



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 508 of 2010

DHIRAJLAL V PATANI..... PLAINTIFF

VERSUS

1. DAVID MAJANJA

**2. STEVE LUSENO(T/a MAJANJA LUSENO &
COMPANY**

ADVOCAGES)DEFENDANTS

RULING

1. The Defendants have applied by **amended chamber summons dated 23rd September 2010** (the original application was dated 3rd May 2010) for an order that the **amended originating summons dated 17th May 2010** be struck out and the Plaintiff's suit be dismissed with costs. The application was brought under **Order VI, rule 13(1) (b), (c) and (d)** of the old **Civil Procedure Rules** (the **Rules**).

2. The grounds for the application appearing on the face thereof are –

(i) That the Plaintiff had fully and unconditionally discharged the Defendants and confirmed that the Advocates' fees had been settled in full.

(ii) That this suit is meant to circumvent the said unconditional discharge.

(iii) That the Plaintiff having instructed the Defendants to compromise **Nairobi HCCC No. 220 of 2007**, and a consent order having been recorded in that suit, this present suit amounts to a collateral attack on the said consent order and is thus an abuse of the process of the court.

(iv) That the Plaintiff as a beneficiary has derived full benefit of the said consent order issued in Nairobi HCCC No 220 of 2007 and the Plaintiff's advocates on record confirmed thereby that the matter was fully settled.

(v) That the Plaintiff and his advocates on record have failed to make a full and frank disclosure in their pleadings by not disclosing all the correspondence exchanged with the Defendants.

(vi) That the Plaintiff is non-suited against the Defendants, and the amended originating summons is frivolous.

3. There is a supplementary affidavit sworn in support of the amended chamber summons. It is sworn by the 2nd Defendant and addresses issues raised by the Plaintiff in his replying affidavit filed on 10th June 2010.

4. The original application has been supported by an affidavit sworn by the same Steve Luseno who was then the only defendant. The 1st Defendant, David Majanja, was added as a party in the amended originating summons filed on 18th May 2010. It appears that there was never any leave of the court under **Order 1, rule 10(2)** of the Rules for addition of the 1st Defendant. Parties cannot be added or removed merely by amendment of the pleadings. Leave in that regard must be sought and obtained.

5. Be that as it may, the Plaintiff's suit is an application by a former client for an account under **Order 52, rule 4** of the Rules. Account is sought in respect of certain monies that the Defendants had retained as their legal fees in connection with acting for the Plaintiff in **Nairobi HCCC 2250 of 2007** and related matters. There does not appear to have been any written agreement for legal fees, and the issue between the Plaintiff and the Defendants appears to revolve around interpretation of the order entered in that suit pursuant to consent dated 30th September 2009.

6. Proceedings under Order 52 of the Rules are meant to be summary and quick anyway. I do not think they commend themselves to being struck out. Any issues regarding their propriety can be dealt with when hearing the originating summons itself. I therefore decline to strike out the amended originating summons and instead direct that the same be fixed for hearing as early as possible.

7. Costs will be in the cause. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2012