



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 27 OF 2016 (O.S)

MARY NZEMBI SIMON APPLICANT

VERSUS

J. M. MAKAU & CO. ADVOCATES.....RESPONDENT

RULING

1. The applicant Mary Nzembi Simon has been duly authorized by Joseph Patrick Mutia to bring the present application on their behalf. The application is anchored on the provisions of order 52 rules 4(1), (3) and order 36 rule 12 of the Civil Procedure Rules.

2. The applicant seeks the following orders:-

(i) That the defendant/respondent as the Advocate of the plaintiffs in CMCC No. 2021 of 2010, Mary Nzembi Simon and Joseph Patrick Mutia vs Kilatya. Theophilus, Kinyala Mautia and Joshua Munene to deliver the cash account of Kshs. 916,440 which they received on behalf of the plaintiffs/applicants. The respondent paid only Kshs. 110,000/= to the plaintiffs/applicants leaving a balance of Kshs. 806,440/= unpaid;

(ii) That the defendant/respondent issued another payment of Kshs. 50,000/= cheque No. (sic) 406420 dated 30th September, 2015 but the defendant later stopped the payment of the said cheque to date;

(iii) That the defendant/respondent as the advocate of the plaintiffs in CMCC No. 2021 of 2010, Mombasa, to make payment or delivery cash account to the plaintiffs/applicants herein;

(iv) That the defendant/respondent to deliver to the applicant a list of monies which the respondent has in his possession or control on behalf of the applicants which monies the respondent received on behalf of the plaintiff/applicants pursuant to the judgment delivered on 26th June, 2013;

(v) That the Honourable court do order that the respondent complies with the above within 14 days from the date of the issuing of this order in default for which judgment be entered in favour of the plaintiffs as against the defendant /respondent; and

(vi) The costs of this application be borne by the defendant/respondent.

3. The application is supported by the affidavit of Mary Nzembi Simon filed on 24th March, 2016. The respondent filed a replying affidavit on 19th June, 2016 opposing the application. In paragraphs 4 and 5 of the said affidavit, the respondent deposes that the applicant had been paid the sum of Kshs. 100,000/= out of Kshs. 203,653/= that was due to her. In paragraph 11 thereof, the respondent avers that the amount of Kshs. 373, 941.000 is due to the applicant's two children, which the respondent is ready and willing to settle save for the matter pending at the Advocates Complaints Commission and the applicant's unwillingness to an amicable settlement.

ANALYSIS AND DETERMINATION

The issue for determination is if the respondent should account for moneys received on behalf of the applicant and settle the outstanding balance if any.

4. This court notes that the respondent paid the applicant Kshs. 383,960/= when this application was waiting to be heard. The respondent raised a legal issue in his affidavit in paragraph 2 to the effect that J.M. Makau & Co. Advocates is not a legal entity capable of suing being sued. Counsel attached a copy of the certificate of registration of his law firm marked as JMM-1 to show that he is the sole proprietor of J.M. Makau & Co. Advocates.

5. In her affidavit dated 24th March, 2016 the applicant in paragraphs 5 and 6 deposes that she had been paid a total sum of Kshs. 110,000/= and that the respondent who represented them in the lower court had refused to pay her full proceeds of Civil suit No. 2021 of 2010 thereby causing her serious mental anguish and untold suffering.

6. At the hearing of the application, Mr. Were submitted that the respondent had paid Kshs. 610,960/= to the applicant. The respondent denied having received the said amount. In its written submissions filed on 13th June, 2016, the respondent made reference to the case of **Mehul Nemchand Haria vs Hombe Saw Mills & Another** [2013] eKLR where the court of Appeal held thus:-

“It is clear from rule 1 of order 29 (now order 30) that where a firm has two or more partners, a suit can be instituted in the firm's name. If however, the firm is a sole proprietorship, the rule does not apply and consequently a suit against a sole proprietorship, must be in the name of the proprietor as opposed to the name of the firm. The proprietor may be described as trading in the name of the firm but this does not mean that the suit is against the firm as the name of the firm is merely descriptive.”

7. Flowing from the foregoing Court of Appeal decision which is binding on me; I find that the application filed on 24th March, 2016 is fatally defective for failure to include in the pleadings that the party being sued is John Muneeni Makau trading as J.M. Makau & Co. Advocates. For the foregoing reasons, the application herein is struck out. Each party shall bear its own costs.

It is so ordered

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of October, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Applicant in person

Mr. Were holding brief for Mr. Makau for the respondent

Mr. Oliver Musundi Court Assistant