



**Nyakina v Rose Obaga t/a Obaga & Co. Advocates (Civil Case  
7 of 2019) [2022] KEHC 17142 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL CASE 7 OF 2019  
REA OUGO, J  
DECEMBER 21, 2022**

**BETWEEN**

**PACIFICA BONARERI NYAKINA ..... PLAINTIFF**

**AND**

**ROSE OBAGA T/A OBAGA & CO. ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The suit was commenced by an originating summons dated August 22, 2019 brought under section 55 and 56 of the *Advocate (Deposit Interest Rules)*, Order 22 Rule (1) & (2), Order 27 Rule (1) and Order 52 Rule 4 subrule (1) & (2), Rule 7 subrule (1) (b) and (2) of the *Civil Procedure Rules* and any other enabling provisions of the law. The applicant seeks the following orders:
  1. That the plaintiff/applicant be allowed to demand and execute upon Advocate Rose Kerubo Obaga t/a, Obaga & Co. Advocates, Town House, 3<sup>rd</sup> Floor Room 8, Kaunda Street Nairobi on the decretal sum arising from the filed Kisii Chief Magistrate's Court Case Number 752 of 2005 in which the Advocate Acted for the applicant but refuses to account the decretal sum paid into her account.
  2. That the plaintiff/applicant having an Advocate client relationship vide a filed Civil Suit, Kisii Chief Magistrate's Court Case Number 752 of 2005 the defendant/respondent Advocate had professional undertaking to the Applicant through her firm of Advocates, Obaga & Co. Advocates and was under obligation to pay in full Decretal sum of Kshs. 1,379,036.00 to the Applicant which plus costs Kshs.208,500.00 total sum Kshs. 1,587,536.00 was paid and since the year 2007 until today is unpaid and the honourable court be pleased to order the payment of the principle with interest Kshs. 3,496,071.14.
  3. That as per the Decree issued on May 20, 2019 the plaintiff's Principal Amount Kshs. 1,288,819.00 and interest Kshs. 2,180,252.14 total Kshs. 3,469,071.14 is due and payable to



the applicant and the defendant/respondent be ordered to pay the full sum to the plaintiff/applicant or make payment to the court such money or securities for the applicant being the current decretal sum claimed and payable to the plaintiff/applicant and should the respondent refuse to pay, a notice to show cause why she should not be arrested and jailed be issued.

4. That costs of this Application be provided for.
2. The application is supported by the grounds on the face and the supporting affidavit sworn by the applicant. According to the Applicant, the respondent acted for her in Kisii Chief Magistrate's Court Case Number 752 of 2005. At the time the suit was instituted she was 7 years of age and the suit was instituted through her father and next friend. The suit in question was for damages following a road traffic accident and was concluded in favour of the applicant. However, an appeal was preferred, Kisii High Court Appeal No 65 of 2007. Before the appeal was set down for hearing, the court directed the appellant to pay part of the decretal sum, Kshs. 788,819 together with costs of Kshs. 218,819. The court further directed that Kshs. 750,941 be deposited in a joint interest earning account in the names of the Advocates of the parties. The appellant in the appeal fully complied with the order of the court by issuing two bankers cheque nos. 023024 and 023025. The appeal was dismissed and the respondent received the full sum of the decretal amount and costs.
3. The applicant deposed that despite the appeal having been concluded in 2012, the respondent has refused to release the sums due to the applicant. She contends that the respondent was obligated to open a trust account in favour of the applicant. The respondent has failed to account for the monies received and any efforts by the next friend to account or release the monies failed. The next of friend in a letter dated March 18, 2011 wrote to the respondent concerning her reluctance in bringing the matter to conclusion. He then wrote to the Advocate's Complaints Commission and his primary concern was that communication with the advocate/respondent was completely strained. The next friend proceeded to file a complaint against the respondent vide the Disciplinary Tribunal Cause Number 56 of 2014 which was dismissed in 2016 for reasons that the next friend had failed to cooperate with the respondent to put the money in a trust account. Despite the efforts made by her father and next friend, she was not paid sums of the decretal amount which has accumulated interest and the total amount is now Kshs. 3,469,071.14.
4. The applicant contends that is now an adult and has discharged her father and next friend and demands payment from the respondent.
5. The respondent in response to the application filed a replying affidavit date May 30, 2022. It was averred that the originating summons filed before the court were incompetent frivolous and abuse of court process on grounds that there was absence of client advocate relationship as the instructions were made by the next friend. Once the applicant reached the age of majority she instructed the firm of Obaga & Co. Advocate to act for her. She also faulted the applicant for failing to comply with the mandatory rules and procedure set out under Order 52 and 37 of the *Civil Procedure Rules* 2010. The next friend neglected to sign the requisite affidavits for investment on monies received on behalf of the minor and the money in the advocate client's current account. She had no capacity to invest the money without the instructions of the next friend and court order pursuant to Order 32 of the *Civil Procedure Rules*. She was always been ready to release the funds subject to payment of her costs. She also contends that the matter before the court is res judicata as the issues were raised before the Advocates Disciplinary Tribunal. The applicant or next friend did not pursue an appeal or review of the decision of the tribunal. She contends that she acted on 3 matters as instructed by the next friend on behalf of the minor; Kisii CMCC No 752 of 2005; CMCC No 347 of 2007; and HCCA No 65 of 2007. The advocates bill of costs vide Kisii Misc Cause Nos 141 and 153 of 2019 were taxed on July 15, 2021. She



advanced that she was also awarded costs in the tribunal. She therefore seeks costs and out of pocket expenses be paid out of the amounts awarded

## Submissions

6. The applicant in her submissions dated July 7, 2022 argued that it has been over 18 years since the respondent received the applicant's money in her account but has neglected to remit to the applicant the money. She relied on Order 52 Rule 4(1) of the [Civil Procedure Rules](#) which provides as follows:

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) the delivery by the advocate of a cash account;
  - (b) the payment or delivery up by the advocate of money or securities;
  - (c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;
  - (d) the payment into or lodging in court of any such money or securities;
  - (e) the delivery up of papers and documents to which the client is entitled.
7. In the case of [Henry Kipkorir Kimutai v Weda Ambrose Otieno & another](#) [2018] eKLR the court relied on the decision of the Court of Appeal in [Harit Sheth t/a K.H. Harit Sheth Advocates](#), Court of Appeal Application No. 276 of 2001 where the court held that:

“with due respect to the learned counsel a professional undertaking is given to an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client ---- it is a bond by an advocate to conduct himself as expected of him by the court to which he is an officer, the advocate is obliged to honour it if only to protect his own reputation as an officer of the court--- accordingly, the advocate who gives his professional undertaking becomes personally bound”

8. The respondent filed submissions before the court on July 29, 2022. She submitted that the amount paid to the advocate on behalf of the applicant is Kshs 1,539,760/-, however her costs should be paid out of the sums received. It was argued that monies received on behalf of the minor can only be handled by the next friend with the approval of the court. The advocate was not the next friend but was acting under the instruction of the next friend who refused to sign requisite affidavits for investments but instead lodged complaints against her.

9. The appellant failed to give instructions relating to the monies received by the advocate. She cited the case of [Gunjan S. Patel v Simon Kamere & Co. Advocates](#) [2011] eKLR where the court held that:

“The law regarding payment of interest on client monies is set out in the [Advocates \(Deposit Interest\) Rules](#) made under Section 83 of the [Advocates Act](#), (cap. 16, Laws of Kenya). Rules 2 to 5 are material, and because of the importance of the relationship of Advocate and Client and in particular, the keeping of accounts, and when interest should be paid on moneys held on client accounts, I set out those rules in full -

- (1) ...
- (2) Except as provided by these Rules an Advocate is not liable by virtue of the relation between the Advocate and the client to account to any client for interest received by the Advocate on



moneys deposited in a client account being moneys received or held for or on account of his clients generally.

- (3) When an Advocate receives for or on account of a client money on which, having regard to all the circumstances (including the account and the length of time for which the money is likely to be held), interest ought in fairness to the client to be earned for him, the Advocate shall take instructions from the client concerning the investment of that money.
- (4) An Advocate is liable to account to a client for interest received on moneys deposited in a client account where the moneys are deposited in a separate designated account.
- (5) In these Rules, "separate designated account" means a deposit account in the name of the Advocate or his firm in the title of which the word "Client" appears and which is designated by reference to the identity of the client or matter concerned."

.....The reason for this rule is, I think clear enough. An Advocates Client account or sometimes referred to as "trust account" is a general non-interest earning account on which an amalgam of all client moneys are deposited and applied or cheques drawn on it, as per the various client's instructions or transactions. According to the custom of banks, interest is paid on term deposits or minimum balances. It is not practicable in a fast moving account with daily transactions to keep term deposits or minimum balances as the sums in the client account will keep fluctuating on a daily basis. That, I think, is the basis of non-liability under rule 2 of those rules.

Rule 3, caters for situations, usually, where large sums of moneys are involved and the transaction is likely to take some time.....

In situations where the client instructs the Advocate to deposit the moneys in an interest earning account, the duty of the Advocate is to deposit the moneys into a "separate designated account", in the Advocate or his firm's name clearly titled "client" and designated by reference to the client or matter in question (rules 4 & 5)."

10. The court in *Gichuki Kingara & Co. Advocates v Charles Mungai Ngure & 6 Others* [2010] eKLR stated:

Has the 4th claimant established a case to compel the applicant to pay interest on the said sum of Kshs.6.3 million? I do not think so. Under Rule 5(a) of The Advocates (Accounts) Rules, the applicant was required to deposit the said sum of Kshs.6.3 million in his client's account. The applicant at the material time, was holding the said amount in trust for the 1st claimant having given a professional undertaking to pay him upon the successful registration of the 4th claimant as the owner of the suit parcels of land. Under Rule 10 of The Advocates (Accounts) Rules, an advocate is prohibited from withdrawing any sum from the client's account which is to the credit of the client for whom the sum is deposited. There is therefore no requirement in law for an advocate to deposit an amount that he is holding pursuant to a professional undertaking that he has given in an interest earning account. Even if the advocate were to deposit the said amount in an interest earning account, under Rule 2 of The Advocates (Deposit Interest) Rules, the advocate is not liable to pay the client the interest that has been earned in respect thereof.

### **Analysis and Determination**

11. The application before the court was canvassed through written submissions and I have considered the written submissions of both the applicant's and the respondent's counsel. The respondent has raised



a defence of res judicata. The principle of res judicata is found in section 7 of the [Civil Procedure Act](#) Cap 21, Laws of Kenya which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

12. The Court of Appeal in [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR quoted with approval the case of [Henderson v Henderson](#) [1843] 67 ER 313 as follows:-

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....”

13. In The [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

14. In the instant case, the question is whether the applicant has satisfied the conditions for the application of the principle of res judicata given the facts of this case. According to the notice from the Disciplinary Committee the substance before them was that the respondent had failed to properly update the client and give proper account. The face of the judgment by the Disciplinary Committee was attached in the respondent’s affidavit as RO4. The issues that have been raised by the applicant herein concern the payment of monies received by the respondent on her behalf together with interest thereon. In the premise, I find and hold that the plea of *res judicata* is not available to the respondent herein.



15. The case before the court raises two issues; whether the applicant has established that there existed a relationship in the nature of advocate client relationship and whether the court can grant the orders under Order 52 Rule 4(1) of the Civil Procedure Rules. The second limb is whether the applicant has established that the respondent should pay interest.
16. In this case, it is not in dispute that the applicant's next friend gave the respondent instructions to represent the child in Kisii CMCC No 752 of 2005. In my view, there existed a relationship of advocate and client between the parties. It is also not in dispute that the minor upon attaining the age of 18 years discharged the next friend. She therefore has the capacity to represent herself and bring forth the current application.
17. According to the decree annexed to the applicant's supporting affidavit, the decretal amount payable to the applicant was Kshs 3,469,071.14. However one of the conditions set out by the court in Kisii High Court Appeal No 65 of 2007, before hearing the appeal challenging the lower court's decision was on deposit of security. According to court order issued on 13<sup>th</sup> December 2007 relating to Kisii HCCA No 65 of 2007, the court directed the appellant therein to pay the applicant Kshs. 788,819/- together with costs of Kshs. 218,819/- and further directed that Kshs. 750,941/- be deposited in a joint interest earning account in the names of the Advocates of the parties. The amounts received by the advocate on behalf of the applicant was therefore Kshs 1,758,579/-. Moronge & Co. Advocates forwarded to the respondent 2 cheques to cover the amount. The amount received by the respondent was therefore tandem with the judgment of the subordinate court that awarded the applicant damages, costs and interest.
18. I therefore find that the respondent received on behalf of the applicant an award of therefore Kshs 1,758,579/-.
19. The applicant also contends that the advocate should pay the interest on the principle up until May 20, 2019. The respondent on the other hand argued that the money it received was held in an advocate client account and earned no interest. She submitted that she did not receive any instruction to deposit the money in a separate interest earning account.
20. Rule 2 of the Advocates (Deposit Interest) Rules made under section 83 of the Advocates Act cap 16 stipulates that except as provided by the Rules, an Advocate is not liable by virtue of the relation between the Advocate and the client to account to any client for interest received by the Advocate on moneys deposited in a client account being moneys received or held for or on account of his clients generally. The court in Meenye & Kirima Advocates v MM (suing on behalf of MFM, a minor) & another [2020] eKLR stated:
 

“The law is clear that an advocate may not be liable to account to a client for interest on an advocate's clients' account. Liability to account will only arise if the client or court specifically instructs the advocate to deposit monies in an interest earning account. In this regard, it was an error on the part of the court to hold that the monies had earned interest.”
21. According to the order made by the court in Kisii HCCA No 65 of 2007, the court directed that Kshs 750,941/- be deposited in a joint interest earning account and a cheque of a similar amount was forwarded to the respondent. The applicant is therefore entitled to interest earned in regard to Kshs 750,941.
22. The respondent in her submissions alleged that she incurred out of pocket expenses other than her costs. However, she has failed to table any evidence of such expenses. Order 52 Rule 4 (3) of the Civil Procedure Rules empowers the court to protect the advocate's lien where the advocate claims costs. The



respondent averred that they had agreed on the costs pertaining to Kisii CMCC No 752 of 2005. She has also filed Kisii High Court Misc Cause No 141 and 153 of 2019 in respect to Kisii CMCC No 347 of 2007 and HCCA No 65 of 2007. In my view, the respondent is entitled to her costs.

23. In the end, I allow the prayers sought in the originating summons dated August 22, 2019 in the following terms:
1. The respondent shall pay the applicant Kshs 1,077,244 that she received vide cheque no. 023024 less her fees as per the Advocates' Remuneration Order.
  2. An order that the respondent pays the applicant Kshs. 750,941/- plus interest.
  3. An order that the respondent do pay to the applicant all money in her custody held on behalf of the applicant failure to which interest to run thereon at court rates from the date of this judgment till full payment.
  4. The applicant shall have the costs of this application.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS AT BUNGOMA THIS 21ST DAY OF DECEMBER, 2022.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

For the Appellant

For the Respondent

Wilkister/ C/A

