



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE NO.19 OF 2014 (O.S)

IN THE MATTER OF ADVOCATES/CLIENT RELATIONSHIP

BETWEEN

PETER FURMETZ.....PLAINTIFF

VRS

JAMES G. MOUKO t/a MOUKO & COMPANY ADVOCATES...DEFENDANT

RULING

In his Originating Summons dated 22nd October, 2014, the applicant is seeking the following main order:-

That the defendant James G. Mouko & Company Advocates do pay the plaintiff Peter Furmetz the sum of Ksh.220,000/- being refund of money received by the defendant from the plaintiff for purposes of instituting in court a civil case for the recovery of refund of purchase price.

The summons are supported by the applicant's affidavit sworn on the 22nd October 2014. The defendant filed a replying affidavit sworn on 11th June 2015. Parties agreed to determine the summons by way of written submissions. A brief summary of the submissions by counsel for the plaintiff is that the plaintiff instructed the defendant on 7/10/2013 to demand ksh.2.5 million. Ksh.20,000/- was paid for purposes of opening a file by the defendant. On 30th October, 2013, the plaintiff paid ksh.220,000/- to the defendant since there was no response to the demand letter. The defendant failed to file a suit despite having been paid ksh.220,000/- which amount included court filing fees of ksh.70,475/-. By 21st March, 2014, no suit had been filed and the plaintiff withdrew instructions.

It is further submitted that the defendant was at fault as there was unreasonable delay in carrying out the plaintiff's instructions to file the suit. The plaintiff's new advocates subsequently filed the suit on 9th April, 2014. The defendant does not explain by what time the pleadings for the suit were ready. No case number was allocated to the plaint allegedly prepared by the defendant. The plaintiff withdrew instructions in writing on 21st March, 2014 and the response was made two months later on 13th May, 2014.

It is contended that, the money paid to the defendant was not used for the intended purpose and should therefore be refunded. The defendant has not denied receipt of the money totaling ksh.240,000/-. The defendant is entitled to recover the money since the service were not rendered.

On his part, the defendant through his counsel maintains that the instructions were carried out. There are several issues being raised and the matter cannot be decided summarily. The defendant prepared the

court papers for filing and the plaintiff signed the verifying affidavit. Before the defendant could file the suit, the plaintiff's wife, one Rehema, informed the defendant that the name of the intended defendant in the suit that was to be filed was Wangui instead of Wanjiku. This necessitated the amendment of the pleadings. The defendant was ready to file the suit when the plaintiff called him informing him that he had consulted a Nairobi Advocate who had advised him properly and the defendant was stopped from filing the suit. The plaintiff withdrew instructions when the case had been allocated a case number. It is also contended that at one time the plaintiff travelled out of the country. The plaintiff later reported the matter to the police and the defendant recorded his statement on 22nd May 2014. Counsel for the defendant cited the Case of **Waki Commissioners v Mohamed Bin Umeya Bin Abdulmaji Bin Mwijabu [1964 KLR 1984]**. It is contended that a claim by Originating Summons was intended to be one based on simple matters without the expense of a full trial. The current matter is not that simple.

The current Originating Summons are brought under Order 52 rule 4 of the Civil Procedure Rules 52 (4) (1) (a) and (b) are cited on the title of the summons. The rule empowers the court to order an advocate to deliver a cash account or pay up money or deliver securities being held by the advocate. It is clear that the relationship between the defendant advocate and his former client did exist but instructions were withdrawn. The main issue for determination by the court is whether the defendant totally failed to carry out the instructions and should therefore refund the entire amount. The plaintiff is demanding a refund of ksh.220,000/- although ksh.240,000/- was paid. According to the plaintiff, the sum of ksh.20,000/- paid in advance catered for the demand letter and opening of a file.

It is the plaintiff's position that since the instructions were not carried out, the entire amount should be refunded. On his part, the defendant is only willing to refund a sum of ksh.70,000/- being the court filing fees. It is the defendant's stand that he carried out the instructions and the plaint was allocated a court case number. I have seen the defendant's letter dated 13th May, 2014 where it is indicated that the case number was 67. I would presume that it was 67 of 2014 since the documents annexed by the defendant show that the initial documents prepared in 2013 were not filed in court. There is a draft plaint whose title is for the year 2013 but it was dated 2014 at page two. The verifying affidavit was done in 2013. It was later amended on the title to read 2014. The list of documents and list of witnesses were all prepared in 2013.

This court is being called upon to decide as to whether the defendant should refund the entire amount or not. Order 52 rule 4 (3) states as follows:

“ (3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit.”

The defendant herein alleges that he did some work. It is clear that even if the suit was not filed, instructions were given to the advocate. The question then is whether legal fees is only payable to an advocate who carries on the instructions to the satisfaction of his client or the instructions *per se* triggers the payment of some amount of money as legal fees for that instruction even if the work is not subsequently done. The current dispute is not one that can be decided summarily at this stage. The plaintiff maintains that the instructions were not carried out all while the the defendant contends that some work was done. The court cannot ignore the defendant's contention as doing that would be making an arbitrary decision. There is need for the court to assess the work purportedly done by the defendant. The court can as well evaluate the alleged work done by the defendant and make a finding that no work was done. However, this court cannot at this moment decide that no work was done. As I have already indicated, the taking of instructions entails payment of a certain fee. This means to keep in check clients who hope from one legal office to another giving instructions and quickly withdrawing such instructions after having received a different legal opinion from another counsel.

The defendant herein is claiming his costs. This court cannot assess his costs as that is the duty of the taxing master who is the Deputy Registrar. Order 52 rule 4 (3) allows the court to make an order for taxation. Section 47 (1) of the Advocate's Act states as follows:

“ (1) The jurisdiction of the court to make orders for the delivery by an advocate of a bill of costs, and for the delivery up of or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the court.”

In order to resolve the dispute, it is prudent to have the costs claimed by the defendant evaluated and assessed by the Deputy Registrar. The taxing officer will hear the submissions of all the parties and make a ruling as to whether any amount is payable to the defendant and if so, how much. Thereafter, the plaintiff can decide, depending on the outcome of the taxation, decide to either amend, withdraw or make any other action in relation to this matter.

In the Case of **Severino Ambale Makoba v Joginder Singh Behan [1976 – 1980] 1 KLR 854**, the appellant had instructed the respondent in a court case. The case was dismissed. The appellant claimed a refund of the legal fees of ksh.2,000/- paid to the advocate. The suit was dismissed by both the Lower Court and High Court on appeal to the Court of Appeal. Justice Madan, J. A noted as follows:

“The important question is whether a client who has paid an agreed fee under an oral agreement to an advocate is entitled to claim a refund of it? In my opinion he is not in a case like the present one where there was good consideration for it in the shape of professional services provided by the advocate as it came out in the evidence in the Court of the Senior Resident Magistrate. It would be manifestly unjust to compel an advocate who has rendered services to his client to refund the fee paid to him by a client because it was not paid under an agreement in writing; section 49 does not intend restitution in the circumstances as they existed in this case.”

Given the pleadings herein, I have come to the irresistible conclusion that the plaintiff's claim cannot be determined summarily. Order 52 (4) (1) (d) allows the court to order payment of money or delivery of securities to the court. The defendant is willing to payback ksh.70,000/-. I do proceed and make the following orders:

- i. The defendant to file and serve his Advocates/Clients bill of costs within twenty one (21) days hereof.
- ii. The defendant to deposit in court a sum of ksh.120,000/- (One Hundred and Twenty Thousand Shillings Only) within sixty (60) days hereof.
- iii. The Originating summons herein shall be mentioned after the defendant's bill of costs has been taxed.
- iv. Costs shall follow the outcome of the final determination the Originating Summons.

Dated, signed and delivered at Malindi this 12th day of November, 2015.

SAID J. CHITEMBWE

JUDGE