



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL NO.2333 OF 1998

**PETER K. KIRIGUA &
ANR.....PLAINTIFFS**

VERSUS

**EQUATOR AIRLINES
LTD.....DEFENDANT**

Coram: Mwera J

Mutai for plaintiff

Omwenga for defendant

Kabaru, Interested party

Njoroge court clerk

RULING

The defendant company filed a notice of motion dated 4.10.10 under the old Order XX rule 15A of Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main prayer therein was:

i) that the administrators of the estate of M/s Mwangi Mbuthia & Co. Advocates namely Mr. K. M Inoti and Mr. Kabaru Ndegwa Advocates, be ordered to render an account for sh. 3m paid by the defendant to M/s Mwangi Mbuthia & Co. Adocates in settlement of the judgement, in default the said administrators be held personally liable.

In two short grounds it was contended that the defendant paid the judgment sum and so the administrators of the estate of Mwangi Mbuthia are liable. Captain Musa Bulhan a director of the defendant/applicant deponed that his company was once represented by M/s Mwangi Mbuthia & Co. Advocates which was wound up when the proprietor died. The plaintiff had obtained judgement here for sh. 3m against the defendant. On/about 01.08.96 the defendant forwarded 6 post-dated cheques each of sh. 500,000/=

(numbers provided) to Mr. Mwangi Mbuthia, and Peter N. Kirigua, one of the administrators (the plaintiff) was notified (ann MB 2). The deponent believes that Peter Kirigua was paid the money because he did not deny payment of those cheques. Thus the defendant should not pay the judgement sum twice over. At some stage the plaintiff had even summoned the administrators of the estate of Mwangi Mbuthia (ann. MB4) to account for the money. The defendant also annexed its bank statement (MB 3) with the 6 cheques having been paid/cleared between August 19, 1996 and Jan 28, 1997.

In a replying affidavit sworn by P. M. Gichuru, Advocate with M/s Kingora Mutai & Co Advocates he deponed that he was conversant with this matter. To him, the motion raised matter that were res judicata. It was not readily clear as to whom Mr. Gichuru represented here but he swore that the applicant once filed an application with similar prayers dated 4.10.10. There was even an earlier similar application dated 22.9.99 (both exhibited). Both were heard and dismissed. So this application should not be entertained. The rulings in these two applications were not supplied. However it was deponed that in the matter that has been pending for over 10 years, it is time the decree - holder moved to execute the decree as ordered by Hon. Muiruri on 18/2/10. As the applicant proceeds to get clarification from the estate of Mwangi Mbuthia Advocate, that should not stand in the way of the decree holder at all. Then it was disclosed that Mr. Gichuru was acting for the decree-holder/plaintiff and for them they received no payment from the advocate of the judgment - debtor. It was its duty to follow up with its lawyers to find out whether those lawyers had paid over the money to the decree – holder, which money had been released by Apollo Insurance Co. to the judgment-debtor, who took a whole year before paying it to its lawyers.

On 13.1.11 Kabarū Ndegwa, Advocate as an interested party in the matter stated that he had been joined in it as a co-Administrator of the estate of Mwangi Mbuthia who ran the firm of Mwangi Mbuthia & Co Advocates. He was appointed with Kathurima M’Inoti in 1999 by the Law Society of Kenya (LSK) to liquidate the late Mbuthia’s law firm. That firm operated both the clients and the office accounts at the national bank of Kenya Ltd, Harambee Avenue Branch. At the time the co-administrators inspected those accounts, the office account had a debit balance while the client one had nil. Thus the firm was insolvent.

As liquidators of Mbuthia’s firm they did not operate any bank account since they did not obtain a grant to do so. At about that time Civil Appeal No. 162/99 decided that LSK had no powers to administer deceased lawyers firms and so they gathered all the files of the firm and handed them over to the LSK. Despite several attempts the court was not favoured with an affidavit from Mr. M’ Inoti on this account. Probably it could contain depositions similar to those of Mr. Ndegwa. Parties were directed to submit. Mr Ndegwa adopted the contents of his replying (above) and asked for the application to be dismissed.

On the part of the defendant/applicant, it was maintained that it paid the whole sh. 3m to its lawyers M/s Mwangi Mbuthia & Co. Advocates for onward transmission to the plaintiff. Bank statements evidenced the payment. That the LSK administrators, call them liquidators of Mbuthia’s law firm, did not produce a client file to show where this money went. The plaintiff was notified of the payment anyway by Mr. Mbuthia. So all in all the plaintiff and the co-administrators have not denied the payment of the money.

This is a rather an awkward situation. The applicant paid sh. 3m by cheques to its lawyers in 1996 and 1997 – Mr. Mwangi Mbuthia, for onward transmission to the plaintiff.

The cheques were paid on presentation and that was reflected in the applicants’ bank statements. It is quite apparent that even as Mr. Mbuthia informed the plaintiff that the payment had been made to him, he did not later report that he had passed the money to the plaintiff whose lawyer denies on his behalf that he was paid.

The two LSK co-liquidators came in to wind up Mbuthia’s firm but Mr. Ndegwa denies that they operated any of his accounts which, on inspection, showed that the firm was insolvent. Then at about that

time the Court of Appeal pronounced that LSK had no powers to appoint administrators for the estates of the deceased lawyers and by that the co-liquidators returned the files of the firm to LSK. They were not there when the payment was made to Mbutia and definitely they know nothing about it. And on the part of the plaintiff he is still waiting for payment.

All in all and without placing before court the rulings in the two previous similar applications which were said to have been disallowed, this court cannot find that this application is res judicata. But it cannot also excuse the defendant from paying the decree holder. It paid its lawyer the money and its lawyer did not pay it over to the decree – holder. Then he died. All that this court can do is sympathise with the applicant in this expensive circumstance but direct that it pays the judgment sum of sh. 3m all over again but may prove its debt with the legal representatives/administrators of the late Mwangi Mbutia. And because the defendant paid the money lastly on 28.1.1997, the court is minded not to impose interest up to this date.

This application is dismissed with costs.

Delivered on 16.5.11.

J. W. MWERA

JUDGE