



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA Miscellaneous Civil Suit 72 of 2005**

**M/S. BANDARI ENTERPRISES (K) LTD.....PLAINTIFF/RESPONDENT**

**-AND-**

**MR. D.K. MUSINGA T/A**

**MUSINGA & CO. ADVOCATES .....DEFENDANT/APPLICANT**

**RULING**

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The defendant moved the Court by Chamber Summons application dated 24<sup>th</sup> May, 2005 brought under Order VI, rules 13 (1) (a), (b), (d) and 16 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The application carried two main prayers, set out as follows:

- (i) “That the plaintiff/respondent’s Originating Summons filed herein on 14<sup>th</sup> February, 2005 be struck out for disclosing no reasonable, or any cause of action, and consequently the suit be dismissed”.
- (ii) “That the plaintiff/respondent’s Originating Summons filed on 14<sup>th</sup> February, 2005 be struck out for being scandalous, vexatious and frivolous and is otherwise an abuse of Court process and consequently, the suit be dismissed”.

The general grounds forming the basis of the application are as follows:

- (a) no advocate/client relationship existed between the plaintiff and the defendant, in relation to Admiralty Cause No. 11 of 1996;
- (b) the plaintiff/respondent did not instruct the defendant/applicant in relation to Admiralty Cause No. 11 of 1996;
- (c) the instructing client was M/s. Hill Taylor Dickinson, solicitors of London, and their instruction was for the defendant to act for the Owner of Motor Vessel “Nikolay Nakrasov”;

- (d) the proceedings have been brought for the purpose of extorting money from the defendant/applicant;
- (e) the plaintiff/respondent already has sought the intervention of other busybodies as away of hoodwinking the applicant into paying undisclosed monies to the plaintiff;
- (f) the plaintiff/respondent has no capacity to bring the suit herein, as it does not exist in law;
- (g) the plaintiff/respondent's Originating Summons is bad in law and is scandalous, frivolous and/or vexatious;
- (h) the plaintiff/respondent's Originating Summons is otherwise an abuse of the due process of the Court.

Evidence to support the application is set out in the affidavit of *Lily K. Musinga*, a partner with the firm *Musinga Munyithya & company Advocates* (formerly *M/s. Musinga & Company Advocates*), filed on 25<sup>th</sup> May, 2005.

The deponent avows knowledge that the applicant firm had received instructions from *M/s. Hill Taylor Dickinson*, Solicitors of London to act for the Onwers of Motor Vessel "Nikolay Nakrasov" who were defendants in admiralty Cause No. 11 of 1996 – and the applicant had duly filed a Notice of change of Advocates, dated 11<sup>th</sup> December 1996, in that regard. It is deponed that the applicant thereafter, took up the matter on behalf of the defendant, and was receiving instructions directly from the firm, *Hill Taylor Dickinson*, Solicitors in respect of Admiralty Cause No. 11 of 1996; and that upon the decree being entered, the applicant "proceeded to carry out the instructions given by the said solicitors as the instructing clients"; and in the end, the applicant's legal fees were duly paid by the said instructing clients.

The deponent deposed that "the plaintiff having not instructed the firm of *Musinga & Company Advocates*, [the plaintiff's case lodged by] Originating Summons herein is misconceived".

The plaintiff had originally claimed, it was deponed, that the applicant was supposed to pay to [the plaintiff] certain monies, "to settle local debts and bills incurred on behalf of the plaintiff's principals".

The deponent expressed her belief, that "the suit herein has been brought by the plaintiff in absolute bad faith and is meant to scandalize the defendant"; the claim had at first been made as a complaint to both a Human Rights Commission, and the Law Society of Kenya.

In a replying affidavit by *Mohamed Hassan Mnyeto*, managing director of the plaintiff/respondent company dated 7<sup>th</sup> July, 2005 it is deponed that the plaintiff was an agent of the Onwers of Motor Vessel "Nikolay Nekrasov", and that this fact had been known to *Mr. D.K. Musinga*. The deponent avers that it was the plaintiff/respondent who first instructed the defendant/applicant to handle court cases in respect of Owners of Motor Vessel "Nikolay Nekrasov", and that the letter which the applicant received from *M/s. Hill Taylor Dickinson*, Solicitors came to the applicant much later. The deponent denies that *M/s. Hill Taylor Dickinson*, Solicitors were the instructing clients of the defendant/applicant; he depones that it is the plaintiff/respondent herein who instructed the applicant. He further depones that it was the plaintiff's duty as the agent of the Owners of Motor Vessel "Nikolay Nekrasov" "to manage all affairs of the ship including the balance of money deposited in respect of Admiralty Cause No. 11 of 1996.

The application was canvassed before me by *Mr. Mabeya* for the defendant/applicant, and *M/s. Okumu* for the plaintiff/respondent.

Mr. Mabeya urged that no reasonable cause of action was shown in the plaintiff's Originating Summons suit of 14<sup>th</sup> February, 2005, and that the said suit was merely frivolous and vexatious – and so it should be struck out.

Mr. Mabeya submitted that the applicant had acted for the defendants in admiralty Cause No. 11 of 1996, but those defendants are not party to the instant matter. It was urged that the applicants herein, in Admiralty Cause No. 11 of 1996, had had no client-advocate relationship with the respondents herein, and that the applicants had only been a protective agent for the defendant in admiralty Cause No.11 of 1996. It was submitted that the respondent had no basis for bringing a suit against the applicant, and that, under Order LII of the Civil Procedure rules, only a client could have sued the applicant; it was submitted that the applicant had a duty to render a financial account to a client, but not to a party such as the respondent herein. The instructing clients, it was submitted, were solicitors in London: and so it was only to them that a duty of financial accounting lay.

Learned counsel Ms. Okumu submitted that the applicant, as an advocate had been instructed by none other than the respondent herein: because while the applicant filed a notice of appointment on 21<sup>st</sup> November, 1996, he only received the first correspondence from the instructing solicitors on 30<sup>th</sup> December, 1996. Counsel acknowledged, however, that the respondent's role was that of an agent; but her position was that there were contentious questions which should be heard in the main cause, and so the suit by Originating Summons should not be struck out.

Mr. Mabeya in response, submitted that since the respondent was an agent of a disclosed principal, there was no basis for the suit against the applicant.

It is clear from the depositions in the affidavits that the main question is whether the applicant received certain monies, from M/s. Hill Taylor Dickinson, Solicitors of London, *in his own right and professional status as an advocate under instructions*, or received instructions also from some other client (namely, plaintiff/respondent). The plaintiff believed that it (the plaintiff) was the instructing client, as well as the party responsible for the management of all such funds as might be available, in respect of Admiralty Cause No. 11 of 1996.

From the documents annexed to the supporting affidavit, the following material facts are shown:

- (i) on 11<sup>th</sup> December, 1996, the applicant gave a notice of change of advocates, indicating that the applicant would henceforth act for owners of Motor Vessel "Nikolay Nekrasov", in place of M/s. Karigithu & Co. Advocates;
- (ii) On 30<sup>th</sup> December, 1996, M/s. Hill Taylor Dickinson, Solicitors of London dispatched a fax-letter to the applicant with certain requests for legal action, thus;

*"... please make an application to the Court that Owners be given such an indemnity ...".*

- (iii) on 15<sup>th</sup> January 1997 M/s. Hill Taylor Dickinson, Solicitors sent a fax message to a company known as Indian Ocean (Kenya) Limited as follows:

*"Mr. Musinga should be instructed to attend the Court and make representations on behalf of Owners [N. Nekrasov] ...*

*"Please ask Mr. Musinga to obtain a very clear order from the Judge with regard to the payment of the discharging costs".*

- (iv) on 4<sup>th</sup> March, 1999 M/s. Hill Taylor Dickinson, Solicitors sent a fax message to the applicant herein as follows:

*“We have discussed this situation with our clients and they have suggested that you should take a total of US\$ 7,000 in order to close the case.*

*“Our clients have also instructed you to remit the balance of funds as soon as possible into our client account ...”*

- (v) on 10<sup>th</sup> March, 1999, the applicant wrote to M/s. Hill Taylor Dickinson, Solicitors, indicating that the proposed payment of US\$ 7,000 would be inadequate – and asked for a greater figure.

- (vi) On 27<sup>th</sup> September, 2003 the respondent herein wrote a letter of complaint to the applicant, one line of which reads:

*“The fact that you proceeded to [the] High Court to litigate on matters pertinent to the said vessel [i.e. Admiralty Cause No. 11 of 1996] without advising or involving us speaks volumes”.*

There is evidence that the applicant was acting on instructions from M/s. Hill Taylor Dickinson, Solicitors of London, and the applicant was not taking instructions from the *respondent* herein. This explains the respondent’s complaint, that the applicant had appeared before the High Court *without taking instructions from the respondent*.

This will also explain why, as regards financial matters, the applicant was dealing only with M/s. Hill Taylor Dickinson, Solicitors, and the applicant felt himself to be under no obligation to take instructions from the respondent herein.

Whether or not counsel has taken instructions from one client or another, in respect of a particular subject, is a *question of fact*. The fact, in the instant case, was that the applicant was *not* taking instructions from the respondent. The decision whether or not counsel will take instructions from a particular client, lies outside the framework of *legal obligations*; it is simply a matter of choice and agreement.

It follows that, the applicant herein had no legal obligations towards the respondent, whether in respect of the conduct of Court motions, or of fee-payment arrangements.

There is, therefore, no legal basis upon which the respondent has founded the Originating Summons of 14<sup>th</sup> February, 2005. Insofar as the case lacks a substratum, not only does it lack reasonable cause; not only is it frivolous and vexatious; not only does it make an unjustified call-for-defence upon the defendant; but it also clogs precious judicial time inappropriately.

On the foregoing grounds, I hereby dismiss the plaintiff’s Originating Summons suit filed on 14<sup>th</sup> February, 2005. The plaintiff shall bear the defendant’s costs.

**SIGNED: J.B. OJWANG**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 11<sup>th</sup> day of December 2009.**

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**JUDGE**

Coram: Ojwang, J.

Court Clerk: Ibrahim

For Defendant/Applicant: Mr. Mabeya

For Plaintiff/Respondent: Ms. Okumu