

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E829 OF 2021(O.S)

BETWEEN

**HALL EQUITORIAL
LIMITED.....PLAINTIFF**

AND

**TITUS MAKHANU & ASSOCIATES
ADVOCATES.....DEFENDANT**

RULING

Introduction and Background

1. By the application dated 30th October 2024, the Defendant (“the Advocates”) seek to stop and terminate these proceedings which were instituted by way of an Originating Summons and have the rival claims adjudicated upon in a "proper and fully-fledged suit". The application is supported by the affidavit of Titus Makhanu, an advocate in the Advocates’ firm, sworn on 30th October 2024 and it is opposed by the Plaintiff through the replying affidavit of its director, Abdulali Kurji, sworn on 18th November 2024. The

application has been canvassed by way of written submissions which I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

2. From their submissions, the Advocates urge the court to determine four issues:

- 1) Whether the Advocates have a rival claim against the Plaintiff's claim*
- 2) Whether the rival claims should be adjudicated upon through the Originating Summons herein*
- 3) Whether the application has been commenced in bad faith*
- 4) Whether the prayers sought in the application should be granted*

Existence of Rival Claims

3. The Advocates have stated that while the Plaintiff is claiming Kshs.3,352,525.88/=, they have raised significant counterclaims totaling over Kshs.43 million, that is; Kshs.3,801,856.50/=; Kshs.11,881,599/=; Kshs.26,449,774.64/=; and Kshs.941,650/=, plus interest and the Advocates contend these cannot be fairly and conclusively determined in the current summary proceeding. In

response, the Plaintiff claims that the Advocates' so-called "rival claims" are for unpaid legal fees, which are properly pursued through the separate, legally established mechanism of taxation of a Bill of Costs. That the hearing of the current suit will not preclude the Advocates from pursuing those claims in the correct forum. They submit that the alleged rival claims are not against the Plaintiff but against two different, non-party entities: *Southern Shield Company Limited* and *Alicate Holdings Limited* and moreover, the Advocates have already filed various bills of costs and is actively pursuing these claims in separate court proceedings, meaning they have a pathway to recover their fees.

4. Going through the pleadings and submissions, I am inclined to agree with the Plaintiff that the Advocates explicitly state in their deposition that their substantial claims are against *Southern Shield*, not the Plaintiff and that the Advocates have filed two Bills of Costs against the said company, that is, **Misc. Civil Application No. E141 of 2021** claiming Kshs.39,990,515.20/= and **Misc. Civil Application No. E147 of 2021** claiming Kshs.23,621,326.50/=. The Advocates have obtained judgments/rulings against the company as Kshs.3,801,856.50/= awarded against it was upheld by the court (Chepkwony J.,). The Advocates further depone that they have obtained a judgment of Kshs.26,449,774.64/=

against *Alicate Holdings Limited*, which they describe as "a subsidiary of Southern Shield."

5. I find that the Advocates implicitly acknowledged that *Southern Shield* is a separate entity that lent money to the Plaintiff, and that the Plaintiff's assets were charged to *Southern Shield* through an All-Assets Debenture and the Advocates explicitly state they have "a lien over all assets of Southern Shield including cash in bank", confirming the debtor-creditor relationship is with *Southern Shield*, not the Plaintiff.
6. The Advocates' direct claim against the Plaintiff appears to be the listed unpaid legal fees totaling Kshs.941,650.00/= that they claim the Plaintiff owes them directly for various cases where they represented the Plaintiff. It is therefore my finding that the Advocates have a rival claim of Kshs.941,650.00/= against the Plaintiff.

Adjudication of the Rival Claim through an Originating Summons

7. Having found that the Advocates have a direct claim of Kshs.941,650.00/= against the Plaintiff, the next question is whether this claim and that of the Plaintiff can be appropriately determined in these proceedings. In **Kenya Commercial Bank**

Ltd v Osede [1982] KECA 35 (KLR), the Court of Appeal considered in detail the nature of an originating summons. Hancox JA., cited several decisions with approval including the dictum of Windham CJ., in **Ramji Kulsumbhai v Ramji's Executors and Others [1957] EA 701** where he stated that, *"It was pointed out in Re Giles (2) [1980] 43, Ch D 391, that such procedure was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question."* (see also **Bhari v Khan [1965] EA 94**).

8. The position in **Oisebe's Case (Supra)** was affirmed by the Court of Appeal in **Kibutiri v Kibutiri [1983] KECA 22 (KLR)** where the court once again stated as follows:

The procedure by way of originating summons is intended: "to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question." This was said in **Re Giles (2) [1890] 43 Ch D 391**, a decision cited with approval by this court's predecessor in **Kulsumbhai v Abdulhussein [1957] EA 699**. See also **Bhari v Khan [1965] EA 94** in which it was held that the scope of an inquiry which could be made on

an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.

9. However, the law has since changed. **Order 37 rule 19** of the **Rules** provides as follows:

[Order 37, rule 19.] Powers of court upon hearing of summons.

(1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.

(2) Where the court makes an order under subrule (1), Order 11 shall apply.

(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.

(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).

10. The Court of Appeal, as per **Ouko JA.**, (as he was then) stated in **Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] KECA 250 (KLR)** that, *“an originating summons cannot therefore be defeated merely because the dispute is highly contentious, complex or involving serious questions of law.”* The court has the jurisdiction to issue directions and direct the manner in which it shall proceed. **Subrule 2 of Rule 19** aforesaid is a clear that the even if the matter ought to have been commenced by way of a plaint, the court may still give directions instead of striking it out. The Court of Appeal made the same point in **Shadrack Bungel (Suing as Administrator of the Estate of Joseph Kipkering- Deceased) v Selina Jerotich (Sued as the administrator of the Estate of Mary Jepkosgei Kiswai- Deceased) [2021] KECA 460 (KLR)** when the court dealt with the same issue and explained that, *“The only issue, we respectfully disagree with the learned Judge, is his finding that an Originating Summons was an unsuitable vehicle to take the dispute to court, since in his view, the dispute was not one envisaged under **Order 37** of the **Civil Procedure Rules**. The truth is that by virtue of that very **Order 37 Rule 19** the summons can be converted into a plaint if the circumstances allow.”*

11. The parties also agree that **Order 52 Rule 4** is intended to secure quick and summary resolutions to disputes between advocates and their clients without undue regard to technicalities. In these proceedings, the Plaintiff is seeking the return of Kshs.3,352,525.88/= plus interest, which he claims was entrusted to the Advocates but was neither deposited as required by a Court of Appeal order nor returned to the Plaintiff. **Sub Rule 4(1)** allows a client to seek an order for “*the payment or delivery up by the advocate of money or securities;*”. In my view, this claim falls within the scope of **Order 52 Rule 4** and can be summarily determined by way of an Originating Summons. Whereas the Advocates have a claim against the Plaintiff, I agree with the Plaintiff that **Order 52 Rule 4(3)** confirms this Originating Summons procedure does not prevent the advocate from recovering costs, as the court can order taxation and payment of the advocate's costs if they allege a claim.

12. It is therefore my finding that the Advocates have not demonstrated that the Plaintiff's claim cannot be effectually and conclusively determined under the summary procedure. The Advocates' genuine claims for costs are adequately protected under separate proceedings, and that any conversion of these proceedings will unnecessarily delay the determination of the Plaintiff's straightforward claim for client funds.

13. From the decisions I have cited above and pursuant to the court's discretionary powers under **Order 52 Rule 4(3)**, I find that the Advocates are at liberty to pursue their claim for fees against the Plaintiff by way of taxation. I believe that my findings above settle this application and the other issues for determination are now moot.

Conclusion and Disposition

14. In the end, I find and hold that the Plaintiff's Originating Summons is properly before the court and that the Advocates have failed to demonstrate any compelling reason to interfere with the proceedings. Accordingly, the Defendant's Notice of Motion dated 30th October 2024, is hereby dismissed in its entirety with costs. The stay order sought is declined, and the proceedings shall continue as previously directed by this court.

DATED SIGNED AND DELIVERED virtually this 7TH DAY OF NOVEMBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Mwiri holding brief for Mr. Wainaina for the Plaintiff/Respondent.
2. Mr. Makhanu for Advocate/Defendant.
3. Amos- Court Assistant

ORIGINAL