are what would form the subject of a reference application.
21. It is submitted for the Applicant that there is no lawful justification for withholding the Applicant's funds on the basis of the Respondent's costs in the other suits. It is further submitted that the said costs are payable by Nilam Doshi and not the Applicant herein. To this end it is the Respondent's case that the instructions to act in the other suits were given by Mr. Ketan Doshi, a director of the Applicant. The Respondent attached letters of instructions with regard to the said suits as signed by Mr. Ketan Doshi. The Applicant or rather Mr. Ketan Doshi did not give any substantial evidence to rebut the fact that he had instructed the Respondent to act in the other suits.
22. The Plaintiffs in the said suits might have nothing to do with the Applicant but they are related to Mr. Ketan Doshi, a director of the Applicant. This fact is undisputed. That is beside the point. It is only logical that Mr. Doshi has the responsibility to ensure that the Respondent recovers their fees or costs in the said suits. He instructed the Respondent to act for the Plaintiffs in the respective suits. From the records, it is clear that the Respondent had never interacted with the Plaintiffs who are related to Mr. Doshi. Mr. Doshi is therefore estopped from denying responsibility of costs over the said suits. In the circumstances, the Respondent is entitled to a lien over the Applicant's funds in his possession.
23. It is not in dispute that the Bills of Costs in the respective suits were taxed. There are rulings with regard to the said taxations as produced by the Respondent. The Applicant has not produced any evidence, for instance a ruling from a reference application, indicating that the aforesaid taxations were reversed.
24. The Applicant has raised an issue that the Respondent has already attempted to execute against one of the Plaintiffs in the other suits. It is therefore the Applicant's case that the Respondent is not justified to withhold the Applicant's funds. It is the Respondent's right to execute as provided for in the law. The fact that he is withholding the funds should only act as security to ensure that at the end of the day he realizes his costs.
25. As I have earlier stated in this ruling, if the Applicant has an issue with the taxed amounts in the

said suits, the same can only be determined by the taxing master or a High Court Judge by way of a reference application.

26. In that case, it is plain that this Court was restricted to making a determination on whether the Applicant is entitled to the funds being held by the Advocate on its behalf. It was not upon this Court to investigate how much fees or costs the Respondent was entitled to or in the alternative how much the Applicant was to pay the Respondent. The contention on fees as raised by the Applicant can only be determined conclusively after full hearing. The purpose of an originating summons is to determine simple matters. Therefore the option available to the Applicant to adequately address its grievances is to file a normal suit.

27. It has been held by the Courts before that the scope of an Originating Summons is limited. In the case of **Kenya Commercial Bank Limited Vs Osebe (1982) KLR 296**, the Court held that-

***“The procedure of Originating Summons is intended for simple matters and enables the Court to settle them without the expenses of bringing an action. The procedure is not intended for determination of the matters that involve a serious question. The procedure should not be used for determining disputed questions of fact...” see also; Civil Appeal No. 30 of 1982, James Njoro Kibutiri Vs Eliud Njau Kibutiri (1983) KLR 1.***

28. In view of the above findings, it is plain that the case herein is disputed and Order 3 sought by the Applicant cannot be granted. Prayers 1 & 2 of the application merely seek clarification of the accounts.

29. In the upshot, the Applicant’s Originating Summons dated **21<sup>st</sup> January 2013** and filed in Court on the same day is hereby allowed in terms of prayers 1 and 2 thereof which must be complied with within 14 days of the Ruling. Costs shall be in the cause.

Orders accordingly.

**READ, DELIVERED DATED AND AT NAIROBI THIS 30TH DAY OF JANUARY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Kimaru holding brief for Machira for the Plaintiffs

M/s Oyugi holding brief for Gitau for Defendant

Teresia – Court Clerk