



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**WINDING UP CAUSE NO. 4 OF 2014**

**IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS OF KENYA**

**IN THE MATTER OF THE WINDING UP OF THE ACADEMY OF DANCE & ARTS LIMITED**

**MICHAEL JOHN STANHOPE DUCKWORTH.....PETITIONER**

**VERSUS**

**PERNILLE KJAER DUCKWORTH .....RESPONDENT**

**AND**

**VIRGINIA WANGUI SHAW.....APPLICANT**

**RULING**

1. This ruling relates to a notice of motion application dated 6<sup>th</sup> February 2019, brought under the provisions of Section 52 of the Advocates Act, Order 51 Rule 1 of the Civil Procedure Act and Section 3A of the Civil Procedure Act.

2. The Advocate (herein “Applicant”) is seeking for orders as follows:-

*(a) That an order be issued staying the adoption of the consent order filed on 5<sup>th</sup> February 2019 as an order of the Court pending the hearing and determination of the application;*

*(b) That a charging order be issued charging the one (1) share held by Michael John Stanhope Duckworth in Academy of Dance and Art Limited pending the hearing and determination of the application;*

*(c) That an order be issued staying the adoption of the consent order filed on 5<sup>th</sup> February 2019 pending the settlement of the fees owed by Michael John Stanhope Duckworth to the Applicant;*

*(d) That the charging order against the one (1) share held by Michael John Stanhope Duckworth in Academy of Dance and Art Limited do remain pending the settlement and satisfaction in full of the fees owed to the Applicant/Advocate;*

*(e) That an injunction be and is hereby issued restraining the Academy and Art Limited from issuing shares or in any way dealing with the shareholding in a manner that will defeat the charging order pending the final settlement and full satisfaction of the fees owed to the Advocate/Applicant;*

*(f) A finding that the actions of Messrs CM Advocates in entering a consent without the involvement the Advocate/Applicant who is on record is unethical and made in bad faith.*

3. The application is premised on the grounds on the face of it and an affidavit dated 6<sup>th</sup> February 2019, sworn by the Applicant, an Advocate of the High Court of Kenya, who has previously practiced as a partner in the law firm of Ransley McVicker & Shaw Advocates and currently Messrs Virginia Shaw & Company Advocates. She avers that she has had personal conduct of matters filed by and against Michael John Stanhope Duckworth (herein “the Petitioner”) from 2014 to date.

4. That the Petitioner has more than six (6) matters in different stages of litigation filed by him or against him by the Respondent herein. These matters are inter alia;

(a) High Court Divorce Cause No. 13 of 2014; MJSD VS PKD: The matter is finalized and there is an order directing the Respondent therein to release to the Petitioner his goods worth over USD 100,000;

(b) HCCC No. 18 of 2014 (OS): A matrimonial dispute where the Petitioner is seeking a division of matrimonial property which includes a house in Karen on five (5) acres and cash in bank accounts worth over USD 2,000,000;

(c) High Court Winding Up Cause No. 4 of 2014: Where the Petitioner has applied for the winding up of the Academy of Dance and Art Limited which he claims to own half its value

(d) Mediation No. 163 of 2016: This was the mediation arising from the matrimonial property dispute;

(e) CMCC 4492 of 2016; Muthaiga Club vs Michael John Stanhope Duckworth;

(f) CMCC 5413 of 2013: Juliet Duckworth vs Michael John Stanhope Duckworth

5. That, right from the start, the Petitioner, informed her that he was not in good financial shape as he had no income and was almost destitute and therefore the parties was agreed that the Petitioner would pay her later when he was able to. As a result the Applicant and the Petitioner entered into an agreement dated 13<sup>th</sup> March 2017, whereby the Petitioner agreed to pay the Applicant fees in the sum of Kshs. 25,000,000 as fees as fair remuneration for the work done in all the aforementioned matters. However, despite having knowledge of the aforementioned agreement, the Petitioner has signed a consent order settling the matter herein in person, without replacing her as is the normal practice, thereby denying her a lien for their fees.

6. It is argued that, the provisions of Section 52 of the Advocate Act provides for the right of an Advocate to charge the assets of a client in realizing the costs. The Applicant avers that she has been instrumental in the preservation of the share the Petitioner holds at the Academy of Dance and Art Limited, a fact which is clearly borne out from the proceedings in the court file. That she has discharged her duties as an Advocate over and above what is expected in the profession and she personally incurred extraneous costs in relation to this matter, including paying Kshs. 180,000 to Ryden International Limited in order to secure a valuation of the assets of Academy of Dance and Art Limited.

7. She argues that the actions of Messrs CM Advocates of entering consent with the Petitioner without her knowledge or information is unethical and unprofessional behavior. If the orders sought are not granted, then she will lose her lien for the payment of his professional fees.

8. However, the application was opposed based on the grounds of opposition filed by the Respondent dated 13<sup>th</sup> February 2019 and filed on the same date. It was argued that:-

(a) *The application is bad in law, an affront to justice and or ultra vires the provisions of Sections 46 of the Advocates Act;*

(b) *The purported fee agreement is in the nature of champerty, and therefore illegal, against public policy and repugnant to justice, morality, professional ethics and fails in the face of the Advocates Act, subsidiary legislation and codes of professional conduct promulgated therein;*

(c) *The application is contrary to the Companies Act and against the tenets of a Private Company in Law. An alleged private contract between the Petitioner, in his personal capacity, and his Advocate(s) has no bearing on the shareholding of the Company; which he had nonetheless voluntarily legally relinquished. A grant of the said prayer would therefore unfairly prejudice the company without any legal premise;*

(d) *The application is fatally and incurably defective and incompetent in so far as it seeks reliefs which the Court is proscribed or divested of jurisdiction to grant by virtue of Section 48 of the Advocates Act which provides that "subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court's jurisdiction, in which event action may be commenced before expiry of the period of one month;*

(e) *The application is ill-conceived, and an abuse of the law and court process, as its effect is to encumber and frustrate the amicable settlement of a dispute between litigants, which settlement had nonetheless been fortified by the Honourable Court;*

(f) *It is implausible in law and for striking out, as it seeks to fault and hold the Respondent responsible, for the confidential undertakings and representations, that neither the Respondent nor her counsel were privy to and thereby unduly prejudicing her lawful entitlement;*

(g) *The application seeks to arm twist the Respondent into inexplicably awarding costs and settling the legal fees incurred and payable as between the Petitioner and his Advocate;*

(h) *The Applicant is not prejudiced in dismissing the suit, as the law accords her sufficient recourse in pursuing her client for her legal fees in the matters she continues to handle for him. The Honourable Court would nonetheless not have jurisdiction to award and/or apportion costs in this Petition, for the multiple matters she appears to be undertaking for and on behalf of the Petitioner;*

*(i) The application is otherwise an abuse of the court process and should be struck out with costs in limine.*

9. The Petitioner swore and filed a replying affidavit dated 12<sup>th</sup> April 2019, he swore stating that the application dated 6<sup>th</sup> February 2019 is bad in law, an abuse of the court process and is ultra vires Section 46 of the Advocates Act. That the Applicant has been aware of the Petitioner's financial situation which has not changed to date. He is aware that he is not in a position to pay the fees demanded. That based on the assurance that there was high probability that all the cases would be concluded by the end of the year 2017 and that the Petitioner would get favourable outcomes, the parties agreed that would pay her Kshs. 25,000,000 being a blanket fee for all the matters. However, by the end of the year 2017, none of the matters had been concluded and the Petitioner is yet to receive any favourable settlement or outcome for the said matters as was promised by the Applicant. Thus the Applicant understood that the said promise to pay Kshs. 25,000,000 was pegged on the Applicant's ability to secure positive outcome in the matters.

10. The Petitioner argued that further the said purported agreement by the Applicant is invalid as per Section 46(c) of the Advocates Act which states that nothing in this act shall give validity to any agreement by which an Advocate retained or employed to prosecute or defend any suit or other contentious proceeding, stipulates for payment only in the event of success in such suit or proceeding or that the Advocate shall be remunerated at different rates according to the success or failure thereof.

11. The Petitioner averred that he entered into the consent agreement with the Respondent in this matter out of desperation and due to the fact that the Applicant no longer acted in accordance with his instructions with regard to the matter and failed to keep him apprised on the progress of the matter. Even then, the said consent was for a minimal amount of Kshs. 2,000,000 which the Petitioner understands is way below the value of the share he held in the Company but which he only accepted out of desperation so as to cater for his basic needs.

12. Thus the amount claimed by the Applicant is way above the settlement amount the Petitioner received. He is therefore not able to raise the said amount. I have considered the arguments by the parties and the submissions filed. I find that, the main issue for determination is whether, the agreement dated 13<sup>th</sup> March 2017 entered into by the Applicant and the Petitioner is valid and enforceable? The subject agreement is annexed to the affidavit in support of the application marked "VWS2".

13. I have considered the same and note that, it provides as follows:-

*"Whereas;*

*(a) The client has instructed the Advocate through Messrs Ransley McVicker & Shaw Advocates to handle the several matters appearing in the schedule hereto;*

*(b) The client has not paid any deposit against disbursements or fees to the Advocate;*

*(c) The Advocate has agreed to handle the matters appearing in the schedule hereto subject to the fees being paid as agreed herein.*

*Now it hereby agreed as follows:-*

*(a) The client confirms that the Advocate is duly instructed to handle the matters set out in the Schedule herein to conclusion in the High court. In the event that any appeal(s) will be lodged in the court of Appeal, the parties will enter into a separate agreement on the payment of the fees;*

*(b) The client agrees to pay to the Advocate a sum of Kenya shillings twenty five million (Kshs. 25,000,000) being the agreed fees for the matters appearing in the schedule hereto;*

*(c) The client agrees to pay to the Advocate disbursements of Kenya shillings one million (Kshs. 1,000,000) for the matters appearing in the schedule hereto;*

*(d) The Advocate will handle the matters appearing in the Schedule hereto in the Chief Magistrate's court and High court to conclusion;*

*(e) The client agrees that in the event that the client withdraws instructions from the Advocate for any reason whatsoever, he shall pay the agreed fees herein of Kenya shillings twenty five million (Kshs. 25,000,000) and disbursements of Kenya shillings one million (Kshs. 1,000,000);*

*(f) The client acknowledges that the Advocate has already undertaken the bulk of the work including filing of pleadings in various matters and court attendances;*

*(g) This agreement can be amended by another agreement duly executed by the parties."*

14. In conclusion, the parties to the agreement agreed that;

*(a) The client confirms that the Advocate is duly instructed to handle the matters set out in the Schedule herein to conclusion in the High court. In the event that any appeal(s) will be lodged in the court of Appeal, the parties will enter into a separate agreement on the payment of the fees;*

(b) The client agrees to pay to the Advocate a sum of Kenya shillings twenty five million (Kshs. 25,000,000) being the agreed fees for the matters appearing in the schedule hereto;

(c) The client agrees to pay to the Advocate disbursements of Kenya shillings one million (Kshs. 1,000,000) for the matters appearing in the schedule hereto;

(d) The Advocate will handle the matters appearing in the Schedule hereto in the Chief Magistrate's court and High court to conclusion;

(e) The client agrees that in the event that the client withdraws instructions from the Advocate for any reason whatsoever, he shall pay the agreed fees herein of Kenya shillings twenty five million (Kshs. 25,000,000) and disbursements of Kenya shillings one million (Kshs. 1,000,000);

(f) The client acknowledges that the Advocate has already undertaken the bulk of the work including filing of pleadings in various matters and court attendances;

(g) This agreement can be amended by another agreement duly executed by the parties.”

15. From the foregoing contents of the agreement, the following facts arise:-

(a) The fees of Kshs. 25,000,000 payable covers all the six matters listed in the schedule to the agreement. Therefore it cannot be charged or recoverable from the proceeds or under this matter per se. Therefore the figure chargeable to this matter out of the Kshs. 25,000,000 is not ascertainable;

(b) As per clause 5, the fees is recoverable where the Advocates instructions are withdrawn for any reason whatsoever. Indeed, by instructing the firm of Messrs CM Advocate the Applicant is no longer on record, appearing for the Petitioner;

(c) The entire agreement does not provide for creating a charge and/or a lien over the asset(s) of the Petitioner;

16. I further note that, the application is bought under Section 52 of Advocates Act. The provision of that Section makes reference to the “property recovered” or “preserved for taxed costs” in reference to the suit or matter. Thus the order for charging must be in relation to any property accruing to the party to the suit out of the matter and the costs enforced should have been taxed. The question is, are there taxed costs herein in relation to this suit matter. The answer is in the negative.

17. The Petitioner has referred to Section 46 of the Advocates Act and argues that, the subject agreement is invalid. In particular, reference is made to sub-section (c) which states:-

“any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof” .....or

18. I have read through the agreement and I find no term or condition that states that the parties agreed that the Applicant would be paid only “in the event of success in the suit matter or proceedings or be remunerated at different rates according to the success of or failure thereof.” Therefore the Petitioner's averments are not tenable. Similarly, the Respondent alleged the consent between the Petitioner and the Applicant is a champerty agreement. Champerty agreement is an unenforceable agreement by which a person with otherwise an interest in a law suit agrees to aid in or carry on its litigation in consideration of a share of the subject matter of the suit (as property or damages). I have again noted that, there is no express agreement between the parties that the Applicant would benefit from any property of the suit. Therefore, the agreement herein is not a champerty agreement. Finally the provisions of Section 48 of the Advocates Act clearly provides for the procedure of action for recovery of costs. Whereas section 51 provides with the general provisions for taxation. As aforesaid under Section 52, the costs ought to be ascertained before a charging order can be issued. In conclusion therefore, I find that; the alleged Kshs. 2,000,000 that was paid in consideration of the share be surrendered by the Petitioner.

19. Finally as regards the issue of unethical behavior of the firm of CM Advocates, I find that it to be a matter of professional ethics that are well dealt with by the professional body that regulates the conduct of the professional business of the lawyers (LSK) and/or Advocates Complaints Commissions.

20. In the circumstances, I decline to grant the prayers sought for herein and order each party meets its own costs. The consent order is hereby allowed and adopted as the order of the court. The Applicant is at liberty to enforce the agreement between her and the Petitioner through a different legal suit. (if she elects to).

21. It is so ordered.

**Dated, delivered and signed in an open court this 1<sup>st</sup> day of October 2019**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

**Ms. Shaw for the Petitioner/Applicant**

**Ms. Atsieno for the Respondent**

**Mr. Lusi for the Objector/**

**Dennis -----Court Assistant**