



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISC. 47 OF 2017 (O.S)

IN THE MATTER OF THE ADVOCATES ACT 2017 LAWS OF KENYA SECTIONS 44, 45, 46 AND 47-52

AND IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010, ORDER 52 RULE 4

BETWEEN

PETER MWANGI MURA

(suing on his own behalf and on behalf of others)..... APPLICANT

VERSUS

ANTHONY OLUOCH

T/A A.T. OLUOCH & CO. ADVOCATES..... 1ST RESPONDENT

THOMAS LETANGULE

T/A LETANGULE & CO. ADVOCATES2ND RESPONDENT

SYLVIA MALEMBA KITONGA

T/A S.M. KITONGA & CO. ADVOCATES.....3RD RESPONDENT

JUDGEMENT

1. By an Originating Summons dated 13th March, 2017 the applicant herein Peter Mwangi Mura suing on his behalf and on behalf of others is seeking for orders that;

1. That the 1st, 2nd and 3rd defendants be ordered to give account and/or details of the distribution of Settlement Amount and produce all documents and payment schedules pertaining to the distribution of the Kshs.1, 300,000,000.00 (Kenya Shillings One Point Three Billion) and the costs of Kshs.30, 000,000.00 awarded to the claimants in **H.C.C 216/2007, 2019/2017 and 255/2007** (consolidated) as ordered in the Consent order dated 15.12.2015.

2. That the 1st, 2nd and 3rd defendants be ordered to file their respective Advocates-Client bills of costs arising out of the aforesaid **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated) for taxation.

3. That the 1st, 2nd and 3rd defendants be ordered to account in specific terms the deductions made in respect of legal fees, administrative costs and auctioneers fees.

4. That the 1st, 2nd and 3rd defendants be ordered to account for the interest accrued and earned on the kshs.250,000,000 hat was deposited as security for costs for a period of two and half years.

5. That the court be pleased to order that the deduction of legal fees by the 1st, 2nd and 3rd defendants as set aside for reason that it is harsh, unconscionable exorbitant and unreasonable with further orders that the costs in question be taxed by the taxing master.

6. That any monies resulting from the consent order dated 15.12.2015 in **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated)

as ordered, unjustly and *unreasonably held by the 1st, 2nd and 3rd* defendants due and payable to the Plaintiffs be hereby and forthwith released unconditionally to the plaintiffs.

7. The defendants be tasked to explain the status of 62-ex-employees of Telkom who were parties to the suit and were excluded in settlement pursuant to the Consent Order dated the 15.12.2015 and are yet to receive the fruits of the decree.

8. The costs of this summons be borne by the defendants.

2. In the Supporting Affidavit sworn by the applicant, Peter Mwangi Mura it is on the grounds that he was an employee of Telkom Kenya Limited together with others he is representing in this suit and were all retrenched in June, 2006. By a consent order of 15th December, 2015 under **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated) it was agreed that Telkom Kenya to pay the former employees Kshs.1.3 billion together with legal costs of Kshs.30 million. The respondents have now refused to disclose or e distribute the decretal sum in accordance with the consent order. There is a breach of fiduciary duty on the part of the respondents as against the applicants with regard to the enforcement of the consent order of 15th December, 2015. The respondents should render accounts and documents pertaining to the enforcement of **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated) consent orders. Such should be through an order for the respondents to give a full account and breakdown and account for how the monies were used as disbursed by Telkom Kenya Limited.

3. In his **Supporting Affidavit, Mr Mura** avers that upon being retrenched by Telkom Kenya limited in June, 2006 their trade union made effort to negotiate but failed. **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated) were filed on behalf of former employees and on 15th December, 2014 the suits were consolidated for the purpose of entering consent orders. The respondents were required to expedite the process of distribution of the decretal sum of Kshs.1.3 billion to the former employees, the applicants herein. The respondents have failed and refused to abide the consent terms as there is no disclosure of the formula applied in disbursing the monies received and there are great disparities and haphazardness. The schedule of payments has names of former employees of Telkom whose payments cannot be accounted for especially;

- a. Leonard Mangezi
- b. Khadija Barshven
- c. Kenneth Kinuthia
- d. Lucy G Miringu
- e. Abdalla Mwangiga
- f. Joseph Wangila

4. Mr Mura also avers that the respondents made colossal deductions from the applicants' lump sum payment b deduction the following;

- a. Lawyers' fees;
- b. Admin fees
- c. Lawyers deposit (in case of A.T. Oluoch & Co. advocates)
- d. Auctioneers fee

5. The deductions made are illegal, excessive, and unreasonable since Telkom paid costs of the suit at Kshs.30 million ad the auctioneers fees deducted had already been catered for by Telkom in the costs paid of Kshs.30 million. The alleged warrant of attachment obtained by the auctioneers was improperly obtained and the consent to lift the same was improperly entered and recorded in court. the deduction of 30% is in fact a double payment since the respondents had been paid a deposit on their legal fees by the applicants prior to the consent orders.

6. Mr Mura also avers that there is genuine apprehension that the decretal sum has been divested into other accounts than the joint client account agreed upon in the consent order to be at Account No.0102033007500 National Bank Upper Hill Branch to three other accounts of;

- a. NIC Bank City Centre Branch A/C name A.T Oluoch & Company Advocates A/c No.1002370502;
- b. Oriental Commercial Bank, Nairobi branch Account Name Sylvia M. Kitonga A/C No.5128976002; and
- c. Chase Bank, City Centre Branch Account Nam Letangule & Co. Advocates Client A/C No.20045610012.

6. Efforts to reach out to the respondents to give account of how much money they paid to the applicants and the mode used in dispatching the same is not done. Telkom should be summoned to give account of money released to the respondents through the Escrow Account No.01002033007500 National Bank Upper Hill Branch with a list to the apportionment and distribution of the same.

7. The 1st and 3rd respondents in reply to the Originating Summons filed **Replying Affidavit sworn by Anthony Tom Oluoch** and filed on

8th June, 2017 and in the **Replying Affidavit of Sylvia Malemba Kitonga** filed on 2nd October, 2017. He avers that he is the 1st respondent and the affidavit is made with authority from the 3rd respondent.

8. The originating summons is seeking the respondents be compelled to deliver and deposit with the court documents, bank statement for the escrow account and fixed deposit accounts, payment schedules and vouchers and all reports pertaining to disbursements on the settlement amount of Kshs.1.3 billion vide consent order of 15th December, 2015 in **H.C.C 216/2007, 2019/2017 and 255/2007 (Consolidated)**. Such application is premature on the grounds that the respondents got instructions from the representatives of the applicants to represent them in **H.C.C 216/2007, 2019/2017 and 255/2007 (Consolidated)** as the former employees had a common grievance against Telkom. The appointed representatives compromised the suits by authorising the respondent advocates to file consent on the 10th December, 2015 and which the court adopted on 15th December, 2015.

9. The 1st and 3rd respondents had the authority of the applicants' representatives in two suits being HCC 2016 of 2007 and 255 of 2005 as consolidated to settle the matters by consent. All applicants in the **H.C.C 216/2007, 2019/2017 and 255/2007 (Consolidated)** have received money and relinquished the respondents from any liability.

10. The respondents also avers that all information was communicated to the applicants through their representatives and the records now sought by the applicants on disbursements made on settlement amounts through a court order cannot issue. The suit involves sixty (6) individuals whereas **H.C.C 216/2007, 2019/2017 and 255/2007 (Consolidated)** had 997 persons not party herein. Information sought is privileged and relate to persons not party herein. The applicants have since signed discharge vouchers releasing the respondents. A proper account was therefore given to each claimant in terms of the total sum payable with net deductions inclusive of legal and other administrative fees.

11. The questions raised with regard to costs are in breach of the Advocates Act and the Advocates Remuneration Order. In the **H.C.C 216/2007, 2019/2017 and 255/2007 (Consolidated)** the parties settled that the award of Kshs.1.3 billion with costs of the suit being at Kshs.30 million and therefore the amount of Kshs.30 million was awarded as costs of the suits to the respondents and not legal costs which is clearly distinct as the applicants had an agreement with the respondents on how legal fees was to be paid in accordance with section 45 of the Advocates Act. By mutual agreements parties addressed the issue of legal fees and where there is a dispute, such was to be addressed within 3 months and thus this court lacks jurisdiction to address the matter.

12. The originating summons should be dismissed with costs.

13. The 2nd respondent in reply to the Originating Summons filed the **Replying Affidavit of Larry Mulomi** and avers that as advocate for the 2nd respondent in conduct of the matter is thus conversant with the issues herein.

14. The applicants have failed to disclose to the court that they have filed various complaints with the Advocates Complaints Commission against the 2nd respondent seeking similar prayers as herein. Some applicants have since withdrawn their complaints.

15. The applicants are aware of **H.C.C 216/2007, 2019/2017 and 255/2007 (Consolidated)** where they had their representatives and the matters resulted into a consent order of 15th December, 2015.

16. During the prosecution of HCC No.219 of 2007 against Telkom, there was an Appeal to the Court of Appeal, Civil Appeal No.207 of 2012 which was dismissed with costs. Efforts to execute the judgement by the 2nd respondent were opposed resulting in multiple applications and which led to the a settlement dated 8th August, 2014. This also led to the consent of 10th December, 2015 and adopted by the court on 15th December, 2015.

17. Mr Mulomi for The 2nd respondent also avers that due to the amount of time taken in prosecuting the claims herein, the applicants bound themselves to a negotiated legal fees charged at a rate of 30% of the amount due in HCCC 219 of 2007 and due to the confidentiality of the settlement amount in the consolidated suits each advocate proceeded to deal with their clients separately and in HCCC 219 of 2007 the 606 former employees were all paid their money. Only 8 such claimants are in this suit being;

- a. Medi Y.M.
- b. Tuiyot
- c. Lucas Oloo Joseph
- d. Michael Ongoma
- e. Joshua Mbago
- f. Esau Muhanji
- g. Naphutally Kanyoro
- h. H.O. Omuyaka

18. All claimants were paid their dues under the **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated). Discharge forms have been executed. There are affidavits of Naphutally Kanyoro, Esau Muhangi and Joshua Mbogo the representatives in HCCC 219 of 2007 and confirm payment and before such payment all claimants were reminded that such pay was less 1% auctioneer fees, 2% administrative fees and 30% legal fees. The 30% legal fees was inclusive of the 2nd respondent representation in the three level court where the claimants were represented at the Court of Appeal and at the Supreme Court.

19. The suit herein is filed in contravention of Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules, 2010 with the applicant riding on a false authority to institute these proceedings over claims not similar for all applicants.

20. The orders sought by the applicants cannot issue as all claimants have been paid and executed discharge of the 2nd respondent; payment of legal fees and costs was done in a transparent manner and all disbursements been accounted for with respect of HCC 219 of 007 and thus no monies are held by the 2nd respondent; the interests claimed from Kshs.250 million deposited as security for costs and orders sought therefrom cannot issue as this related to Telkom and they are not a party herein. To seek the respondents do file bill of costs is contrary to the Advocates Act and the matter should be dismissed with costs.

21. This court has carefully read and considered the Originating Summons herein, the Ruling of the court delivered on 17th July, 2017, the written submissions and the relevant provisions of the law and the court makes the following finding:-

22. The applicant has sought for orders for the respondent to render account of Kshs.1.3 billion award and Kshs.30 million costs awarded under **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated) following a consent order of 15th December, 2015. The applicant is also seeking for orders that the respondents be ordered to file their respective Advocate Client Bill of Costs for taxation and that they should account for legal fees, administrative costs and auctioneer fees charged on the consent amounts and also that the respondents should account for the interests accrued and earned on the Kshs.250 million deposited as security for costs for a period of two and a half years.

23. The Originating Summons is brought under the provisions of sections 44, 45, 46 and 47-52 of the Advocates Act Cap 16 Laws of Kenya and under order 52 Rule 4 of the Civil procedure Rule, 2010.

24. On 17th July, 2017 the court delivered ruling and addressed several matters now raised in the substantive Originating Summons. The orders sought in the application dated 13th March, 2017 were of the nature that the respondents should be compelled to deposit with the court records pertaining to the disbursements of the settlement amount of Kshs.1.3 billion under the consent order of 15th December, 2015 in **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated).

25. In the Ruling, the court also addressed the objections filed by the 2nd respondent filed on 3rd May, 2017 and which related to Section 45(2A) of the Advocates Act Cap 16 on the question as to whether a party can challenge an agreement within one year of its execution and whether there was contravention of Order 1 Rule 13(1) and (2) of the Civil Procedure Rules, 2010 with regard to the applicants authority to act for all the applicants.

26. In the Court Ruling, account was taken of all matters and particularly the objections of the 2nd respondent on the application of section 45(2A) of the Advocates Act Cap 16. Account was also taken of the consent orders of 15th December, 2015 and which are largely the subject leading to this suit following settlement in **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated).

27. Also, in the court Ruling regard was given to the fact that taking into account the provisions of section 45 of the Advocates Act, the applicants herein are noted as 41 inclusive of the applicant, Peter Mwangi Mura. At paragraphs 38 and 39 of the Ruling, the court held as follows;

... these applicants do not state whether there was a remuneration agreement between them and the respondents save that they had advanced counsel(s) a total sum of Kshs.2 million before the consent and order for the legal costs were agreed at Kshs.30 million.

There is also no evidence that the applicants paid Kshs.2 million to the respondents before the consent order was filed and legal fees agreed at Kshs.30 million.

28. Having put into account all matters relevant, the applicable law and particularly the provisions under which the originating Summons was premised upon, the orders prayers thereon and cognisant of the fact that parties have a consent decree vide orders of 15th December, 2015 which is not challenged, and pursuant to the provisions of section 45 of the Advocates Act Cap 16 Laws of Kenya, the court ordered the respondents to show the formula applied in making disbursements with regard to the consent order within 14 days by giving a detailed account of payment made with regard to the 41 applicants herein.

29. On 7th August, 2017 the parties attended court to confirm compliance with the court ruling delivered on 17th July, 2017. The 1st and 3rd respondents submitted that they had filed Civil Appeal No.188 of 2017 and noted that with the appeal now filed, they could not comply with the court ruling and orders therefrom. The court ordered and directed the respondents to comply with the ruling of 17th July, 2017 as there had no stay of proceedings herein.

30. The issues and matters set out under the court ruling of 17th July, 2017 therefore become pertinent to the court addressing the substantive orders in the Originating Summons. Without the applicants addressing the specific agreements entered into with the respondents as set out above, to issue a blanket order(s) pertaining to the prayers in the Originating Summons would be to defeat the course of justice for other

parties set out in **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated). The precise and concise nature of orders in the ruling of 17th July, 2017 shall be an override and negated by issuing the prayers sought in the main.

31. Nothing stops the applicants from addressing the orders of the court of 17th July, 2017. To pursue the substantive orders in the Originating Summons without taking into account the same, shall erode the dignity of the court. where the 1st and 3rd respondents filed Civil Appeal 188 of 2017 and failed to serve the applicants, as noted above, there are no orders stopping the execution of the orders of 17th July, 2017.

32. The applicants had moved the court seeking urgent orders. The basis and foundation was the Originating Summons and the same was secured by the orders issued on 17th July, 2017. Such were to enable the court address the Originating summons in a clear and concise manner and taking into account that Originating Summons should only be filed for the purpose of having a simpler, shorter and speedier process. To thus circumvent the ruling of 17th July, 2017 where the 41 applicants issues should have been identified, clarified and singled out as against the 997 claimants under **H.C.C 216/2007, 2019/2017 and 255/2007** (Consolidated) to avoid the obvious.

Accordingly, having carefully considered the instant Originating Summons, the court finds no merits and the same is hereby dismissed. Each party to bear own costs.

Delivered in open court at Nairobi this 20th day of April, 2018

M. MBARU

JUDGE

In the presence of

Court Assistant: Nancy Bor

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