



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO. 9 OF 2010**

**STEPHEN MBURU WAINAINA.....APPELLANT/RESPONDENT**

**VERSUS**

**MARJORIE NJERI KARAU.....RESPONDENT/APPLICANT**

**RULING**

***Brief Background***

1. The Applicant in this matter had appointed Mburu Mbugua of Mburu Mbugua & company advocates to act for her in a negligence claim. He advised the applicant to file the claim out of time in a miscellaneous application. It was filed in the Kiambu Senior Principal Magistrate's court as Miscellaneous Application No 12 of 2007. Upon the demise of Mr Mbugua, the applicant appointed Messrs Wahito & Company advocates to take over the brief, and they concluded it in the Magistrates court. The Applicant was awarded Shs 500,000/= in damages.
2. Upon an appeal against the lower court's decision, the High Court (Ang'awa J) determined that the proceedings in Miscellaneous Application No. 12 of 2007 were a nullity for being conducted in a miscellaneous file. The costs of the appeal as well as the costs of the subordinate court were awarded to the Appellant/Respondent.
3. Upon that turn of events, the Applicant withdrew her instructions from the firm of Messrs. Wahito & Company Advocates and instead instructed the firm of Messrs Kembu Gitura & Co. Advocates, to take over the matter. To the applicant's chagrin, the firm of Messrs. Wahito & Company Advocates sought to have its legal fees in the matters before the subordinate court and the High Court paid by the Respondent/Applicant. The applicant contests the payment demands.

***The Application***

4. The Respondent/Applicant seeks the following substantive orders;

***"a) .....***

***b) The Honourable Court be pleased to call on Messrs. Wahito & Company Advocates to show cause why they should not repay the Respondent/Applicant the costs of the appeal and of the lower court awarded to the Appellant/Respondent herein.***

***c) The Honourable Court be pleased to call on Messrs. Wahito & Company Advocates to show cause why client/advocate costs in the appeal and lower court matter herein should not be disallowed as between the said advocates and the Respondent/Applicant herein.***

***d) Costs of this application be borne by Messrs. Wahito & Co. Advocates."***

5. The application was filed by way of Notice of Motion under **Order 9 Rule 9(a)** and **10** and **Paragraphs 61** and **79** of the **Advocates Remuneration Order, 2009**. The key provisions relied on to obtain the court's direct action on the costs of counsel are those under the **Advocates' Remuneration Order Paragraphs 61** and **79**. They provide as follows:

***"61. Costs improperly incurred by advocate***

***(1) If in any case it appears to the Court or a judge that costs have been incurred improperly or without reasonable cause, or that by reason of any undue delay in proceedings under any judgment or order, or of any misconduct or default of the advocate, any***

*costs properly incurred have proved fruitless to the party on whose behalf the same were incurred, the Court or judge may call on the advocate by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the advocate and his client, and also (if the circumstances of the case shall require) why the advocate should not repay to his client any costs which his client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require*

#### **79. Instructions of judge as to costs**

*The judge may, for special reasons to be certified by him, allow an advocate's costs in any case in which costs are not allowed under the foregoing rules, and may allow costs in addition to the costs provided by this Order, or may refuse to allow an advocate's costs, or may allow costs at a lower rate than that provided by this Order."*

#### **Parties' Submissions**

6. Parties filed written submissions to dispose of the application. The Applicant's case is that she entrusted the firm of Messrs. Wahito & Co. Advocates to offer her proper legal guidance and had no knowledge that they had been proceeding on a wrong file. In the circumstances, the firm failed in discharging their duty of care as professionals and ought to have regularized matters in the lower court. She also lodged a complaint with the Advocates Complaints Commission.

7. She asserts that she has suffered financial loss as well as mental anguish as she now has to file a fresh suit and appoint another firm of advocates to act for her. Further, she contends that the firm Messrs. Wahito & Co. Advocates had their costs taxed against her in taxation proceedings in which she was unrepresented. The Applicant states that the Respondent has on the other hand assessed its costs at Kshs. 109,600/- and those of the appeal at Kshs. 81,015/-.

8. The Applicant contends that the firm of Messrs. Wahito & Co. Advocates should waive their fees and bear the costs of the litigation. She submitted that on the contentious issue of an Advocate's negligence, towards his client and the basis for liability she relies on the case of **Champion Motor Spares Limited v Phadke & Ors (1969) EA 42**, quoted in **National Bank of Kenya Limited v E Muriu Kamau & Another [2009] eKLR**, where the Court of Appeal stated:

*"An advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law consistently arising in practice"*

9. Further referring to the **National Bank case** Counsel highlighted the following statement of the court regarding negligence of an advocate, taking it that the respondent herein was negligent:

*"The law is that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and in tort. Where the advocate is in breach of his contractual duty to his client or where he fails to use proper care towards the fulfilment of the instructions he was given, he is liable in damages in damages so far as his client suffers the loss"*

On the strength of this quotation, counsel submitted:

*"...we therefore humbly submit that this being the case here, the applicant who was the client of Wahito & Company Advocates cannot be made to suffer more loss by being subjected to pay the costs of the appeal and the advocates costs lower court matter because doing so would be subjecting the applicant to punishment for the gross negligence of the advocate*

10. The Respondent opposed the application. The Replying affidavit dated 19<sup>th</sup> June, 2015 was deposed by Wahito Tumuti, an advocate of the High Court of Kenya, practicing in the name and style of Wahito & Company Advocates.

11. Their case is that judgment in Kiambu SPMCC No. 12 of 2007 was entered in favour of the Applicant. The Respondent appealed on some eight grounds, none of which involved the fact that the lower court proceedings was a nullity, as that was not an issue canvassed in the appeal. However, judgment was rendered in favour of the appellant/respondent and costs of the appeal as well as the lower court accordingly awarded to the appellant/respondent.

12. It is contended that the only reason that the appeal succeeded was because the proceedings had been conducted in a miscellaneous application instead of a suit, an issue not raised in the appeal.

13. According to the firm of Messrs. Wahito & Co. Advocates, they advised the Respondent/Applicant to appeal since they did not agree with the reasoning of the court. However, the Respondent/Applicant withdrew her instructions and instructed the firm of Messrs. Kembi Gitura & Co. Advocates. Consequently, the firm of Messrs. Wahito & Co. Advocates sought to discuss the issue of their legal fees with the Respondent/Applicant. However, upon her refusal to discuss the same, they sought to have the bill taxed. Further, that the Respondent/Applicant lodged a complaint at the Advocates Complaints Commission, which proceedings are still pending. Thus the suit herein is prejudicial.

14. The firm of Messrs. Wahito & Co. Advocates further contends that no form of negligence can be attributed to it. It is their case that if there is any form of negligence, then the Respondent/Applicant should file a suit as professional negligence is a cause of action. In that scenario, the Respondent /Applicant will be required to give full particulars of negligence. They associated themselves with the authorities cited by the applicant, and urged that the suit be dismissed with costs.

## **Discussion and Analysis**

15. I have considered the parties' depositions and submissions. The main issue before me is:

Whether costs alleged to be improperly incurred by an advocate, namely Messers Wahito & Company, on grounds that the advocate was negligent are recoverable under this application. The subsidiary issue is whether in light of the complaint filed by the applicant in this matter with the Advocates Complaints Commission, this application lies.

### **Negligence and recoverability of costs**

16. **Section 53** of the **Advocates Act, Cap 16** establishes the Advocates Complaints Commission which consists of such commissioner(s) as are appointed by the President for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof.

17. **Section 53 (4)** and **(6)** of the **Advocates Act**, provides:

***“4. It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee, thereof....***

***6. If the Commission considers that the complainant has suffered loss or damage by reason of the advocates conduct, the Commission may, by order, award such complainant compensation or reimbursement not exceeding one hundred thousand shillings”***

18. Under **Section 53(8)** of the Act, there is provision for appeals to the High Court for parties aggrieved by the decision of the Commission.

19. It is not in dispute that there is a complaint lodged by the applicant with the Advocates Complaints Commission against Wahito Tumuto advocate in respect of the litigation the subject of this application. The respondent attached to his affidavit exhibits “WT7” and “WT8” being letters exchanged between the Commission and Wahito & Company, Advocates.

20. The complaint before the Advocates Complaints Commission does not appear to have been resolved one way or another. Indeed, there is neither any evidence of the outcome of the complaint process nor a conclusive position on it. Perhaps it is pending, or perhaps it is on-going.

21. What is clear, however, is that the basis for the invocation of the provisions of the Advocates Remuneration Order in this application is the alleged *negligence* of the advocates, Messers Wahito & Company. I agree with the respondent that where negligence is alleged, it must be particularised in a suit. I note, however, that Messers Wahito & Company Advocates have not been enjoined as parties to this suit, although negligence is asserted as the cause of the applicant's demand. No trial has been conducted in respect of the alleged negligence, and this court has not been asked to enjoin Messers Wahito & Company.

22. The question that arises in my mind is: can Wahito & Company Advocates be enjoined in this matter: What is the cause of action in the substantive suit? Against whom is the action in the suit? If the action is successful against whom can judgment be enforced? Is the respondent in this application a “necessary party to the action” ie can he properly be enjoined?

23. **Order 1 R10(2)** provides as follows:

***“ The court may at any stage of the proceedings either upon or without application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as a plaintiff or defendant, be struck out and that the name of any person who ought to be joined , whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”***

24. In this case, the substantive suit concerns an appeal against the lower court's decision ( by A. Ongeri SPM as she then was). The Memorandum of Appeal seeks the following orders:

***“a) That the appeal be allowed and the learned Magistrate's judgment, decision and decree be set aside and be substituted by this honourable court's orders.***

***b) That this honourable court do adjudicate and determine the issue of filing suit out of time without proper leave and arrive at a just judgment in light of the evidence on record.***

***c) ALTERNATIVELY, the honourable court do order a re-trial of this suit by the lower court for the suit to be disposed”***

25. There is no plaintiff or defendant in the substantive suit under which the present application is anchored; only an appellant and respondent. The respondent therein is Marjorie Njeri Karau. As such should the appeal be successful, the judgment would reverse the lower court's decision and be enforced in her favour in terms of the orders sought in the memorandum of appeal. Thus, the judgment would not be connected or associated in any way to the respondent in the present application. The claim against the respondent in the present application, therefore, does not properly lie in the suit herein, or at all.

26. In **Amon v Raphael Tuck & Sons Ltd (1956) 1AllER 273** the court held, inter alia, that:

*“The party to be enjoined must be someone whose presence is necessary as a party. What makes a person a necessary party ..... The only reason which makes a person a party to an action is that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party*

*It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly and legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally – that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested.”* (emphasis supplied)

27. Is Wahito & Company a “necessary party”? Does the firm fit the legal criteria for a necessary party in this matter? Can they be enjoined in the appeal? A necessary party is clearly a person who ought to be enjoined as a party and in whose absence no effective decree can be passed in a proceeding. If such necessary party is not impleaded, the suit may be a non-starter (See Mabeya, J in **Jan Bolden Nielsen v Herman Philipus Steyn & 2 Others [2012]eKLR**). To my mind Wahito & Company are not a necessary party to the suit, and cannot be enjoined even if the court were minded to do so in exercise of its discretion.

28. In light of the foregoing, and since there is no indication that the dispute resolution method elected by the applicant before the Advocates’ Complaints Commission is exhausted, there is no basis for this application to be before the court within the appeal herein.

29. I further note that in the **National Bank case** cited by the applicant as the basis for premising their application on negligent conduct, the advocate there was sued directly as a party. Here, no suit has been filed against the respondent herein. He is dragged in during the prosecution of a substantive appeal. That is improper and is an abuse of the appellate process.

30. The upshot is that I hereby dismiss the application with costs.

31. Orders accordingly.

**Dated and Delivered at Nairobi this 24<sup>th</sup> Day of May, 2017**

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**RICHARD MWONGO**

**PRINCIPAL JUDGE**

Delivered in the presence of:

1.....for the Applicant

2.....for the Respondent

Court Clerk.....