



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO 559 OF 2011**

**ODERA OBAR & CO ADVOCATES..... PLAINTIFF**  
**VERSUS**  
**BIBIANA MBATHA NGOTHO..... DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion dated and filed on 16<sup>th</sup> May 2012 was brought under the provisions of Section 3A of the Civil Procedure Act, Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules 2010 and all enabling provisions of the law. It sought the following orders:-
  - i. **THAT the Statement of Defence filed on the 15<sup>th</sup> day of March 2012 be struck out with costs to the Plaintiff.**
  - ii. **THAT judgment be entered against the Defendant as prayed in the Plaint dated 7<sup>th</sup> day of December 2011.**
  - iii. **THAT the cost of this Application be provided for.**
2. The grounds under which the Plaintiff relied upon were as follows:-
  - a. **On 22<sup>nd</sup> day of February 2008 the Plaintiff on the one hand and the Defendant on the other hand entered into an agreement in writing for professional services in P & A NO 553 of 2007 at an agreed fee of 2% of the obtained entitlement of estate of the deceased allocated to the Defendant.**
  - b. **The Plaintiff discharged its obligation under the aforesaid Advocate Client Agreement culminating in the Confirmation of Grant with the Defendant securing a portion of the estate.**
  - c. **The Value of the entitlement due to the Defendant was agreed and the same was tabulated in an invoice dated 26<sup>th</sup> day of August 2011 with the legal fees due to the Plaintiff being agreed at Kshs 4,244,509.18.**
  - d. **The Defendant was truly and justly indebted to the Plaintiff to the tune of Kshs 4,244,509.18 together with costs and interest.**
  - e. **The Statement of Defence filed on the 15<sup>th</sup> day of March 2012 lacked merit and should be struck out for being scandalous, frivolous, vexatious and otherwise and (sic) abuse of the**

**court process and was merely a sham calculated and/or intended to delay and/or prejudice the fair hearing of this suit.**

- f. In the premises, it was only fair and just that aforesaid the Statement of Defence be struck out and judgment entered in favour of the Plaintiff.**

### **AFFIDAVIT EVIDENCE**

3. In his Supporting Affidavit also sworn and filed on 16<sup>th</sup> May 2012, Odera Obar Kennedy, a senior partner in the Plaintiff's firm of advocates deposed that on or about 22<sup>nd</sup> February 2008, the Plaintiff entered into an Advocate – Client agreement with the Defendant whereat it was agreed that the Defendant would pay the Plaintiff instruction fee of not less than and not more than 2% of the obtained entitlement from the estate of Anthony Athanas Ngotho in P&A NO 553 of 2007. He further stated that the Plaintiff rendered legal services in the said matter during the period of 28<sup>th</sup> February 2008 and 17<sup>th</sup> August 2011 leading to the confirmation of grant on 11<sup>th</sup> September 2009.
4. The deponent added that Andrew Mbaya who was donated a General Power of Attorney on 8<sup>th</sup> March 2007 was empowered to, amongst other issues, enter into binding contracts on behalf of the Defendant.
5. He contended that in a meeting held between the Plaintiff and the Defendant's appointed attorney on 24<sup>th</sup> August 2011, it was agreed that the Defendant's entitlement would be Kshs 144,889,641.20 which put the Plaintiff's fee at Kshs. 4,520,687.23 less credited amounts coming to Kshs 4,244,509.18. This amount was tabulated in an invoice and the Plaintiff's letter dated 26<sup>th</sup> August 2011 which the deponent averred had never been controverted by the Defendant.
6. It was the deponent's contention that there having been a legally binding agreement, the Plaintiff's costs were not subject to taxation as had been alleged in the Defendant's Defence and that the Defendant was therefore stopped from reneging on the agreement that had been arrived at.
7. The Plaintiff therefore sought to have the Defendant's Defence struck for being threadbare, a sham and an abuse of the court process merely intended to delay the fair trial of the suit.
8. The Defendant did not file any Replying Affidavit or Grounds of Oppositions in response to the Plaintiff's application.

### **LEGAL SUBMISSIONS BY THE PLAINTIFF**

9. The Plaintiff's written submissions were dated and filed on 28<sup>th</sup> January 2013.
10. It submitted that the Defendant had admitted in paragraph 4 of her Defence that she had not paid the fees due to the Plaintiff and that she had stated that the fees charged by the Plaintiff were manifestly excessive. It also directed the court's mind to the fact that the said fees were agreed on two (2) occasions i.e on 22<sup>nd</sup> February 2008 when the Plaintiff and the Defendant entered into the Advocate-Client Agreement and on 24<sup>th</sup> August 2011 when the Defendant's duly appointed attorney agreed on the fee payable to the Plaintiff. The Plaintiff therefore argued that the Defendant could therefore now contend that the fees charged were excessive.
11. The Plaintiff further averred that the Defendant had not applied to set aside or vary the agreement on the ground that the said agreement was harsh, unconscionable, exorbitant and unreasonable under Section 45(2) of the Advocates Act Cap 16 (Laws of Kenya) and had in fact been barred from doing so under Section 45(2) (A) of the Advocates Act as the time provided for bringing such an application had lapsed.
12. In addition, the Plaintiff argued that under the provisions of Section 45(6) of the Advocates Act, the costs of an advocate which are subject of an agreement were not subject to taxation. The Plaintiff relied on the case of **HCCC MISC Application NO 6060 of 2007 D.N. Njogu & Co Advocates vs National Bank of Kenya [2009] eKLR** which reiterated the said fact and the case of **Express Newspapers Plc News (UK) Ltd & Others (1990) 3 All ER 376** where it was held that it is a principle of law of general application that it is not possible to approbate and reprobate. It argued that this was the same principle in **Lissenden VCA (1990) 1 All ER 425**. The Plaintiff therefore urged this court to disregard paragraph 5 of the Defendant's Defence that the contract it entered into with the Defendant was not subject to taxation in respect of Schedule X of the Probate & Administration.

13. As regards paragraph 6 of the Defendant's Defence, the Plaintiff argued that the acts of the Defendant's duly appointed attorney bound the Defendant in her capacity as the Principal. The Plaintiff relied on the case of **HCCC NO 788 of 1997 Ndege Wholesalers Ltd vs Chikoo** where Ringera J held that **"... an agent's knowledge is to be imputed to the principal ..."**
14. It was the Plaintiff's further submission that the Defendant was therefore precluded from asserting that her duly appointed attorney lacked authority to enter into the agreement arrived at in the meeting of 24<sup>th</sup> August 2011.
15. In respect to paragraph 7 of the Defendant's Defence, the Plaintiff argued that the complaint by the Defendant at the Disciplinary Committee was dismissed in its entirety for want of a *prima facie* case and accordingly, the Defendant's Defence lacked *bona fides*, it was hopeless, oppressive and intended to cause unnecessary anxiety, expense and trouble to the Plaintiff.
16. The Plaintiff therefore prayed for striking out of the Defendant's Defence and entry of judgment its favour for the sum of Kshs 4,244,509.18 together with interest at the rate of 14% from 26<sup>th</sup> September 2011 until payment in full.
17. Other cases relied upon by the Plaintiff were listed in its Further Supplementary list of Authorities dated and filed on 8<sup>th</sup> October 2013.

### **LEGAL SUBMISSIONS BY THE DEFENDANT**

18. The Defendant did not file a Replying Affidavit or any grounds of opposition. However, on 22<sup>nd</sup> February 2013, she filed written submissions dated 14<sup>th</sup> February 2013. While highlighting her submissions, counsel for the Defendant sought leave of the court to file a Replying Affidavit so as to attach crucial documents that could assist the court in arriving at a just determination this matter.
19. This was an application that was strenuously opposed by counsel for the Plaintiff who pointed that the Defendant had had ample time to file a Replying Affidavit. She stated that the Defendant filed Grounds of Opposition and Preliminary Objection on 15<sup>th</sup> March 2012, which this court did not find in the court file, and that the Plaintiff had put its submissions based on the pleadings that were on record. To move the matter forward, counsel for the Plaintiff agreed that the Defendant's counsel could refer to the Grant of Letters of Administration as it was part of the Defendant's Bundle of Documents.
20. In her submission dated 14<sup>th</sup> February 2013 and filed on 22<sup>nd</sup> February 2013, the Defendant admitted that she donated to Andrew K Mbaya, Power of Attorney and that the Plaintiff and the said Attorney executed an agreement dated 20<sup>th</sup> February 2008 in which it was agreed that the legal fee shall not be less than and not more than 2% of the obtained entitlement due to the Defendant.
21. It was the Defendant's contention that payment of the advocates fees in client's property offended Section 46 of the Advocates Act and **that "in any event that particular clause had been overtaken since Clause 2:2.1 I had been fulfilled"**. The Defendant did not elaborate on this submission and it is difficult for this court to speculate as to what argument she was advancing.

### **LEGAL ANALYSIS**

22. Ordinarily, where a party has failed to file its Replying Affidavit or Grounds of opposition to an application, the court will invariably deem such an application to be unopposed and proceed to grant the orders sought as prayed. Be that as it may, a court must not also proceed without considering the prayers that are before it against the backdrop of the documents such a party is relying on.
23. If a court were to proceed without bearing in mind the merits of a case, it would run the risk of granting orders or prayers that should never have been granted in the first place.
24. Therefore, a party must satisfy the court that it is entitled to orders that it seeks. The burden of proof lies upon such a party. Thus the burden of proving that it was entitled to the orders sought in the Plaintiff's Notice of Motion application dated and filed on 16<sup>th</sup> May 2012 lay with the Plaintiff herein.
25. For the reason that striking out pleadings is a draconian step that should be exercised cautiously so

- as not to deny a party a fair and reasonable opportunity to prove its case, it behoves upon the court to be certain that the Defence is so hopeless that the same cannot be redeemed. The court will therefore carefully analyse all the relevant facts so as to come to a just determination of this matter.
26. Valuation of the Defendant's entitlement was, in her written submissions, shown to have been Kshs 66,950,000/=. Based on the agreement, it said the Advocates fees stood at Kshs 1,399,000/= being 2% of the aforesaid entitlement. This information was not supported by any evidence as the Defendant did not file a Replying Affidavit. The tabulation of the balance of costs given at Kshs 603,911/= in the said written submissions was also not supported. In the absence of any affidavit evidence, this court is unable to attach any weight to the Defendant's said assertion and any contentions that were not supported by an Affidavit.
  27. The question of how the Plaintiff arrived at the legal fee of Kshs 4,244,509.18 is pertinent. Exhibit "OOK 1" which is the agreement does not give any quantum of the Defendant's entitlement to the estate but only states **"that the legal fees shall not be less than and not more than 2% of the obtained entitlement due to the Defendant"**.
  28. Paragraph 6 of the Supporting Affidavit stipulates that on 24<sup>th</sup> August 2011, the Plaintiff and the Defendant's Attorney held a meeting where the entitlement of the estate due to the Defendant was agreed at Kshs 144,899,641.20 with the Plaintiff's fees being pegged at Kshs 4,520,687.23 as was set out in an invoice annexed in Exhibit marked "OOK 3".
  29. The question of what the Defendant's entitlement of the estate is not as clear as the Plaintiff has attempted to put it. The Plaintiff pegged the value of the properties at Kshs 144,899,641.20 which it said was pursuant to a meeting with the Defendant's attorney. Save for an invoice and a letter, there is no other documentary evidence confirming that the Plaintiff and Defendant were of the same mind.
  30. In the absence of an agreement reduced in writing or a written acknowledgement showing that that the Defendant's said attorney had agreed to payment of the sum of Kshs 4,520,681.23 as legal fees, it would therefore be in the interests of justice that evidence be led on this point for the court to interrogate the value of the Defendant's entitlement of the estate in question, whether the Defendant's said attorney entered into any agreement with the Plaintiff and if so, whether the same was binding upon her.
  31. The issue of whether or not a Bill of Costs ought to have been filed first before the suit herein was filed or that provisions of Section 46 of the Advocates Act were offended are also issues that the Defendant is at liberty to canvass during a full trial.
  32. This court has come to the conclusion that the matter also ought to proceed for full hearing to establish the exact role of the said Andrew Mbayu and the implications and ramifications of his actions as far as the Defendant is concerned.
  33. This court has carefully considered the Plaintiff's assertions that the Defendant's Defence is scandalous, frivolous or vexatious, that it may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the court but finds that there are certain pertinent issues that it would need to interrogate further before it can enter judgment as has been sought by the Plaintiff. The court has also had due regard to the parties' written and oral submissions and case law submitted herein.

### **DISPOSITION**

34. In the circumstances foregoing, the court hereby declines to grant any of the Plaintiff's prayers sought in its Notice of Motion application dated and filed on 16<sup>th</sup> May 2012. As the said application is not merited, the same is hereby dismissed. Each party will bear its own costs as the Defendant did not file any Replying Affidavit or Grounds of Opposition to the Plaintiff's said application.
35. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 24<sup>th</sup> day of January 2014

**J. KAMAU**

**JUDGE**