



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 545 OF 2013

NANCY WANJA GATABAKI.....APPLICANT

VERSUS

ASHFORD MURIUKI MUGWUKU

(T/A ASHFORD & CO ADVOCATES).....RESPONDENT

R U L I N G

1. The substantive application herein (**chamber summons dated 21st March 2012**) is a client and advocate dispute over an **agreement for fees dated 22nd February 2012**. The application was brought by the client under **section 45(2) of the Advocates Act, Cap 16**. The main relief sought is that the said agreement be **set aside**. There are two alternative prayers, one for **variation** of the agreement, and the other for an order for **taxation** of the Advocate's fees. The application is to be heard with the assistance of two assessors who are advocates of not less than five years standing; they have already been appointed by the Registrar after consultation with the Chairman of the **Law Society of Kenya** as required by the aforesaid subsection (2) of section 45.

2. In the course of giving directions for hearing of the application,

the Applicant applied on 4th July 2013 for leave of court to cross-examine the Respondent upon his replying and further affidavits filed respectively on 20th July 2012 and 18th July 2013. The reason advanced for the said application by the Applicant's learned counsel, **Mr Gathenji**, was that there were matters stated in the said affidavits which touched on the integrity of the Respondent, coupled with allegations of fraud and deceit, presumably attendant to making of the challenged agreement for fees, and other issues relating to the court settlement which is the basis of the challenged agreement.

3. The Respondent opposed the application. His learned counsel, **Mr Ng'ang'a**, took the view that the validity of the impugned agreement was not in question since the agreement was in writing and was duly signed. He stated that the agreement could only be challenged in respect to **quantum** as per section 45(2) aforesaid of the Advocates Act; that is, on grounds that the agreement is **harsh** and **unconscionable, exorbitant** or **unreasonable**. He further argued that **fraud** was not a ground of challenge under the said sub-section.

4. Mr Ng'ang'a also took the view that cross-examination of the Respondent would unduly prolong a matter which should be expeditiously determined on the basis of affidavit evidence. He also argued that the Advocates Act and the Rules made thereunder were by themselves a complete code of law which does

not permit the importation of rules and procedures governing ordinary civil litigation.

5. I have considered the submissions of the learned counsels. In litigation governed by the Civil Procedure Act and Rules, the grant of leave to cross-examine the maker of an affidavit is a discretionary power of the court under **Order 19, Rule 2** of the **Civil Procedure Rules, 2010**. Likewise, the leave to cross-examine sought herein is at the discretion of the court. It bears remembering, however, that the exercise of discretion by the court must have a sound basis; it should not be exercised in a whimsical or capricious manner. See the case of **National Bank of Kenya Ltd & 2 Others –vs- Kisumu Paper Mills Ltd [2009] eKLR**. See also the case of **Mbogo –vs- Shah [1968] EA 93**. The question to ask is whether any material has been placed before the court which would assist in the exercise of its discretion.

6. An applicant to cross-examine the deponent of an affidavit must lay a proper basis for such application. He must state which specific paragraphs and allegations in the affidavit in question give rise to the need for cross-examination.

7. The Applicant herein should have demonstrated which portions of the two affidavits of the Respondent she needed to cross-examine him upon and why it was necessary to cross-examine. The Applicant has not discharged this burden. It is not sufficient merely to request for leave to cross-examine. There must be a proper basis for it.

7. In addition, the main application in these proceedings (chamber summons dated 21st March 2012), does not set out any specific particulars of fraud which would give rise to the need for cross-examination of the Respondent, given the gravity of any allegation of fraud. The application can be properly dealt with by way of submissions upon the affidavit evidence on record. Generally cross-examining the Respondent upon his two lengthy affidavits would unduly prolong the matter and turn the application into a fully-fledged hearing. Such a hearing could not have been the intention of section 45(2) of the Advocates Act.

8. The upshot is that the application for leave to cross-examine is refused with costs to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2013

H P G WAWERU

JUDGE

We the Assessors agree that leave to cross-examine the Respondent upon his replying and further affidavits should not be granted.

KYALO MBOBU

1ST ASSESSOR

E. W. KINYENJE-OPIYO

2ND ASSESSOR

DELIVERED THIS 1ST DAY OF OCTOBER 2013