



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 157 of 2012

NANCY WANJA GATABAKI APPLICANT

VERSUS

ASHFORD MURIUKI MUGWUKU

T/A ASHFORS & CO. ADVOCATES RESPONDENT

RULING AND DIRECTIONS

1. The Plaintiff has come before this court by way of a Chamber Summons dated 21 March, 2012 brought under the provisions of **section 45 (2) (b), (c) and (d)** of the *Advocates Act* as well as **sections 1 A (1), (2), 3, 3A and 63 (e)** of the *Civil Procedure Act* and **Order 52 Rules 3 (1), (2) and (4)** of the *Civil Procedure Rules*. In her application the Plaintiff seeks *inter-alia* the following:

“1.

2. **THAT** the fee agreement dated 22nd February, 2012 between the Applicant (as the Client) and the Respondent (as the Advocate) be set aside.

3. **THAT** in the alternative and without prejudice to prayer 2 above, the fee agreement dated 22nd February, 2012 made between the Applicant and the Respondent (as the Advocate) be varied by substituting the amount of remuneration fixed therein to such amount as the Honourable court may deem just and fair.

4. **THAT** further in the alternative and without prejudice to prayers 2 and 3 above, the costs in question and represented in the fee agreement dated 22nd February, 2012 made between the Applicant (as the Client) and the Respondent (as the Advocate) be taxed by the Registrar of this Honourable Court.

5. **THAT** this Honourable Court be pleased to consolidate this instant application within the High Court of Kenya at the Nairobi Commercial and Admiralty Division Civil Suit Number 146 of 2012 between the Respondent versus the Applicant and Equity Bank Limited.

6. **THAT** the suit and operation of the interim orders issued on 14th March 2012 and or any other consequential Orders issued thereafter in the High Court of Kenya at the Nairobi Commercial and Admiralty Division Civil Suit Number 146 of 2012 between the Respondent versus

the Applicant and Equity Bank Limited be stayed and suspended pending the hearing and determination of the instant Application and/or further orders of this Honourable Court.

7. THAT the instant application be fixed for hearing interparties on a priority basis and before the hearing of the Respondent's Notice of Motion application dated 12th March 2012 in the High Court of Kenya at Nairobi Commercial and Admiralty Division Civil Suit Number 146 of 2012 between the Respondent versus Applicant and Equity Bank Limited.

8. THAT costs of this application be paid by such party as the court deems fit".

2. The Application was founded on the following grounds as well as the supporting affidavit of the Plaintiff herein sworn on 21 March, 2012:

"1. That the fee agreement dated 22nd February 2012 made between the Applicant and the Respondent is harsh, unconscionable, exorbitant and unreasonable in respect to the amount of Kshs.61,200,000/= fixed and payable to the Respondent as his professional legal fees and further the said fee agreement is stipulating a further future payment of Kshs.10,000,000/= for services which have not yet been rendered by the Respondent.

2. That the amount stipulated in the fee agreement dated 22nd February 2012 is manifestly excessive and more than the amount recommended and payable for as costs and or professional fees due to an advocate as prescribed on taxation in the Advocates Act Cap 16 (the total amount already paid and fixed in the fee agreement is approximately 10% of the settlement sum of thereabout).

3. That the Applicant did not get the benefit of an optional advise from the Respondent or any independent legal advice or opinion or otherwise on the fee agreement dated 22nd February 2012 and being a lay person she relied on the expertise of the Respondent who is a professional and a party to the agreement who used compulsion, duress, misrepresentation and undue influence to have the fee agreement executed and entered into with the Applicant.

4. That in the two (2) suits where the Respondent was on record for the Applicant and Petitioner respectively in Nairobi HCC No. 352 of 2011 and Winding Up High Court Cause No. 24 of 2011 at Nairobi in the matter of Muga Developers Limited the two (2) matters/suits were settled by a consent order dated 6th September 2011 where, inter alia, it was provided:

- The Applicant is and shall be paid a sum of Kshs.725,619,000/= (and the Applicant has been paid to date Kshs.402,219,000/=).**
- The Nairobi High Court winding Up Cause No. 24 of 2011 was marked as withdrawn with costs of Kshs.5,000,000/= to be paid to the advocate for the petitioner who was the Respondent there (which sum of Kshs. 5 million the respondent has been paid).**

5. That pursuant to the afore said consent judgment and upon the Applicant being paid the 1st instalment of Kshs.140 Million, she paid the Respondent Kenya shillings Twenty Million (Kshs.20,000,000/= to be paid to the advocate for the petitioner who was the Respondent there (which sum of Kshs.5 mill the respondent has been paid).

6. That further the Applicant has paid to the Respondent a further sum of Kshs.460,000/= towards disbursements in HCCC 352 of 2011 and Nairobi High Court winding Up Cause No. 24 of 2011 at Nairobi where the Respondent is still on record for the Applicant.

7. That there has been no delay in filing of the present application by the Applicant as demand for the sum of Kshs.61,200,000/= was served on the Applicant by the Respondent on 15th March 2012 and the disputed fee agreement was entered into on 22nd February 2012 through compulsion

duress and undue influence.

8. That on 16th March 2012 and to the utter surprise of the Applicant, the Respondent served the applicant with pleadings and orders in HCC No. 146 of 2012 where inter alia the Respondent has been granted orders to a first charge on proceeds recovered in the two (2) suits where the Respondent represented the Applicant and the orders granted were directed against the Applicant's bank Equity Bank Limited Kiambu Branch directing that the applicant and the Gannishee shall not be utilizing, disbursing, withdrawing, transferring and or otherwise utilizing the proceeds of the consent judgment orders dated 6th September 2011 in Nairobi HCC No. 352 of 2011.

9. That it is only fair, just and equitable that this Honourable Court do intervene and have the fee agreement dated 22/2/2012 varied, set aside and the amount substituted to such an amount as this Honourable Court may deem fit and fair or order that the costs in question be taxed by the Registrar of this Honourable Court as by law provided.

10. That the Orders sought herein by the applicant will determine once and for all the final amount reasonably and conscionably payable as Professional fees/costs to the Respondent who without prejudice had been instrumental to the settlement in HCC No. 352 of 2011 Nairobi and should also be conscious that the matter did not proceed to full hearing and was settled by consent with a total settlement in HCC No. 352 of 2011 Nairobi of Kshs.725,619,000/= and 3.6 acres of land allocated to the applicant within the property of the subject suit.

11. That the Respondent will not suffer any prejudice if this Honourable Court suspends, stays, and or consolidates Nairobi HCC No. 146 of 2012 filed by the Respondent to enforce the fee agreement dated 22/02/2012 (the subject matter of this suit) with this instant application as this will enable this Honourable Court with the assistance of two (2) assessors who are advocates of the High Court of Kenya appointed by the Court's Registrar after consultation with the Chairman of the Law Society of Kenya to arrive at a final decision on the fee agreement dated 22nd February 2012 with no delay.

12. That it is in the interest of justice and the court process that Orders be granted suspending and staying order granted in Nairobi HCC No. 146 of 2012 and consolidating the same with the instant application.

13. That the Respondent has not disclosed nor declared in his Notice of motion application dated 12th March 2011 and filed in Nairobi HCC No. 146 of 2012 that he has received a total of Kshs.25,460,000/= towards his Professional fees and disbursements in HCC 352 of 2011 and Nairobi High Court Winding Up Cause no. 24 of 2011 in the matter of winding up of Muga Developers Limited which suits are subject matters of the disputed fee agreement where the Respondent represents the Applicant.

14. That the Applicant stands to suffer irreparably if the Orders sought are not granted as the Respondent has filed a suit HCC No. 146 of 2012 at Nairobi to enforce The fee agreement dated 22/02/2012 which the Applicant is challenging as harsh and exorbitant, and where the Respondent has orders in his favour directing the Applicant and her bank not to disburse, withdraw, transfer and or otherwise utilize the proceeds of judgment/consent Orders dated 6/09/2011 paid into the Applicant's account at Equity Bank Kiambu Branch.

15. That the fee agreement dated 22nd February 2012 obtained through compulsion, duress, undue influence and intimidation is harsh, exorbitant, manifestly unjust for being excessive and exorbitant and having not disclosed the amount of Kshs.35,460,000/= which the Respondent has received to date in representing the Applicant and if the fee agreement is not set aside or varied, the Respondent shall all inclusive have pocketed a cool and staggering Kshs.96,660,000/= for representing the applicant in HCC No. 352 of 2011 at Nairobi and High Court Winding Up Cause

No. 24 of 2011 at Nairobi which two (2) matters has since been settled by consent judgement and they did not proceed to full trial.

16. That it is only fair and just that this Honourable Court intervene by varying in and setting aside the fee agreement dated 22nd February 2012 and by further consolidating this instant suit with HCCC No. 146 of 2012 and staying the orders granted in the said suit”.

3. When counsel for the parties appeared before me on 19 September, 2012 my directions were sought as regards the way to proceed with the Plaintiff's Application above referred to. Before I do that, I find it necessary to review some of the facts contained in the 3 Affidavits filed as regards the Application. The Plaintiff's Supporting Affidavit went into the history of the various matters in which the Defendant had been given instructions to act as from May 2011. Such matters involved a joint venture agreement to develop two properties owned by the Plaintiff and her husband involving the Suraya Property Group Limited. The Defendant also represented the Plaintiff in 2 High Court matters being *HCCC No. 352 of 2011* and *Winding-up Cause No. 24 of 2011*. The Affidavit in contained numerous complaints from the Plaintiff to the effect that she had been overcharged by the Defendant for the legal services rendered by him on her behalf. The conclusion of the Plaintiff's Affidavit was that the Defendant should not be allowed by this court to benefit from a fee agreement that the Plaintiff maintained was harsh, exorbitant, unconscionable and unreasonable and obtained through unconventional means. However, the Plaintiff did admit that she had entered into a Fee Agreement (hereinafter "the Fee Agreement") with the Defendant dated 22 February, 2012 and annexed a copy thereof to her said Affidavit. In fact that document was headed "Variation to Fee Agreement dated 8th September, 2011". In the preamble to that document the above two High Court matters were detailed and at clause 2 of the Fee Agreement it detailed:

"The legal fees payable to the Advocates for the services so far rendered to the Client up to conclusion of the aforesaid matters as at 6th September, 2011 has been agreed at Kenya Shillings 60,000,000/-(Kshs Sixty Million) exclusive of VAT and Kenya Shillings 10,000,000/-(Ten Million) for the continuing work plus VAT."

4. The Defendant filed his Replying Affidavit sworn on 19 July, 2012. He contended that the Application was misconceived and that the fees he had charged were neither harsh and unconscionable nor exorbitant nor unreasonable. He maintained that the amount of the fees could not be subject to taxation given that the Fee Agreement was in place. He also maintained that the Application defied the tenets of equity, fairness and justice and that it was an abuse of the court process. He maintained that the entire Application was wholly misconceived insofar that it was filed after the case which the Defendant had filed herein being *HCCC No. 146 of 2012*, **Ashford Muriuki Mugwuku vs. Nancy Wanja Gatabaki** in which, he said, that this court had already determined that the Fee Agreement being challenged in this matter was valid. Similarly, the Defendant maintained that the prayer contained in the Plaintiff's Application for consolidation of this suit with *HCCC No.146 of 2012* was misconceived as the two suits entail different parties and that the mode of determination of each suit is distinct. The Defendant maintained that the Fee Agreement was valid as it fulfilled the requirements of **section 45(1)** of the *Advocates Act*. The same related to contentious business, was in writing and had been signed by the Plaintiff, witnessed and partly performed by her.

5. On 9 August, 2012, the Plaintiff herein swore and filed a Supplementary Affidavit which was entirely devoted, paragraph by paragraph, to responding to the Replying Affidavit of the Defendant dated 19 July, 2012. I do not consider that the Supplementary Affidavit lends anything further as regards the directions that counsel have asked me to give in respect of this matter.

6. The issue before this court for determination is in relation to **section 45 (2)** of the *Advocates Act*. That provides as follows:

"(2) A client may, apply by chamber summons to the court to have the agreement set-aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman

of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order –

- (a) that the agreement be upheld; or**
- (b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or**
- (c) that the agreement be set aside; or**
- (d) that the costs in question be taxed by the Registrar;**

and that the costs of the application be paid by such party as it thinks fit."

It seems that what the Plaintiff has done in her Application before court is to detail and adapt the above sub-paragraphs (b) to (d) to prayers 2, 3 and 4 thereof.

7. In his early submissions, Mr. Gathenji for the Plaintiff indicated that the directions that the Plaintiff sought were that the Court should be constituted in accordance with **section 45 (2)** of the *Advocates Act*. The Registrar of this court should now appoint 2 assessors who should be advocates of not less than five years standing, after consultation with the Chairman of the Law Society. He noted that the section of the Act does not seem to require a court order for this purpose. He noted that the Plaintiff's advocates had written a letter dated 7 September, 2012 asking for the Registrar's cooperation in such appointment. He stated that after that was done then the court will be constituted in accordance with the law.

8. Mr. Ng'ang'a for the Defendant confirmed that he had been served with the said letter addressed to the Registrar and that he had responded thereto under cover of a letter dated 12 September 2012 addressed to the Plaintiff's advocates and copied to the Registrar. The Defendant's advocates had reconsidered the two suits being *HCCC No. 146 of 2012* which was the Defendant's suit seeking to enforce the Fee Agreement and this suit which sought to set-aside the Fee Agreement. Taken together they involve the question of fees. Counsel stated that in view of **section 1 A** of the *Civil Procedure Act* giving prominence to just and expeditious disposal of the matters before court his client would seek directions:

"(1) That suit *HCCC No. 157 of 2012* be consolidated with suit *HCCC No. 146 of 2012*.

(2) The issues raised in *HCCC No. 157 of 2012* be considered as a defence in suit *HCCC No. 146 of 2012*".

Counsel drew my attention to the point that there is a prayer in the Plaintiff's own pleadings that the two suits should be consolidated. Counsel had canvassed his colleague in that regard and the said letter dated 12 September, 2012 set out the Defendant's position.

9. In reply, Mr. Gathenji stated that he had no problem with the consolidation of the two suits. However he urged priority to be given to this suit *HCCC No. 157 of 2012*. He noted that any order that this court should give in this matter must be shared with the assessors. The court had no choice, as this was a statutory requirement. He further noted that the decision of the constituted court involving the 2 assessors was final in that regard as per **section 45** of the *Advocates Act*. However, he commented that suit *HCCC No. 146 of 2012* must comply with the provisions of **Order 11**. As to the position so far with the two suits, the application before court in this one involved a Chamber Summons in contrast to *HCCC No. 146 of 2012* which was a full suit. Rather as if counsel was not in favour of consolidation of the 2 suits, Mr. Gathenji noted that the arguments as between the two suits were different as the earlier fee agreement in one suit had been overtaken by events. The Fee Agreement in this suit is dated 20 February, 2012. In that regard, this court had been addressed at length on the wrong fee agreement which have been superceded. This was explained in the Supplementary Affidavit of the Plaintiff.

10. On 3 August, 2012, my learned brother Musinga J. set aside the default judgement that had been entered in *HCCC No. 146 of 2012*. The learned Judge accepted the Defence filed therein by the Plaintiff herein even though it had not been filed within the prescribed time. It seems, therefore, that the next step as far as the parties are concerned in that suit is for the provisions of **Order 11** to be complied with. It seems therefore that the said suit has reached the stage as between the close of pleadings and the actual hearing of the same. It would seem appropriate therefore, bearing in mind the submissions of Counsel, that as both suits involve a question of legal fees, that the same be consolidated with this suit. However, I am hesitant to so order as it has been pointed out that *HCCC No. 146 of 2012* involves another party, the Garnishee – Equity Bank Limited. I do not believe that the issues are identical in the two suits but I do concur with counsel for the Plaintiff herein that it makes more sense for this suit to proceed first in order that the vexed question of the Defendant's costs is dealt with first.

11. That leaves the question therefore as to how to advance the court process in regard to this particular suit. In this regard I have to note the provisions of **section 45 (1)** of the *Advocates Act* which reads:

"Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may –

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the applicant's instruction the in respect thereof or his fees for appearing in court or both;

(c) Before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's the for the conduct thereof;

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorised in that part."

To my mind, that sub-section must necessarily be considered as far as the Plaintiff's Application before the court concerned.

12. I have perused the Defendant's advocates' letter to the advocates for the Plaintiff of 12 September, 2012 as it was copied to the Deputy Registrar of this Division of the High Court. Similarly a copy of the Plaintiff's advocates' letter dated 11 September, 2012 addressed to the Registrar of this court has now been placed upon the court file and I have had the benefit of seeing the same. As the Plaintiff's counsel pointed out in his submissions before court, by bringing the provisions of **section 45 (2)** of the *Advocates Act* into play, this court has very little discretion but to direct the constituting of what I might term a special Court involving a Judge of the High Court sitting together with 2 assessors to be appointed by the Registrar after consultation with the Chairman of the Law Society. The decision of that "special" Court as regards this Application will be final as per the sub-section of the *Advocates Act*. Accordingly, I direct the Registrar of this Court do proceed with all due speed to consult with the Chairman of the Law Society and to appoint two assessors being advocates of this court of not less than five years' standing. As this matter has now become more civil in nature than commercial, the Registrar may well wish to consider that the Judge to be appointed/identified to deal with this Application may well be attached to the Civil Division of this Court rather than the Commercial Division. Parties shall be notified by the Registrar as to when the "*special Court*" has been constituted in order for this Application to proceed.

Dated and delivered at Nairobi this 25th day of September, 2012

**J. B. HAVELOCK
JUDGE**