



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.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.....APPLICANT**

**[suing on his own behalf and on behalf of others]**

**VERSUS**

**ANTHONY OLUOCH**

**T/A A.T. OLUOCH & CO. ADVOCATES.....1<sup>ST</sup> RESPONDENT**

**THOMAS LETANGULE**

**T/A LETANGULE & CO. ADVOCATES..... 2<sup>ND</sup> RESPONDENT**

**SILVIA MALEMBA KITONGA**

**T/A S.M. KITONGA & COMPANY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The ruling herein relates to the applicants' application dated 13<sup>th</sup> March, 2017 and the 2<sup>nd</sup> respondent's Notice of Preliminary Objections filed on 3<sup>rd</sup> May, 2017.
2. The applicants through their Originating Summons and Chamber Summons brought under the provisions of Order 52 Rule 4, Order 40 Rule 1, 2, and 3 of the Civil Procedure Rules, 2010 and the Advocates Act, 2017, sections 44, 45, 46 and 47-52 and 3A of the Civil Procedure Act and through application dated 13<sup>th</sup> March, 2017 are seeking for orders that;

*a) The matter be placed for directions before the trial court handling ELRC Cause No.230 of 2017 and Cause No.229 of 2017 on 14<sup>th</sup> March, 2017;*

*b) The respondents be compelled to deliver and deposit with the court all the following documents: bank statement for the escrow account and the fixed deposit accounts, payments schedules and vouchers, receipts, acknowledgements and all reports pertaining to disbursements of the settlement amount sum of Kshs.1, 300,000,000.00 vide consent order of 15.12.2005 in HCC No.216/2007; HCC No.219/2007; and HCC No.255/2007 at Nairobi.*

*c) That the costs of the application be provided for.*

3. The application is supported by the affidavit of the applicant and on the grounds that the applicants are former employees of Telkom Kenya Limited who were later retrenched following restructuring and reorganisation of the company in June, 2006. The applicants instructed the respondents to act for them in a matter between them and former employer regarding disputed payments for their early retirement benefits vide HCCC No.216 of 2007; HCCC No.255 of 2007 at Milimani as consolidated.

4. On 15<sup>th</sup> December, 2015 a consent order was recorded in HCCC No.216 of 2007 and HCCC No.233 of 2007 (consolidated) wherein it was agreed that Telkom Kenya Limited pay the applicants a lump sum of Kshs.1,300,000,000.00 plus agreed legal costs of Kshs.30,000,000.00.

5. Prior to the recording of the consent the applicants had advanced over Kshs.2, 000,000.00 to their advocates as legal fees

6. Under clause 7 of the Consent Order of 15<sup>th</sup> December, 2015 the parties agreed to have the matter marked as fully settled and that Telkom Kenya Limited be discharged of all and any claims in the matters arising from its employment relationship with the employees/applicants.

7. Other grounds in support of the application are that it is only fair for the court to summon the respondents to give a full account for how much money they agreed to pay the applicants and the mode used in dispatching the same and how much in total was released to the respondents. The respondents are liable to give an account of the monies, documents, papers and other relevant materials received and held on behalf of the applicants pursuant to the purported consent.

8. The respondents have in the process of paying the applicants arbitrarily withheld some funds, failed to pay some beneficiaries and to others made part payment without any justification. The court should intervene and order the respondents to produce documents relating to the payment and distribution of the settlement amount and the agreed costs in the consent.

9. In his affidavit, the applicant, Peter Mwangi Mura avers that as the representative of the applicants, they were retrenched by Telkom Kenya Limited in June, 2006 following a retrenchment. There was agreement with their trade union over a compensation package. The negotiation did not materialise and which led to the applicants giving instructions to the respondent advocates to represent them in HCCC No.216, 219 and 255 of 2007 – **John Ochanda and 996 others versus Telkom Kenya Limited; Naphutan Kanyoro and others versus Telkom Kenya Limited; and Michael Ayako and others versus Telkom Kenya limited.** The suits were consolidated and a consent order entered on 15<sup>th</sup> December, 2015. The respondents have since failed and or refused to appropriately disburse the amounts in accordance with the consent. They have not disclosed the formula used in the disbursements. Applicants on the same scale and number of years received different payments. The payment schedule contains names of retrenches whose payments cannot be accounted for;

1) Leonard Mangezi;

2) Khadija Barshven;

- 3) Kennedy Kinuthia;
- 4) Lucy Muringu;
- 5) Abdalla Mwangiga; and
- 6) Joseph Wangila.

10. The respondents made colossal deductions from the lump sum in lawyers' fees; administration fees; lawyer's deposit; and auctioneers fee. These deductions are illegal, excessive, unreasonable and unconscionable since they had been paid by Telkom Kenya Limited for costs of the suits at Kshs.30 million which was to cover legal costs. The auctioneers' fees deducted from the applicants had already been settled by Telkom Kenya Limited and the purported warrant of attachment obtained by the auctioneers were 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 and during the conduct of the suit in court.

11. The applicant also avers that there is apprehension that the settlement sum of Kshs.1.3 billion has been divested to the other account other than the joint client account agreed upon and indicated in the consent namely Joint Client Account A/C No.[...] National Bank Upper Hill Branch to 3 other accounts;

- a) NIC Bank City Centre Branch A/C name Anthony A.T. Oluoch & Company Advocates A/C No. [...];
- b) Oriental Commercial Bank Nairobi Branch Account name Sylvia M. Kitonga A/C No.[...]; and
- c) Chase Bank, City Centre Branch Account name Letangule & Company Advocates Client A/C No.[...].

12. The Applicant also avers that efforts to reach out to the respondents for a tally of disbursed amount have not borne fruit. The respondents have failed to give account on how much money they agreed to pay the applicants and the mode used in dispatching the same. The Telkom Kenya Limited should be summoned to court to give an account of the amount released to the respondents through the Escrow Account No.[...] National Bank Upper Hill Branch.

13. The 1<sup>st</sup> and 3<sup>rd</sup> respondents, Anthony Oluoch t/a A.T. Oluoch & Co. Advocates and Silvia Malemba Kitonga t/a S.M. Kitonga & Company filed a **Replying Affidavit sworn by Anthony Tom Oluoch** the 1<sup>st</sup> respondent and avers that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were given instructions by the representatives of the applicants in various suits in court in HCCC 216 of 2007, 219 of 2007 and 255 of 2007. The operating file was that of HCC No.216 of 2007 John Ochanda versus Telkom Kenya Limited. The suits proceeded and were concluded as a representative suit for all the applicants. With the consolidated suit, a fourth (4<sup>th</sup>) case in the matter of ELRC Cause No.561 of 2014 Ochieng Owiti and Others versus Telkom Kenya Limited which proceeded and was concluded as a representative suit.

14. The consolidation of suits which address similar parties and issues is allowed under Order 1 rule 8 of the Civil Procedure Rules to avoid multitude of suits where parties have a common grievance and interest. The plaintiffs in the consolidated suits appointed representatives who had authority to file or swear documents in court on their behalf and were responsible for their joinder to the suits.

15. The consolidated suits were compromised when the respective advocates got instructions to file a consent dated 1<sup>st</sup> December, 2015 and file don 10<sup>th</sup> December, 2015. The entire suits between the parties were settled. The consent was adopted by the court on equal date. It is therefore not correct that the decision taken by the plaintiffs' representative does not represent their common interest in the consent filed with the court. Each plaintiff was paid and a discharge form filed.

16. The averment by the applicants that there is critical information with regard to the consent and payments formulas that were not communicated to them is a fact that is not true as all information was relied to the applicants through their representatives.

17. The orders sought by the applicants seeking for the respondents to be compelled to produce bank statements and records from the escrow account cannot be issued by this court. This matter involves 60 individuals. In HCC 216 of 2007, 219 of 2007 and 255 of 2007 as consolidated involves 997 persons who are not parties herein. The information sought is privileged and the prayer seeking to have account information for persons who are not parties herein would be unlawful. The 1<sup>st</sup> and 3<sup>rd</sup> respondent are covered under the lawyer/client privilege covering 936 clients whose claims were settled and are not parties herein. The suits are thus incompetent for non-joinder of parties likely to be affected by the orders sought by the applicants.

18. Mr Oluoch also avers that the applicants must seek the express consent of all these persons in the suit under HCC No.216 of 2007, 219 of 2007 and 255 of 2007 in order for the respondents to be in a position to release their individual private bank information as requested. Each plaintiff was given a proper account in terms of total sums paid less net deductions, legal fees and other administrative costs. All plaintiffs signed and executed a discharge.

19. Plaintiffs in HCC No.255 of 2077 are 13 plaintiffs namely;

- 1) Mura P.M.
- 2) C.M. Sostenes
- 3) Kikuvi Maundu
- 4) Zara Suleiman Mlanao
- 5) Gulam Kadir Bakshi
- 6) Susan Auma Monye
- 7) Alio Madey Mohamed
- 8) Pamela A Onginjo
- 9) Japhet Mukotano Nyaki
- 10) Nzokolo Patrick pius
- 11) Meshack Angudi Adero
- 12) Nyambu E M
- 13) Said AA

20. The accounts sought are contained in the summary of payments advice slip which the plaintiffs have been issued with and by filing suit as herein, it is in abuse of court process and should be dismissed.

21. On the question of costs due to advocates, the same is addressed under the Advocates Act and the Advocates Remuneration Order. The consent and order for costs at Kshs. 30 million was for costs for the suit to the defendant and not legal costs. There is clear distinction between party and party costs and advocate client costs which are costs different and not one and the same.

22. There was agreement between plaintiffs and defendants on how legal fee was to be paid in accordance

with section 45 of the Advocates Act. The law allow an advocate and client to agree on legal fees or through advocate/client bill of costs. A client not satisfied with the agreement can challenge the same within one year and three months. The client can also file an advocate/client bill of costs which can be taxed by the taxing master. The court thus has no jurisdiction to entertain the matter as filed. Questions of taxation should be filed before the Magistrate's court. The Originating Summons and Chamber Summons Application as filed should be dismissed.

23. The 2<sup>nd</sup> respondent, Thomas Letangule t/a Letangule & Co. Advocates in reply filed a Replying Affidavit and Notice of Preliminary Objection. In the **Replying Affidavit sworn by Larry Mulomi** advocate for the 2<sup>nd</sup> respondent he avers that the suit herein is an afterthought, filed without leave and in contravention of section 45(2A) of the Advocates At as file done year after an agreement between the plaintiffs and defendants was executed. The suit contravenes Order 1 rule 13(1) and (2) of the Civil Procedure Rules, 2010 as the applicants have no authority of all the plaintiffs.

24. The applicants have failed to disclose to the court that through their representatives they agreed and issued instructions to the 2<sup>nd</sup> respondent to deduct 1% auctioneer's fees, 2% administrative fees and 30% legal fees. Each applicant agreed to such deductions and independently executed a discharge form in receipt of their payment. The applicants have also failed to disclose that they have filed complaints with the Advocates complaints commission against the 2<sup>nd</sup> respondent seeking similar prayers as herein and some have since withdrawn their complaints on good grounds. Thus are in abuse of the court process.

25. The applicants have failed to disclose that they signed an agreement for legal fees at 30% citing the option of an agreement as against the long and acrimonious taxation of costs procedures. The applicants are thus estopped from challenging and alleging malice in an agreement they voluntarily signed as a condition in their instructions to the 2<sup>nd</sup> respondent.

26. Based on privileged advocate/client information, the 2<sup>nd</sup> respondent can only give specific information relating to the applicants and not any other party. To do otherwise would in breach of confidentiality.

27. The matters between the applicants and the respondent's stems from a background of their retrenchment by Telkom Kenya Limited which matter was filed in the High Court and proceeded to the Court of Appeal and to the Supreme Court. Various applications were filed and the 2<sup>nd</sup> respondent attended for the applicants. The matters culminated in a consent filed on 15<sup>th</sup> December, 2015. Parties in 2014 had entered into a Deed of Settlement/Compromise dated 8<sup>th</sup> August, 2014 which provided for a full and final settlement of the dispute. This process took time and account of advocates costs and Telkom Kenya Limited reneged on the Deed prompting the 2<sup>nd</sup> respondent to file further applications and eventually the consent was filed.

28. The applicants agreed to forgo the process of taxation and opted for a 30% legal fees agreement. At the Court of Appeal and Supreme Court, the plaintiffs had instructed Senior Counsels who were also entitled to legal fees out of the 30% agreed amounts. The applicants were also reminded that 1% auctioneers fees, 2% administrative fees and 30% legal fees were payable. All disbursements and deductions have since been accounted for in complete disclosure. No money is held by the 2<sup>nd</sup> respondent for the applicants and the matter now filed is in abuse of court process.

29. The Notice of Preliminary Objections is on the grounds that the application dated 13<sup>th</sup> March, 2017 is;

*a) The suit and application brought by the applicants is time barred*

*b) The applicants entire suit and application is bad in law, incompetent, fatally defective and abuse of court process*

c) *The suit dated 13<sup>th</sup> March, 2017 be dismissed.*

30. The parties filed written submissions.

31. Taking into account the pleadings, submissions and the objections filed by the 2<sup>nd</sup> respondent

### **Determination**

32. The substance of the applicants' Chamber Summons is that the respondent be compelled to deliver and deposit with the court all the documents, bank statements for the escrow account and the fixed deposit accounts, payment schedules and vouchers, receipts, acknowledgements and all reports pertaining to disbursements of the settlements amount sum of Kshs.1, 300,000,000.00 vide consent order of 15<sup>th</sup> December, 2015 in HCC No.216 of 2007, HCC No.219 of 2007 and HCC No.255 of 2017 as consolidated. The reasons for seeking such orders is that the applicants instructed the respondents to represent them in the matters above and a consent was drawn and filed in settlement of the consolidated matters. That prior to the consent of 15<sup>th</sup> December, 2015 the applicants had advanced legal fees amounting to Kshs.2 million to the respondents. That consent order entered on 15<sup>th</sup> December, 2015 fully discharged the Telkom Kenya Limited of all claims between the parties. That the respondents should thus give a full and transparent breakdown and account for how much money they agreed to pay the applicants and the mode used in dispatching the same and how much money in total was realised to the respondents

33. The applicants have not set out the reasons why the orders with regard to why this matter should be placed and or heard together or by the same court as in Cause No.230 of 2017 and Cause No.229 of 2017. No basis is established in the entire application or in the supporting affidavit.

34. The applicants have based the application on the provisions of sections 44 to 52 of the Advocates Act. Such provisions allow advocate and client to agree on remuneration payable to the advocate by the client. Such an agreement must be signed by the client. Where there is a contentious issue on the agreement, the client may under the provisions of section 45 (2A) of the Advocate's Act make an application within one (1) year of making such agreement to have it varied, reviewed or set aside.

35. It is common cause that several suits where the applicants were parties and represented by the respondents have now been settled by consent. Such suits were between the applicants and Telkom Kenya Limited. The consent order was filed on 15<sup>th</sup> December, 2015 thus settling suits in HCC No.216 of 2007, HCC No.219 of 2007 and HCC 255 of 2005, Consolidated.

36. Clause 4 of the consent order provided as follows;

*4. THAT the defendant further agrees to pay the plaintiffs' legal costs which are agreed by consent to be in the sum of Kenya Shillings Thirty Million Only (Kshs.30,000,000.00) which amount shall be inclusive of all taxes an [and] disbursements ("the Legal Costs").*

37. The applicants contention is that prior to the consent order of 15<sup>th</sup> December, 2015 they had paid their advocates a total sum of Kshs.2,000,000.00 in legal fees. Further that the respondent should give a full and or breakdown and account for how much money they agreed to pay the applicants and the mode used in dispatching the same and how much money in total was released to them in accordance with the consent order. The respondents should disclose the formula used in disbursing the monies received by the applicants as there are great disparities. The applicants note that some of them in the same scale and with the same number of years worked received different sums amounts and thus there is no uniform formula and payments vary from one applicant to the other. That there are some former employees or retrenchees whose payments cannot be accounted for.

38. Noting the provisions of section 45 of the Advocates Act upon which the applicants have relied upon in making their application, the consent order referenced above and filed on 15<sup>th</sup> December, 2015 I find the applicants herein are 41 inclusive of the applicant as set out in annexure "PMM1" to the Supporting

Affidavit of Peter Mwangi Mura. 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.

39. 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.

40. The 2<sup>nd</sup> respondent also avers that the applicants, through their representatives agreed and issued instructions to advocate to deduct 1% auctioneers fees, 2% administrative fees and 30% legal fees. No such agreement has been submitted by the 2<sup>nd</sup> respondent or the 1<sup>st</sup> and 3<sup>rd</sup> respondents as having been executed by the applicants or their representative.

41. Section 45(1) of the Advocates' Act provides as follows;

*45. (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—*

*(a) Before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;*

...

*and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.*

42. I take it; the consent filed on 15<sup>th</sup> December, 2015 is not contested. The consent settled the suits referenced above. Such consent is an order of the court and part of its terms is an agreement that all legal fees is settled at Kshs.30 million.

43. Parties herein thus accepted and executed a consent which is now the order of the court. Such consent I find to be similar to an agreement as under section 45 of the Advocates' Act as the legal fees was agreed upon. As held in **HCC MISC. 730 OF 2006 D.N. Njogu & Co. Advocates versus National Bank of Kenya;**

*... It is provided for under section 45(6) of Cap 16 that where there is an agreement, the costs of an advocate shall not be taxed, unless there is fraud, illegality and/or coercion in the agreement. ... The advocate knew and was conscious of the effect and implication of the contract he was entering into and once he appended his signature on the contract, then he has no way to wriggle out of it. The law provides that an advocate can enter into a contract on payment of fees. And if he decides to bind himself to a sum far below the scale allowed, then he cannot be heard to rubbish the contract.*

44. In this case the 1<sup>st</sup> and 3<sup>rd</sup> respondents aver that all information relating to the payments due to the applicants and all plaintiffs in HCC 216 of 2007, HCC 219 of 2007 and HCC 255 of 2007 was relayed to the plaintiffs through their representatives. However no record is attached to confirm such averments.

45. Also, In this case, the 2<sup>nd</sup> respondent avers that the applicants have failed to disclose that they signed an agreement for legal costs at 30% but where such an agreement exists; the 2<sup>nd</sup> respondent has not submitted it. In any event, where such agreement, if any, was executed between the parties, by filing the consent and order of 15<sup>th</sup> December, 2015, the terms therein address the legal fees payable to the respondents.

46. The 2<sup>nd</sup> respondent further seeks to justify the charges made against the applicants on the grounds that the settled suit in the consent of 15<sup>th</sup> December, 2015 were matter that took long to settle between the

plaintiffs and Telkom Kenya Limited and the 2<sup>nd</sup> respondent was forced to file different applications before the Court of Appeal and the Supreme Court to either defend or urge the plaintiffs' case. However, following various suit, on 15<sup>th</sup> December, 2015 parties filed consent to compromise the entire suits and or cases. The averments that prior to the consent of 15<sup>th</sup> December, 2015 the 2<sup>nd</sup> respondent handled two taxation matters arising from the consolidated suits in Misc. Application No.111 of 2014 and Misc. Application No.1191 of 2013 – **Keysian Auctioneers versus John Ochanda & 996 and others**. That in these cases the auctioneer's fees was approximately Kshs.150, 000,000. Eventually the costs due were negotiated under the consolidated suits but the 30% legal fees was inclusive of the 2<sup>nd</sup> respondent representation in the three levels hierarchy of courts with each attracting distinct legal costs but were collapsed into a single percentage to make less the burden on the applicants. These averments relate to facts which arose before the consent order of 15<sup>th</sup> December, 2015.

47. Ultimately the respondents in the consolidated suits agreed to the legal fees payable. I take it the respondents took into account all necessary factors pertaining to each suit under HCC 216 of 2007, HCC 219 of 2007 and HCC 255 of 2007 in addressing the issue of legal fees due at Kshs.30 million. To justify any other additional costs outside of this amount would be to negate the entire consent order of 15<sup>th</sup> December, 2015.

48. I find the applicants are justified in seeking the rationale and formula used and or applied by the respondents in disbursing the monies received by the applicants drawn from the consent filed on 15<sup>th</sup> December, 2015. The justifications made by the respondents that there was an agreement and they did incur costs in addressing the various suits looked at in view of the consent order and the agreement filed on 10<sup>th</sup> December, 2015 and attached to the 2<sup>nd</sup> respondent Replying Affidavit at annexure "LM-13" and which agreement at clause 3 provides as follows;

*3. The defendant further agrees to pay the plaintiffs' legal costs which are agreed by consent to be in the sum of Kenya shilling Thirty Million Only (Kshs.30, 000,000.00) which amount shall be inclusive of all taxes and disbursements ("the Legal Costs").*

49. My reading of this clause together with clause 4 of the consent order of 15<sup>th</sup> December, 2015 both agree to the extent that the legal fees due to the respondents under the consolidated suits was Kshs.30 million. Such amount is inclusive of *all taxes and disbursements in legal costs*. To read the clauses otherwise would be to negate the consent order as set out above.

50. Section 45 (2A) of the Advocates Act is clear to the extent that an aggrieved client *may* file a complaint. For the applicants to file the current application seeking to know the formula used in making disbursements to them in view of the consent order filed on 15<sup>th</sup> December, 2015 and in view of the reasons made by the respondents to justify the additional costs, the orders sought are with merit. The respondents taking into account the consent order filed settling the legal fees payable to them should render a proper account to the applicants herein. Such account shall apply to the applicants herein. Such shall not prejudice the advocate and client privilege with regard to any person not party herein.

**I find merit in the applicants' application dated 13<sup>th</sup> March, 2017 to the extent the respondents shall show the formula applied in making disbursements with regard to the consent order of 15<sup>th</sup> December, 2015. I order and direct as follows;**

- 1) The objections filed by the 2<sup>nd</sup> respondent are without merit and hereby dismissed;**
- 2) The respondents shall within 14 days from the date hereof give a detailed account on the deductions made with regard to the applicants herein on payments and or disbursements made from the consent order of 15<sup>th</sup> December, 2015;**
- 3) On the 2<sup>nd</sup> respondent's annexure "LM-13" and the schedule of plaintiffs thereof, the respondents shall set out the 41 applicants herein;**

**4) The respondents shall further give a schedule of the applicants as follows;**

**i) Name;**

**ii) Last position held;**

**iii) Last paid gross salary;**

**iv) Number of years served;**

**v) Amount paid in disbursement;**

**vi) Amounts charged in legal fees;**

**a. Total auctioneer fees charged;**

**b. Total administrative fees charged; and**

**c. Total legal fees charged.**

**5) The above orders shall only apply to the listed applicants in accordance with the listed persons under the application filed with the Chamber Summons dated 13<sup>th</sup> March, 2017;**

**6) Mention on 7<sup>th</sup> August, 2017 for the respondent to confirm order (2), (3) and (4) above; and**

**7) Costs to the applicants.**

Delivered in open court in Nairobi and dated this 17<sup>th</sup> day of July, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

.....

.....