



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
MILIMANI COMMERCIAL & TAX DIVISION
MISCELLANEOUS APPLICATION NO. E065 OF 2018
IN THE MATTER OF ADVOCATE CLIENT RELATIONSHIP

AND

IN THE MATTER OF THE ADVOCATES ACT

JOSEPHAT SAMMY KITUKU.....APPLICANT

VERSUS

ROSE OBATA T/A OBAGA & CO. ADVOCATES.....RESPONDENT

ARISING FROM MILIMANI CMCC NO. 2937 OF 2013

JOSEPHAT SAMMY KITUKU.....PLAINTIFF

VERSUS

ROSE OBATA T/A OBAGA & CO. ADVOCATES.....1ST DEFENDANT

DR. DANIEL KARANJA2ND DEFENDANT

RULING

1. The subject notice of motion herein is dated 5th February 2019 brought under the provisions of; Section 3A & 80 of the Civil Procedure Act, Order 45 & 51, Rule 1 and Sections 40, 46(d) and 47 of the Advocates Act Chapter 16 of the Laws of Kenya and all other enabling provisions of the law. The applicant is seeking for orders that;

- a. The Honourable court be pleased to review its order of 27th September 2018 and instead declare the legal fees agreement dated 15th January 2013 invalid;
- b. The Honourable court be pleased to order the scale fees Advocate Client fees of 25% to wit Kshs. 382,452.80 plus VAT of Kshs. 61,192.45 totaling to Kshs. 443,654.25 as the total Advocate client legal fees due to the Advocate thus meaning the client was entitled to Kshs. 1,086,166.05 so that the Advocate do pay the client an extra Kshs. 385,482.05;
- c. Costs of the application be borne by the Respondent in any event.

2. The background facts are that the parties entered into and recorded a consent in court on 27th September 2018, to the effect that;

“By consent, the amount due to the applicant is agreed at Kshs. 700,684.00. The Respondent shall issue two cheques, one for Kshs. 200,000 dated 2nd October 2018 and the other of Kshs. 500,684 post dated 5th November 2018. That the matter be mentioned on 18th

November 2018 to confirm compliance and mark it as settled.”

3. The agreement was entered into pursuant to the filing of a notice of motion application dated 14th September 2018, in which the applicant seeks for orders that;

a. The Honourable court be pleased to order that pending inter partes hearing and determination of the application, the Respondent do transfer the sum of Kshs. 1,289,954 being the decretal amount plus party and party fees less 30% Advocate client fees to Wafula Simiyu & Company Advocates through its client account at Diamond Trust Bank Kenya Limited, Nation Center Branch, Account No. 0112708101 and account for every deduction within forty eight (48) hours of the order;

b. In the alternative to prayer (a) above, the court be pleased to order the Respondent to deposit the entire sum of Kshs. 1,842,791 in court or in an interest earning account between the Respondent and the firm of Wafula Simiyu & Co. Advocates within seven (7) days of the order;

c. The Respondent be ordered to file in this cause a copy of the contentious legal fees agreement signed by herself and the applicant or in the absence her itemized bill of costs for taxation;

d. Costs of the application be borne by the Respondent in any event.

4. Pursuant to the consent recorded on 27th September 2018, the Respondent wrote to the applicant a letter dated 2nd October 2018 forwarding two cheques as follows;

a. Cheque No. 3783 dated 2nd October 2018 for Kshs. 200,000;

b. Cheque No. 3784 postdated 5th day of November 2018 for Kshs. 500,684

The copies of these cheques are attached to that letter. The matter was thus marked as settled.

5. However, the applicant avers that when the consent was recorded, his advocate Mr. Simiyu took the action believing it was in his interest. That he was unwell and unable to attend court. He avers that the consent was based on the legal fees agreement dated 15th January 2013, which the Respondent made Mr. Simiyu to believe it was the true agreement. He avers that the signature appearing on that legal fees agreement is not his. That he signed a handwritten agreement at the Respondent’s office and the one availed to him.

6. The applicant further avers that Mr. Simiyu was not aware of these facts as he was only informed of the legal fees agreement when the court told the parties to negotiate settlement of the matter. He also denied instructing the Respondent to file an appeal in the High Court of Appeal No. 226 of 2017 and an application for stay of execution but abandoned it.

7. That the subject sum of money is the decretal sum he was awarded in the CMCC No. 2937 of 2013 on 17th April 2017 in the sum of Kshs. 1,500,276 plus costs. The amount paid is Kshs. 1,842,791 which the Respondent is holding and has refused to release. He has lodged a complaint with the Law Society of Kenya, whereby the Respondent argued that there is a pending appeal hence the money cannot be released.

8. Further, the Respondent was informed by Mr. Simiyu vide a letter dated 8th August 2018, that she could deduct her legal fees and release the other sums but she declined to respond accordingly. He reiterated that the Respondent has never given him a copy of the legal fees agreement and she should be compelled to produce a copy in court.

9. The matter was canvassed orally and on directions of the court on filing of skeleton submissions. I have seen the applicant’s submissions on record. The Respondent submissions are not on record (to find out if any were filed). There is also no replying affidavit.

10. I have considered the application, the grounds, affidavit in support and I find that the applicant denies signing the subject legal fees agreement referred to herein. The Respondent has not rebutted the same; save to argue that if the applicant wants to set aside the consent, he has to refund the money he has been paid first.

11. However, the applicant argues that it is a mockery of justice and violation of Article 159 of the Constitution to require him to refund the decretal sum he is entitled to. The applicant referred the court to several authorities on the defence of “no est factum” to argue that the document he signed is different from the one availed to his lawyer on record. That he did not know, agree or intend to sign a legal fees agreement where the amount captured is indicated as 30% of the recovered damages. The parties agreed on the ration of 75.25 in favour of the applicant as against the Respondent.

12. In final conclusion, I find that there is no dispute that the parties recorded the subject consent herein, the applicant has applied the same be reviewed and declare the legal agreement dated 15th January 2013 to be invalid. However, I find that, a consent order is contractual in nature. It can only be set aside and/or reviewed on the consent of both parties or on any other grounds upon which a contract can be varied or set aside. This court cannot review a consent order suo moto. I decline to grant that prayer. I also decline to grant the alternative prayer in that, the grant thereof will validate an agreement that is contested. The court will have to establish first which of the two legal fees agreements referred to herein is valid.

13. That means that, the consent herein is set aside as the Respondent did not oppose the same. It is not reviewed. Having set it aside, the

parties revert back to the position they were in before the consent was recorded. That position is to canvass the application dated 14th September 2018. In the meantime, it is not in dispute that the sum which is the subject of this matter is the decretal sum owing to the applicant out of a judgment in his favour. As the parties canvass the pending application, the status quo prevailing remain. Each party shall keep the funds in their possession. The costs of this application shall abide the outcome of the application dated 14th September 2018.

14. It is so ordered.

Dated, delivered and signed on this 29th day of April 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Delivered by email

.....for the applicant

.....for the Respondent

.....Court Assistant