



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL CASE NO. 444 OF 2018

OLIVER NJIHIA THANDI.....APPLICANT/CLIENT

VERSUS

**ONESMUS G. GITHINJI T/A ONESMUS GITHINJI & CO.
ADVOCATES.....RESPONDENT/ADVOCATE**

RULING

1. The Chamber Summons before me is dated 17th August, 2018 and is supported by the grounds set out on the face thereof and the affidavit sworn by *Oliver Njihia Thandi*. The applicant is seeking the orders hereunder:

i) THAT the time within which to file the application be extended and the application be deemed as properly filed.

ii) THAT the agreement dated 6th June, 2014 be set aside.

iii) THAT this Honourable Court be pleased to order a taxation on the bill of costs to certify the amount payable to the respondent in respect to the sale and purchase of LR NO. 9265/3, 9265/4 and any other work done in the impugned agreement dated 6th June, 2014.

iv) THAT costs of the application be provided for.

2. Oliver Njihia Thandi, the applicant herein, averred that the respondent had previously represented him in a number of matters; that a disagreement ensued between the parties over the failure to account for funds and/or withholding of the same, the applicant filed a disciplinary case against the said respondent before the Advocates Disciplinary Tribunal under TR Case No. 151 of 2014.

3. The deponent went on to state that the tribunal delivered its judgment on 18th June, 2018 thereby finding that the respondent owes the applicant the sum of Kshs.1,340,000/= which amount he was ordered to pay within strict timelines. That the tribunal also held that the applicant should apply to have the agreement dated 6th June, 2014 set aside since it does not have the jurisdiction to make such an order.

4. It was the deponent's further assertion that he could not file the application in good time for the reason that a certified copy of the tribunal's judgment was only made available to him on 13th July, 2018. That the agreement is inter alia, unconscionable and unreasonable in light of the rates stipulated under the Advocates (Remuneration) Order, 2009; and the same is unlawful since it does not conform to the provisions of the Law of Contract Act.

5. The Chamber Summons stands opposed. The respondent filed a Notice of Preliminary Objection on 22nd January, 2019. In essence, it was argued that the application is statute barred by dint of Section 45 (2) of the Advocates Act; that consequently, this court lacks jurisdiction to entertain the same; that the application is incurably defective by virtue of the fact that it seeks two (2) claims which ought to be canvassed separately and that the same is frivolous, vexatious and an abuse of the court process.

6. In her oral arguments, *Ms. Mugure* counsel for the respondent reiterated that the prayer seeking to set aside the impugned agreement is statute barred on the basis that the same has been made after the lapse of the timelines set out in Section 45 (2A) of the Advocates Act, adding that the said agreement was entered into sometime in 2014. The advocate argued that the applicant ought to have first sought leave of the court to file the application and in the circumstances, this court lacks jurisdiction to entertain the application.

7. It was *Ms. Mugure's* submission that the Chamber Summons is frivolous, vexatious and an abuse of the court process since a similar matter is before the Disciplinary Tribunal under Case No. 151 of 2014.

8. On his part, *Mr. Muturi* advocate for the applicant contended that this court has the power to enlarge the time required for filing the

application. Furthermore, he submitted that the timelines set out in Section 45 (2A) of the Advocates Act are not mandatory and that in any case, the application has been filed timeously. He went ahead to submit that legal fees charged ought to be affordable and that the charging of fees by advocates is a matter of public interest.

9. In her response, Ms. Mugure argued that there is an application for review before the disciplinary tribunal scheduled for March. That the application is brought in bad faith.

10. Having considered the grounds in the Chamber Summons, the Preliminary Objection and rival arguments, I will first address the grounds raised in the Preliminary Objection.

11. The respondent argued that the application is time barred. In response thereto, while I am alive to the implications of Section 45 (2A) of the Advocates Act, I have noted that among the substantive prayers sought by the applicant is an extension of time within which to file the application. In this sense, the said prayer cancels out the respondent's argument and thus, grounds (1) and (2) of the Preliminary Objection cannot stand.

12. That said, I have perused the remaining grounds and do not find the same to amount to preliminary objections on points of law but are instead, issues that ought to have been addressed by way of a reply to the application. In view of the foregoing, grounds (3) and (4) fail and the Notice of Preliminary Objection stands dismissed.

13. Having determined the above, I now turn to the Chamber Summons. It is noteworthy that the said application is largely premised on an agreement purported to have been entered into between the parties. I have seen the said agreement marked as annexure "ONT4" and observed that the same was signed solely by the applicant. The respondent's signature does not appear anywhere. The question that comes to mind therefore is whether there was an agreement between the parties in light of the principles encompassing the law on contracts.

14. The Court of Appeal in the case of *Devcon Group Limited v Timsales Limited [2016] eKLR* made reference to its earlier analysis given in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR* that:

"It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration."

15. While it is correct that other elements have been referenced in various writings, the above-mentioned elements must be present in the formation of any valid contract. As earlier mentioned, the agreement was not executed by the respondent and hence, there is no way to establish that an offer was made and which offer was accepted. In other words, there is no evidence to indicate that there was a meeting of minds between the parties. Similarly, the issue of consideration cannot arise where there is no clear indication of an offer and acceptance.

16. In the premises, I am of the considered view that the purported agreement as it stands is a one-sided document and cannot therefore be termed as giving rise to an agreement between the parties. The said document is not legally binding and cannot be enforced by either of the parties. Consequently, this court cannot set aside a contract that was not in existence in the first place.

17. On the second issue relating to the taxation, my simple view is that it is not for this court to order the taxation of a bill of costs; this is purely at the discretion of the parties.

18. In light of the foregoing, I find no reason to extend time for the performance of any action.

19. The upshot is that the Chamber Summons is hereby dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 7th day of March, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent