



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NUMBER 425 OF 2010

ALBERT ODUOR MUMMA. PLAINTIFF/APPLICANT

VERSUS

PETER OPONDO KALUMA 1ST DEFENDANT/RESPONDENT
THE REGISTRAR OF BUSINESS NAMES. 2ND DEFENDANT/RESPONDENT
THOMAS OTIENO K'BAHATI. 3RD DEFENDANT/RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 29th October, 2010 filed by Ransely Mc Vaicker & Shaw Advocates for the plaintiff/applicant who is **ALBERT ODUOR MUMMA**. The application was filed under Certificate of Urgency. It was brought under Order 44 rule 1 and Order 50 rule 1 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya).

The prayers in the application are as follows: -

- 1. That this application is certified as urgent and service thereof be dispensed with in the first instance.***
- 2. That the order made on 23rd September, 2010 and issued on 19th October, 2010 be reviewed or varied in accordance with prayer 3 hereunder.***
- 3. That the funds held in account No. 0102098921701 Standard Chartered Bank, Kenyatta Avenue Branch be released to M/s Hamilton Harrison & Matthews Advocates.***
- 4. That the costs of this application be provided for.***

The application has grounds on the face of the Notice of Motion. The grounds are as follows: -

- a) The funds in the client account No. 0102098921701 Standard Chartered Bank, Kenyatta Avenue Branch are funds held on account of the Kenya Railways Corporation deposited in part payment of a decree issued in HCCC No. 104 of 2003.***
- b) The plaintiff in HCCC No. 104 of 2003 has now obtained an order that the decretal amount has to be paid.***

c) If the funds are not released to Ms Hamilton Harrison & Matthews Advocates they will commence proceedings to compel the payment of these sums through, inter alia, committal to civil jail of the Managing Director of Kenya Railways Corporation.

d) The funds held in the account are solely for the benefit of Kenya Railways and held for purposes of paying to the decree holder in HCCC No. 104 of 2003.

e) There is currently no order staying execution of the decree.

f) It is in the interests of justice that this application be allowed.

The application was filed with a supporting affidavit sworn on 29th October 2010 by Prof. Albert Oduor Mumma. It is deponed in the said affidavit, inter alia, that the deponent would rely on the pleadings and proceedings herein especially the Chamber Summons dated 14th September, 2010. That the deponent had practiced under the name Lumumba, Mumma and Kaluma Advocates and that, during that time, he had acted for Kenya Railways Corporation in **HCCC No. 104 of 2003-Bidco Oil Refineries Limited Versus Kenya Railways Corporation and Prime Fuels Limited**.

That a consent judgment was entered in that matter against the 1st defendant for Kshs.11,625,694/- with interest from 2003. That following the entry of the consent judgment, the Corporation through the deponent entered into negotiations in an attempt to reduce the interest payable with the advocates for the plaintiff. It was further deponed that as a result of the negotiations, the Corporation paid into the firm's client account on 9th and 25th October, 2009 a total of Ksh.7,000,000/-; that the negotiations were not successful; that the plaintiff filed an application for an order of mandamus to issue against the Managing Director of the Corporation in order to be paid the decretal amount. That on 12th October, 2010 the court allowed the application. That there was no order staying the execution of that order; that the Ksh.7 Million held on the account of the Corporation should be released to Hamilton, Harrison & Matthews Advocates to avoid execution proceedings in the nature of contempt of court proceedings being taken against the Managing Director. That, therefore, the order of 23rd September 2010 should be varied to allow the release of funds to the said firm of advocates.

The applicant filed written submissions on 14th December, 2010. It was contended in the said submissions that in February, 2003 Bidco Oil Refineries Limited instituted a suit against Kenya Railways Corporation and Prime Fuels Kenya Limited seeking damages of Ksh.16,910,976/- arising from the derailment of 16 wagons belonging to the Corporation. That on 4th of March 2008, a consent judgment was entered between the plaintiff and Kenya Railways Corporation for Ksh.11,625,694/- and a decree extracted there from. That following the said consent judgment, negotiations were entered into between the plaintiff herein (Albert Mumma) who was representing Kenya Railways Corporation and the advocates for the 1st defendant M/s Hamilton, Harrison & Matthews in an attempt to reduce the interest payable.

In the meantime, Kenya Railways Corporation credited into the account of Lumumba, Mumma and Kaluma Advocates the sum of Ksh.7 Million, with Ksh.2 Million paid on 9th December, 2009 and Ksh.5 Million on 25th of January, 2010. These amounts were for the purpose liquidation of the decretal amount arising from HCCC 298 of 2009.

It was contended that the amount which was deposited in the account at Standard Chartered Bank, Kenyatta Avenue belonged to the client Kenya Railways Corporation and that the same was held in trust to their order with respect to settling a decretal amount.

That the advocates were put in a position of trustee with respect to funds and same could not be held in a general account. Reliance was placed on the case of **Re Clarke Ex parte NewLand (1876) 4Ch.515** wherein the English court held that a Solicitor could not hold money that was paid to pay creditors on a lien, as such money was held in trust on behalf of the client. The solicitor was ordered to pay the same to

the creditors.

Reliance was also placed on the case of **Stumore Versus Campbell & Company (1892) QB314** where the English court stated, inter alia, as follows: -

“It appears that some money was paid in the hands of the defendants who are Solicitors for a particular purpose. So long as that purpose existed there was a trust imposed on them and they were bound, if they accepted money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed, and the result of that failure was that another trust arose immediately to pay back the money with the person who gave it.”

In answer to the objections raised by the 3rd defendant/respondent who opposed this application, counsel contended that the allegation in the 3rd defendant's replying affidavit filed on 29th November, 2010 was not supported by the facts and was a preposterous claim. On the bill of costs which was executed by the 1st defendant, it was contended that there were specifically two important matters that arose therefrom. The bill related to the period 2005 while the 1st defendant joined the firm as a partner in July 2004. It was contended that the applicant had stated in the plaint dated 14th September 2010, that the partnership was illegal having been formed in contravention of section 32 of the Advocate's Act (Cap 16). Secondly, the 3rd defendant has not had the conduct of the matter between **Bidco Company Limited & Kenya Railways Corporation** nor had the 1st defendant. The contention was that at all material times, the applicant had personal conduct of this matter. There was, therefore, no fees chargeable by the 1st and 3rd defendants.

It was further contended that the 1st defendant was not qualified to act as a partner. Reliance was placed on the English case of **Hudgell Yeats & Company Versus Watson (1978) 1QB 451** where the court dealt with the issue of a Solicitor in a Partnership who had failed to take out a Practice Certificate and held that he could not charge for the work done.

Reliance was also placed on the Kenyan case of **Harbans Singh Soor Versus Matthew Oseko Misc. Appl. No. 901, 933, - 938 of 2009 (UR)** where the court dealt with an application under section 32 of the Advocates Act (Cap 16). The court stated that a freshly admitted advocate with a practicing certificate did not qualify to engage in legal practice on his own behalf whether full time or part time, whether alone or in partnership unless he has served for a continuous period of two years as a salaried employee.

Such an advocate as the 1st defendant would be an unqualified person to act on his own or in partnership. No legal fees can be charged by him for any work done. In addition, as the Ksh.7 Million belonged to the client and was paid to the Advocate for the purpose of payment to the advocates for Bidco Ltd, M/s Lumumba, Mumma & Kaluma Advocates became trustees of the funds and could not purport to claim a lien over the same. Counsel urged the court to grant the prayers sought.

The 1st defendant Peter Kaluma filed a replying affidavit sworn by himself on 20th February, 2010 and filed on 24th January, 2011. It was deponed in the said affidavit, inter alia, that the account at Standard Chartered Bank, Kenyatta Avenue Branch was the sole client account maintained by the law firm Lumumba, Mumma & Kaluma Advocates. It was deponed that the said account had the funds of all the clients of the firm and not a single client as the plaintiff had purported in his application. That the plaintiff and the deponent were the sole signatories to the said bank account before the plaintiff was retired from the firm. That the plaintiff had not signed out as a partner/signatory to the account. That at the time the plaintiff was retired from the firm the firms' client account had Ksh.6,500,000/- belonging to the various clients of the firm and not Ksh.7,000,000/- as falsely presented by the plaintiff. That no funds had been deposited into the account since the plaintiff was retired from the partnership and that the deponent had confirmed with the firm's banker that the account still held the sum of Ksh.6,500,000/-.

That the firm represented Kenya Railways Corporation in HCCC 104 of 2003 and in several other matters and in consequence, Kenya Railways Corporation owned the firm over Ksh.5 million in legal fees, some

of which was currently subject to taxation in High Court Miscellaneous Application No. 485 of 2010. In addition, other Bills of Costs by the firm against Kenya Railways Corporation were contemplated. That the firm held no money for Kenya Railways Corporation either in the subject account or at all. That the plaintiff, having been retired from the firm in July 2010, was currently a stranger to the firm and had no basis or legal standing to claim monies allegedly paid to the firm by a client. That it was strange that the application herein was made by Albert Mumma who was currently a stranger to the firm and not the Kenya Railways Corporation.

That upon being retired from the firm, the plaintiff disappeared with all the records of the firm including the firm's disbursements records for the client account, receipt books, bank statements and other accounting books and records and had refused to release the same to the firm, despite several meetings and promises to do so. That without the financial records, it was impossible for the firm to ascertain and designate the exact amount for each client kept in the account.

That the plaintiff was fully aware that several clients had come forward claiming money held on their behalf in the account following his retirement, which claims had not been addressed. That the plaintiff had promised to release and deliver the financial records to the firm in the last meeting held, but had disappeared thereafter. That the plaintiff was aware that the amount in the client account was far below the sums claimed by clients. That the plaintiff was patently dishonest in purporting to claim that the funds in the sole clients accounts herein, were held exclusively for Kenya Railways Corporation. That the documents annexed to the plaintiff's affidavit and marked "AM3" did not tell the full story about what monies were held in the account. That only when all the records were obtained, would it be possible to determine the amount of funds owed to clients. That in any event, the issue of settlement of accounts following retirement of the plaintiff had not been dealt with and was a matter to be settled amicably or through arbitration under Clause 45 of the firm's Partnership Deed. In this affidavit the deponent annexed "PK" which were documents and correspondences related to this matter.

The application was also opposed by or on behalf the 3rd defendant/respondent Thomas Otieno K'bahati. He filed a replying affidavit sworn by himself on 26th November, 2010. It was deposed in the said affidavit that the deponent was a partner in the firm of Lumumba, Mumma & Kaluma Advocates. That the subject account at Standard Chartered Bank, Kenyatta Avenue Branch was the sole client account maintained by the law firm of Lumumba, Mumma & Kaluma Advocates into which was paid funds of all clients of the firm, and not just the funds of a single client as the plaintiff had purported to present in his application. That the account had some Ksh.6,500,000/- belonging to the various clients of the firm, and not Ksh.7,000,000/- falsely alleged by the plaintiff. That the firm represented Kenya Railways Corporation in HCCC No. 104 of 2003 as well as several other cases and matters. That in consequence, Kenya Railways Corporation owed the firm over Ksh.5 Million in legal fees, some of which was currently subject to taxation in High Court Miscellaneous Application No. 485 of 2010. That other Bills of Costs by the firm against Kenya Railways Corporation were contemplated. That the firm held no money for Kenya Railways Corporation either in the subject account, or at all a fact that the Corporation been had duly notified. That the plaintiff having been retired from the firm in July 2010, was currently a stranger to the firm and had no basis or legal standing to claim monies allegedly paid to the firm by a client. That the court should find it strange that Kenya Railways Corporation had not applied to have the funds in question released to it. That after being retired from the firm, the plaintiff wrongly took away the records of the firm including those related to the firm's partners, the firms financial and accounting records and books, and had refused to release them to the firm. That the plaintiff had promised to release and deliver the financial records to the firm in the last meeting held with him. That though the partners in the firm that is Mr. Kaluma and the deponent had discussed with the plaintiff the need to resolve the matter relating to the funds held in the account herein, he was not co-operative. That the plaintiff was lacking in candour in purporting to claim that the funds in the sole clients account were solely held for Kenya Railways Corporation. That in any event, the issue of settlement of accounts following the retirement of the plaintiff as a partner, was a matter to be settled through Arbitration under Clause 45 of the firm's Partnership Deed. That further, the plaintiff's application herein was not tenable without a sound basis as the plaintiff had sought that the firm of advocates declared illegal. That the purported accounts documents annexed to the plaintiff's affidavit and marked "AM3" were not authentic and were inadmissible in law. In this affidavit were annexed as "TOK" documents and correspondences relied on

together with a copy of an Advocate Bill of Costs in Civil Suit No. 1467 of 2005.

The 2nd defendant did not file a response to the application.

On the hearing date Ms. Shaw appeared for the applicant. Mr. Mwenesi for the 1st defendant, and Mr. Oluoch Olunya for the 3rd defendant/respondent. There was no appearance for the 2nd defendant, the Registrar of Business Names.

Counsel for the applicant/plaintiff relied on the supporting affidavit and the written submissions. Counsel emphasized that because the money was paid to the advocates for a specific purpose, a trust arose. No lien could attach to the amount as alleged in the replying affidavits. Counsel contended that no evidence was provided to contradict what the applicant had stated. Counsel emphasized the decision in the English Case of **Stumore Versus Campbell Company (1892) QB314** and stated that the money belonged to the client and should therefore, be transferred to Hamilton Harrison & Matthews Advocates as requested.

Mr. Mwenesi for the 1st defendant/respondent relied on the supporting affidavit. Counsel submitted that the law applicable to an application for review was Order 45 of the Civil Procedure Rules, as well as Section 80 of the Civil Procedure Act (Cap 21 Laws of Kenya). Counsel contended that the applicant must be asking for review on the basis of “**sufficient reason**”, as no information of discovery of new evidence or error on the face of the record has been given by the applicant. In addition, the application for review also requests for mandatory orders on the ground that funds were held as clients’ funds. Counsel contended that the prayers requested could not be granted unless the court was sure of the facts. It was the advocates firm and not an advocate in person who would be accountable. The accounting records had also been taken away. There was no garnishee application filed. No application was filed by either Kenya Railway Corporation Limited or Hamilton, Harrison Matthews Advocate or Bidco Ltd. The prayers herein were therefore, not grantable. Counsel asked that the application be dismissed.

Mr. Olunya for the 3rd defendant/respondent relied on the 3rd respondents replying affidavit. Counsel associated himself with what was submitted by Mr. Mwenesi. He argued that the plaintiff was a stranger who had resigned from the advocates’ partnership. There was no evidence that he was instructed by Kenya Railways Corporation to file the application. Counsel contended that Kenya Railways Corporation was the one entitled to pursue the transfer of the money.

In response, Mrs. Shaw for the applicant stated that the money was to be released, not to the plaintiff, but to the beneficially. In any case, the court had allowed parties to apply.

I have considered the application, documents filed, the submissions, both written and oral, and the law. This is an application for review of the court’s orders issued on 23rd September, 2010. It is also an application requesting that funds held in account No. 0102098921701 Standard Chartered Bank, Kenyatta Avenue, on account of Kenya Railways Corporation deposited in part payment of HCCC No. 104 of 2003, be released to M/s Hamilton Harrison & Matthews Advocates.

The order sought to be reviewed reads as follows: -

“That the funds in the client’s account be preserved for the benefit of the said clients until further orders of the court and parties be at liberty to apply”

The considerations in an application for review of a court’s order, on one hand, and for release of funds from an advocate, on the other hand, are different. Prayer 2 of the application is for review of the court’s orders.

The review of the court’s orders was correctly sought under order 44 Rule 1 of the Civil Procedure Rules (now replaced by the Civil Procedure Rules 2010 – Legal Notice 151 of 10th September 2010). Order 44 Rule 1 of the Civil Procedure Rules provides: -

“1. (1) any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed;

And from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or would not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when being respondent he can present to the appellate court the case on which he applies for the review.”

For this court to grant a review, the applicant for review must demonstrate either discovery of new and important matter or evidence which was in existence at the time when the decree or order was made, or demonstrate a mistake or error apparent on the face of the record, or demonstrate other sufficient reason. The applicant does not appear to have demonstrated the discovery of any new facts or evidence. He also has not demonstrated any error or mistake apparent on the face of the record. He appears to rely on the 3rd limb of “**sufficient reason**” that the money was deposited on account of Kenya Railways Corporation.

In my view, the facts disclosed by the applicant herein do not give any sufficient reason for the review of the court’s orders. First of all, the plaintiff does not claim to be one of the clients. Secondly, the order of the court actually reserves the money for the benefit of those clients. Kenya Railways might be one of those clients. Thirdly, there is no evidence that the said money was in a special account in the name of any particular client as alleged. In my view, there are no sufficient reasons to grant a review of the court’s order. The burden was on the applicant to demonstrate the sufficient reasons. He has not done so. Therefore, prayer No. 2 of the application cannot be granted. I will dismiss the same.

The other substantive prayer, is that the money in the said account be released to Hamilton Harrison & Matthews Advocates. Indeed, an advocate who receives money from a client for a particular purpose holds the same in trust for the client. I am in full agreement with what was stated in the case of **Stumore Versus Campbell & Co. (1892) QB134** where the English court stated, inter alia.

“..... Some money was placed in the hands of the defendants who are solicitors for a particular purpose. So long as that purpose existed there was a trust imposed on them and they were bound, if they accepted the money at all, to employ it or lay it out in a particular way as indicated in the trust.”

An advocate who receives money for a particular purpose cannot turn round and say that he has a lien over that money. The issue of costs due to the advocate from the same client is irrelevant.

Though the applicant relied on the case of **Harbans Singh Soor Versus Matthew Oseko, Misc. Application No. 901, 933 – 938 of 2007, (UR)** to claim that the partnership was a sham, as Mr. Kaluma who was a partner in the advocates firm was not qualified to practice in his own name, and therefore, could not be a partner in the firm of Lumumba, Mumma & Kaluma Advocates, that argument does not help him.

In my view, the issue as whether or not the firm of advocates was properly constituted cannot be

determined in a preliminary application for review of a court's order like the present one. In any event if that firm of advocates was a sham, then the applicant, who was also in the said firm before he retired, cannot stand to benefit from that sham arrangement.

Prayer 3, of the Notice of Motion is therefore also not grantable by this court for the above reason.

In addition to the above, the money is said to have been received from Kenya Railways Corporation. Kenya Railways Corporation is neither a party in these proceedings nor did it file any affidavits to support the application. The applicant herein cannot claim to be Kenya Railway Corporation who is the client. He cannot, as a lawyer, claim to have stepped into the shoes of Kenya Railways. It should have been Kenya Railways to file the application for their advocates to release the money. They have not done so, and therefore, the powers of this court to enforce a trust arrangement between an advocate and a client cannot be exercised in the present circumstances. The applicant has no basis for bringing this application and asking for prayer 3. The application should have been brought by Kenya Railways as a client.

Lastly, still on prayer 3, the beneficiary of the funds is said to be Hamilton, Harrison & Matthews Advocates. Again, that firm of advocates is strangers in this application. They are not parties in the application. They appear to be advocates in Miscellaneous Civil Application No. 295 of 2009 between Bidco Limited and Kenya Railways Corporation. That can be so, but in the present application, neither Hamilton Harrison & Matthews nor Bidco Limited are parties. That also defeats prayer 3.

I therefore find and hold that the Notice of Motion dated 29th October, 2010 has no merits. I have to dismiss the same on the above reasons.

Consequently, I dismiss the Notice of Motion dated 29th October, 2010. I will, however, order that costs be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 14th day of April 2011.

.....
GEORGE DULU
JUDGE

In the presence of

Ms Wesonga holding brief for Mrs. V. Shaw for plaintiff/applicant

Mr. Asa holding brief for Mr. Mwenesi for 1st respondent

Catherine Muendo – court clerk