



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVILSUIT NO. 239 OF 2011

BEATRICE N. KARANJA.....PLAINTIFF

VERSUS

M/S NJERI KARIUKI ADVOCATES.....DEFENDANT

**Coram : Mwera J.
Monger for Plaintiff
Nderitu for Defendant
Njoroge court clerk**

RULING

The originating summons dated 27.6.11 was filed by a party describing herself as the executrix of the estate of the late Josphat Njuguna Karanja. It is against the respondent/advocate. The applicant/plaintiff invoked the powers donated by Order 52 rule 4 (2) and Order 10 (1) of Civil Procedure Rules. The court was asked to order the respondent:

- i) to deliver a cash account in respect of all transactions handled on behalf of the applicant;
- ii) to deliver the list of money and securities in her possession, to the applicant OR in the alternative to lodge the same in court;
- iii) to deliver up papers, documents e.g. title deeds, as listed in the supporting affidavit.

The grounds stated that the respondent has failed or neglected to account to the applicant as laid out in the orders sought despite notice/demand. That the respondent had even failed to render a bill and/or have the same taxed.

The applicant swore a supporting affidavit in which up to thirty three (33) assets/properties were described. That the respondent had transacted matters relating to them when administering the estate of the late Josphat Karanja, an account of which or return of documents was not made. The respondent

should render her fee note, now that she is no longer acting for the applicant, to have the same taxed. She will be paid from the proceeds of sale of one of the assets but in the meantime the respondent is retaining the title to plot number KAJIADO/OLCHORE – ONYORE/5452 as security for her costs.

It does not look like a replying affidavit or other papers in opposition were filed but both sides were directed to submit. Submissions should explain each side's case.

The applicant's side more or less repeated what was contained in the originating summons and reproduced Order 52 rule 4 of Civil Procedure Rules. Four cases WERE CITED including *Dixon Obel Otondo t/a Aloo & Co. Adv*s [2006] e KLR and *John Karungai Nyamu & Anr Vs Muu & Associates* [2008] e KLR to emphasise that an originating summons like this, needs to be met with papers in opposition being filed in response to the facts pleaded. And further, that before an advocate claims that his/her fees are due, a fee note should be rendered and if not paid, a bill is taxed. Otherwise the advocate has no right to hold on any money that has come to him/her for onward transmission to a client as lien for fees. So the orders ought to be granted.

The respondent reacted by stating that the originating summons here did not lie in the light of the fact that the applicant had admitted being indebted to her:

“3. That despite demands having been made in the past as well as in the present, the plaintiff has adamantly and obstinately refused and continues to refuse to pay any costs owed by her to the respondent and it is the respondent's view that the suit before this honourable court is merely a legal gimmick to avoid payment of a clearly admitted debt owed to the respondent by the plaintiff.

It was added that the respondent provided the pertinent accounts of the business conducted. The applicant had been furnished with information regarding outstanding fees owed but with no reaction. So this cause is not genuine. The respondent urged this court to stay these proceedings until the respondents obtains a certificate of costs under section 52 of the Advocate's Act.

Order 52 rule 4 of Civil Procedure Rules reads:

“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 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 to the applicant of a list of money or securities which the advocate has in his possession or control on behalf of the applicant;**
- (d) the pay 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.”**

Such an application should be by way of originating summons, which this one is. The applicant prayed that if the documents, money securities etc held by the respondent cannot be released to her then they should be lodged in court.

Without rebuttal or denial and from the submissions, there was advocate and client relationship between the 2 litigants here. The applicant gave to the respondent the documents named to facilitate the proceedings in the administration of the estate of the late Josephat Karanja. The respondent has them. All she says is that she did the work required by the applicant, to a point. Then it stopped. She asked to be paid costs but the applicant has all along neglected/refused to pay up. Then that should be seen as the reason the respondent still holds onto the documents, monies, securities etc the applicant is after. The court was asked to stay these proceedings until the respondent obtains a certificate of costs, but it was not shown that any bill of costs had been filed and was awaiting taxation.

While agreeing with Lesiit J in the *John Karungai Nyamu* (Supra) 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, this court is satisfied that the applicant is properly before this court for a remedy. The respondent has no basis not to comply with the orders this court is about to give.

Orders as sought in questions/prayers 1, 2, 3, 5 are hereby made/issued in favour of the applicant. The delivery/payment shall be effected in the next thirty 30 days. In any event without an agreement as to costs, the applicant deponed and the respondent did not deny that she is holding title no. KAJIADO/OLCHORE – ONYORE/5452 as security for the expected costs. That is an act of good faith and fairness on the part of the applicant. After the directed compliance the respondent will do well to file and serve a bill of costs in the next 45 days. In the event it is not settled, then the parties can move to taxation, with the ensuing certificate of costs being subjected to section 52 of the Advocates Act, if necessary.

The orders are made as sought with costs.

Delivered on 27.10.11.

J. W. MWERA
JUDGE