

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E251 OF 2020

BETWEEN

AFRIKON LIMITED.....PLAINTIFF

AND

GEORGE KANG'ETHE KAGWIMI T/A KAGWIMI KANG'ETHE

& COMPANY ADVOCATESDEFENDANT

RULING

1. At the time material to this suit, the Plaintiff (“Afrikon”) was a client of the Defendant (“the Advocates”). There is no dispute that the Advocates represented Afrikon against IVRCL Limited (“IVRCL”) and Sutanu Sinha and in other matters.

2. Afrikon’s case is outlined in the plaint dated 14th July 2020. It instructed the Advocates to file proceedings in **HCCC No. 329 of 2018 Afrikon v IVRCL Limited and Sutanu Sinha**. In the course of those proceeding the accounts of IVRCL at UBA Bank Kenya Limited (“UBA Bank”) were frozen pending the arbitration. The dispute was referred to arbitration before a single arbitrator. It was finalized by an award dated 21st February 2020 in which Afrikon was awarded Kshs. 456,820,265.04. The Advocates thereafter successfully filed an application for recognition and enforcement of the award. On 13th March 2020, the Advocates proceeded to execute the award by receiving Kshs. 176,588,395,69, which had been frozen in an account at UBA, to its client account.

3. The gravamen of Afrikon’s case against the Advocates, is that it did not give any authority or consent to the Advocates to receiver the money held in the account at UBA Bank. It accused the Advocates of failing to keep it informed of the progress of the arbitral proceedings. It further accused the Advocates of forging the signature of its director in order to fraudulently apply for enforcement of the arbitral award and receive the money in its own account. Afrikon complained that the decretal amount received by the Advocates on its behalf was transferred to third parties without its authority or consent. Afrikon further accused the Advocates of fraud, misrepresentation and negligence. It prayed for the following reliefs in the plaint:

- i. A declaration that the Defendant is in breach of his fiduciary duty to the Plaintiff.
- ii. A declaration that the Defendant was negligent in executing instructions by the Plaintiff.
- iii. A declaration that the payment of KES 26,000,000 paid to Greenex Consultants Limited is based on a fraudulent agreement which is null and void ab initio.
- iv. A declaration that the KES 80,993.395.60 retained by the Defendant is based on a fraudulent fee agreement dated 16th August, 2019 which is null and void ab initio.
- v. An order compelling the Defendant to release to the Plaintiff the sum of KES 176,990,207.67.
- vi. Interest at court rates on (v) above.
- vii. Exemplary and punitive damages for the illegal withholding of the funds in (v) above.
- viii. Costs of this suit.

4. Based on the facts I have outlined above, Afrikon moved the court by the Notice of Motion dated 14th July 2020 under **sections 1A, 3A and 63(e)** of the **Civil Procedure Act** and **Order 51 (1)** of the **Civil Procedure Rules** seeking the following reliefs:

[1] Spent

[2] Spent

[3] Pending the hearing and determination of the suit filed herein, the Defendant/Respondent be compelled to deposit in court the sum of KES 176,990,207.67 paid to the Defendant on behalf of the Plaintiff by UBA Kenya Limited in partial satisfaction of the Decree in HCCC No. 329 of 2018 Afrikon Limited v IVRCL Limited and Sutanu Sinha.

[4] THAT cost of this Application be awarded to the Plaintiff.

5. The application is supported by the affidavit of Afrikon's Managing Director, Jung Woosum, sworn on 14th July 2020 setting out the sequence of events I have set out above. He referred to several payments which he stated were made without Afrikon's knowledge, approval or consent after the arbitral award was delivered as follows:

- On 24th February 2020, Kshs. 21,645,000.00 paid to Kimani & Wachira Advocates (representing IVRCL in HCCC No. 329 of 2018) in settlement of party and party bill of costs.
- On 5th March 2020, Kshs. 3,660,000.00 paid as the Arbitrator's fee.
- Kshs. 70,000,000.00 paid to the Defendant's personal account.
- Kshs. 59,000,000.00 paid to the Defendant's account
- Kshs. 26,000,00.00 paid to Greenex Consultants Limited

6. Afrikon considered the Advocates conduct reprehensible. It therefore lodged a complaint of theft by servant against the Advocates with the Directorate of Criminal Investigations ("the DCI"). The DCI commenced investigations, applied for and obtained orders from the court permitting it to investigate the Advocates accounts. The thrust of Afrikon's case in the application before this court is that unless the orders sought are granted, its money, which has been wrongfully withheld or utilized by the Advocates to its detriment, will be unrecoverable.

7. In opposition to the application, the Advocates filed a Notice of Preliminary Objection dated 4th August 2020. It was based on the fact that there is pending litigation between the parties in respect of the subject matter being **HC COMM NO. E220 of 2020 (Kagwimi Kangethe and Co., Advocates and Others v I & M Bank Ltd)** wherein Afrikon applied and was joined as an interested party to that suit. In the circumstances, it is contended that Para. 19 of the Plaint as well as the verifying affidavit are false and violate **Order 4 rule 1(1) (f) and (2)** of the **Civil Procedure Rules** in so far as those proceedings are not disclosed.

8. In the replying affidavit sworn on 15th August 2020, Mr Kangethe, reiterated the contents of the Preliminary Objection and added that Afrikon has also lodged a complaint against the Advocates dated 17th July 2020 before the Advocates Disciplinary Committee raising the same matters which have been raised in this suit. He states that he has responded to the complaint and the matter is now pending determination before the Committee.

9. Mr Kang'ethe deponed that Afrikon was guilty of non-disclosure of material facts as it failed to disclose that it was indebted to the Advocates on account of legal fees. The Advocates stated that they not only acted for Afrikon in **HCCC No. 329 of 2018** and the Arbitration proceedings against IVRCL but also in many other cases including; **HCCC No. 91 of 2017 Afrikon v Ecobank Kenya Limited, HCCC No. 121 of 2016 Ecobank v Afrikon and Others, ELRC Cause No. 680 of 2014, Aladin De Guzman v Afrikon, CMCC No. 9192 of 2018, ICEA Lion General Insurance Co., Ltd v Afrikon, ELRC No. 1483 of 2018, Namit Pandey v Afrikon, HCCC No. 534 of 2013, Afrikon v Hyundai Engineering Ltd and CMCC No. 4350 of 2018, African Eco Safaris v Afrikon**. The Advocates contended that they are owed an aggregate of Kshs. 10,932,600.00 on account of fees in those matters and have since issued demand notices and will in due course file bills of costs for taxation.

10. As regards the arbitration proceedings between Afrikon and IVRCL, Mr Kangethe deponed that he faithfully executed the Afrikon's instructions and kept Mr Woosum apprised of progress of the arbitral proceedings, recognition and enforcement of the arbitral award and consequent execution and that Mr Woosum was aware of the fact that the monies deposited in UBA Bank were recovered.

11. As regards, the allegation by Mr Woosum that he did not execute the affidavit in support of the application for recognition and enforcement of the arbitral award, Mr Kangethe deponed that the affidavit was in fact signed by Mr Don Kee Jung, the Executive Director, since Mr Jung Woosum was not available. He further contended that the allegation regarding the forgery ought to have been made by Mr Don Kee Jung.

12. Mr Kangethe stated that as the Advocates on record for Afrikon, they had authority to receive the decretal sum and did not require any other or further instructions to receive the decretal amount. Mr Kang'ethe deponed that he also had full authority to pay third parties. He stated that in accordance with a Memorandum of Understanding dated 1st November 2019 between Afrikon and Greenex Consultants Limited, he was given an irrevocable authority to pay out Kshs. 70,000,000.00 agency fee. That he paid the firm of JK Wachira and Company Advocates in settlement of Party and Party costs in **HCCC No. 329 of 2019** in accordance with a consent recorded by the parties and entered into with the full knowledge of Afrikon. Mr Kangethe stated that from the decretal sum, he also deducted Kshs. 3,950,000.00 being reimbursement of the Arbitrator's fees which he had paid on Afrikon's behalf as it had consistently failed and or refused to pay despite reminders.

13. Mr Kang'ethe also referred to a fee agreement dated 16th August 2019 between the Advocates and Afrikon where the agreed fee was Kshs. 95,000,000.00 but which Afrikon failed to pay despite demand. When the Advocates received the decretal amount of Kshs. 176,588,395.60, they deducted Kshs. 80,993,385.60 leaving a balance of Kshs. 14,006,604.40 to be recovered in the future. The Advocates contend that those fees have been appropriated and taxes thereon paid and remitted to the Kenya Revenue Authority. The Advocates also

provided an account of the decretal amount received as follows:

	AMOUNT RECEIVED	AMOUNT PAID OUT
1. Decretal sum received on 13 th March 2020 from UBA Bank	176,588,395.10	
2. Payment made to Greenex Consultants Ltd pursuant to the MOU dated 1 st November 2019		70,000,000.00
3. Payment made to J.K. Wachira and Company Advocates being Party and Party Costs as per the Consent dated 24 th February 2020		21,645,000.00
4. Reimbursement of Arbitrator's fee paid on behalf of the Plaintiff		3,950,000.00
5. Partial recovery of fees pursuant to Fee Agreement dated 16 th August 2019 in HCCC No. 91 of 2017		80,393,395.00
6. CREDIT BALANCE DUE TO AFRIKON		NIL

14. Based on the facts disclosed, the Advocates submitted that they do not hold any money on account of Afrikon and neither is it entitled to any credit balance. In the circumstances, it urged that the mandatory order sought cannot be granted. The Advocates maintained that Afrikon remains indebted to it as there are still bills to be settled as such the application lacks merit and ought to be dismissed.

15. Both parties filed written submissions which their advocates highlighted briefly. From the application, depositions and submissions, two issues fall for determination. The first issue which relates to the preliminary objection, is whether these proceedings are subjudice and an abuse of the court process in view of the other proceedings pending involving the same parties and subject matter. Second, whether the court should issue a mandatory injunction directing the Advocates to deposit the Kshs 176,990,207.67 in court.

16. The Advocates' contention in support of the preliminary objection is that Afrikon applied and was allowed to join **HCCC No. E220 of 2020: Kagwimi Kang'ethe and Company Advocates v I & M Bank and Director of Criminal Investigation** as an interested party. Counsel submitted that the suit deals with the same subject matter and is still pending and that Afrikon is legally barred from proceeding under **section 6** of the **Civil Procedure Act**. In the Advocates view, it does not matter that Afrikon is an interested party in the matter.

17. Afrikon takes a different view and submits that this case is different from **HCCC No. E220 of 2020** hence **section 6** of the **Civil Procedure Act** does not apply. It argues that although the subject matter is the same, the proceedings are not between the same parties as it is only an interested party. Further, it contended that as an interested party it was not seeking any reliefs in the matter.

18. It is common ground that Afrikon is an interested party in **HCCC No. E220 of 2020: Kagwimi Kang'ethe and Company Advocates v I & M Bank and Director of Criminal Investigation**. The brief facts of that case were that the DCI has applied for and obtained orders from the Magistrates Court to freeze the Advocates accounts at I & M Bank. The Advocates therefore filed that suit against I & M Bank and the DCI to unfreeze its accounts. Since Afrikon made the complaint to the police, it was joined as an interested party to that case.

19. The issue of subjudice is covered by **section 6** of the **Civil Procedure Act** which provides as follows:

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim are litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

20. I hold that the present case is different from the previous suit as it does not involve I & M Bank and the DCI. Although Afrikon is an interested party in the previous suit, it does not seek any relief in its favour against any of the parties including the Advocates. As an interested party, it can only participate by assisting either party or making submissions to help the court. In this respect **section 6** of the **Civil Procedure Act** does not apply to the circumstances of this case and this suit is not subjudice.

21. As regards the existence of the proceedings pending before the Advocates Disciplinary Committee ("the Committee") established under the **Advocates Act (Chapter 16 of the Laws of Kenya)**, I hold that the jurisdiction of the court and the Committee in respect of the subject matter is different and serves different purposes. A complainant may pursue a claim for professional misconduct against an advocate while seeking other reliefs from the court in parallel proceedings. I agree with the decision in **Republic v Advocates Disciplinary Committee and 2 Others ex. P Mpuko Nahason Mwitii NBI JR No. 459 of 2014 [2015] eKLR** cited by counsel for the Afrikon where the court stated that:

53. It is therefore clear both on the law and on authorities that breach of professional undertaking amounts to a professional misconduct. Since an advocate has a professional duty and or obligation to honour his undertaking, the failure to do so in my view amounts to a "**disgraceful or dishonourable conduct incompatible with the status of an advocate**" under **section 60(1)** of the

Advocates Act hence constitutes a professional misconduct in which event the Tribunal is empowered to investigate the same. The mere fact that a party who has suffered a loss as a result therefore is entitled to invoke the Court's jurisdiction under **Order 52 rule 7 of the Civil Procedure Rules** does not in my view bar a complaint being lodged with the Tribunal on the same issue. As this Court held in **R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013**, "...the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

22. The complaint before the Committee deals with professional misconduct. The Committee cannot grant the orders sought in this suit and as the authorities show, it is not an abuse of the court process to proceed with this case. For the reasons I have stated, I therefore dismiss the preliminary objection and turn to the substance of the application.

23. Counsel for Afrikon submitted the reasons given by the Advocates for receiving and disbursing the money received on account of the decretal sum were not justified as the Advocates did not have any authority or instructions to disburse the amount to third parties or themselves. Counsel cited **International Air Transport Association and Another v Akarim Agencies Company Limited and 2 Others ML HCCC No. 15 of 2014 [2014] eKLR** where the court set out the principles applicable in making an order for preservation of assets as follows;

Therefore, depending on the type of order sought, two things must be present for an order for preservation or freezing of assets to issue, namely; 1) that the traced property has been identified or located to the defendant; and 2) prima facie evidence has been laid before the court showing that the property will be dissipated unless the order is issued.

24. Counsel for Afrikon also relied on the decision in **Samuel Gachie Kamiti v Oseko and Ouma Advocates LLP ML HCCOMM No. 64 of 2019 (OS) [2020] eKLR** where the court ordered the advocates to deposit the money under dispute while observing as follows:

20. In the matter at hand, there is still a dispute as to the validity of the Retainer Agreement. If found to be invalid, then the advocates costs will have to be determined through taxation. Yet the Advocates have a right of lien over the deposited sum because that right accrues once a claim for payment of fees is made even though fees has not been ascertained with finality by taxation or formal recognition of the retainer agreement.

21. That said, because this Court will be referring this dispute to arbitration, I am inclined to make an order that does not compromise the Advocate's right of lien over the money but which addresses the anxiety of the client about recovering whatever amount, if any, may be payable to him on resolution of the dispute. Such an order is for the money to be deposited in an account in which the lawyers for both parties have control.

25. The position taken by the Advocates is that the application before the court is one for a mandatory injunction which the court should be reluctant to grant based on the established principles outlined in several cases including **Viable Décor Solutions Ltd v Co-operative Bank of Kenya Ltd ML HC COMM No. 175 of 2014 [2014] eKLR** and **Rafique Ebrahim v William Ochanda t/a Ochanda and Company Advocates HC COMM No. 293 of 2013 [2013] eKLR**. It has not been held that a mandatory injunction should not to be granted on an interlocutory application in the absence of special circumstances and even so in clear cases either where the court takes the view that the matter should be determined immediately or where the injunction is directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff (see also **Vol. 24 Halsbury's Laws of England 4th Edn. para 948**).

26. The Advocates provided a statement of account setting out the payments it made. Two payments were made to third parties; Greenex Consultants Limited and J. K. Wachira and Company Advocates. Although Afrikon disputes that Advocates authority and consent to transfer the money, the money was indeed transferred and is no longer in the hands of the Advocates. Further, as the Advocates points out, the third parties to whom the money was paid are not parties to this suit hence the court cannot make an order in their absence.

27. Afrikon also seeks Kshs. 3,950,000.00 which the Advocates paid to the arbitrator and then claimed through reimbursement from the decretal sum. As an agent of Afrikon, the Advocates were entitled to pay this amount in order to secure the arbitral award. Afrikon cannot take advantage of the arbitral award in one breathe and disavow the arbitrator's fee in another. In the three instances, it is clear that the first condition for making an order for preservation stated in **International Air Transport Association and Another v Akarim Agencies Company Limited and 2 Others (Supra)** that the money must be located in the defendant has not been established.

28. This leaves the sum of Kshs. 80,393,395.00 which the Advocates appropriated on account of its fees based on a remuneration agreement. This amount, according to Mr Kang'ethe has already been appropriated hence it is no longer with the defendant. In **Samuel Gachie Kamiti v Oseko and Ouma Advocates LLP (Supra)**, the court ordered the Advocates to deposit the money in a joint account because they were exercising their lien on account of fees. This is not the case here as the money has already been appropriated based on a remuneration agreement hence I cannot issue a mandatory injunction at this stage.

29. Before I make the final order, I wish to emphasize that this ruling is only in respect of whether the court should grant interim relief and not whether the claims have merit. Those are issues that will be adjudicated at the hearing of the suit. Following the findings, I have made, I now dismiss the Notice of Motion dated 14th July 2020 with costs to the respondent.

DATED and DELIVERED at NAIROBI this 10th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Ms Muriraja instructed by McKay and Company Advocates for the Plaintiff.

Mr Kang'ethe instructed by Kagwimi Kang'ethe and Company Advocates for the Defendant.