



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 150 OF 2012 (OS)

IN THE MATTER OF: THE ADVOCATE/CLIENT RELATIONSHIP

**MOMBASA CMCC NO. 2771 OF 2000 S M W –VS- MOHAMED RAZA
TRANSPORTERS**

-AND-

**IN THE MATTER OF: AN APPLICATION FOR THE DELIVERY BY
THE RESPONDENTS HEREIN (AN ADVOCATE) OF MONEY
AWARDED TO THE BENEFICIARY HEREIN J W WHICH CAME
INTO HIS POSSESSION AND OR HIS CONTROL ON BEHALF OF THE
BENEFICIARY HEREIN IN RESPECT OF MOMBASA CMCC NO. 2771
OF 2000**

-BETWEEN-

J W (suing thro' next friend M W T) APPLICANT

V E R S U S

LUMATETE MUCHAI T/A

LUMATETE MUCHAI & CO. ADVOCATES RESPONDENTS

JUDGMENT

1. **M W T**, acting as next friend of **J W**, a minor, brought this action by way of Originating Summons against the firm of Advocates, Lumatete Muchai & Co. Advocates seeking the following prayers-

(a) **THAT** the Respondent's deliver cash account amounting to Kshs. 60,000/- the balance due which are in the possession on the Respondents.

(b) **THAT** this Honourable Court to make an order the whole of aforesaid amount or such amount may be found together with interest at the rate of 14% percent per annum from 5th July 2002 till payment be paid full to the Applicant or be lodged in Court.

(c) **THAT this Honourable Court be pleased to issue further orders that in default of their counting for and/or making payments of aforesaid amount the Court to issue necessary orders for execution.**

APPLICANT'S CASE

2. M W T acted in person. She presented the Applicant's case by stating that she was the wife of the late P W W (Deceased). The Deceased died in 1998 through a road traffic accident. By the time the deceased died the Deceased's family had according her own words **"set me aside, ignored me as the wife of the Deceased, one S B W took the estate of my husband, filed a case and appointed M/S Lumatete Muchai & Co. Advocates to act for her."** She proceeded to state that the said Law firm filed a case being **CMCC No. 2771 of 2000** for compensation of the Deceased's Estate on behalf of S M W. The suit was compromised in May 2002 whereby a consent judgment was entered in favour of Deceased's estate for Kshs. 192,640/-. That on approaching the Advocates they paid her Kshs. 50,000/- on compassionate grounds but failed to pay her the balance of the money received in respect of **CMCC No. 2771 of 2000**. In the affidavit in support of the Originating Summons Margaret prayed for the Court to have the Advocate account for the amount paid. But perhaps because she may have limited knowledge in law, when she testified before Court she sought the Court to order the traffic accident case to be re-heard.

3. On cross examination Margaret accepted that the amount awarded in the traffic accident case was paid to the Deceased's mother who was the Plaintiff in **CMCC No. 2771 of 2000**. She confirmed she had not to date obtained Letters of Administration in respect to Deceased's estate.

RESPONDENT'S CASE

4. Defence relied on the affidavit sworn by Lumatete Walubengo Muchai. He deponed that he is a stranger to the allegations before Court. He did admit the traffic accident case was filed by the firm on behalf of Deceased's mother but that when it was filed the Advocates were unaware of the existence of the Applicant or his next friend. It was denied that the firm of Advocates had agreed to pay the Applicant the balance of the awarded amount. It was denied that a letter of the Chief confirming Margaret and J W as wife and son of Deceased respectively. Further that on the ground that Margaret had accepted the payment of Kshs. 50,000/- on compassionate grounds and had withdrawn her claim against the firm, the present claim could not succeed.

ANALYSIS

5. The Deceased died in the year 1998. Although J W was born in 1996, going by the Birth Certificate annexed to the Originating Summons, that Birth Certificate was issued in the year 2004 after the death of the Deceased, who is reflected as the father in that Birth Certificate. It is instructive to note that the information on that Birth Certificate was supplied by the mother, Margaret. Further the National Identity Card of Margaret No. **[particulars withheld]** was only issued in the year 2002, again this was after the death of the Deceased. Since both the Birth Certificate of Jimmy and the National Identity Card of Margaret were issued after the Deceased passed away can they be sufficient proof that Jimmy was the son and Margaret the wife of Deceased, whose name appear on both documents. In my view since the Defendant specifically denied that they were both son and wife of Deceased there was need for another document to be presented before Court. It is important to note that the Chief's letter which confirms those alleged relationships was also written in the year 2001 after the subject accident case was filed.

6. Over and above that short coming I find that the Plaintiff has failed to show she has a cause of action against the firm of Advocates. Cause of Action is defined in the Black's Law

Dictionary as-

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.”

In further explanation of that term the dictionary has this to say-

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the Plaintiff actually violated by the Defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.”

Bearing in mind the evidence presented by Plaintiff and bearing in mind the above definition I find that the Plaintiff has no cause of action against the Defendant. Her cause of action if at all lies against the mother of Deceased who failed to disclose to the Advocate her son's existence. Further it is to the mother of the Deceased the money the Plaintiff seeks was paid to. The firm of Advocates did no more than it was required to do when it acted for the Plaintiff's mother-in-law. Plaintiff's claim rightly should have been addressed to her mother in law.

CONCLUSION

7. It is for the above reasons that I find Plaintiff's case is misconceived and is without merit. The same is dismissed with costs to the Defendant.

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

MARY KASANGO

JUDGE