



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 516 OF 2013

MWANGI KENG'ARA &

COMPANY ADVOCATES :::::::::::::::::::::::::::::: APPLICANT/ADVOCATE

VERSUS

UPWARD SCALE INVESTMENT

COMPANY LTD. :::::::::::::::::::::::::::::: 1ST CLIENT/RESPONDENT

LINMERX HOLDINGS LIMITED ::::::: 2ND CLIENT/RESPONDENT

RULING

1. Before the court is a Notice of Motion application dated 4th March 2014. The application is expressed to be filed under Section 1A, 1B, and 3A of the Civil Procedure Act, Order 49 Rule 7 (1) and Order 50 Rule 1 of the Civil Procedure Rules, 2010, Section 13A of the Advocates Remuneration Order and all other enabling provisions of the law.
2. The Applicant seeks the following orders:-
 1. *Spent*
 2. *Spent*
 3. *That this Honourable court be pleased to consolidate this matter with High Court Miscellaneous Application Number 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528 and 529 of 2013 Nairobi High Court Miscellaneous Application Number 26 of 2014 between the parties herein.*
 4. *That this Honourable court be pleased to make such order that there is a multiplicity of Bills of Costs yet the cause of action in all is one agreement.*
 5. *That in the alternative, the bills be presented for taxation before the same Taxing Officer at the same time.*
 6. *That costs of this application be in the course.*
3. The application is premised on following grounds:-
 - a. *The Applicants retained the Respondent in relation to sale, purchase and transfer of parcel of land known as Land Reference No. 209/309/1 (IR No. 92457) situate along 4th*

- Ngong Avenue Nairobi which sale was between the 1st and 2nd Clients/Respondents.*
- b. *That the Respondent was also required to carry out the following tasks within the same transaction:-*
 - i. *Prepare and agreement to subscribe shares in the 2nd Applicant by M/s Richhood Limited.*
 - ii. *Prepare a shareholders' agreement for M/s Richhood Limited.*
 - iii. *Prepare an unconditional agreement for acquisition of shares in the 2nd Applicant for purposes of joint venture for purchase of land between the 1st and 2nd Applicants, M/s Richhood limited and M/s First Western Consortium Limited.*
 - iv. *Prepare a shareholders agreement for 2nd Applicant.*
 - v. *Provide Secretarial Services to the promoters of 2nd Applicant.*
 - vi. *Prepare deed of assignment of the Civil and Structural Engineering fees.*
 - vii. *Prepare memorandum of agreements for appointment of the Civil Structural Engineer.*
 - viii. *Prepare memorandum of agreement for appointment of the Mechanical and Electrical Consulting Engineers.*
 - ix. *Prepare memorandum of agreement for the appointment of Architect (TRIAD Architects).*
 - x. *Prepare a deed of assignment of the Architect (TRIAD Architect) professional fees.*
 - xi. *Prepare the deed of assignment of the quantity surveyor (Masterbill Integrated Project)*
 - xii. *Prepare the deed of assignment of the quantity surveyor (Masterbill) professional fees.*
 - xiii. *To act in the sale, purchase and transfer of LR. No. 209/309/1 from 1st to 2nd Applicant as joint counsel for the Applicants.*
 - c. *The item sought to be taxed in all these bills fall under one transaction, relate to the same subject matter and the instructions in issue for determination in the all these bills are identical.*
 - d. *That consideration of these suits will save cost and time for the parties and that it is unfair for the bills regarding every item of conveyance contained in the letter of instruction be taxed in isolation. The consolidation will aid in meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses.*
 - e. *That the multiplicity of the bills of costs filed by the Respondent indeed amounts to unjust enrichment as the said firm of advocates is bent on being paid over and over for the same purported instructions.*
 - f. *That the same raises ethical issues and it is therefore in the interest of justice that the prayers sought be granted.*
 - g. *That no prejudice will be suffered by the Advocate/Claimant.*
4. The application is supported by affidavit of **JOSEPH GITAU MBURU** dated **4th March 2014** which mainly amplifies the above stated grounds.
 5. The application is opposed. The Respondent **M/s Mercy Nduta Mwangi** has sworn an affidavit dated **14th March 2014** and filed in court on the same day. That affidavit has many annexures running to hundreds of pages and it is not paginated. The Respondent has also filed a further affidavit dated **17th March 2014** in opposition to the application. The Respondent also filed a Notice of Preliminary Objection dated **10th March 2014**.
 6. The brief history of the application is as follows. Midstream a commercial transaction whose particulars are in the pleadings, the Applicants, various firms, companies, entities and individuals, fell out with the Respondents, an advocate on account of the Advocate's remuneration concerning the said transaction. Because the Respondent/Advocate held in her possession certain titles to the various properties involved in the said transactions, the Client/Applicant filed a civil suit number 14 of 2013. (Originating Summons) seeking among other orders that the Respondent/Advocate release those titles. As expected the Advocate/Respondent raised the issue of her fees which were outstanding. The court directed the Respondent/Advocate to release the said titles on the condition that the Client/Applicants deposited security for her fees in court of Kshs.2,045,603.90 which was

done. The court also directed that the Respondent/Advocate files 16 Bills of Costs for taxation in relation to the said instructions by the client. The court observed that after the said Bills of costs were taxed, a reconciliation as to the monies paid and received would be required. The Respondent/Advocate then prepared 17 Bills of Costs, which are at various stages of taxation pursuant to the Court Ruling of 19th November 2013. The current application now seeks the stay of that process, and the consolidation of all the said bills of taxation on the grounds that the bills arise from the same transaction, involve the same parties and the same subject matter and that if they are allowed to proceed individually, would be time consuming, untidy and would amount to unjustly enriching the Respondent/Advocate.

7. I have considered the application and opposition to it and the submission of the parties, both on the law and on technicalities proposed under the Notice of Preliminary Objection. I have decided to ignore the technicalities of the law, proposed by the Advocate/Respondent and to deal with the substance. That being so, the only issue in this matter is whether this court can allow stay of the said taxations, and a consideration of all the said taxation processes going on. On this issue I will restrict myself to the substantive law on consolidation, and not the law of procedure. But before I leave the law of procedure, I must note that the new Constitution of Article Article 159 (2) (d) which frowns upon unmitigated reliance on technicalities of procedure to defeat a substantive claim necessarily makes a fusion between the Advocates Remuneration Order and the Civil Procedure Rules 2010. It is upon the Judge, always in the interest of substantive justice, to make a judicially justifiable choice to uphold a right which would otherwise have been defeated at the alter of technicality.
8. The Respondent/Advocate submitted that prayer number 4 of this application, being the substantive order herein is an issue which has been determined in the Ruling of Justice Havelock of 19th November 2013, and is therefore *res judicata*. In that Ruling the court directed at page 22 as follows:.

***“As a result, this court directs that the Defendant will file 16 Bills of Costs herein for taxation purposes in relation to the notes that were raised and which were included in the annexure to the Defendant’s Replying Affidavit 1st February 2013 from pages 69 to 102.*”**

At page 23, the Judge stated,

“in the meantime and pending the Taxing Officer’s decisions on the 16 Bills of Costs, the monies deposited in court shall remain there.”

9. From above decision it is clear that the filing of separate Bills of Costs for taxation arises from an order of this court. That order, until it is revised or appealed against remains in force, and the Respondent/Advocate, in coming up with separate Bills of Costs is simply complying with this court’s order. It is clear from that Ruling that the issue of duplicating or multiplicity was determined when the court found out that 16 pieces of work had been done by the Advocate/Respondent for which 16 Bills of Costs could be filed. It is therefore beyond the scope of this court now to find that there is duplicity or multiplicity of suit and that consolidation should ensue. I therefore cannot open up that issue for submissions and further determination without following the procedure of review.
10. The other issue which arises from the said Ruling is that the court envisaged a situation where the parties would move fast and do taxation so that the money deposited in court could be released to the deserving party. Pursuant to that the Advocate/Respondent filed the 16 Bills of Costs on 10th December 2013 and has proceeded to have the bills listed for taxation on various dates stated at paragraph 23 of her replying affidavit. The taxation process is currently underway, and has been temporarily stayed under this application.
11. Under the circumstances I decline to grant prayer 3 and 4 of the application.
12. I have also been persuaded by the submission of the Applicant that the Bills for taxation appear to

arise from similar or substantially similar transactions, and has a familiarity threat, and that they should be heard together or at least by the same Taxing Officer for the purposes of tidiness, and to avoid possibility of over-enriching the Advocate/Respondent. This submission seems to be reasonable despite the fact that each of the bills is individual and separate without any consideration of other factors. However, that is easier said than done. The truth of the matter is that these instructions emanated from the same source or sources substantially similarly, and during the process of negotiations when parties were still friendly to each other, were issued in same sitting or vide same communication. In this regard, the Applicant deserves at least an opportunity to comment, during the taxation process that what is contained in Bill (1) for example, is already covered in Bill (6). Again, the amount being claimed by the Advocate/Respondent of over Kshs.24,000,000/= is quite substantial. It is only fair that the Applicant be given a fair chance to know that he has or is able to make adequate input in the process of taxation. This he can best do if he can have the process being done together or at least before a single Taxing Officer.

13. In the upshot, I make order as follows:-

- a. *The Notice of Motion dated 4th March 2013 partially succeeds to the extent that I direct that the said bills for taxation shall be presented for taxation before the same Taxing Officer at the same time.*
- b. *The parties herein shall fix a date for the taxation of the said bills within 14 days from the date herein.*
- c. *The temporary stay of proceedings herein is hereby lifted.*
- d. *I assess the cost of this application at 50% and grant the same to the Advocate/Respondent.*

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI

THIS 27TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Ms. Otieno holding brief for M/s Mwangi for Plaintiff

Gathue holding brief for Njenga for Defendant

Jason – Court Clerk