



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**MISC CAUSE NO.101 OF 2015**  
**IN THE MATTER OF ADVOCATES ACT CAP 16, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010**

**JACKSON INZIANI KHAYUMBI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PATRICK AMAKOBÉ.....DEFENDANT/APPLICANT**

**RULING**

1. On 11<sup>th</sup> April 2016 **Patrick Amakobe** took out an originating summons and filed in court on the same day in which he sought two prayers; that the respondent, an advocate of the High Court, be compelled to produce and deliver an agreement in respect of remuneration, and that the said advocate be ordered to deliver accounts and documents pertaining thereto. The originating summons was supported by an affidavit sworn on the same date 11<sup>th</sup> April, 2016 and which appears to repeat the prayers in the originating summons. It also refers to some cheque issued to the applicant by the advocate which was allegedly unpaid upon presentation to the bank and some unpaid balance that is still outstanding.
2. Upon being served, the respondent filed a Notice of Preliminary Objection on 28<sup>th</sup> April, 2016. It is dated 15<sup>th</sup> April, 2016. The Notice of Preliminary Objection was to the effect that:-
  1. ***This court lacks jurisdiction to hear and determine the originating summons.***
  2. ***The application before court is bad in law, incompetent, lacks merit, totally defective, an abuse of due process of court,***
  3. ***The affidavit in support is fatally defective, and that the application has been drawn by an incompetent person hence should be struck out or dismissed.***
3. During the hearing of the application, **Mr Shikule** appeared for the applicant while **Mr Khayumbi** was for the respondent. The court directed that the preliminary objection be taken first.
4. **Mr Khayumbi** submitted that the application related to an advocate/client bill of costs which had been taxed by the Deputy Registrar of this court and for that reason an application should have been filed in the original file. Counsel submitted that once such a Bill of Costs has been taxed, the court cannot entertain the present application.

5. **Mr Khayumbi** further submitted that the advocate/client Bill of Costs was taken in **Misc Application Number 101 of 2015** and if the applicant was aggrieved with the taxing master's decision, his present application offends paragraph 11 of the Advocates Remuneration order which required he seeks reasons within 14 days. **Mr Khayumbi** was of the view that the application before court is ambiguous and is not clear on what the applicant seeks.

6. Learned Counsel further submitted, that the documents attached to the applicant's affidavit are not annexures, are improperly on record hence inadmissible. Counsel referred to a decision in **Misc Application No.815 of 2009, Edna K. Njagi t/a E.K. Njagi & Co. Advocates v New Kioni Ltd & Another** for the proposition that a party aggrieved by an decision of the taxing master must comply with paragraph 11 of the advocates ((Remuneration) order. He prayed that the originating summons be disallowed.

7. **Mr Shikule** on his part opposed the preliminary objection and submitted that the court had the necessary jurisdiction to her the originating summons. Learned counsel submitted that what was before court was not an application but originating summons, which is a substantive suit. He also submitted that the supporting affidavit is self explanatory and that although the attachments to the supporting affidavit do not have a commissioner's exhibit stamp, that does not make them inadmissible. According to counsel, the prayers sought in the originating summons are clear enough and within the Advocates Remuneration Order. The applicant, counsel submitted, wants clarity and pointed at grounds (a) and (b) on the face of the originating summons as buttressing the applicant's prayers. Counsel concluded that the prayers sought in the originating summons are not ambiguous and prayed for dismissal of the preliminary objection.

8. Before court is a Preliminary Objection to the originating summons filed by **Patrick Malombe** seeking an order that the respondent be compelled to produce some agreement and that the respondent do deliver accounts and documents, which application the respondent says is incompetent and that the court has no jurisdiction to entertain it.

9. What can be gathered from the record is that, the parties were advocate and client and from that relationship, the respondent advocate filed advocate-client Bill of Costs which was taxed by the taxing master of this court and a ruling delivered on 24<sup>th</sup> March, 2016. It is after that ruling that the applicant moved this court through this originating summons, seeking some orders and the respondent has raised an objection to it.

10. The first objection taken is that this court has no jurisdiction to hear and determine the originating summons. The reason advanced is that since the advocate-client Bill of Costs has been taxed, the court cannot entertain the summons, which appears to challenge the ruling of the taxing master without following **rule 11** of the Advocates (remuneration) order..

11. Jurisdiction is the power of a court to determine a matter presented before it for adjudication. Jurisdiction of this court is granted by **Article 165(3)(a)** of the Constitution which gives this court unlimited original jurisdiction in criminal and civil cases. That means this court has jurisdiction to hear and render itself on any dispute of a civil nature except where the jurisdiction of the court is expressly ousted by the **Constitution** or clear provisions of a statute. Secondly, under its inherent powers, this court has jurisdiction to hear any application presented before it and make a determination on it. For that reason, submissions that this court has no jurisdiction to hear the originating summons is in my view, unsustainable

12. **Mr Khatyumbi** has also attacked the originating summons saying that it ought to have been filed independent of this file since it is a suit of its own. This submission that the originating summons is an independent suit is conceded by **Mr Shikule** although, according to him, there is nothing wrong in filing it in the present file.

13. Originating summons is a manner allowed for instituting suits. Originating summons is governed by **order 37** of the Civil Procedure Rules 2010. **Order 37** provides for situations when a party may take out originating summons. It is important to note that **Order 37 rule 15** provides:-

***“The originating summons when filed, shall be filed and entered in the register of suits, but after the serial number, the letters “OS” shall be placed to distinguish it from complaints filed in ordinary suits.”***

Rule 16 –

***“The registrar shall, within thirty days of filing of the originating summons and with notice to the parties, list it for directions before a Judge in chambers.”***

14. **Order 37 rules 15** and **16** distinguish originating summons from the ordinary suits and puts them in a special class of suits. That is why rule **15 requires** that the originating summons be entered in the register, of suits but must contain the words “**OS**” to distinguish it from the ordinary suits, thereafter. It is fixed for direction at which time the court directs how it will proceed. That makes an originating summons an independent suit which must be filed independent of other suits.

15. The originating summons before court, has been filed in an existing miscellaneous file contrary to **Order 37 rule 15** of the Civil Procedure Rules. It is not an ordinary application and cannot therefore be heard in an existing file taking the number of the earlier suit.

16. Without going into the merit or otherwise the originating summons, I find that the originating summons was improperly filed and is therefore incompetent before court. The preliminary objection succeeds to that extent.

Consequently, the originating summons dated 15<sup>th</sup> April, 2016 is hereby struck out with costs.

**Dated at Kakamega this 13<sup>th</sup> day of September, 2016.**

**E.C. MWITA**

**JUDGE**