



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APPLICATION NO. 50 OF 2013

SIMON NJUMWA MAGHANGA.....PLAINTIFF/RESPONDENT

-VERSUS-

JOYCE JEPTARUS KAGONGO T/A CHESARO & CO. ADVOCATES....DEFENDANTS

RULING

INTRODUCTION

1. **Joyce Jeptarus Kagongo** (hereinafter “**the Advocate**”) has by Notice of Motion dated 24th January 2014 brought under **Sections 1A & B, 3, 3A, 63 (b) and (e)** of the Civil Procedure Act sought this court's order as follows:

- i) That this application be certified urgent and its service be dispensed with in the first instance.**
- ii) That there be stay of execution of orders made on 28th November 2013, prior to and subsequent thereto, pending hearing and determination of the Application.**
- iii) That the court do order that the bill of costs dated 30th November 2009 be taxed first prior to execution of the orders.**
- iv) That the court be at liberty to grant relief(s) and orders it deems necessary and expedient to meet the ends of justice.**
- v) That costs of the Application be provided for.**

2. Prayers 1 and 2 of the Application are spent. The Application is supported by the Affidavit of the Advocate sworn on 24th January 2014 and on the following grounds:

- i. That the Applications were dismissed merely for non attendance and not merit.
- ii. That though the case proceeded and condemned the Applicant, she was entitled to her fee unless she was acting *pro bono*.
- iii. That the bill of costs were in fact proceedings in respect of the same matter and would produce the net effect and sum payable to the Respondent herein.
- iv. That the court order for execution has omitted the Advocates costs.
- v. That the Applicant is willing and ready to deposit security for the amount demanded in court and have the bill taxed.
- vi. That it is fair just and equitable in the circumstances of the case.

3. Briefly, the background of this case is that the Advocate acted for **Simon Njumwa Maghanga** (hereinafter “Simon” or “Respondent”) in Mombasa CMCC No. 5144 of 2004 in which Simon sued Crater Automobiles (NBI) Limited. The Advocate received **Kshs. 1,500,000.00** on behalf of Simon on account of the said suit.

4. On 13th March 2012, Simon filed **Misc. Civil Application No. 58 of 2012 (O.S)** in which he sought an order that the Advocate do deliver a cash account of all monies received on his behalf in the said suit and that the Advocate do deliver all the sums received less legal fees.

5. On 6th November 2012, **Mwongo, J.** ordered that Kshs. 1,500,000.00 be deposited by the Advocate in court within two weeks less the Advocate's fee which was to be ascertained within one week. The Advocate failed to make the deposit as ordered prompting Mwongo, J. to order, on 19th December 2012, that the Advocate do deposit the full amount of Kshs. 1,500,000.00 in court pending further directions. The order of 19th December 2012 was also not obeyed by the Advocate and so by an application dated 29th April 2013, Simon moved the court for the arrest and committal to civil jail of the Advocate.

6. By a Ruling delivered on 28th November 2013, this court found the Advocate to be in contempt of court and ordered her to pay Simon Kshs. 1,500,000.00 within 14 days failure to which the Advocate be arrested and committed to civil jail for 6 months. The Advocate has now filed the present Application seeking an order that her bill of costs dated 30th November 2009 be taxed first prior to the execution of the court's order of 28th November 2013 that ordered her arrest.

THE ARGUMENTS

The Applicant's Case

7. The Advocate does not deny that she received Kshs. 1,500,000.00 on behalf of Simon. However, her case is that she is entitled to her legal fee which she intends to deduct from the said amount before remitting the balance to the Respondent. The Advocate submits that she can only ascertain the amount of her legal fees after taxing the bill of costs. She argues that if she does not deduct her fees from the said amount, then she will not recover her fees because Simon “is a man of straw”.

8. Although the Advocate's Bill of Costs filed in **Mombasa High Court Miscellaneous Application No. 395 of 2012** is for Kshs. 612,869.00, the Advocate annexed a Draft Consent dated 23rd December 2013 indicating that she is willing to release Kshs. 1,150,000.00 to Simon and retain Kshs. 350,000.00 as her fees.

The Respondent's Case

9. The Respondent filed Grounds of Opposition to the Application. He argues that the Advocate is not entitled to the orders sought as she is in contempt of court and has not purged herself of that contempt. The Respondent submits that the Advocate's costs which form the substratum of the Application are outstanding due to the Advocate's own indolence to tax her bill of costs and therefore she should not continue withholding the Respondent's money.

ANALYSIS/DETERMINATION

10. The Advocate's case, as I understand it, is that she is holding the Respondent's money as lien over her unpaid legal fees.

11. It is not in dispute that the Advocate was instructed to provide legal services to the Respondent. It is also not in dispute that the Advocate is holding monies which came into her possession on behalf of the Respondent. Further, it is not in dispute that the Advocate is yet to tax her bill of costs.

12. What is in dispute, and what this court has to determine, is whether an advocate can exercise lien over a client's money pending taxation of the Advocate's bill of costs.

13. That question was dealt with by **Lesiit, J.** in the case of **John Karungai Nyamu & Another V Muu & Associates Advocates [2008] eKLR** as follows:

“The matter is very simple. Section 48(1) of the Advocates Act stipulates:

“Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the

client, unless there is reasonable cause, to be verified by affidavit filed with the plaint for believing that the party chargeable there with is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month."

It is clear from the foregoing that an Advocate's fees are not due until his Bill of Costs has been served on the client and where it is not settled, until it is taxed by the court. The client has exercised its rights under Order LII rule 4(1)(d) of Civil Procedure Rules which stipulates thus:

"O. LII. r.4 (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).....

(b).....

(c).....

(d) The payment into or lodging in court of any such money or securities."

The Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien, at least no such law has been cited to the court. What the Advocate is doing by holding onto the Plaintiffs' monies, is irregular and the court cannot condone the same." (underlining mine)

14. I agree with the learned Judge's holding that the Advocate's fee only becomes due after the bill of costs has been taxed by the court. Before the bill is taxed, there is no telling how much is due to the Advocate. The position therefore is that an advocate cannot exercise lien over client's money on the basis of a bill of cost that is yet to be taxed. It is improper for an advocate to withhold a client's money on account of fees that is yet to be ascertained through the taxation process. The Advocate should release the client's money to him.

15. In the instant case, the Advocate did not comply with the court's order requiring her to deposit the money in court. Depositing the money in court would have safeguarded Advocate's interest if she had genuine fears that the Respondent would not be able to pay her fee once the same is taxed. The Advocate disobeyed the court order which, in my view, protected her own interest.

16. No reason has been given why the court should review its earlier order requiring the Advocate to release the money to the Respondent. The mere allegation that the Respondent will not be able to pay the Advocate's fees once the same is taxed is not a legal basis upon which the Advocate should continue holding the client's money. I say so because as already observed, the Advocate's fees only becomes due

upon taxation of the bill of costs. Before taxation, the entire amount belongs to the client.

17. The Advocate's bill of costs was filed on 5th December 2012. No reason has been given why the same remains untaxed to date. The Advocate should not be allowed to benefit from her own indolence at taxing the bills. Equity only favours the vigilant, not the indolent.

18. In my view, the Advocate has not established a basis upon which this court should grant her the orders sought. Her application dated 24th January, 2014 is dismissed with costs.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE