**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 129 OF 1989(OS)**

**JOHN MACHARIA MUHUNI**

**MACHARIA MUHUNI …….. APPLICANTS**

**VERSUS**

**HERMANT PATEL**

**A Y A JIWAJI AND JIWAJI ……..…….. RESPONDENTS**

## RULING

The respondents in this action brought by originating summons are John Macharia Muhuni, an advocate, and Macharia Muhuni and Co, a firm of advocates, with John Macharia Muhuni as the sole partner. They are the applicants in this application expressed to be brought under order IV rule 1, order VI rule 13 (1) (b), (c) and (d) and order 52 rule 6A, Civil Procedure Rules. The respondents in the application as plaintiffs in the action are Hermant Patel, a medical practitioner, and A Y A Jiwaji and Jiwaji, a firm of advocates. The applicants seek an order striking out with costs the originating summons on the grounds that it is otherwise an abuse of the process of the court.

Mr Macharia Muhuni the 1st respondent prosecuted the application on his own behalf and on behalf of his firm, the second respondent as 2nd applicant in this application. His submission was three pronged. Firstly, that the suit was improperly brought by originating summons, as it should have been brought by plaint as provided under order IV rule 1 Civil Procedure Rules. Secondly that there is no indication under what provision of the law the suit was brought by originating summons. He went further to urge that if the action was brought pursuant to the provisions of order L11 rule 6A Civil Procedure Rules, the plaintiffs did not disclose the undertaking upon which the originating summons were grounded. He also submitted that the 1st plaintiff/1st respondent is a stranger to him. Mr Hamzaali Jiwaji appeared for the both plaintiffs, the respondents in this application in answer to Mr Macharia Muhuni's submission he said this; that the affidavit in support of the originating summons sets out the specific undertaking upon which the summons is grounded and by whom it was given; that the replying affidavit to the originating summons did admit the existence of such undertaking, and that this application is an obvious ploy to delay the payment of the money the applicant had specifically given and undertaking to pay.

The court has power under order VI rule 13 (1) Civil Procedure Rules to strike out pleadings. Originating summons are pleadings and are therefore covered under that provision. The jurisdiction to strike out pleadings, however may only be exercised in the very exceptional cases. It may only be resorted to in the obviously hopeless cases (*Haggard Pelicier v Freres* 1892 AC P68).

Mr Macharia Muhuni submitted that the plaintiffs have not particularized or clearly identified the undertaking upon which the suit is based. It will perhaps be appropriate at this stage to give the background facts to this matter.

The firm of advocates known as A Y A Jiwaji and Jiwaji was instructed by Nariman Rahim and her husband to file a suit for the recovery of damages to injuries arising from a car accident. They duly filed Mombasa High Court Civil Case No 966 of 1980, prosecuted it and recovered Kshs 324,427/= as general and special damages. Out of that figure the firm retained Kshs 224,427/=. Ksh 100,000 was paid over to their clients with an undertaking to release whatever balance that would be due to them after taxation of advocate/client bill of costs.

Nariman Rahim and her husband were unamused by the course of action their advocates had adopted. They approached Mr Macharia Muhuni with instructions to demand from and recover the balance of the money awarded to them from A Y A Jiwaji and Jiwaji advocates. Macharia Muhuni esq duly took steps to recover the money. Several letters were traded between him and the firm of A Y A Jiwaji and Jiwaji. Among those was one dated 7th May 1985; and upon which this originating summons has been grounded. The letter in pertinent part read:

"Our client has instructed us to ask you to let us have your cheque for the balance of the sum due to her, which you are now holding, for the purposes of investing the same and in that connection, she has instructed us to undertake to you, which we hereby do, to pay to you the amount due to you after the said bills are taxed." In response to that letter A Y A Jiwaji and Jiwaji forwarded their cheque for Kshs 224,427/= "as requested". They concluded their forwarding letter (dated 14th May 1985) as follows:

"We shall be reconciling accounts after taxation."

It should be noted from the foregoing that A Y A Jiwaji and Jiwaji did not deduct any sums from the total sums awarded to their client in Civil Case No 966 of1980. They only retained what was awarded as party and party costs.

Subsequently A Y A Jiwaji and Jiwaji's advocate/client bill of costs was taxed at Kshs 70,652.30 and a certificate of taxation was duly issued on 23rd March 1987. The advocates added to the taxed costs a figure of Kshs 39,950/=. That was money incurred by way of medical expenses. Nariman Abdulrahim Mohammed and Hamid A Haq admitted by their joint letter to A Y A Jiwaji and Jiwaji advocates dated 29th November, 1984 that the money was owing from them on account of Mr Hermant Patel, and a small sum of Kshs 750 on account of K A Anjarwalla. The total came to Kshs 110,602.30. They gave credit of Kshs 49,378 as party and party costs. A balance of Kshs 61,224.30 remained. This is the money which was demanded from the applicants and in respect of which this suit related. Mr Macharia Muhuni's replying affidavit in support of the originating summons in pertinent part, deposes to the fact that the decretal sum in that case remained with A Y A Jiwaji and Jiwaji advocates for a considerable period of time in the course of which it earned interest which he reckoned amounted to Kshs 30,686.90. It was his further deponment that that figure offset whatever sums that may have been owing to A Y A Jiwaji and Jiwaji which, according to his computation, did not exceed Kshs 21,274/30.

These are the basic facts. Mr John Macharia Muhuni submitted that on the basis of those facts there was no undertaking given by him or his firm to have entitled the plaintiff's to bring this action. It is not so obvious as he puts it.

I must admit I am in a predicament. I am enjoined not to trespass on the jurisdiction of the trial court by not expressing any opinion on the evidence. Yet the submissions of both counsel are based on affidavit evidence which has been adduced and is on record. All I wish to state here is this. If there was any undertaking, that is a matter of evidence. The person or group of persons to whom the undertaking was given would be entitled under order LII rule 6A (1) (b) Civil Procedure Rules to bring action by way of originating summons if the undertaking was not given in a specific suit. It does not lie upon this court at this stage to say whether or not there was any undertaking, and if there was whether or not it was given in a suit.

Those are matters for consideration at the hearing of the originating summons. On the evidence as it stands, I find nothing to make me rule that the suit is an abuse of the process of the court.

In the above circumstances I am disinclined to grant the prayers sought. I dismiss this application with costs.

Dated and Delivered at Mombasa this 14th Day of July, 1989,

**S.E.O. BOSIRE**

**……..**

**JUDGE**