



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 462 OF 2012 (OS)**

**MULIMI KIMANTHI.....PLAINTIFF**

**VERSUS**

**FRANCIS KALWA**

**T/A KALWA ADVOCATES.....DEFENDANT**

**J U D G M E N T**

1. By Originating Summons dated 17/07/2012, brought under, **sections 1A, 1B & 3A of the Civil Procedure Act, Order 52 Rule 4(1)(a), (b) and Rule 2 of the Civil Procedure Rules 2010**, the plaintiff claimed from the defendant a sum of Kshs. 350,000/- together with interest at court rate from 15/12/2005.
2. The amount claimed was alleged to be the settlement amount for general damages and costs received from the Insurance Company of East Africa Limited on behalf of the plaintiff in a claim for damages.
3. The plaintiff's claim is that in 2004, he instructed the defendant to act for him and pursue a claim for damages following an accident that occurred on 9/04/2004. The defendant managed to obtain an out of court settlement on behalf of the plaintiff for which he received a settlement cheque of Kshs. 350,000/= on 15/12/2005. Despite as aforesaid, the defendant failed to remit to the same to the plaintiff.
4. In support of his case, the plaintiff swore an affidavit on 17/07/2012 wherein he explained the background to his claim. He produced letters from the defendant to show that the defendant actually acted for him. He further produced correspondence exchanged between his advocates and the defendant showing demand of the amount and the defendant's promise to settle the same.
5. Despite being served, the defendant failed to oppose the suit.
6. The suit was brought pursuant to **Order 52 Rule 4(1) & (2)** which provides: -

***“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) 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.***

***(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.”***

7. **Order 52 Rule 10(2)** provides: -

***“(2) No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.”***

8. On 22/2/2021, the Court directed the parties to file their submissions. The plaintiff filed his submissions but the defendant did not. The Court has duly considered the affidavit in support of the Summons and the submissions on record.

9. It was submitted for the plaintiff that the defendant had confirmed his commitment to settle the claim vide a letter dated 23/03/2012. That vide that letter, the defendant had admitted the plaintiff’s claim against him. That to-date however, the defendant had failed to settle the same. That the relationship between the defendant and the plaintiff was that of a fiduciary nature whereby the defendant had a duty to act in the best interest of the plaintiff.

10. In **Kim Jong Kyu v Housing Finance Company Ltd & 2 others [2015] Eklr**, the Court of Appeal held: -

***“In our legal system, the advocate/client relationship has long been recognized as fiduciary relationship in which the client places his or her confidence, faith, reliance and trust in the advocate, whose aid, advice, opinion or protection is sought from time to time. The client gives the advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the advocate. These duties and responsibilities are provided for in the statute and the rules of conduct as we demonstrate below. The sets of rules that govern the advocates’ professional conduct arise out of the duty that they owe to the court, their clients, and fellow advocates. Section 80 of the Advocates Act stresses the advocate’s duty to a client;***

...

***Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:***

***In addition, the Advocates (Accounts) Rules and the Advocates (Deposit Interest) Rules draw the permissible limits of dealings with funds received on behalf of and for the benefit of a client. The foregoing emphasises that an advocate must at all times act in the best interest of his client; that where he is required to invest he must do so prudently and avoid obvious risks and; that failure to account for funds held by an advocate on behalf of a client is in fact a criminal offence.***

11. This Court reiterates the foregoing here accordingly. In the present case, the defendant failed to respond to the plaintiff’s claim which remain unopposed. The plaintiff gave facts including the cheque number and date the defendant received the amount from the insurance company. That averment was not denied. Further, in his letter dated 23/03/2012 to the plaintiff’s advocates, the defendant asked for more time ‘to compute the same in order to give a firm and acceptable proposal on settlement’.

12. That was clearly an admission that there were sums due from him which he was bound to account for to the plaintiff. The Plaintiff relied on the case of **Kenya Hospital Association v Luis Wahome t/a L. Wahome & Company Advocates [2007] eKLR** where **Azangalala J.** awarded the sums claimed by the Plaintiff together with interest holding: -

***“With regard to the claim for KShs.130,000.00 the advocate has not filed any response thereto. The factual position given by the client in its further affidavit sworn on 4.4.2006 is therefore uncontroverted. There is therefore no reason why the advocate should be permitted to continue holding onto that sum either”.***

13. That position resonates with the present case. The plaintiff has proved his case to the required standard. I enter judgment for the plaintiff against the defendant for KShs.350,000/= together with interest thereon at 12% per annum from the date of filing suit until payment in full. The plaintiff will also have the costs of the suit plus interest thereon.

It is so decreed.

**DATED and DELIVERED at Nairobi this 20<sup>th</sup> day of May, 2021.**

**A. MABEYA, FCI Arb.**

**JUDGE**