



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 434 OF 2012**

1. ALONZO WILSON  
2. WILBRODA MUHATI WILSON .....PLAINTIFFS

VERSUS

PATRICK MUTULI

(Trading as on business as

MUTULI & ASSOCIATES).....DEFENDANT

**R U L I N G**

1. Although this originating summons was registered as a fully-fledged suit, it is essentially an application under **Order 52 of the Civil Procedure Rules, 2010** (the **Rules**) and ought to have been registered as a miscellaneous application or cause. Accordingly the parties will be referred to as Applicants and Respondent respectively.

2. The Applicants seek two main orders in the **originating summons dated 3<sup>rd</sup> September 2012**

(i) That the Respondent do, within a time to be fixed, pay to the Plaintiffs the sum of KShs 403,336/64.

(ii) That in the alternative the Respondent do deliver a cash account of the moneys due to the Applicants, and that the amount found due be paid within a fixed time.

3. The originating summons is brought under **Order 45, Rules 4 and 10** of the Rules and is supported by the affidavit of the 2<sup>nd</sup> Applicant annexed thereto.

4. Rule 4 aforesaid of Order 52 provides as follows –

**“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. **the delivery by the advocate of a cash account;**
- b. **the payment or delivery up by the advocate of money or securities;**
- c. **the delivery of the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;**
- d. **the payment into or lodging in court of any such money or securities;**
- e. **the delivery up of papers and documents to which the client is entitled.”**

5. The Applicants were former clients of the Respondent who is an Advocate of this Court.

6. The Applicants’ case as set out in the supporting affidavit is that the Respondent undertook in writing to refund to the Applicants the sum of KShs 403,336/64 forwarded to him for payment of stamp duty and other expenses in connection with an apartment purchase transaction which he failed to complete. The Respondent also undertook to compensate the Applicants for lost rent in the sum of KShs 60,000/00. The letter of the Respondent undertaking to do all that is annexed to the affidavit. A demand letter by the Applicants’ advocates addressed to the Respondent is also exhibited.

7. The Respondent filed a memorandum of appearance. He did not file a replying affidavit, but this cannot be held against him in view of **Rule 10(2)** of Order 52 which provides –

**“(2) No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.”**

8. At the hearing of the originating summons there was no appearance for the Respondent despite notice. The Applicants therefore proceeded *ex parte*. I have considered the submissions of their learned counsel.

9. The Applicants forwarded to the Respondent the sum of KShs 403,336/64 for a specific purpose in connected with a transaction he was handling for them. He did not complete the transaction as instructed. He undertook in writing to refund the money. He did not make the refund despite written demand.

10. In these circumstances an account as sought in prayer 2 of the application is not necessary. I will grant prayer 1 and direct that the Respondent shall pay to the Applicant (through their advocates on record) the sum of KShs 403,336/64 **WITHIN TWENTY-ONE (21) DAYS** of delivery of this ruling. In default the Applicants may execute the same as a decree of the court. It is so ordered.

11. The Applicants shall have costs of this application.

**DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2013**