



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 83 OF 2013 (O.S.)**

**KENINDIA ASSURANCE COMPANY LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JANET MULWA & COMPANY ADVOCATES ..... DEFENDANT/APPLICANT**

**RULING**

1. Before the court is a Notice of Motion application dated **13<sup>th</sup> March 2013** seeking the following orders:
  1. *That this application be certified urgent, be heard ex-parte and service of the same be dispensed with in the first instance.*
  2. *That a temporary injunction do issue to restrain the Respondent herself, or through her employees, servants and/or agents from proceeding/prosecuting of taxations/filing of submissions/executions/filing of bills against the Applicant pending the hearing and determination of the application herein.*
  3. *That a temporary injunction do issue to restrain the Respondent herself, or through her employees, servants and/or agents from proceeding/prosecuting of taxations/filing of submissions/executions/filing of bills against the Applicant pending the hearing and determination of the Originating Summons dated 7<sup>th</sup> March, 2013 and filed on 8<sup>th</sup> March, 2013.*
  4. *That costs of this application be provided for.*
2. The Application is premised on the grounds set out therein and on the affidavit of AMINO AKONG'A dated 13<sup>th</sup> March 2013.
3. It is to be noted that before the said application was filed the Applicant did come to court on 11<sup>th</sup> March 2013 with the Originating Summons dated 7<sup>th</sup> March 2013 also under Certificate of Urgency seeking *inter-a-alia* the orders now sought in the current Notice of Motion. The prayers in the Originating Summons were not granted and so the Applicant, two days later, filed this Notice of Motion.
4. The history of the said Originating Summons and the said Notice of Motion, and indeed the grounds upon which both are based can be summarised as follows.

5. The Applicant, an Insurance Company alleges to have instructed the Respondent, a firm of advocates to act for the Applicant in insurance matters filed in court. It is alleged that the Respondent has failed to inform and update the Applicant on the progress of those matters, and has refused to reconstruct its lost and/or misplaced files. This notwithstanding the Respondent, due to a dispute in payment of the Respondent's fees, has taken steps to file numerous bills of costs against the Applicant without giving the Applicant any information relating to original cases, when they were filed, when they were heard and judgement delivered, their case or claim numbers and other relevant information the Applicant would require to enable it meet the demands for payment of the advocates fees. It is alleged that the Applicant continues to make payments to the Respondent under duress due to their inability to confirm from their records and/or system whether payments have already been made and/or ascertain outstanding balance thereof when the proper details are not furnished. The Applicant is, however, ready to pay after the full disclosure is made by the Respondent. Mr. Mbogo for the Applicant submitted that this court should by an order of injunction restrain the Respondent and all her agents from proceeding/prosecuting of taxations and/or filing of submissions or executing of all the new and/or pending bills against the Applicant until the Original Summons is heard and determined. Mr. Mbogo further submitted that if the prayers sought are not granted the Respondent will continue with the cases and this will be prejudicial to the Applicant, and the said Original Summons will be rendered nugatory.
6. The application is opposed by the Respondent through a replying affidavit sworn by JANET MULWA and filed in court on 2<sup>nd</sup> April 2013. M/s Mulwa submitted that indeed her firm was instructed by the Applicant from the year 2005, but that the Applicant has not paid her firm's fees for most of the work done during that time. M/s Mulwa denies that her firm has refused to give any information to the Applicant to enable the Applicant reconstruct any of its lost or misplaced files. She has always provided suit numbers, status of proceedings, date of Judgements and claim numbers, but that the Applicant has simply refused to honour their undertaking to pay their fees. The Respondent submitted that to date she has filed about 150 bills of costs in court for taxation, and that there is nothing else to file. These bills of costs refer to individual cases and so if the Applicant requires any information, that information can only be availed, where applicable, on file by file or suit by suit basis, and that a global ban to the progress of these cases is legally untenable, and if allowed by this court, is a travesty of justice.
7. I have carefully considered the application. The issues for the court to determine in my view are:-
  - i. ***Whether there are bills for taxation in court and whether this court can stop their progress in court.***
  - ii. ***How and to what extent a grant or refusal of the orders sought would affect the parties herein.***
8. As for the first issue, it is not disputed that indeed the advocate had been retained by the Applicant and instructed to represent the Applicant in court in respect of several matters of the Applicant filed in court. Somewhere along this advocate/client relationship, the client failed to keep abreast with fees payment and this eventually caused the Respondent to file in court about 150 bills for taxation. Firstly, I have to note that the process of taxation is legal, and is the only lawful way through which an advocate whose fees is disputed can find a solution. So, when the advocate resorted to filing her bills of costs for taxation that was the right thing to do. The advocate did this on case by case or file by file basis. This means that if the Applicant required any information from the advocate that information had to be asked for within a specific case or file. A blanket request for information involving over 150 different files is not only difficult to comply with, but also shows that the Applicant is not serious. The practice of insurance companies instructing advocates is fairly simple. The insurance firm notes in its record the following issues, *inter-alia*:-
  - i. ***Name of the claimant.***
  - ii. ***Date of accident or claim.***
  - iii. ***Claim reference number.***
  - iv. ***The advocate defending the claim.***

- v. **The amount (if known) of the claim.**
- vi. **Others.**

9. The above information is in the complete domain of the insurance company. Before a file is issued to an advocate to prosecute or defend, the insurance company already has in its records all the relevant information. It is possible that in a few cases, and for various reasons, that information may be lost, and the insurance company may have a genuine need to ask for such information. In this matter it has not been alleged that the Applicant has, either through a fire or some other misfortune, lost its records. The application is not that one, two, or even ten cases be stopped. No. The application is that the entire process of filing, prosecuting, taxing, executing all those 150 files be suspended. That in my view does not sound like a reasonable request.
10. The Respondent avers in its replying affidavit that, an Insurance Company that cannot keep records for 150 claims does not sound to be a prudent insurance company. That is not the kind of image that the Applicant should want to give to the public. Insurance business is based on trust. If the public is satisfied that the Applicant cannot keep proper records, what kind of guarantee can it give the public on its policies?
11. The Applicant, an insurance company must inculcate and retain public trust. To go to court to stop a legal process with the sole intention of delaying a claim is to act in bad faith. This is a court of equity. A party seeking an equitable remedy must come to court with clean hands, and must himself be ready to do or give equity. 150 files now due for taxation are not a few files. If the claim by the Applicant was genuine, the Applicant should demonstrate the same by, for example paying  $\frac{1}{3}$  or  $\frac{1}{2}$  of the advocates total claim as they sort out the issue of missing information. This is more so because the advocate has rendered services which will eventually be paid.
12. I have considered this application. I now have to address the second issue. How will the grant or refusal to grant these orders affect the parties? To my mind, if I grant these orders I would be championing impunity by rewarding a party who has come to court in bad faith and with unclean hands with the sole purpose of denying or delaying the Respondent the enjoyment of the fruits of her labour. This would be to punish the Respondent for doing the Applicant's work. In my Ruling, this court has the duty to protect the Respondent from the Applicant's unlawful uncaring and ill intended action.
13. Secondly, if I do not grant the orders sought the Applicant will not suffer any prejudice at all. Neither will it suffer any damages. The bills for taxation will still be taxed in a forum where the Applicant is fully represented by a counsel, and the Applicant would only pay the taxed costs. In conclusion, the Notice of Motion before the court is mischievous, misplaced, ill-founded and based on bad faith. I dismiss it with costs to the Respondent.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 11<sup>th</sup> DAY OF DECEMBER 2013**

-----  
**E. K. O. OGOLA**

**JUDGE**

**In the presence of:**

*No Appearance for the Plaintiff*

*M/s Akaka holding brief for Mbogo for the Defendant*

*Teresia - Court Clerk*