



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 685 OF 2008 (O.S)

IN THE MATTER OF THE ADVOCATES ACT

BETWEEN

GRAHAM ALDER

PROF. ALBERT MUMMA

NICK EVANS

**(COMMITTEE MEMBERS OF THE KAREN
LANGATA**

DISTRICT ASSOCIATION suing on their own behalf and on

behalf of all other members of the Association).....PLAINTIFFS

VERSUS

STEPHEN MUSALIA MWENESI

**T/A S. MUSALIA MWENESI ADVOCATES.....
.....DEFENDANT**

RULING

INTRODUCTION

1. The Application before the Court is the Plaintiffs' Originating Summons dated **18th November 2008** and filed on **20th November 2008**. It is expressed to be brought under the provisions of **Order LII Rule 4** of the Civil Procedure Rules. It sought the following orders:-
 1. *The Defendant do forthwith surrender to the Plaintiffs the files listed in the annexed affidavit of Graham Alder.*
 2. *The Defendant do forthwith surrender to the Plaintiffs any other files or documents in his possession relating to the Plaintiffs.*

3. *The Defendant do forthwith cease from acting as the Plaintiffs' Advocate in all matters connected with the Plaintiffs.*
4. *The Defendant do deliver such cash accounts in respect of the payment of party and party costs in all matters in which the Defendant was instructed by the Plaintiffs.*
5. *The Defendant do pay the Plaintiffs the funds due to them.*
6. *The Defendant do pay the costs of this Summons.*

THE PLAINTIFFS' CASE

2. The application is supported by the Affidavit of GRAHAM ALDER, the 1st Plaintiff and sworn on **18th November 2008**. The Plaintiffs also filed written submissions dated 16th February 2015 on even date in support of the application.
3. The 1st Plaintiff avers that in or about the year 1995, the Karen Langata District Association (herein the Association) through the members of the committee instructed the Defendant to represent it in various matters including suits filed on its behalf. There was a written agreement to this effect and the parties operated on the basis of the retainer.
4. The Plaintiffs' case is that differences started arising between the Association and the Defendant when the Association informed him that it could no longer afford to pay the monthly retainer of Kshs. 60,000/=. Thereafter the Association withdrew its instructions from the Defendant. (*A copy of the said letter is attached to the application*) According to the Plaintiffs, the Defendant continued to appear in Court purporting to represent them, despite the official communication to him by the Plaintiffs withdrawing instructions. This prompted them to write another letter dated 25th November 2005 terminating his instructions.
5. It is the Plaintiffs' contention that subsequently, the Defendant declined to release all the Association's files to it or its representative despite persistent demand. This, according to the 1st Plaintiff has seriously prejudiced the Association and its members for lack of information which the Defendant has declined to provide. It is further the Plaintiffs' contention that despite the withdrawal of instructions, the Defendant continues to appear in Court causing them great prejudice. The 1st Plaintiff averred that there are matters that had come to a conclusion and party to party costs paid to the Defendant who declined to account for the same to the Association.
6. It is the Plaintiff's case that it is unjust for the Defendant to continue to hold the Association's files and demand fees that are not outstanding.

THE DEFENDANT'S CASE

7. In opposition to the application, the Defendant filed a Replying affidavit sworn by himself on **7th May 2009** as well as written submissions dated **5th March 2015** and filed in Court on **6th March 2015**.
8. The Defendant averred that his firm was holding the Association's files as lien for fees on Advocate client basis. He further averred that he was not aware of any party and party costs paid in any of the matters the firm was handling for the Association.
9. It was the Defendant's contention that he was not aware of any matter in which the firm had acted without instructions. He maintained that they had continued to represent the interests of the Association in circumstances where they had full instructions and remained by law the Advocates on record.
10. It is the Defendant's case that the Association has persisted in refusing to pay reasonable fees for services rendered. It is further the Defendant's case that Order III Rule 9A of the Old Civil Procedure Rules (Currently Order 9 Rule 9 of the Civil Procedure Rules, 2010) was to deal with the kind of mischief that the Association is now involved in where clients after getting a Judgment in their favour, change advocates or seek to act in person to deny the Advocate who had been on record his fees.

LEGAL ANALYSIS

11. I have considered the application as well as the written submissions by Counsel in support and in

- opposition to the application. Having done so, I take the following view of the matter.
12. It is not in doubt that the Advocate client relationship between the parties herein has deteriorated or there is none at all.
13. The following are the issues for determination:-
- **Whether the Defendant should cease from acting as the Plaintiffs' Advocate in all matters connected with the Plaintiffs.**
 - **Whether the Defendant should surrender to the Plaintiffs the files in his possession relating to the Plaintiffs.**
 - **Whether the Defendant should deliver such cash accounts in respect of the payment of party and party costs in all matters in which he was instructed by the Plaintiffs and subsequently pay the Plaintiffs the funds due to them.**
14. On the first issue, it is the Plaintiff's case that the Defendant has declined to release their files on grounds that he is holding the same as lien for unpaid fees. Indeed this is the Defendant's position in his Replying affidavit. His contention is that the Plaintiffs have persisted in refusing to pay his fees. The Defendant also submitted that the Plaintiffs ought to have filed and served him with a Notice of intention to act in person or a Notice of Change of Advocates before calling for their files. I however do not know of any law that states that an Advocate should hold onto a Client's files until they are served with a Notice of Change of Advocates or a Notice to act in person.
15. The Plaintiffs' submission is that they settled the Defendant's fees under the retainer agreement before it was terminated. Thereafter, and there being no agreement on fees, it is the Plaintiffs' case that it is preposterous for the Defendant to be holding onto their files. It is further their submission that the Defendant having failed to move to tax his fees has acted indolently and maliciously to the detriment of the Plaintiff and should therefore immediately release the files allegedly held as lien for unpaid fees.
16. From the foregoing facts, it does not seem to me that the Plaintiffs are disputing the fact that the Defendant is entitled to some fees. Their contention is that the Defendant has not taken steps to ascertain the same. Indeed, the Defendant did not specify how much fees was owed to him and this Court has no jurisdiction to determine the same as it falls within the precincts of the taxing master. Having said that, what is left for this Court to determine is whether the Defendant can hold onto the Plaintiffs' files as lien for unpaid fees.
17. The general rule is that an advocate has a right of lien over the Client's property. As already stated, the Defendant has not shown that it filed a Bill of Costs to recover his fees from the Plaintiffs. In the current case, since the issue of how much fees are payable to the Defendant is disputed, the same could only become due after it was taxed by the court. As there was no taxation, there is no amount due capable of attracting lien to the client's files or property if any. In the case of *Simon Njumwa Maghanga Vs Joyce Jeptarus Kagongo t/a Chesaro & Co. Advocates (2014) eKLR* the Court found that an advocate's fees is only due after taxation.
18. In view of the foregoing, the advocate's right of lien in this matter has not arisen or the same has not been substantiated. However, as earlier stated, the Plaintiffs seem not to dispute that the Defendant is entitled to some legal fees. In fact in its submissions, the Plaintiff has offered to give an undertaking that they will settle the Defendant's costs once it files and taxes its bills in Court. Therefore, to strike a balance between the interests of the parties in this matter, the files held by the Defendant will be released on the basis that the Plaintiffs offers security for the amount demanded in the Bill of Costs, if any.
19. I now turn to the second issue on whether the Defendant should cease from acting for the Plaintiffs. As much as the Plaintiffs maintain that they had withdrawn their instructions to the Defendant to act on their behalf, it seems the Defendant believed that he still had instructions to handle the Association's matters. The Plaintiffs' submission is that they clearly withdrew instructions from the Defendant in the year 2005 by a letter dated 25th November 2005 and marked GA 3. However, the letter marked GA 3 is dated 22nd November 2002. I have perused the file and cannot place my hands on the letter dated 25th November 2005.
20. Nevertheless, in the letter dated 22nd November 2002 the Plaintiffs informed the Defendant that they could no longer afford to pay a monthly fee to retain his services. The Plaintiffs however stated to the Defendant that they would continue to engage his services but on a case to case basis.

To my understanding the Plaintiffs did not require the Defendant to cease acting for them in the matters he was already handling. If that was their intention, then the same was not unequivocally addressed in the letter of withdrawing instructions. Nonetheless, that seems to be besides the point given the current circumstances. The Advocate client relationship between the parties herein has definitely been severed. It is highly unlikely that the Defendant would be in a position to continue acting for the Plaintiffs. It is obvious that with the broken relationship there can be no instructions forthcoming. As for the Plaintiffs, their position is clear, they want the Defendant to cease acting as their Advocate in all matters connected with the Plaintiff.

21. In my view, for the Defendant to cease to act in the current circumstances does not require an order of this Court. What is required is for the parties herein to take the necessary steps to realise their rights. What is the prudent thing for an advocate to do if his or her relationship with the client has been severed or strained for whatever reasons? In my view, the only logical thing for such an advocate to do is to cease acting for such a client and hand over the matters to the client or a representative of the client's choice as appropriate.
22. On the other hand, I believe the Plaintiffs should be aware of or at least have a record of the matters in which the Defendant was acting on their behalf. In that case, all they need to do is to file a Notice of change of Advocates in the respective matters or a Notice to act in person. (*See Order 9 rules 5, 6, 8 & 9 of the Civil Procedure Rules*) Further, they can peruse the Court file to find out the status of such matters. There is no evidence on record to the effect that the Plaintiffs have taken such steps. In that case, the order sought for by the Plaintiff to the effect that the Defendant cease acting for them is premature as the Plaintiffs have not explored the avenues provided for in law.
23. Last but not least, is the issue of party and party costs. It is the Defendant's case that although there are matters that had been concluded it had not received any party and party costs. There is no way the Court can establish that fact. However, the Plaintiffs have also not specified the matters in which they allege such costs were paid or provided proof to that effect. As provided for under Section 107 of the Evidence Act, he who alleges must prove. Therefore an order by this Court to the effect that the Defendant do deliver a cash account of the payment of party and party costs in all matters will be speculative and an order in vain. In any case, there is no evidence or status report before this Court to show whether or not such party and party costs were paid. In that same vein, this Court cannot order the Defendant to pay the Plaintiffs the funds due to them yet the said funds have not been substantiated.

DISPOSITION

24. In the circumstances foregoing, the upshot of this court's ruling is that the Plaintiffs' Originating Summons dated **18th November 2008** and filed on **20th November 2008** is allowed in the following terms:-
 - a. ***The Defendant to file a Bill of costs within thirty (30) days from the date of this ruling failure to which the files shall be immediately released to the Plaintiffs without deposit of security.***
 - b. ***The Plaintiffs to deposit security for the amount demanded in Court pursuant to the Bill of Costs filed in (a) above.***
 - c. ***The Defendant do surrender to the Plaintiffs the files listed in the annexed affidavit of Graham Alder subject to orders (a) and (b) above.***
 - d. ***The Defendant do surrender to the Plaintiffs any other files or documents in his possession relating to the Plaintiffs subject to orders (a) and (b) above.***
 - e. ***Each Party to bear their own costs of the application.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Nyagah for for Plaintiff

Mr. Onindo for Defendant

Teresia – Court Clerk