



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NUMBER 101 OF 2013(O.S)**

**IN THE MATTER OF ADVOCATES ACT CHAPTER 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 52 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**JOHN NYOTA MUCHUNU.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KAGUCIA & CO ADVOCATES .....DEFENDANT/RESPONDENT**

**RULING**

1. The Originating Summons hereof and dated 5<sup>th</sup> May 2013 was taken out by the plaintiff against the law firm of Kagucia & Company Advocates. The plaintiff seeks orders that the said law firm, being the defendant, be directed to file its Bill of Costs for taxation, and to release a title **Number IR 118134 of the Subdivided LR No 9030/3/2 Nakuru Municipality** which he holds in lien upon the plaintiffs payment of the law firms taxed fees.

2. In his supporting affidavit, the plaintiff states that he engaged the law firm in a conveyancing transaction, had paid he legal fees but was later given a fee note for Kshs.37,844/= that he does not owe to the firm, and that the legal firm has failed to tax its Bill of Costs thus causing him go suffer loss. He annexed by way of exhibits various documents and receipts purportedly in support of his allegations.

3. On the 5<sup>th</sup> March 2015, the defendant law firm filed a Preliminary Objection raising some legal issues urging the court that the Originating Summons is incompetent and an abuse of the court process and ought to be struck out.

The Preliminary Objection is based on the following grounds:

1. That the Application is malicious, scandalous, frivolous and vexatious and/or otherwise an abuse of the court process.

2. That the Application is hopelessly defective

3. That Application is in contravention of mandatory requirements of **Order 37 Rule 16**, in that having been filed on the 4<sup>th</sup> December 2013, it has to date not been listed for directions, before judge.

4. That the Application contravenes Section 51(1) of the Advocates Act Cap 16 Laws of Kenya.

5. That the Application is wanting in merit in that the annexure “**JNM 3**”, The Fee Note dated 5<sup>th</sup> March, 2010 lacks substantial relation to the Plaintiff/Applicant whilst annexure “**JNM 4**” reflects malice on the part of the Plaintiff/Applicant.

6. That the Plaintiff/Applicant has been indolent to the utter prejudice of the Defendant/Respondent in that the Application has never been fixed for hearing despite the Defendant/ Respondent having entered appearance more than one (1) year ago, that is to say, on the 15<sup>th</sup> January 2014.

7. Consequently, the Application herein is incompetent and an abuse of the due process of court and the Defendant/Applicant prays that the same be struck out.

4. Mr. Kagucia while submitting on the Preliminary Objection stated that the said Originating Summons as drawn was hopelessly defective, malicious and vexatious and an abuse of the court process.

He stated that there is a laid down procedure and format in the manner of instituting proceedings against advocates and their law firms. It was his submission that failure to adhere to the procedural requirement as provided was fatal to the **Originating Summons under Order 37 Rule 16 and 17 of the Civil Procedure Rules, 2010**.

5. **Order 37 Rule 16** provides that within 30 days of filing of an Originating Summons and with notice to the parties it ought to be listed for directions before a judge in chambers. The plaintiff ought to move the court by application for directions under the above rule. Submission by Advocate for the plaintiff that the matter has been fixed for mentions severally cannot be good submission. I have not found or seen an application by the plaintiff in the court file seeking that the court do give directions on the hearing of the Originating Summons.

Mr. Kagucia submitted that there is no Advocate-client relationship between his law firm and the plaintiff. He urged the court that the fee note subject of these proceedings dated **5<sup>th</sup> March 2010 for Kshs.37,971 issued from his law firm was addressed to one Wachira Githinji of P.O. Box 12596, Nakuru**.

It is his submission, then that it is the said **Wachira Githinji** who ought to have instituted these proceedings and not the plaintiff, John Nyota Muchunu, as an Advocate-client relationship did not exist between them.

6 In response to the Preliminary Objection, Mr. Mwalo Advocate for the plaintiff conceded that there are errors on the format and procedure on the manner of these proceedings against the Advocates as provided in the Advocates Act, but stated that these being technicalities are not enough to pursuant the court to strike out the Originating Summons, as they do not go into the substance of the Originating Summons.

On why directions were not taken, it was his submission that the mentions taken before the court encouraged out of court negotiations, and before directions could be taken, the Preliminary objection was filed and a hearing date taken. He urged the court to disallow the preliminary objection.

7. I have considered the originating summons and the annexures to the supporting affidavit. I have also considered the Preliminary Objection and submissions by both counsel.

The Respondent has conceded that the correct procedure and legal provisions were not adhered to. The court notes that provisions under **Order 37 Rules 16-18** are mandatory and ought to be adhere to.

While I appreciate that **Article 159** of the **Constitution** implores law enforcers to administrator justice without due regard to technicalities, it is also true that if there are substantive provisions in other statutes, in this case the Civil Procedure Act and Rules, and also the Advocates Act, Chapter 16, that ought govern the matter at hand, such legal provisions ought not be sacrificed under the guise of **Article 159 of the Constitution**.

8. The subject matter of the Originating Summons is basically Advocate-client relationship and an unpaid fee note dated 5<sup>th</sup> March 2010. The fee note is issued from the Advocates firm. It is addressed to one Wachira Githinji and not the Plaintiff herein John Nyota Muchunu. NO nexus has been demonstrated between the Advocate and the plaintiff. For clarity purposes only, I have looked at the originating summons as drawn. I am unable to find the connection or nexus between the plaintiff and the defendant Advocates. He has been referred to as a busy body in these proceedings – to urge other persons case. It is my finding that the fee note having been issued to a different person, then, the whole Originating Summons brought by the plaintiff is non suited and fatally defective as there is basically no cause of action against the defendant law firm that accrues to the plaintiff. There is no Advocate-client relationship shown that could have precipitated these proceedings. Coupled with the defects in format and procedure, and the delay in prosecuting the Originating Summons I find no reason to keep the said Originating Summons in the court records. The preliminary objection is upheld and the originating summons is struck out with costs to the Defendant.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of October 2015**

**JANET MULWA**

**JUDGE**