



**REPUBLIC OF KENYA**

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

**MISC. NUMBER 360 OF 2011**

**KWENGU & COMPANY ADVOCATES.....APPLICANT /1<sup>ST</sup>  
RESPONDENT**

**VERSUS**

**1. APEX FINANCE INTERNATIONAL LIMITED.....2<sup>ND</sup>  
RESPONDENT**

**2. ANGOLO LEASING AND FINANCING INTERNATIONAL  
LIMITED.....3<sup>RD</sup> RESPONDENT**

**3. GEORGE ONER OGALO.....INTERESTED  
PARTY/APPLICANT**

**RULING**

1. Before this court is an application dated and filed on the 1<sup>st</sup> October, 2013 by one George Oner Ogalo. He seeks to be enjoined as an Interested Party in this suit, and further a stay of execution of court orders issued against him on the 5<sup>th</sup> April 2012 as well as an order to set aside, renew and or vary the said orders issued on the 5<sup>th</sup> April, 2013. The application is brought under the provisions of Order 45 rule 1, order 1 rule 10(2) ad order 22 (1) of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act. It is premised on the grounds that the 1<sup>st</sup> Respondents Kwengu & Company Advocates have sought to execute the Judgment and decree obtained in respect of an Advocate- client Bill of costs in respect of a High Court Judicial Review Miscellaneous Application Number 64 of 2011 where the applicant was not a party.

2. High Court Misc. Application (Judicial Review) No. 64 of 2011 was filed by the firm of Olaly Cheche and Company Advocates on the 3<sup>rd</sup> June, 2011 on behalf of the exparte applicants.

The application is supported by the affidavit of the applicant George Oner Ogalo sworn on the 25<sup>th</sup> September, 2013 and filed on the 1<sup>st</sup> October, 2013. Upon service of the application upon the 1<sup>st</sup> Respondent, grounds of opposition were filed together with a replying affidavit in opposition. Temporary orders of Stay of execution were issued by the court on the 4<sup>th</sup> October, 2013. On the 27<sup>th</sup> March, 2013 and before interparties' hearing of the application, the applicant filed a Notice of Preliminary Objection through his advocates Kenyatta Odiwour and Company attacking the 1<sup>st</sup> Respondent's advocate – client Bill of Costs arising from the Judicial Review Application Number 64 of 2011.

3. On the 7<sup>th</sup> October, 2014 parties to this matter were granted leave to file further affidavits in support and in opposition of the application and the Preliminary objection respectively the applicant's Advocates

argued that the Preliminary Objection he filed on the 27<sup>th</sup> March, 2014 would determine the whole case. Parties however urged the court to hear both the preliminary objection and the motion together.

4. The Preliminary Objection dated 27<sup>th</sup> March, 2014 and filed on even date by the Interested party raised objection on the 1<sup>st</sup> Respondents Advocate-client Bill of Costs, and the whole suit under which the Bill was filed, High Court Misc. Application Number 64 of 2011(JR) – as stated above.

The said Judicial Review application was filed on behalf of the Exparte applicant by one Cheche Edward Olaly practicing in the name and style of Olaly Cheche & Company Advocates. It is submitted that as at the date of filing of the said suit, the said Edward Olaly Cheche Advocate did not hold a valid practicing certificate hence the pleadings were filed contemptuously and illegally by an unqualified person as defined under **Section 34(1) of the Advocates Act** that Prohibits an unqualified person from taking instructions directly or indirectly, or to prepare documents or instructions or receiving any fees, gain or reward for the work done.

5. It was submitted for the applicant that the entire suit, and the Advocate-Bill of Costs emanating from the suit are an illegality and ought to be struck out.

It was further submitted that the suit, and by implication the Advocate-client Bill of costs were illegally and unprocedurally filed and heard by a court of competent jurisdiction, and by the Applicant having misled the court by withholding that very relevant material, the suit ought to be struck as having been incompetent *ab initio*.

Mr. Kenyatta, advocate for the applicant and mover of the Preliminary Objection produced a letter, by way of an annexure to the applicant's application and marked G003 from the Law Society of Kenya that confirmed that according to the Law Society of Kenya records, the proprietor of the Law Firm, Olaly Cheche and Company Advocates, Mr. Cheche Edward Olaly did not hold a Practicing Certificate in the year 2011, that the last one he held was in the year 2010 having paid for it on the 20<sup>th</sup> July, 2010.

6. He further buttressed his submission by showing that the Misc. Application Number 64/2011 was struck out by the Honourable Justice Emukule in his ruling dated the 5<sup>th</sup> October, 2012 when the Honourable Judge, on the question whether there were proper juristic persons in the application before the court. It answered in the negative and proceeded to order striking out of the applicants motion dated 7<sup>th</sup> June, 2011 and filed on the 8<sup>th</sup> June, 2011. He further held that a non-existent applicant can neither pay nor receive costs.

7. The applicant in the HCC Misc. Application Number 64/2011(Judicial Review) were Apex Finance International Limited as 1<sup>st</sup> Applicant, Anglo-leasing and Finance International Limited as the 2<sup>nd</sup> Applicant. As stated earlier, the applicants, declared to be non-existent juristic persons were represented in the suit and application by the said firm of Olaly Cheche & Company Advocates.

In response to the Application and the Preliminary Objection, the 1<sup>st</sup> Respondent, Kwengu & Company Advocates submitted that the Bill of costs was taxed against the parties, and that the intended interested party was not a party to the taxation proceedings nor in the certificate of costs, and that by his application to be enjoined to the proceedings, and being an agent of the respondents, was trying to bring the case from the back door on behalf of the non-juristic parties. It is submitted that he filed a defence denying being an agent of the Respondents when served yet he was not a party. However, it is submitted that he gave an undertaking to pay legal fees on behalf of the respondents to the 1<sup>st</sup> respondent and hence liable to pay the legal fees as taxed. It was the 1<sup>st</sup> respondent submission that the application for leave to enjoin the interested party in these proceedings be dismissed.

8. I have carefully considered submissions by counsel for the applicant on the preliminary objection and the application. I also heard submission by the 1<sup>st</sup> Respondent on the application, and the preliminary objection.

I agree with the Applicant's counsel Mr. Kenyatta that determination of the Preliminary Objection would determine the entire application he had filed on the 1<sup>st</sup> October, 2013.

9. In my view, the preliminary objection must be sustained. Here is a scenario of a none juristic party represented in court by an unqualified person in the name of the firm of Olaly Cheche & company Advocates whose proprietor, Edward Olaly Cheche Advocate without valid practicing certificate, draws and signs documents and files in court. Thereafter the court strikes out the application, and by implication the entire suit. The respondents Advocates then proceed to file this suit and tax an Advocate-Client Bill of costs against the now declared none jurisdic and none existent persons, obtains a certificate of costs in the sum of Shs.215,834,117/= and moves to obtain a decree against the said non existent persons, and now the applicant, who was not a party to the proceedings as admitted by the 1<sup>st</sup> respondent from the inception upto the conclusion of the case.

I must state that the whole process from the inception was a mockery of justice and court procedures. Any further proceedings, unless by way of appeal, review, or variation of the striking out orders issued by the court on the 5<sup>th</sup> day of October 2012, must be stopped to safeguard the integrity of the court and the rule of law. The upshot of the above is that the preliminary objection is upheld.

10. The court finds that this suit being a perpetuation of the illegality of the former suit HCCC Misc. Application No. 64/2011 (Judicial Review) cannot be allowed to stand. The advocates who are the Applicants in the suit filed the Bill of Costs against non existent bodies. As stated above these proceedings are tainted with illegality. The certificate of costs obtained against the parties and applicant herein cannot be enforced, least to the applicant who as found, was not a party to the initial proceedings giving rise to this present suit/application.

11. This court to allow this suit to remain alive when it is too clear that it is non suited and a nullity would be to do injustice to itself. In any event, the firm of Kwengu and Company Advocates the applicant hereof had no *lucus standi* to file the Bill of Costs arising from the HCCC No. 64/2011(Judicial Review) as the said firm never acted on behalf of the Respondents in the said suit. All pleadings were drawn and signed by Mr. Olaly Cheche Advocate who admittedly, did not hold a practicing certificate.

It therefore follows that this suit is also incompetent and is hereby struck out. Consequently the orders issued this court on the 5<sup>th</sup> April 2013 and on the 5<sup>th</sup> April 2012 shall, by dint of the order hereof, be of no consequence.

It is so ordered.

**Dated, signed and delivered this 28<sup>th</sup> day of May, 2015.**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Kenyatta for the applicants

No appearance for Respondent's

Court clerk - Lina