



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 105 OF 2016 (OS)**

K M (Minor Suing through his mother next friend)

R A N..... PLAINTIFF/APPLICANT

VERSUS

LYDIA NTHENYA

JOSEPH TARUS T/A

TARUS & COMPANY ADVOCATES ..... DEFENDANTS/RESPONDENTS

**RULING**

1. Through an Originating Summons dated 21<sup>st</sup> October, 2016 brought under Order 52 rules 4(1) and (2) of the Civil Procedure Rules, the applicant seeks the following orders:-

(i) That the defendants/respondents as the advocates of the plaintiff in Chief Magistrate's Civil suit No. 2451 of 2008, K M (minor suing through his mother and next friend) R A N versus Hezron Chua, the owner of motor vehicle KZQ 022 Mitsubishi lorry to deliver the cash account of Kshs. 620,134/- received on behalf of the plaintiff/applicant which judgment was made on 17<sup>th</sup> December, 2014;

(ii) That the defendants/respondents as the advocates of the plaintiff in CMCC No. 2451 of 2008, Mombasa to make payment or delivery of the sum of Kshs. 620,134/- to the applicant herein;

(iii) That the defendants/respondents to deliver to the applicant a list of monies which the respondents have in their possession or in control on behalf of the applicant which monies the respondents received on behalf of the applicant pursuant to the judgment which was delivered on 17<sup>th</sup> December, 2014;

(iv) That the Honourable court do order that the respondents comply within fourteen (14) days from the date of issuing of this order in default of which judgment will be entered in favour of the plaintiff as against the defendants; and

(v) That the costs of this application be borne by the defendants/respondents.

2. The application is supported by the affidavit of the applicant, R A N filed on 21<sup>st</sup> October, 2016. The

respondents entered appearance on 26<sup>th</sup> October, 2016 and filed a notice of preliminary objection on the same day. The respondents on 4<sup>th</sup> November, 2016 filed grounds of opposition under the provisions of Order 51 rule 14(1) of the Civil Procedure Rules, 2010. The 2nd respondent filed a replying affidavit sworn on 7<sup>th</sup> April, 2017 to oppose the application. The applicant thereafter filed a supplementary affidavit on 22<sup>nd</sup> May, 2017.

3. It was the applicant's submission that her child was involved in an accident and a case to wit CMCC No. 2451 of 2008 was filed where a sum of Ksh. 686,075.70 was paid to the respondents' law firm on 6<sup>th</sup> August, 2015. She stated that the said respondents have only paid her Kshs. 6,000/= for transport. She prayed for justice to be done and for her application dated 21<sup>st</sup> October, 2016 to be allowed.

4. The 2nd respondent who represented himself as well as the 1st respondent opposed the application and stated that it is maliciously meant to embarrass them. He submitted that subsequent to the filing of Mombasa CMCC No. 2451 of 2008, the applicant got a Judgment for Kshs. 500,000/- general damages, special damages of Kshs. 10,450/- plus costs giving a total of Kshs. 620,134.00 which he stated had not been paid to date. He indicated that the said amount was to be transmitted to their law firm by Munyithya Mutugi Umara, Muzna & Co. Advocates.

5. Counsel further submitted that when the payment was delayed, he called the applicant whom he advised to file a declaratory suit against the insurance company. She paid Kshs. 20,000/= deposit which was not adequate. The 2<sup>nd</sup> respondent submitted that he was to top up the balance. They issued a notice to the insurance company and prepared a plaint for filing but before they did so, they were served with an Originating Summons requiring them to account for money received.

6. In reference to a copy of the cheque attached to the applicant's supplementary affidavit, Mr. Tarus informed the court that it was drawn in the name of Joseph Munyithya Mutugi & Co. Advocates, who were the insurance company's Advocates. The respondents prayed for the Originating Summons to be dismissed.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if the respondents were paid the decretal sum and costs due to the applicant.

7. The provisions of Order 52 rules 4(1) and 2 of the Civil Procedure Rules on which this application is premised provides as follows:-

***“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 into 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.”***

8. A clear reading of the provisions of Order 52 rule 4(1) of the Civil Procedure Rules places the onus on

the applicant to show that his/her Advocate did receive monies which he/she has failed to account for or to transmit to a litigant. A client/advocate relationship must have been in existence for the orders sought to be granted. In the present case, there is no doubt that the respondents' law firm represented the applicant in Mombasa CMCC No. 2451 of 2008. What is in doubt is whether the respondents' law firm received the sum of Kshs. 620,134/- on account of the applicant. They denied having received the said sum of money.

9. The applicant through her supplementary affidavit exhibited a copy of cheque No. 100026 drawn in favour of Joseph Munyithya Mutugi & Co. Advocates for the sum of Kshs. 686,075.70. The cheque was drawn on 6<sup>th</sup> August, 2015 by Kenya Orient Insurance Limited. The missing link in the applicant's allegation is the nexus between the said cheque and Mombasa CMCC No. 2451 of 2008. The applicant has failed to show that a cheque for the amount due to her was drawn by the law firm of Joseph Munyithya Mutugi & Co. Advocates in favour of Tarus & Company Advocates. The applicant failed to attach to her supporting or supplementary affidavits documents that would have shown that there was transmission of the decretal amount to her Advocates, who then failed to remit the money to her.

10. For the said reason, I find the application before me to have been filed prematurely. I hereby strike it out. The applicant will be at liberty to file a fresh application if she so pleases. Each party will bear its costs of the application.

**DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of November, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Plaintiff/applicant present in person

Mr. Kangogo for the defendants/respondents

Mr. Oliver Musundi - Court Assistant