



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE NO. 277 OF 2014**

**MISCELLANEOUS CAUSE NO. 278 OF 2014**

**MISCELLANEOUS CAUSE NO. 279 OF 2014**

**MISCELLANEOUS CAUSE NO. 282 OF 2014**

**WILLIAM C. GITHARA t/a GITHARA & ASSOCIATES ADVOCATES.....APPLICANT**

**Versus**

**BURRELL INTERNATIONAL LIMITED.....1<sup>ST</sup> RESPONDENT**

**MACHARIA PAUL MWITHAGA.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. There are 4 Applications before the Court concerning the same Client and the same Advocates and Clients. The arguments raised in this file apply to the other files. In the circumstances, it is in compliance with the overriding objective that they be dealt with and resolved together.

2. The four Files are:

- i. Misc 277 of 2014;
- ii. Misc 278/2014
- iii. Misc 279/2014
- iv. Misc 282/2014

3. The dispute and issues arise from the taxation of each of the 4 files between the same Advocates and the same client in relation to:

1. For 277 of 2014: The matter arising from Instructions to Act for the 1<sup>st</sup> Respondent in a Debt Collection matter by Paramount Bank.
2. 278 of 2014: The matter arising from an action for Enforcement of the Arbitral Award in the High Court of Kenya in Nairobi Misc. Cause No. 301 of 2013.

3. 279 of 2014: The matter arising from an action of Preservatory Orders to stop payment of Kshs.26,480,566.40 by Paramount Bank to the Ministry of Public Works in Nairobi HC 157 of 2010.

4. 282 of 2014: The matter arising from an action for Arbitration before Sole Arbitrator Festus Litiku.

### The Applications

4. The Application itself seeks orders that:

1. The 2<sup>nd</sup> respondent be struck out of this application herein.

2. Costs of this application be provided for

5. The Application is based on the grounds that:-

a. The application does not disclose reasonable cause of action against the 2<sup>nd</sup> Respondent.

b. The inclusion of the 2<sup>nd</sup> Respondent in the affidavit in support of the Bill of Costs dated 21<sup>st</sup> October, 2014 is malicious, scandalous, vexations and meant to cause embarrassment to him.

c. There was/is no privity of contract between the applicant and the 2<sup>nd</sup> Respondent in the subject matter of this taxation.

d. 2<sup>nd</sup> Respondent does not owe any legal fees to the applicant.

6. The Applications are brought by the Second Respondent. The Application asks for “the Second Defendant to be struck out”. I interpret that to mean that any claims against the Second Defendant be struck out. The gist of the Applications are that, although the Second Respondent admits giving Instructions to the Advocate, he did so as Director of the First Defendant and therefore cannot be personally liable for the Advocates Fees, costs etc.

7. This matter arose after the Bill of Costs was lodged and the files were about to be taxed. It relates to the question of who is the party that retained the advocates. The matter was not raised before the Deputy Registrar within the taxation, but are brought before this Court on a separate application. It seems that the same issue has arisen in associated proceedings brought by the Bank against the Advocates, where the 2<sup>nd</sup> Respondent adopts a different position.

8. The Supporting Affidavit is sworn by a Paul Macharia Mwithiga who confirms that he is conversant with the facts of the matter (or each matter) he confirms that he is a Director of the First Respondent to the Taxation and that the Advocates acted for the First Respondent in relation to the matters underlying each Bill of Costs and Application. He says he is therefore not personally liable for any of the fees. He asserts that he does not owe the Applicant any legal fees and prays that his name be struck out of the proceedings.

9. There was a Bill of Costs dated served lodged in September and the Supporting Affidavit was dated 21<sup>st</sup> October 2014 and filed the next day. It was fixed for Hearing on 4<sup>th</sup> November 2014. The Respondents’ Advocates filed their Notice of Appointment on 12<sup>th</sup> September 2014. The current Application was filed on 1<sup>st</sup> December 2014 and dated 27<sup>th</sup> November 2014.

10. In response to the Application the Advocates filed a Replying Affidavit sworn by a William Cucu Gathara. He argues that this Application is not brought in the correct forum as the purpose of a taxation is to decide an quantum not liability. The issue he says should be raised if there is an application or suit for Judgment on the taxed costs.

11. The Supporting Affidavit sets out the work done and Exhibits including a professional undertaking given on the understanding that the arbitral award would be paid directly to the Advocates (**Exhibit WCG 1 p1& 4**) It seems that did not happen and Paramount Bank sought payment from the Advocates instead of the first Defendant.

12. Although it is correct that is one of the opportunities the 2<sup>nd</sup> Defendant can challenge liability, however, he could also raise a challenge to the retainer and the terms thereof, if the facts support such a challenge.

13. The Replying Affidavit further states that the 2<sup>nd</sup> Respondent has admitted liability within HCC 252 of 2014 and his Defence dated 18<sup>th</sup> February 2015. The documents exhibited to the Replying Affidavit are particularly revealing in particular:

1. The Defence in HCCC 252 of 2014, in particular paragraph 14 relied on by the Respondent
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Replying Affidavit in Civil Suit NO. 252 of 2014, which at Paragraph 11 state that the process of taxation is not complete and hence it is premature to imagine that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would not pay his legal fees. The affidavit is not dated but stamped on 2<sup>nd</sup> July 2012.
3. Paragraph 22 of the same Affidavit states; "the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have deponed under oath that they will pay ....."
4. The "Instructions Note/undertaking in **Exhibit WCG 3** demonstrates that the 2<sup>nd</sup> Defendant gave a personal undertaking dated 20<sup>th</sup> February 2011 to pay the Plaintiffs costs jointly and severally of the 1<sup>st</sup> Defendant. (pages 1 & 2 **Exhibit WCG 2**)

14. Although paragraph 14 of the Defence is relied upon, it is in response to paragraph 16 of the Plaint and a copy is not before court so the admission relied upon is of Limited value but the other documents present a very different proposition from that put forward in Supporting Affidavit.

15. I have read the Parties Written Submissions and Authorities and they raise various issues for determination. Below is set out a Summarised List:

#### Issues

1. Under Solomon vs. Solomon does a company have a separate identity from its director alternatively is it a separate entity from its directors".
2. Is the Agent of a named principal is liable for the acts done in the name of that principal?
3. As between the Company and/or Director – who was the client?
4. Who undertook to make the payments?
5. In what situation was payment to be made under the undertaking exhibited?
6. Who was to make payments in what circumstances? Were there to be any conditions?
7. Was 2<sup>nd</sup> Respondent acting as agent or on his own behalf when promising to pay?
8. Does **Section 120 of the Evidence Act (Cap 8 Laws of Kenya)** apply?
9. Can a director be personally liable for payment where the Company has received the benefit?

10. Is the application misconceived within the taxation. Alternatively does the taxation decide only quantum?

11. Is the position taken in In Civil Suit NO. 252 of 2014 ie (Arguing that the Plaintiff cannot seek Judgment on costs prior to taxation) inconsistent?

### Authorities

1. Habbury's Laws of England volume 14 5<sup>th</sup> Edition 2009 Para. 277.

2. Company Directors, duties, Liabilities and Remedies Edited by Simon Martimer.

3. Mc Collin vs Gilphin & others 1881

4. In Re International Contract Company.

5. Valentine Opiyo v. Mashine Adhiambo

6. Paul Ogada v. Kassim Owango.

7. Lloyd v. Grace & Co. 1912 AC 716

16. However the crux of the matter is whether or not the Second Defendant promised to pay. From **Exhibit WCG3**, it is clear he did. In fact he was very happy to broadcast that promise when it served his purposes within other proceedings. He now seeks to resile from it. **Section 120 Evidence Act** provides:

*“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”*

17. In addition, there is the question of whether the same issue has been adjudicated upon in different proceedings, bringing into play **Sections 6 and 7 Civil Procedure Act (Cap 21, Laws of Kenya)** they provide:

#### **Section 6 Stay of suit.**

*No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court have jurisdiction in Kenya to grant relief claimed.*

#### **Section 7 Res Judicata**

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

18. The issue of clean hands is self-evident. The Second Respondent failed to call the Court's attention to the full scope of the dealings between the Advocate and Client giving justification to the allegation of absence of full and frank disclosure.

19. In the circumstances and for the reasons set out above, I dismiss the Application with costs. I also

order the Matter to be returned to the Deputy Registrar for taxation under Section 49 of the Advocates Act. If there is any arrangement between the Company and the Second Respondent as to how the liability for costs is to be shared it can be raised subsequent to the certification of quantum.

20. This Order is repeated in: **Miscellaneous Cause No. 278 Of 2014; Miscellaneous Cause No. 279 Of 2014; Miscellaneous Cause No. 282 Of 2014.**

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER , 2015.**

**Coram:**

**Clerk: Joseph Kabugi**

..... **for Applicant**

..... **for Respondent**