REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 667 OF 2013

MBUGUA & MBUGUA ADVOCATES.....ADVOCATES/APPELLANT

VERSUS

KENINDIA ASSURACE CO. LTD.....CLIENT/RESPONDENT

R U L I N G

This genesis of this matter is that on 2nd July 2013 the applicant/advocates M/s Mbugua & Mbugua Advocates filed an advocate/client bill of costs pursuant to schedule V Part II paragraph 22 of the Advocates Remuneration Order, against Kenindia Assurance Company Limited (hereinafter called the clients.) The bill of costs was in respect of legal fees on account of legal representation in **NRB SRMCC No. 963 of 1996 – Argos Furniture Limited – Vs – Yobesh Mogaka**.

The client/respondent is represented by the law firm of Kinyanjui Njuguna & Co Advocates. When the bill came up for taxation before F.R. Wangila Deputy Registrar on 20th February 2014, the respondent's counsel sought letter of instructions and supporting documents. The parties agreed to file written submissions to dispose of the taxation. By a ruling delivered on 8th May 2014, the Deputy Registrar disallowed the advocate/client bill of costs on account that the same was statute barred, as the last action was on 14th April 2005, about 9 years earlier. She relied on the authority of **Abucha & Co Advocates – Vs – Trident Insurance Co. Ltd [2013] eKLR** Per **Justice Waweru** in **Nairobi HC Misc Application No. 527/2011**.

Arising from the deputy registrar's ruling dated 8th May 2014 the advocate/applicant filed chamber summons dated 20th June 2014 pursuant to paragraph 11(2) and 79 of the Advocates Remuneration Order seeking to set aside the order or ruling of the taxing master dated 8th May 2014, amongst other prayers, on the grounds, among others, but more significantly, that the taxing master (deputy registrar) lacked jurisdiction to entertain or determine on whether or not the said advocate/applicants bill of costs as filed was statute barred.

In addition, the applicant contends that the taxing master acted in excess of jurisdiction under the Advocates Remuneration Order.

On 21st August 2014, the respondents filed a replying affidavit in opposition to the applicant's chamber summons. The affidavit is sworn by Mr. Kinyanjui Theuri advocate, having the conduct of the matter herein on behalf of the respondent.

The affidavit was sworn on 19th August 2014. It is the respondent's advocate's replying affidavit that provoked the applicant to lodge a notice of preliminary objection dated 25th September 2014 and filed in Court on 26th September, 2014. The gist of the preliminary objection is that the said affidavit of Kinyajui Theuri advocate offends the law and wore specifically, the provisions of Order 19 of the Civil Procedure Rules, 2010. The applicant sought to have the said replying affidavit struck out and granted the orders as prayed in the chamber application.

Both parties appeared before me on 29th September 2014 and argued the preliminary objection.

In support thereof, Mr Mbugua advocate submitted that his objection has nothing to do with the form in which the affidavit is as that can be cured under Order 19 rule 7 of the Civil Procedure Rules. His borne of contention was that the replying affidavit offends the best evidence rule as set out in order 19 Rule 3 of the Civil Procedure Rules which provides that affidavits shall be confined to such facts as the deponent is able to prove.

He further cited the proviso thereof which provides that in interlocutory proceedings, or by leave of Court, a party can swear an affidavit containing statements of information and belief showing the sources and grounds thereof.

In his view, the proviso was not available to the respondent and particularly the deponent of the said affidavit because what was before the Court was not an interlocutory proceeding but a reference to determine the dispute between the parties fully and finally.

He argued that the entire paragraphs of the affidavit were argumentative with no factual matters but expressions of legal opinion hence it is scandalous, offensive and ought to be struck out under Order 19 rule 6. According to counsel, if a matter in an affidavit is argumentative then it is scandalous and offensive and if it is expressive of legal opinions, it is scandalous, offensive, oppressive and irrelevant. In his opinion, an argumentative affidavit will not help the Court reach a fair decision.

He pointed out that the offensive and scandalous paragraphs 4 – 16 quote sections of the law and court decisions which makes the affidavit look more of a submission. In his view, legal opinions and submissions are not to be set out in an affidavit, citing **HCC 202/2007 Albany Taylor and Wendy Taylor – Vs – Stella Nafula and Christopher Taylor; CA 352/2004 Kamlesh Pattni – Vs – Nassir Ibrahim Ali and Others; HCC 63/09 Manchester Outfitters – Vs – Prann Galot and 3 Others and HCC 588/2003 Lila Vadgawa – Vs – Mansukhlala Shantilal Patel**.

All the cited authorities, he submitted, espouse the principles that expressions of law are not to be contained in an affidavit; submissions are not to be entertained in an affidavit; and that hearsay evidence is for exclusion and so are legal opinions.

In response, Mr. Odhiambo counsel for the respondent dismissed the preliminary objection raised as lacking in merit. In his view, a preliminary objection must be grounded on a purely point of law, and that contrary to that expectation, counsel for the applicant had raised a preliminary objection that require certain facts to be ascertained as to whether the paragraphs complained of are argumentative or not. In his view, , there was no certainty that a particular law had been breached. Citing the **Mukisa Biscuit Manufacturing Company Ltd – Vs – West End Distributors Ltd (1969) EA 696** Per **Law JA** that a preliminary point cannot be raised if any facts cannot be ascertained or what it seeks is judicial discretion of the Court.

The respondent's counsel urged the Court to disregard the preliminary objection as in determining whether the paragraphs in the affidavit are argumentative or not, the Court is being asked to exercise its discretion which offends the principles laid down in the **Mukisa Biscuit Manufacturing Co. Ltd (Supra)**.

The respondent relied on the case of **Dorothy Margaret Wanjiku Kungu – Vs – Akash Himatlal**

Dodhia [2014] eKLR page 3 paragraph 6 that a preliminary objection cannot be raised if any facts require to be ascertained, arguing that the current preliminary objection requires ascertaining whether the deponent had the capacity to swear the said affidavit. He urged the Court to examine in any event, the applicant's own affidavit in support of the chamber summons at paragraphs 3 and 11 which raise similar issues of law which counsel had complained of as offensive to the rules relating to affidavits. He emphasized that Order 19 rule 3(2) refers to facts which the deponent is able to prove and that the replying affidavit relates to a ruling which the applicant seeks to be overturned by this Court. He cited Article 159 of the Constitution urging the Court not to determine the matter on the basis of procedural technicalities as the affidavit was proper. He dismissed the authorities cited as being inapplicable to this case.

Mr Mbugua contended that Article 159 of the Constitution was not meant to oust the rules of procedure and therefore the latter must be enforced. He maintained that as the preliminary objection if allowed will determine the matter fully, his application should be allowed, with costs.

I have carefully considered the preliminary objection by the applicant and counsel's submissions for and against the same, guided by the cited authorities and the relevant law.

The applicable law relating to affidavits is Order 19 of the Civil Procedure Rules. Rule 1 thereof provides matters to which affidavits should be confined as *"to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."*

This subrule 1 strikes a dichotomy between non-interlocutory and interlocutory applications. In the former case, affidavits must be confined to facts which the deponent can prove of his own knowledge. This dichotomy incidentally suggests that "application" in rule 2 is not confined to interlocutory applications.

If the deponent adheres to facts within his personal knowledge, then the evidence can be given for the purposes of rule 2 even on non-interlocutory (i.e. substantive) applications. Rule 2 provides that:

> ***2(1) upon any application, evidence may be given by affidavit but the Court may, at the instance of either party, order the attendance for cross examination of the deponent.***

Order 19 rule 3(2) provides that the costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall, unless the court otherwise directs, be paid by the party filing he same.

Under rule 6, the court may order to be struck out from any affidavit any matter which is scandalous, irrelevant, or oppressive.

Rule 7 provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

As to whether the proceedings herein are interlocutory or substantive i.e. whether they would determine the rights of the parties fully and finally or are meant to keep matters to the status quo pending such determination;

I have no doubt in my mind that a reference as envisaged under paragraph 11(2) of the Advocates Remuneration Order is intended to determine the rights of parties to a dispute fully hence, a substantive matter. In such a case, and as was rightly put by the respondent/applicant counsel, the proviso to rule 3 of Order 19 is not available as a matter of right, unless leave of court is sought and obtained. No such leave of court was sought or granted to depose such *"facts"* which contain arguments in the form of

submissions. Affidavits are not meant for submitting arguments but for stating facts as the deponent is able of his own knowledge to prove.

In the cases of **Cammille – Vs – Meralli [1966] EA 411, Mayers & Another – Vs – Akira Ranch Ltd [1974] EA 169,** the court held that:

> ***"where an affidavit contains averments of apparent importance in the proceedings but which transgress the requirements of order 19 rule 3(1) and in regard to which the leave of court under the proviso to that subrule has not been obtained, the retention of such averments in the affidavit contrary to the expressed wishes of the opposing party would be oppressive within the meaning of rule 6 of the order."***

However, in K**amless M.D. Pattni – Vs – Nasir I. Ali and 2 Others [2005] eKLR**, the court held that only offending portions of the affidavit would then be rejected, not the entire affidavit. Looking at the affidavit of Mr. Kinyanjui Theuri, advocate sworn on 19th August 2014, and especially paragraphs 4, 5, 6, 9, 11, 13 and 14 of the said replying affidavit, I am satisfied that the "facts" or depositions contained therein are derived from personal knowledge of the subject herein and the applicable law. However the said paragraphs which the respondent/applicant counsel takes issue with are fraught with verbose argumentative propositions, expression of opinion and law coupled with decided cases relied on. It would indeed be oppressive to allow such matters to masquerade as factual opinions and therefore I am enjoined to accept the submissions by counsel in support of the preliminary objection and the decisions cited. Accordingly, I proceed and hereby strike out the paragraphs 4, 5, 6, 9, 11, 13 and 14 of the replying affidavit by Mr. Kinyanjui Theuri advocate and declare them expunged from the record for being scandalous, offensive irrelevant and oppressive to the adverse party.

The respondent's arguments that the court cannot uphold the preliminary objection as raised because it is being asked to ascertain facts as to whether the paragraphs complained of are argumentative or not lacks any merit. In a preliminary objection, the court is indeed being asked to look at what is proposed and determine whether it meets the requirements of the law or it is offensive to the law established and that is all that I have done. I am not persuaded that the Mukisa Biscuit case is applicable in this clear case, and as it was cited by the respondent generally to advance the proposition that:

> ***"A preliminary objection cannot be raised if any facts cannot be ascertained or what it seeks is a judicial discretion of the court."***

As I have stated, this court is capable of ascertaining, by glancing at the paragraphs of the affidavit subject matter, that indeed they are out of order with the provisions of Order 19 of the Civil Procedure Rules. The discretion to strike out the offending paragraphs is donated by law and I see no reason to depart from that law.

It has also been argued by the respondent that the preliminary objection as raised is a mere technicality which can be ousted by the oxygen principle and Article 159 (2) (d) of the Constitution. In this case, I am not persuaded that the cited law was intended to oust all procedural laws of the land and or to aid parties who deliberately seek to flout the established principles of law that are meant to aid the court in the dispensation of justice.

The oxygen principle and Article 159 (2) (d) were, in my view, not a panacea for filing scandalous, oppressive and irrelevant pleadings or proceedings, and particularly, when the party seeking to rely on those provisions is a seasoned advocate and an officer of the court herein in defence of his clients' cause. I am fortified by the decision of the Court of Appeal on this point in **Kakiita Maimai Hamisi – Vs Persi Pesi Tobiko & 2 Others CA 154/2014** Per **Karanja Ouko & Kiage JJA** that:-

> ***"Article 159 and its handmaiden sections 1A and 1B of the Civil Procedure Act, are not a panacea nay a general whitewash that cures and mends all ills, misdeeds, and defaults of litigation hence, parties should not take umbrage or pitch tent therein in the hope that it is such.***"

In another Court of Appeal decision of **Mumo Matemu – Vs – Trusted Society of Human Rights Alliance and Others CA 290/2013**, the Court of Appeal observed:

> ***"Procedure is also a handmaiden of just determination of cases."***

Further in **Shabbir Ali Jusab – Vs – Annar Osman Gamrai and Another [2013] eKLR** (Supreme Court decision as cited in **Raila Amollo Odinga – Vs – IEBC and 4 Others Supreme Court petition No. 5 of 2013**), the Supreme Court pronounced itself thus concerning references to Article 159 (2) (d) of the Constitution:-

> ***"The essence of the provisions of Article 159 (2) of the Constitution is that a court of law should not allow the prescriptions of procedure and form to triumph the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best cause."***

I have no reason to depart from the above expression and pronouncement by the Supreme Court that Article 159 of the Constitution cannot be applied in every other situation where it is clear that precedents have been set by law and the courts in settling certain procedural matters after the effective date of the promulgation of the Constitution.

In addition, Section 1A (3) of the Civil Procedure Act expects and therefore places a duty to parties to proceedings or an advocate for such a party to assist the court to further the overriding objective of the Act, and to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

The respondent/counsel has also attacked the applicant's affidavit as sworn and filed on 20th June 2014 by Joseph Njoroge Mbugua as containing paragraphs 3 and 11 which are argumentative and expressive of opinion and law and that what the respondent's advocate was doing was merely responding thereto. I agree with the submission above only that I do not agree that two wrongs can make one right.

The issue of those paragraphs 3 and 11 are unfortunately not before me for disposal and if it does emerge at the opportune time, I will deal with them as appropriate, noting that paragraph 11(2) of the Advocates Remuneration Order does not even mandate the application by chamber summons to be accompanied by an affidavit in support. Counsel for the applicant implored this court upon striking out the offending paragraphs complained of as contained in the affidavit of Mr. Kinyajui Theuri advocate, to grant the orders as prayed in the reference.

I hesitate to do so for reasons that whether or not the chamber summons/reference dated 20th June 2014 is opposed or not, the burden of proving that the applicant is entitled to the orders sought therein has on him to prove on a balance of probability.

There should not be any short cuts to accessing justice, noting that the reference is substantive application seeking to determine rights of parties fully and whole on the dispute pitting the advocate and client over alleged unpaid legal fees for the legal services rendered. And even if this court were to find that the entire affidavit opposing the reference was incompetent, this court reserves the discretion which is unfettered, and in the interest of justice, to grant the respondent leave to file a fresh affidavit in place of the offending affidavit. Nonetheless, as I have not found that all the paragraphs of the affidavit complained of are offensive, the respondent has an opportunity to rely on the remaining parts thereof to challenge the reference. The cardinal principle being employed by the court in this instance is that every person who avails himself/herself of the jurisdiction of the court has an unimpeded right to be heard as espoused in Article 50(1) of the Constitution. That being the case, this court will not be in a rush to oust the parties from the judgment seat and or deny them an opportunity to ventilate their grievances where there is clear intention and necessity to be heard. The court further takes judicial notice of the fact that legally, it is not

the quantity of the evidence that determines the success of an argument but its relevance, admissibility and credibility, (see Section 5 of the Evidence Act – Cap 80 Laws of Kenya.)

The upshot of all the above expositions is that the preliminary objection as raised is hereby allowed to the extent that I have stated.

I further direct that for expeditious disposal of the dispute herein, the applicant do set down for hearing the chamber summons/reference filed on 20th June 2014.

The costs of the preliminary objection shall be costs in the main reference/chamber summons.

Dated, signed and delivered at Nairobi this 29th Day of

October, 2014.

R.E. ABURILI

JUDGE