



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 583 OF 2003(OS)

GRACE WANJIRU KANYARI

T/A MIDIAN AGENCIES.....APPLICANT

VERSUS

CHRIS MUTUKU

T/A CHRIS MUTUKU ADVOCATE...RESPONDENT

RULING

The matter coming up for hearing on 11th December, 2003 was a Notice of Preliminary Objection on the part of the Respondent to the applicant's Originating Summons dated 12th June, 2003. The Respondent's Notice of Preliminary Objection is supported by a Repeating Affidavit.

It is necessary to set out the essence of the Originating Summons itself, before considering the objection on its merits. The Originating Summons is dated 12th June, 2003 and was filed on the same day, being brought under order LII, Rules 4, 6A and 9 of the Civil Procedure Rules. The Applicant was seeking orders as follows:

- (a) that all the monies which the respondent has received from the Nairobi City Council in respect of this matter be deposited with the Court, pending the hearing and determination of the suit;
- (b) that the Respondent do deliver a cash account of all monies received by him on behalf of the applicant from the Nairobi City Council as decretal sum in HCC No. 1856/2001 (Midian agencies – v- Nairobi City Council);
- (c) that the Respondent do declare the amount retained by him to cover his professional fee, in respect of HCC NO. 1856/2001;
- (d) that the Respondent do deliver to counsel for the Applicant all the sums received less the retained legal fee.

The Originating Summons is supported by an affidavit sworn by the applicant. The main points in the sworn statement are as follows:

- (i) Sometime about 22nd April, 1998, Midian Agencies was contracted by Nairobi City Council to collect debt on its behalf.

(ii) Sometime about 8th June, 1998 the debt collection contract was suspended.

(iii) By the time the debt collection contract was suspended, Midian agencies had collected more than Kshs. 57 million and was now entitled to 10% of this money as commissions, i.e. Kshs.5,703,844/-

(iv) The Nairobi City Council refused to settle the commission, and the Applicant then instructed the Respondent to file suit against the Council. This was done in 2000, resulting in an interlocutory judgment for Kshs. 5,703,844 with costs and interest, the total coming to Kshs. 6,794,857 as at 25th March, 2003.

(v) On 15th December, 2000 the Respondent filed an application for an order of mandamus to compel the Council to settle the decree with costs totalling to Kshs. 8,146,583/85

(vi) The Respondents then informed the Applicant that the Council had agreed to clear its payment obligation by monthly installments, even though the amount of monthly payment was not disclosed.

(vii) The Applicant has sought details on amounts paid monthly, accounts on monies so far paid, and indications of professional fees charged, but without success.

(viii) In October, 2002 the Applicant appointed Chege Wainaina & Co. Advocates to follow up on this matter, but the Respondent has declined to co-operate and to supply required information.

(ix) The Applicant believes that the Respondent was fully paid by the Nairobi City Council but has not been forthright on the matter.

In the Respondent's objection to the application by Originating Summons, the main assertion is that-

“ the proceedings instituted in this suit are incompetent, misconceived, bad in law and baseless....”

The Respondent therefore applies that-

“ the said objection be determined preliminary to, and in advance, of any determination of the said Chamber (sic) Summons on the merits and that the hearing be limited, in the first instance, to (a) determination of such preliminary objection, namely (1) THAT the Originating Summons is irredeemably bad in law; (2) THAT the supporting affidavit of GRACE WANJIRU KANYARI is ex-facie incompetent, fatally defective and inadmissible and it ought to be struck out without further ado.”

To his Notice of Preliminary Objection the Respondent attached his own long affidavit of 14 paragraphs. The main elements of this affidavit are as follows:

(a) He believes that the application and its supporting affidavit are “irredeemably bad in law and they ought to be struck out”

(b) He denies having any knowledge regarding monies due to the Applicant as the decretal amount specified in HCC No. 1856 of 2001.

(c) He admits having acted for the Applicant in HCCC No. 1856 of 2001 Grace Wanjiru Kanyari – Nairobi City Council, and says she the Applicant was awarded Kshs.5,203,844/000 together with costs and interest, after the Respondent made an application for summary judgment.

(d) He says that, with regard to the decretal amount recorded by the court in HCCC NO. 1856 of 2001, the Applicant had by agreement made on 12th February, 2002 accepted to take only Kshs. 3,021,388/-, presumably leaving out a balance of Kshs. 2,182,456, i.e. 42% of the decretal amount.

The Respondent asserts that the applicant did indeed receive the said sum of Kshs. 3,021,388/- and did acknowledge receipt of the same.

(e) He asserts that in the light of her agreement to receive Kshs. 3,021, 388 in full satisfaction of all claim due to her, the Respondent is estopped from making any further claim; and that had she felt genuinely dissatisfied she should have founded her case on section 44(2) of the Advocates Act (Cap. 16, Laws of Kenya) . He pleads sanctity of all agreements made by two consenting adults.

(f) He asserts that as things now stand, it is the applicant who remains indebted to him in the sum of Kshs. 163,459/80.

On 27th June, 2003 the Plaintiff filed her grounds of opposition to the preliminary objection. She asserts that:

(i) the Originating Summons is competent and properly before the Court;

(ii) that Section 44(2) of the Advocates Act does not apply to these proceedings;

(iii) that the proceedings are for accounts, rather than taxation;

(iv) that it is only after accounts are taken that a party can consider whether what is retained as fee is excessive, in which event the party can move the Court under Section 44(2) of the Advocates Act.

Filed with this objection to the Grounds of Opposition of the Respondent, was the Applicant's Replying affidavit. She makes the following pertinent points:

(a) the application before the Court is for accounts: the Advocate to declare the amount that has been paid by the Nairobi City Council, how much thereof he has paid to the Applicant or any other person on the Applicant's instructions, and how much has been retained by him for his professional fees;

(b) the Respondent should not ask for security, as he does in his Chamber Summons Application dated 20th June, 2003 and filed on 24th June, 2003, because this is not a suit but an application for accounts;

(c) in any event the amount of Kshs.500,000 being demanded as security is excessive, given the nature of the proceedings;

(d) the agreement the Respondent is citing as a basis of estoppel against the Applicant is not available to the respondent, as he had not been a party to it and gave no consideration in respect of it;

(e) the document of agreement cited by the respondent is silent about the decretal sum from HCCC NO. 1856 of 2001.

On 24th June, 2003 the Respondent, clearly in anticipation of the hearing of the Applicant's Originating Summons Application had filed a Chamber Summons applicant praying for an order " THAT the applicant (do furnish) security for costs of Kshs. 500,000/-" The grounds for this particular application are:

(i) that the Applicant's case is " mischievous, frivolous, mala fide and absolutely baseless both in law and fact and will in all probability be dismissed with costs";

(ii) that "the applicant is a person of straw and questionable character and mien, besieged and hounded by

a plethora of debts and therefore incapable of satisfying any order for costs that may be made against her”.

The Respondent supports his Chamber Summons application with his own affidavit in which he asserts:

- (a) the Applicant has no sustainable claim against him, as she had executed a legally binding agreement regarding his fees and her net entitlement from the proceeds of HCCC No. 1856 of 2001;
- (b) the Applicant has no business premises, and no operational business outfit;
- (c) the applicant is perpetually in financial problems, and that on 24th January, 2001 she had been committed to civil jail;
- (d) the Applicant has no attachable assets;
- (e) the costs of this matter are likely to run to the figure of Kshs. 500,000, and the instruction fees alone will come to Kshs.162, 198/70; and the applicant should be ordered to furnish security for costs.

The hearing of this matter on 11th December, 2003 took place at the motion of the Respondent, who had, firstly, the Notice of Preliminary Objection on the part of the Respondent to the Applicant's Originating Summons dated 12th June 2003, which Notice was dated 20th June 2003 and filed with the Notice of 24th June, 2003.

It is to be noted that two days before the Respondent moved the Court through the above two processes, the Applicant had already filed and served a Hearing Notice for her Originating Summons of 12th June, 2003, and this had stated the hearing date as 30th June, 2003. There seemed to be some competition for the first hearing between the parties. On 3rd November, M/s Chege Wainaina & Co. Advocates for the Applicant wrote to the Respondent, requesting a meeting at the Court Registry on 11th November 2003 for the purpose of fixing a hearing date (must be for the Originating Summons of 12th June, 2003) . But on 6th November 2003 the Respondent wrote to the Deputy Registrar asking for a date for hearing his own application (quite obviously for his own matters of 20th June, 2003) , and this letter was not copied to the Applicant.

This competition for the first hearing, with its outcome of the Respondent having priority, must not conceal an important feature in the whole matter going to the root of the question for resolution. It is impossible to resolve the issues in the Respondent's Notice of Preliminary Objection to the Applicant's Originating Summons, or the issues in the Respondent's Chamber Summons Application, without at the same time dealing with the Originating Summons itself on the merits. And it follows that in this Ruling, all the questions in (i) the Originating summons of 12th June, 2003; (ii) the Notice of Preliminary Objection of 20th June, 2003; and

(iii) the Chamber summons application of 20th June, 2003, are being reconciled and resolved. It ceases to be important, therefore, which party moved the Court first.

At the hearing of 11th December, 2003 the Respondent stated that it is his applications of 20th June, 2003 that were up for hearing; and he proceeded to argue the case for commitment of security for his costs by the Applicant in the sum of Kshs. 500,000/-. He maintained that the Originating Summons application was mischievous and was in all probability going to be dismissed with costs, and the Applicant, the woman of straw that she was, would be unable to pay the costs, hence the need to establish costs security for the Respondent ahead of the hearing of the Applicant's application by Originating Summons. Counsel stated that the Applicant was a person of questionable character who had already been in civil jail and was beleaguered by debt. Mr. Mutuku sought to rely on a case, a copy of which he, however, did not

supply, the Microsoft Corporation Case, HCCC no. 810 of 2001, in which this court had apparently ruled that an application without a verifying affidavit was null and void, and he argued that the Originating Summons application fell in precisely this category.

Although the word “ Verifying” has not been used by the Applicant, it should be noted that her Originating Summons application, dated 12th June, 2003 was filed together with her detailed affidavit, also dated 12th June, 2003, and the filing date for both was 12th June, 2003. As this matter has come before other Judges of this Court before (before Rimita, J on 12th June, 2003, and before Aluoch, J on 30th June, 2003) and this question has not, as shown from the records, been raised, I must take the position that the Applicant’s Originating Summons of 12th June, 2003 was duly verified and cannot at this stage be faulted on form.

Mr. Ngala who represented the Applicant submitted that there was no need for a Verifying affidavit, as the Originating Summons was based on Order LII, rules 4, 6 and 9, and that under Rule 4 an Originating Summons is an application rather than a suit. He submitted that this kind of application is required to be made by Originating Summons, by Order X. The purpose of this particular application is to seek an account, on the part of the Respondent, for a sum of money that is in the order of some fifteen million Kenya Shillings. Counsel submitted that the Chamber Summons application by the Respondent appeared to be intended to prevent the accounting demand in the Originating Summons from being heard. He submitted that there was no legal requirement for security for an Advocate’s costs being guaranteed especially in relation to an application such as this one. He prayed for the Respondent’s Chamber Summons application to be dismissed, and expressed concern about the quite negative light in which the Respondent had portrayed the Applicant’s character, as the Respondent pursued his applications and as the Respondent made a case for security being guaranteed for the Respondent’s costs prior to hearing the Originating Summons application.

Exercising his right of reply, the Respondent still contested the propriety of an Originating Summons as the instrument for the Applicant’s application. The Respondent returned to a point in his own affidavit, that the Applicant is not entitled to any account, as she had earlier signed some document by which she had expressed satisfaction with payments received from the Respondent, in relation to HCCC NO. 1856 of 2001. He also raised queries as to the mental stability of the Applicant. He argued that the Originating Summons Application was a frivolous one which was brought without bona fides.

The whole of the respondent’s case is based on the character and antecedents of the Applicant as a person; and the Respondent considers these as entirely negative and taking away any credence that might be attached to the Originating Summons application or to any statement sworn by the Applicant. The Respondent considers the Applicant’s case to be devoid of merit and deserving of dismissal with costs. The Respondent considers the applicant to be so undependable and so untrustworthy that her case should not be heard, unless she first pays security for costs.

However, the Court had no opportunity to take any evidence on these matters, and thus such perceptions cannot be relied upon as a factual foundation for reaching a judicial decision.

The Court must start from the main prayer before it, and this is contained in the Originating Summons application of 12th June, 2003. All that the Applicant is seeking is, quite clearly, an account, on financial matters which appear to have been shrouded in fog. It is agreed that the Applicant had instructed the Respondent to handle for her certain contractual matters with the Nairobi City Council, and that the dispute ended up as Midian Agencies –v- Nairobi City Council, HCCC No. 856/2001. In the performance of this role the Respondent received certain monies, most probably running to several million shillings. These monies were destined towards the Applicant. Certain sums of money were indeed paid by the Respondent to the Applicant. It is completely unclear how and in what amounts these moneys were processed and paid out or not paid out. This is an eminent case for the taking of accounts, and indeed it is surprising that the Respondent would not at any stage have perceived that if he did not at the time account for these several millions of Shillings, he would sooner or later be called upon to do so and that when this would come, it would be only natural and quite appropriate that he, the Respondent, be made to account.

The rendering of accounts of this nature is a short procedure of application and does not require a suit in the ordinary sense. The use of Originating Summons as the process for seeking such accounts appears to me to be perfectly in order, and I thus do not accept the Respondent's submission that the present application runs into any difficulty in the nature of want of form.

It follows that I am not in agreement with the Respondent that the application is "incompetent, misconceived, bad in law and baseless", or that the Originating Summons is "irredeemably bad in law".

The main objection of the Respondent has had to do with the reputation that he attributes to the Applicant and her mode of conducting business. All these are not, however, before this Court and the Court will thus not make it its business to pronounce on the personal imperfections of the Applicant. And if the Court confines itself to the merits of the Applicant's case, then it has to be stated that she has a valid case for seeking account from the Respondent. It is the finding in this Ruling that the Respondent has not had a proper answer to the basic elements in the application. Consequently I resolve all the issues in the several concurrent applications in favour of the Applicant and order as follows:

1.The Respondent shall deliver to the Applicant a complete account of all the monies received by him on behalf of the Applicant from the Nairobi City council in respect of the Respondent's handling of the case, Midian Agencies –v- Nairobi City Council, HCCC No. 1856 of 2001.

2.The Respondent shall declare to the Applicant the amount of money retained by the Respondent to cover the Respondent's professional fee in respect of the Respondent's handling on behalf of the Applicant of the case, HCCC NO. 1856 of 2001.

3.Orders No. 1 and No.2 shall be complied with within a period of 30 days of the date hereof.

4.I dismiss the Respondent's Notice of Preliminary Objection as well as his Chamber Summons Application of 20th June, 2003.

5.The Respondent shall pay the applicant's costs in this matter.

Dated and delivered at Nairobi this 23th day of January, 2004.

J.B. OJWANG

AG. JUDGE

CORAM: Ojwang, Ag. J.

Court clerk: Mutea

For the Applicant: Mr. Ngala, Instructed by Chege Wainaina & Co advocates.

For the Respondent: Mr Mutuku