Adiedo v Agutu & another (Miscellaneous Case 205 of 2019)
[2023] KEHC 27155 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27155 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CASE 205 OF 2019

RE ABURILI, J

DECEMBER 20, 2023

BETWEEN

SHEM ODUOR ADIEDO ..... APPLICANT

AND

BENARD OLWENY AGUTU ..... 1ST RESPONDENT

OUMA NJOGA & CO ADVOCATES ..... 2ND RESPONDENT

RULING

1. The applicant herein is Shem Oduor Adiedo. Vide his Notice of Motion dated May 5, 2023, he seeks for orders directing that the monies which were previously held in a joint account no. xxx with Family Bank, Eldoret Branch in the names of Nyaundi Tuiyot & Co. Advocates and the 2nd respondent that were released to this court *vide an order dated January 8, 2023*{{term{refersTo |title See} be released to the applicant and other beneficiaries as follows;

    Shem Oduor Adiedo..... Kshs. 258,000

    Wycliff Teddy Oduor..... Kshs. 170,000

    Ruth Atieno (Deceased)..... Kshs. 125,000

    Lorine Achieng.....Kshs. 130,000

2. It was the applicant's case that following a Road Traffic Accident on the February 9, 2008, he and his children filed separate cases for compensation at the Principal Magistrate's Court at Maseno and judgement was rendered in their favour.

3. The applicant further averred and deposed in his supporting affidavit that the defendant in those cases preferred appeals to the High Court in Kisumu against all their awards being Civil Appeals 88, 89,90

and 91 of 2011 which were all dismissed save for Civil Appeal 90 of 2011 where the lower court award was reduced to Kshs. 100,000 from Kshs. 200,000.

4. The applicant further averred that prior to hearing of the appeals, the court had made an order that one half of the entire decretal sum be released to the 2nd respondent who was the applicant's advocate while the other half be held in a joint interest earning account hereinabove mentioned.

5. It was the applicant's case that at the conclusion of the appeal, the court made an order that one half of the decretal sum held in the joint account of the advocates be released to this court and that subsequently, Kshs. 683,000 was released to the court and that the same should be released to him with the share of the deceased Ruth Atieno released to him as her father.

6. The 1st respondent was served through his counsel but they never filed any response to the application.

7. The 2nd respondent relied on the replying affidavit sworn on the 21st September 2020 in which he admitted that the applicant had instructed him to lodge civil suits on his behalf and on behalf of his 3 minor children in claims for damages for injuries sustained as a result of a road traffic accident they were involved in, and sustained injuries and which the 2nd respondent successfully secured awards in their favour as follows, which said awards were subject to 15% contributory negligence on the part of each claimant:

    Maseno PMCC No. 33 of 2010 General damages Kshs. 200,000

    Special damages Kshs. 1,500

    Costs Kshs. 47,523

    Maseno PMCC No. 32 of 2010 General damages Kshs. 200,000

    Special damages Kshs. 1,500

    Costs Kshs. 47,523

    Maseno PMCC No. 31 of 2010 General damages Kshs. 250,000

    Special damages Kshs. 1,500

    Costs Kshs. 47,898

    Maseno PMCC No. 29 of 2010 General damages Kshs. 250,000

    Special damages Kshs. 1,500

    Costs Kshs. 47,648

8. It was the 2nd respondent's case that he agreed to represent the applicant and his 3 children on the understanding that the legal fees would be recovered from the proceeds of the award of damages expected to be made on successful completion of the suits.

9. The 2nd respondent deposed that the defendant in those cases preferred appeals to the High Court in Kisumu against all their awards being Civil Appeals 88, 89,90 and 91 of 2011 and as a condition of stay of execution of the various decrees, it was agreed that the 1st respondent would deposit with the 2nd respondent's firm 50% of the decretal sum and the costs of each of the suit with the balance being deposited in a joint interest earning account.

10. It was the 2nd respondent's case that as he was on record for the applicant in the appeals, he explained to him and the applicant understood that he would retain the 50% deposited in his firm as security for the work done in the lower court as well as for the pending appeals.

11. It was deposed that the 1st respondent was successful in two appeals, Kisumu HCCA 90 & 92 of 2011 where general damages were reduced from Kshs. 200,000 to 100,000 and Kshs. 250,000 to 100,000 respectively. However, the applicant denies that he was in any way connected to SPMCC 30/ 2010 whose appeal is 92/2011.This is evident from the instructions notes filed by the advocate herein showing that the applicant only instructed the advocate to represent him, his daughter Laureen Achieng, Daughter Ruth Atieno and further instructions signed by Wycliffe Teddy Oduor. There is therefore no justification for the advocate claiming from the applicant for a fifth person who is in no way connected to the applicant and his children.

12. The 2nd respondent deposed that a dispute arose between his firm and that of Nyaundi Tuiyoot Advocates regarding sharing of the funds in the joint interest earning account as the said firm wished to deduct their costs of the successful appeals which were taxed at Kshs. 73,731 a piece on the 23.7.2018.

13. The 2nd respondent reiterated that he held the 50% of the decretal sum paid to him in lien as security for his fees both in the lower court matters as well as the appeal matters whereas the 50% surrendered in court from the joint interest earning account is yet to be apportioned due to the dispute between the parties advocates and that it was thus not true that he had declined to release any funds to the applicant or his children as insinuated.

14. The applicant filed written submissions wherein he asserts that his rights and those of his children were violated by the advocate who received half of the decretal sum on their behalf in 2010 amounting to Kshs 775,000 and retained the whole of it without informing them until when he visited the court and learnt from the Civil Appeals No. 88 of 2011in 2016.The rest of the submissions were reiterations of the facts leading to the application.

15. It should be noted that twice, the matter was referred to mediation without success. The court implored parties to negotiate in vain.

Analysis and Determination

16. I have considered the application, the grounds in support and the depositions as submissions. The issue for determination is whether the application has any merit. It is not in dispute that the Advocate represented the applicant and his children, in a case where damages were awarded to them and appeals preferred to the High Court from the lower Court. It is also not in dispute that half of the decretal sum in all the four cases together with costs assessed were paid to the 2nd respondent advocate as a condition for stay pending appeal while the balance was deposited in a joint interest earning account held by the 2nd respondent advocate herein and the judgment debtor's counsel, which sums of money was later ordered to be deposited in this court.

17. It is also not in dispute that the advocate having represented the client would no doubt be entitled to his legal fees for the professional services rendered whether by agreement or through taxation process.

18. Section 52 of the *Advocates Act* is clear that the provision is applicable only after costs for the advocate against the client are taxed in respect to the matter at issue. In *John Karungai Nyamu & another v Muu & Associates Advocates* [2008] eKLR, and *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co Advocates* [2014] eKLR, it was held, *inter alia*, that an advocate has no right under any law to hold monies that has come to him for onward transmission to his client as lien, and therefore, the continued holding of the client's money by the advocate is illegal.

19. The Court pronounced itself as follows:

> " The matter is very simple. Section 48(1) of the *Advocates Act* stipulates:

"Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint for believing that the party chargeable there with is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month."

It is clear from the foregoing that an Advocate's fees are not due until his Bill of Costs has been served on the client and where it is not settled, until it is taxed by the court. The client has exercised its rights under Order LII rule 4(1)(d) of *Civil Procedure Rules* which stipulates thus:

"O. LII. r.4 (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for-

(a).....

(b).....

(c).....

(d) The payment into or lodging in court of any such money or securities."

The Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien, at least no such law has been cited to the court. What the Advocate is doing by holding onto the Plaintiffs' monies, is irregular and the court cannot condone the same."

20. Thus, an Advocate's fee becomes due and payable upon taxation and or by consent of the parties. To this end, Section 48 (1) of the *Advocates Act* stipulates that:

> " Subject to this Act, no suit shall be brought for recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm has been delivered or sent by registered post to the client..."

21. Under order 52 rule 4 *Civil Procedure Rules*:

> " 4(1) where the relationship of advocate and client exists or has existed, the court may, on the application of the client or his legal personal representative, make orders for
>
> a...
>
> b...
>
> c...
>
> d... The payment into or lodging in court of any such of money or securities."

22. I am further in agreement with the holding by Lesiit J in *John Karungari Nyamu & another* (*supra*), relying on the above provision that:

> " The Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien..." and further rendered that the Advocates fee only becomes due after the Bill of Costs has been taxed by the Court. Before the Bill is taxed, there

is no telling how much is due to the Advocate. The position is therefore that an advocate cannot exercise lien over client's money on basis of a Bill of Costs that is yet to be taxed. It is improper for an advocate to withhold a client's money on account of fees that is yet to be ascertained through the taxation process. The Advocate should release the client's money to him." (emphasis added)

23. Throughout these proceedings, I have not seen any bill of costs or Certificate of Costs issued to the advocate, the 2nd respondent herein for his costs against the client, the applicant herein, and although he claims that they agreed with the applicant to get his fees from the damages payable, what he retained is half and not 30% with costs incurred as per the instructions notes attached.

24. As earlier stated, the advocate received half of the decretal sum awarded to the applicant and his then children way back in 2010 and despite his allegation that he retained the money upon agreeing with the applicant, there is no evidence of any agreement for him to withhold all that money which was paid to him on behalf of the applicant and his children as decree holders. The order for payment of half of the decretal sum was clear that the said money be paid to the plaintiffs/ respondent and the balance thereof be deposited in an interest earning account. This was by consent. The proceedings of the lower court are all in this file and indeed they are clear that the money was to be paid to the plaintiffs. instead, the 2nd respondent received and withheld all the monies without paying to his clients any part thereof.

25. This court also observes that vide a ruling dated 28th march, 2019, Cherere J in Civil appeal 88 of 2011 where this applicant was the respondent, dismissed the judgment debtor's application to have the amount paid in excess in Civil appeal 92 of 2011 be offset from the amount held in the joint account which the respondent / now applicant opposed. The court observed that the applicant herein and his minor children were not parties to civil Appeal No 92 of 2011.

26. I reiterate that the advocate herein withheld the monies due to the applicant and his then children for unnecessarily long period. Had that money been paid into an interest earning account, it would have earned interest. the money was even more than what was left in the interest earning account inclusive of interest.

27. The applicant and his children cannot be hovering in court for all these years with paper judgments yet they are the ones who were injured following the accident. Whereas the advocate has enjoyed part of the decretal sum, the applicant and his children are still waiting more than thirteen years later. That cannot be justice by any means. Justice delayed is justice denied. The applicant and his children too deserve justice.

28. For avoidance of doubt, the letter written by the judgment debtor's advocates dated 17/1/2018 gives a clear explanation of the sums as awarded in the lower court for each plaintiff and the monies retained by the 2nd respondent advocate herein as a condition for stay pending the appeals.

29. Appeals No. 92/2011 and 90/2011 were successful with the High Court reducing the decretal sums from 200,000 to 100,000 in both appeals. However, HCCA 92/2011 was not part of the applicants' series cases. The appellant's counsel had proposed that the amounts paid to the advocate herein be treated as being payment in full to settle the matters save for costs which they were ready to taxed. This was not accepted by the advocate herein hence the stalemate.

30. It is worth noting that recovery of costs from a client by an advocate is subject to the law of limitations. To date, whether in respect of the claim in the lower court or on appeal in the High Court, the advocate has never filed any bill of costs between him and the clients for settlement, even as he retained the monies paid to him on behalf of his clients. This court would have directed him to file such bills for

taxation but from my calculation of the period which has lapsed, such claims are stale and would be unrecoverable.

31. In *Abincha & Co. Advocates v Trident Insurance Co. Ltd* [2013]eKLR the Court stated as follows:

> " An advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in Section 4(1) (a) of the *Limitation of Actions Act*. In this connection see also *Halsbury's Laws of England*, 4th Edition, Volume 28 at paragraph 879 (page 452) which states –
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> "879. Solicitor's Costs. In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action;
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> 1. if a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor;
> 2. if there is an appeal from the judgment in the action, time does not begin to run against the solicitor, if he continues to act as such, until the appeal is decided;
> 3. if judgment has been given and there is no appeal, time runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute.
>
> In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work.
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> A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill, but nevertheless time runs against a solicitor from the completion of the work and not from the delivery of the bill. If some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance." [own emphasis]

32. Thus, an advocate's retainer is subject to the limitation period of 6 years as set out in Section 4 of the *Limitation of Actions Act* which provides as follows:

> " 4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued...
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> a) actions founded on contract...
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> b) actions to enforce a recognizance
>
> c) actions to enforce an award
>
> d) ....
>
> e) ....
>
> (3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt be recovered after the expiration of six (6) years from the date on which the interest became due. "[own emphasis]

33. To date, there has been no taxation of the costs due to the advocate upon the conclusion of the appeals wherein judgment was entered, in respect of HCCA 88/2011 on 26/9/2016; 90/2011 on 26/9/2016; 89/2011; and 91/2011, all on the same day.

34. Even section 52 of The *Advocates Act* on charging order provides that:

> Charging orders
>
> "Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate:
>
> Provided that no order shall be made if the right to recover the costs is barred by limitation". [own emphasis]

35. The judgments on appeal having been delivered over six years ago and the advocate having failed to file his bill of costs for any recovery from the clients, I find that he has no lien and neither can he claim to be entitled to any monies held by the court.

36. I further observe that the bank wherein the fixed deposit account was opened continued charging maintenance fees yet the money was on fixed deposit account and despite reversing some of the charges, other charges were never reversed hence the money in question was depreciating instead of appreciating. In addition, the Bank also charged legal fees from the account including charges for authentication of the court order and it is not clear on what authority they were doing that, since this was an account opened on the authority of the court and therefore only statutory charges such as withholding tax on the interest paid would apply.

37. In other words, the money deposited in the fixed deposit account depreciated over time instead of appreciating and none of the advocates for the parties raised any issue as they debated over the apportionment in view of the two appeals wherein the amounts were reduced by half from shs 200,000 to shs 100,000, plus costs which were taxed at kshs 73,731.

38. It is undisputed fact that the advocate herein received ksh 775, 816 vide cheques No. 000944 as admitted in the statement of account filed on 7/10/2021, while his clients received nothing for all the 13 years that they have been waiting and attending court. In the statement of accounts filed in court, the advocate maintained that he laid claim over all the sums paid to him in partial settlement of the decrees as well as the monies held in the joint fixed deposit account meaning, the claimants had nothing left for themselves. Is this fair and just, would a party who goes to court come out with nothing because all the awards made in their favour has been taken up by the advocate, and if so, where is justice in such a case?

39. In *Simon Maghanga v Joyce Kangogo* [2014] e KLR, Kasango J stated as follows and I agree:

> "No reason has been given why the court should review its earlier order requiring the Advocate to release the money to the Respondent. The mere allegation that the Respondent will not be able to pay the Advocate's fees once the same is taxed is not a legal basis upon which the Advocate should continue holding the client's money. I say so because as already observed, the Advocate's fees only becomes due upon taxation of the bill of costs. Before taxation, the entire amount belongs to the client.
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> The Advocate's bill of costs was filed on 5th December 2012. No reason has been given why the same remains untaxed to date. The Advocate should not be allowed to benefit from her own indolence at taxing the bills. Equity only favours the vigilant, not the indolent."

40. In the same vein, the question is, if the advocate felt that the monies held in the fixed deposit account and now deposited in court together with what was paid to him pending appeal was his, why did not file his bill of costs into court for taxation?

41. For all the above reasons, I find and hold that the applicant has made out a case for this court to order that the monies being held by this court as deposited from the joint fixed deposit account should be released to him and all his children in the proportions proposed by the applicant who, in my view, has suffered enough injustice by the withholding of the said monies yet no bill of costs was filed into court for assessment to determine how much of the said sums of money was due to the advocate herein. The advocate herein cannot now claim that part of the money belongs to the successful appellants as the said appellants have never filed any application in court to recover part of the monies which monies would include what the advocate herein was paid and not just what they deposited in the fixed deposit account.

42. Accordingly, the application dated May 5, 2023 is allowed as prayed. For avoidance of doubt, the payments shall be made as follows to the following persons:

    Shem Oduor Adiedo..... Kshs. 258,000

    Wycliff Teddy Oduor..... Kshs. 170,000

    Shem Oduor Adiedo to receive for Ruth Atieno..... Kshs. 125,000

    Lorine Achieng.....Kshs. 130,000

43. Each party shall bear their own costs of the application.

44. This file is now closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE