REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL 6 OF 2019

SABATIA INVESTMENT LIMITED..... PLAINTIFF/APPLICANT

VERSUS

HARI GAKINYA & COMPANY ADVOCATES.....DEFENDANT/RESPONDENT

R U L I N G

The application before me is the Notice of Motion dated 11th July, 2019 by Hari Gakinya & Company "*Advocates from the defendant/respondent*." The defendant/respondent is described as "Hari Gakinya & Company Advocates". The defendant/respondent seeks the following orders:-

a) THAT this application be certified as urgent and service be dispensed with in the first instance.

b) THAT pending hearing and determination of this application inter-parties, the Honourable Judge Prof. JOEL NGUGI be pleased to disqualify himself from hearing this matter.

c) THAT this Honourable Court be pleased to review it's directions given on 18th June, 2019 and direct thereof that this matter be heard by way of *viva voce* evidence and the parties be at liberty to call witnesses and file statements.

d) THAT the costs of this application be provided for.

The grounds for the application are set out on the face of the application.

1. THAT the Honorable Judge has made adverse order against the applicant in a matter related to this file being NAKURU HCCC NO. 31 OF 2017 having accused the applicant of forging a consent that never was.

2. THAT by reason of (1) above, the Honorable Judge is unlikely to be a neutral arbiter in this matter.

3. THAT the present suit is one involving an oral agreement between a client and advocates in the presence of witnesses and the same can only be proved by oral evidence of the said witnesses subjected to cross-examination.

and the affidavit in support by John Hari Gakinya on 11th July, 2019.

The gist of the affidavit is that the defendant/respondent acted for the plaintiff/applicant in Nakuru HCCC 31 of 2017 (**Sabatia Investment Limited vs. County Government of Nakuru)** – in which matter the defendant/respondent came on record after judgment had been delivered – and replaced the firm of Githui & Company Advocates – who had been on record. To support that averment John Hari Gakinya annexed several documents – JHGI – notice of change of advocates with the supporting affidavit of Gideon Kibet Toroitich, JHG II – consent signed between Hari Gakinya and Company Advocates (Advocates for the plaintiff) and County Government of Nakuru (advocates for the defendant) JHG III – proceedings dated 19th March, 2019 to 18th June, 2019 is HCCC 31 OF 2017 before *Prof. Joel Ngugi J.*

John Hari Gakinya further deponed that upon coming on record he had negotiated payments of the decree, which included giving into some demands - which was witnessed by one Lawrence Kipkorir Kinpngok but with full knowledge and consent of the plaintiff.

The "*the agreement on fee and disbursement of decretal sum was agreed on orally and the same was executed to the letter with all parties involved clearly (sic) received their share apart from me*" – meaning that he, as counsel never received his fees – except negative publicity

through the applicant, its advocates and the court – without a hearing. That it was on the basis of this negative publicity – and "malicious instructions" that brought the Hon. Judge Prof. *"John Ngugi" (sic)* to draw conclusions that he – John Hari Gakinya had entered the consent by himself and on the behalf of the County and further ordered for investigations. He deponed further that the only consent JHG III was signed between himself and Mr. Kinuthia (for the County), settling the matter between the parties. At paragraph 11 of his affidavit, he set out the reason why it was necessary to get the oral testimony of the applicant.

> ***"11. THAT the applicant has, through his advocates accused me in the print media of having defrauded him, an allegation he has not stated in this (sic) proceedings and having forged court documents without substantial evidence in a manner fashioned to injure my reputation, without compensation a style that the plaintiff advocates has adopted against other advocates, to destroy(sic) reputation through the media instead of litigation in court. It is only fair therefore, that this matter be heard by oral evidence to give the plaintiff a platform to substitute (sic) all the allegations on cross- examination. Annexed hereto and marked "JHG III" is a copy of the News Paper in question."***

He alluded to a JHG III "*Copy of the News Paper in question*" but more was attached.

He urged this court to find that it is judicially prudent to hear oral evidence.

Counsel for the applicant,Mr. Ogolla, did not file any affidavit in response and chose to argue the same on points of law.

In his oral submissions, Mr. Gakinya reiterated the contents of his affidavit laying emphasize on the issue that between him and Mr. Ogolla's client – there had been some communication prior to the conclusion of the HCCC 31 of 2017 on which he wished to subject him to cross-examination.

He submitted that the communications had to do with agreements entered into, money paid out, and supporting evidence extracted from his bank account (which evidence was not annexed).

Mr. Ogolla argued on the basis of the provisions of **Order 45** of the **Civil Procedure Rules** because the application sought to have the directions given on 18th July, 2019 by the Hon. Prof. J. Ngugi, J reviewed.

He argued that there was no apparent error on the face of the record, no new evidence/material.

That in HCCC 31 of 2017 counsel for the applicant's position was that the whole decretal sum was paid, hence Mr. Gakinya's submission about part payment of the money and other agreement on modes of payment was not the true picture.

He also argued that the application was incompetent on the grounds that the firm of Hari Gakinya & Company Advocates was acting both as a litigant and a law firm. That this was putting the firm in a precarious position because an advocate cannot act in a matter where he was going to be a witness. Hence, if Hari Gakinya's application would be allowed, he would be both litigant and advocate at the same time.

According to Mr. Ogolla, the application to proceed by way of oral evidence was not tenable as this was a case of advocate/client where the client's claim was that the whole decretal sum had not been paid to the client. That the only way to ascertain this would be to look at the file where the judgment was given, ascertain the decretal sum, and then ascertain what was due to the advocate through a taxed bill of costs. That would not require any hearing.

Finally, Mr. Ogolla argued that the application ought to have been brought under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** and not **Section 3** and **31** of the **Civil Procedure Act.**

In a brief rejoinder, Mr. Gakinya argued that it was now settled that the issue of citing wrong provisions of the law was a technicality which the court could ignore and deal with the substantive issue.

Regarding the precarious position of the counsel being both litigation and advocate at the same time, he submitted that the advocate was not sued as a private person/litigant but as an advocate. That parties had not applied for directions to warrant the directions that had been issued. That the directions were given by court on its own motion hence reviewable.

I have carefully considered all the submissions by counsel.

The issue for determination is whether the application before me has merit.

The record herein will show that this application was provoked by the orders made by *Ngugi J* on 18th June, 2019 where he found that the applicant herein had mishandled himself as an advocate and drew the following conclusions:-

> ***"i) The county never filed the Notice of Motion Application dated 31st January, 2019 as its counsel who ostensibly signed that application says his signature is a forgery.***
>
> ***ii) As such, that application is a nullity. It is as if it does not exist. It is hereby expunged from the record.***
>
> ***iii) The expungement of that application from the record must also mean that all the proceedings in this file that came after its filing and related to that application including the onstensible consent order of 27th February 2019 must be similarly***

expunged from the file.

iv) The result is that the consent judgment between the parties in the suit herein remains the dispensation of the suit. The file remains closed for purposes of the suit."

Following those conclusions, the Judge gave the following directions:-

"i) Mr. Kinuthia, the County Attorney to make an official complaint at Nakuru Police Station about the forgery so that investigations can be conducted and those responsible to be charged as appropriate.

ii) Mr. Kinuthia and the county to officially make a complaint against Mr. Gakinya regarding his conduct in purporting to enter a consent on its behalf on 27th February, 2019 when the matter was in court.

iii) The Deputy Registrar to extract his decree and serve it on the Nakuru County Attorney and the OCS, Nakuru Central Police Station."

The applicant herein is seeking that this court,

"…be pleased to review its directions given on 18th June, 2019 and direct that this matter be heard by way of viva voce evidence and parties be at liberty to call witnesses and file statements."

The directions referred to are those issued by *Ngugi J* on 18th June, 2019 as quoted herein above – in HCCC 31 of 2017. The first question one would ask is why in this court hearing this application yet it is not this judge who made those directions.

The answer is to be found in order on the record of 25th July, 2019 before *Ngugi J,*

"Hearing of the prayer (c) in the application dated 11th July, 2019 scheduled from 10th July, 2019 (Court 3) originating summons (main suit scheduled for 2nd December, 2019."

From the record, it is not clear how the Hon. Judge had dealt with the prayer (b). i.e. the prayer seeking that he disqualifies himself from the matter pending the hearing and determination of the application. The order is the file is simply that the issues with regard to prayer (c) be heard and determined by this court. In my humble view, it is only upon his determination of this issue (of disqualifying himself from the matter) that would free the other issue for determination by myself or any other Judge. As it is now, the Hon Judge is still seized of the matter. When I read the proceedings on 18th June 2019, and directions he gave that this court proceeds to deal only with prayer (c), the prayer for review of the directions he issued, and after hearing both counsel, I am of the view that that would split the application, for one Judge to hear arguments on prayer (b) and another to hear arguments on prayer (c). My take is that the two prayers are Siamese twins and require to be dealt with simultaneously. Since the issue of prayer (b) has not been determined, I have not been put in the position to determine prayer (c).

In the circumstances, I respectfully decline to determine the issues related to prayer (c) and direct that the matter be placed before the Judge for further directions on 28th November, 2019.

Orders accordingly.

Dated, delivered and signed at Nakuru this 7th day of November, 2019.

Mumbua T. Matheka

Judge

In the presence of

Hari Gakinya for applicant

N/A for respondent