



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT
CIVIL SUIT NO. 630 OF 2010
INVESCO ASSURANCE CO. LIMITED.....PLAINTIFF
VERSUS
ALEX GATUNDU T/A
GATUNDU & CO. ADVOCATES.....DEFENDANT

R U L I N G

The Chamber Summons dated 5th October 2010, is brought under **Sections 1A (1) 1B (1)** of the **Civil Procedure Act, Orders 111 Rule 2 (c), V1 Rule 13(1) (d), V11 Rules 1 (e) and 2, XV111 Rule 4** of the **Civil Procedure Rules** (2009 Revised Edition). In it the Applicant seeks orders of the court that the suit be struck out or otherwise dismissed with costs on the basis that:-

1. **It is an abuse of the court's process**
2. **The Plaint originating the action herein is hopelessly incompetent and fatally defective.**
3. **The plaintiff has not complied with the mandatory provisions of Order VII Rule 1 (e) and (2) of the Civil Procedure Rules there being no valid verifying affidavit, or at all, accompanying the plaint herein nor averments that there was no previous proceedings nor any subsisting suit between the parties herein respecting the subject matter herein.**
4. **This Honourable Court lacks jurisdiction to issue a permanent injunction operating *sine die* against an advocate restraining them (*sic*) from executing on account of their legal fees as prayed for in the plaint unless there is no outstanding legal fees at all.**
5. **The Plaintiff has no *locus standi* to institute this suit.**

The application is supported by an affidavit sworn by the Applicant on 5th October 2010, to which he has annexed copies of several documents and correspondence evidencing the Applicant's various claims against the Respondent in respect of legal fees for services rendered to it, and the Respondent's liability to pay the said claims, amounting to Kshs 18,064,883/= but discounted, after negotiations, to Kshs 14,098,075/= which the Respondent has offered to pay by instalments. The Applicant relies on the said documentation to show that the Respondent has admitted the indebtedness and an agreement reached for the repayment of the legal fees by agreed instalments, under a mutually agreed scheme of

payment. Among the documentation annexed are copies of post-dated cheques issued to the Applicant pursuant to the said agreement, which were dishonoured but returned to the respondent after it requested that the same be returned for “*further and/or necessary action*”. The letter requesting for the same is annexed as “AG8”.

The Application is opposed on the strength of a Replying Affidavit sworn by the Respondent’s claims manager, Paul Gichuhi, on 14th October 2010, which does not, in my view, directly address the issues raised in the application and the facts as presented in the supporting affidavit, but which seeks to introduce matters that are not supported by the annexures thereto, and which, in my considered opinion, do not provide an adequate answer to the matters raised in the supporting affidavit in any event. What the Respondent seeks to demonstrate by the Replying Affidavit is that the Defendant/Applicant intends to put pressure to bear on the Plaintiff/Respondent in regard to “*unascertained and legally uncognisable debts*”, in that the Applicant’s taxations, causes and advocate’s bills raised are the subject of challenge on the ground that they contain “*numerous procedural irregularities*” which, in the Respondent’s opinion buttresses the contention that the Plaintiff/Respondent does not owe the amounts set out in the supporting affidavit. According to the Respondent, it never admitted the debt and its offer to settle the same by instalments is purely a reconciliatory gesture.

In this regard, the deponent states in paragraph 10 of the replying affidavit, *inter alia*, as follows:

“ It is the Defendant’s openly and unlawful and unreasonable demand to the Plaintiff/Applicant to admit in writing to owe a whopping Kshs. 18 million and pay Kshs. 9 million upfront within 72 hours or face dire consequences and unspecified consequences that precipitated the inception of the instant suit. It is regrettable that the Defendant/Applicant herein in his affidavit under reply persists in its unlawful and unreasonable demands”

And in paragraph 11

“ That, the Plaintiff/Applicant (*sic*) reiterates that there is no legally enforceable agreement, legal debt or acknowledgement whatsoever of the same on the part of the Plaintiff and this honourable court should allow the instant suit to proceed on merits for the Defendant/Respondent (*sic*) to be put on onus of tabling the same before this honourable court for full consideration and determination on merits”

The deponent attempts to throw cold water on the negotiations between the Applicant and the Respondent in respect of the claim stating in paragraph 12 of the replying affidavit that:

“On the face of the provisions of the Advocates Remuneration Order, the system of formulae allegedly agreed between the Defendant/Respondent (*sic*) and the Applicant’s (*sic*) members of staff is extraneous to the law, oppressive and immaterial in as far as the same was never recorded in court in various taxation causes involving the Plaintiff/Applicant (*sic*) and the Defendant/Respondent (*sic*)”

In his attempt to blame others and cast aspersions on the Defendant/Applicant’s dealings with the Plaintiff/Respondent, the deponent to the replying affidavit contradicts himself in that in paragraph 12 he claims not to have been privy to the negotiations, whereas in paragraph 5 he has depones as follows;

“That the Defendant/Respondent’s (*sic*) allegation that I have no authority to act on behalf of the Plaintiff/Applicant (*sic*) is self defeating on the face of subsequent averments where he admits to have transacted with me on behalf of the company in various forums relating to his legal fees”.

In paragraph 14 of the replying affidavit the deponent cited what he calls past rip-offs through “*irregular and unsubstantiated and or irreconciled settlements leading to overpayments of debts to its (the Plaintiff/Respondent’s) financial peril and detriment*” which he says was a major factor leading the Respondent being placed under statutory management and near liquidation. I am unable to see the relevance of these averments to the Respondent’s suit against the Applicant. In my considered view, the

same, as well as the averments in paragraphs 15, 16 and 17 of the replying affidavit only point to lapses in the Respondent's internal financial controls and/or possible mismanagement which, in my view cannot form the basis of a complaint against the Applicant, unless it is shown that he participated in the "rip off" scheme.

In the oral submissions made in reply to the application, learned counsel for the Respondent, Mr. Ndegwa urged the court to take judicial notice of the fact that the Respondent has only come out of statutory management and needs time to put its house in order, saying that the reconciliation of accounts is a main prayer in the suit. I do not consider that a prayer for the taking of accounts can be entertained before a cause of action has been established as against a party from whom accounts are demanded.

There is no dispute that the Defendant/Applicant has acted for the Plaintiff/Respondent as part of its panel of advocates and that he is entitled to charge reasonable fees for the services rendered. The issue of advocates costs is one that is governed by the **Advocates Act** and the **Advocates Remuneration Order** and, as rightly submitted by counsel for the Applicant, **Order 52** of the **Civil Procedure Rules**.

The said provisions provide a comprehensive procedure for dealing with disputes relating to advocates/clients costs. The Plaintiff/Respondent accepts this to be the case as is seen from paragraph 12 of the replying affidavit. The Respondent has clearly admitted that the suit was filed to with the sole intention of delaying its being called to pay the Defendant/Applicant, which in my view is not the right way to go. Any dispute as regards advocates bills would be properly addressed under the Advocates Remuneration Order and the filing of this suit is clearly an abuse of the process of the court.

There being no denial but rather a clear admission that the Defendant/Applicant rendered legal services to the Plaintiff/Respondent and is entitled to charge reasonable fees for those services, his demands are backed by statute and cannot be said to be unlawful or illegal. That the Plaintiff needs time to reorganize itself, having just come out of statutory management, does not entitle it to avoid liability at all costs to the extent of blocking innocent victims of its past financial mismanagement from pursuing their legal rights against it. The Plaintiff/Respondent's cause of action against the Applicant is not at all disclosed in the plaint and I see no triable issues arising thereunder. Having arrived at this conclusion, I do not find it necessary to address the procedural defects and/or technicalities raised by the Defendant/Applicant in challenging the suit. Clearly the Plaintiff/Applicant's position appears to be one of the proverbial "*guilty and afraid*" which in my view does not give rise to a cause of action in law.

The Respondent has not adequately answered the Defendant/Applicant's Chamber Summons dated 5th October 2010, and its attempts to dispute the contents of the several documents exhibited by the Applicant are without support.

For all the above reasons, I find that the suit is unfounded and lacks merit. The same is gross abuse of the process of the court and hereby dismissed with costs to the Defendant/Applicant.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of MARCH, 2011

M. G. MUGO
JUDGE

In the presence of:

Mr. Ngunjiri

For the Applicant

Mr. Ndegwa

For the Respondent