



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 350 OF 2009 (O.S.)**

**GUNJAN S. PATEL.....APPLICANT**

**VERSUS**

**SIMON KAMERE P/A M/S KAMERE & CO. ADVOCATES.....RESPONDENT**

**RULING**

By an Originating Summons dated and filed on 17<sup>th</sup> December 2009 (*the application*), the Applicant Gunjan S. Patel, sought the following orders against the Respondent Simon Kamere t/a M/s Kamere & Co. Advocates, (*the Respondent*) -

- (1) *Payment or lodging into court all such sums or monies or outstanding balance received by himself for and on behalf of the applicant or in the ALTERNATIVE,***
- (2) *Payment to the Applicant all such sums or monies or the outstanding balance thereof,***
- (3) *Interest on 1 or 2 above from 2003 to date,***
- (4) *Costs of the application.***

The Application was supported by the Affidavit of the Applicant sworn on the same day, (17<sup>th</sup> December, 2009) and the grounds that -

- (a) *that the Respondent received the sum of Kshs 1,369,515/= on behalf of the Applicant,***

- (b) *that the applicant has only received Kshs 848,403/=, and*
- (c) *that there existed Advocate and client relationship between the Applicant and the Respondent.*

Paragraphs 3, 4, 5, 6 and 7 of the Supporting Affidavit are both material and relevant to this Ruling. The Applicant deponed as follows -

**(1) *The Respondent represented me in Nakuru CMCC No. 1033 of 2003 and in Nakuru CMCC No. 899 of 2001 respectively (para. 3),***

**(2) *That the two cases were finalized, and I was awarded (damages?) as follows -***

**(a) *Nakuru CMCC No. 1033 of 2003 Ksh 1,285,907***

**(b) *Nakuru CMCC No. 899 of 2001 Ksh 83,408 (para. 4)***

**(3) *That we agreed with Mr. Kamere that his fees would be a total of Ksh 155,910/= to be paid as follows -***

**(a) *I gave a computer valued at Sh 75,000/=***

**(b) *To be deducted from the deceased sum Sh 80,910/=***

**Total Sh 155,910/=**  
**(Para. 5)**

**(4) *That I was therefore to receive a total of Ksh 1,288,405/= from the Respondents. (para. 6) and***

**(5) *That an Agreement was contained in a letter I did to Kamere on the 29<sup>th</sup> July 2003 and received by himself on 4/08/2009 (Marked GSP "I") (para. 7).***

In his Replying Affidavit to the Application sworn on 26<sup>th</sup> January but filed on 28<sup>th</sup> January 2010, the Respondent denied the contents of paragraphs 5, 6 and 7 of the Supporting Affidavit, and stated - ***"I have never at any time reached the agreement alleged by the applicant and I put the Applicant to strict proof thereof."***

The Respondent also denied the Applicant's allegations as set out in paragraphs 9, 10 and 11 of the Supporting Affidavit that he had been evading or had evaded the Applicant and stated that at the time the applicant telephoned him in November 2009, he had been on sick leave, and that he so informed the applicant.

The Respondent also avers in paragraphs 6 and 7 of his Replying Affidavit that he needed time to verify the Applicant's claim and have all the matters in which his firm acted for the applicant sorted out, and

establish whether the firm owed the Applicant any moneys. The Respondent also averred that he was served with the application before he had undertaken the exercise, and without any notice of intention to sue or demand having been made.

On the foot heels of the Application, (O.S.), the Applicant's Counsel, the firm of M/S Ogola and Associates filed a Notice of Motion dated 28<sup>th</sup> February 2008, for orders that Judgment be entered against the Respondent for the sum of Kshs 431,200/= as interest accrued from the debt owed to the applicant of Ksh 440,000/=, and costs for the application and generally for the suit.

The Motion was supported by the Affidavit of Gordon Ogola Esq. sworn on 28<sup>th</sup> February 2010, and the grounds that -

**(a) the judgment sought by the Applicant is for a straightforward liquidated sum, and**

**(b) the Respondent has already paid a sum of Ksh 440,000/= and he has neglected to pay the interest amounting to Ksh 431,200/= and costs accrued.**

To the Motion, the Respondent filed a Replying Affidavit sworn 8<sup>th</sup> April 2010, and depones inter alia, that the release of the sum of Ksh 440,000/= to his Advocates, and opening of an account was not an admission of liability as is envisaged under Order 13 rule 2 of the Civil Procedure rules 2010 (*para 5 and 6*), and that at no time has he (*the Respondent*) received any instructions from the applicant to invest any money that came into his possession, on the Applicant's behalf to earn interest on the sums held .. (*para. 7*).

So far as I am able to discern from the Record, neither the Applicant, nor his Advocate has filed any further Affidavit to rebut the contentions by the Respondent that he has never reached any agreement with Applicant **firstly** that the applicant was to receive the sum of Ksh 1,288,405/= and **secondly**, to invest any moneys in an interest earning account.

Indeed, those are the twin issues to be determined on the Applicant's Originating Summons (*the application*).

On the first question whether the Applicant was receive Shs 1,288,405/= the answer seems clear to me.

In his letter dated 29<sup>th</sup> July 2009, addressed by the Applicant to the Respondent, the Respondent clearly stated that out of the total sum of Ksh 1,369,315/= awarded to him in Nakuru CMCC No. 1033 of 2003 and Nakuru CMCC No. 899 of 2001 the Respondent was to deduct Ksh 80,910/= in respect of the agreed fee of Shs 155,910/=, out of which the sum of Ksh 75,000/= was credited to the value of the computer. The applicant reiterated his position in paragraphs 4 and 5 of his supporting affidavit as already outlined above. The Respondent did not in his Replying Affidavit specifically deny receiving the Applicant's letter of 29<sup>th</sup> July 2009 and neither did he reply to it. The clear implication is that he broadly agreed with the Applicant's letter on the question of his fees.

That means that the total sum due to the Applicant was Ksh 1,288,405/= as by 29<sup>th</sup> July, 2009 the date of the Applicant's letter to the Respondent. Out of that sum the Respondent deposited or paid into the Applicants' account a sum of Kshs 848,403.75 leaving a balance of Sh 440,000/= in the hands of the Respondent. Out of the latter sum, Ksh 400,000/= was into a joint account in the name of the Applicant's

and Respondent's Advocates, leaving a balance of Ksh 40,000/= to be accounted for by the Respondent.

The Applicant not only claims that he has only received Shs 848,403/= but also claims interest in the sum of Ksh 431,000/= on the balance of Ksh 440,000/=:, from February 2004 to February 2011. Is such interest in law due?

The law regarding payment of interest on client monies is set out in the **Advocates (Deposit Interest) Rules** made under Section 83 of the Advocates Act, (*Cap. 16, Laws of Kenya*). Rules 2 to 5 are material, and because of the importance of the relationship of Advocate and Client and in particular, the keeping of accounts, and when interest should be paid on moneys held on client accounts, I set out those rules in full -

"(1) ...

**(2) *Except as provided by these Rules an Advocate is not liable by virtue of the relation between the Advocate and the client to account to any client for interest received by the Advocate on moneys deposited in a client account being moneys received or held for or on account of his clients generally.***

**(3) *When an Advocate receives for or on account of a client money on which, having regard to all the circumstances (including the account and the length of time for which the money is likely to be held), interest ought in fairness to the client to be earned for him, the Advocate shall take instructions from the client concerning the investment of that money.***

**(4) *An Advocate is liable to account to a client for interest received on moneys deposited in a client account where the moneys are deposited in a separate designated account.***

**(5) *In these Rules, "separate designated account" means a deposit account in the name of the Advocate or his firm in the title of which the word "Client" appears and which is designated by reference to the identity of the client or matter concerned.***

Unfortunately neither of the Applicant's nor the Respondent's counsel made reference to any of these Rules. Clearly however, an Advocate is not liable merely by virtue of the relationship of Advocate and client to account to any client for interest received by the Advocate on moneys deposited in a client account.

The reason for this rule is, I think clear enough. An Advocates Client account or sometimes referred to as "*trust account*" is a general non-interest earning account on which an amalgam of all client moneys are deposited and applied or cheques drawn on it, as per the various client's instructions or transactions. According to the custom of banks, interest is paid on term deposits or minimum balances. It is not practicable in a fast moving account with daily transactions to keep term deposits or minimum balances as the sums in the client account will keep fluctuating on a daily basis. That, I think, is the basis of non-liability under rule 2 of those rules.

Rule 3, caters for situations, usually, where large sums of moneys are involved and the transaction is likely to take sometime. In those situations, and they will be far and between, and usually in high octane law firms, it behoves the Advocate to seek instructions from the client on the deposit of the moneys to earn interest pending completion of the transaction.

In situations where the client instructs the Advocate to deposit the moneys in an interest earning account, the duty of the Advocate is to deposit the moneys into a "**separate designated account**", in the Advocate or his firm's name clearly titled "**client**" and designated by reference to the client or matter in question (*rules 4 & 5*).

In this case, there is no evidence that the Advocate (*Respondent*) thought that the sums in issue were such that the client ought in fairness to earn interest, and did not therefore seek any instructions from the client on the treatment of the money recovered in the litigation. The purported computations of interest by the Applicant's Advocates per their letter of 25<sup>th</sup> March 2010 to the Respondent's Advocates and the Respondent's Advocates reply thereto dated 31<sup>st</sup> March 2010 were done under misapprehension of the law, and had no basis either in law or fact.

There was no basis in law because the Advocates (*Deposit Interest*) Rules were not breached by the Respondent. There was no basis in fact because the Applicant did not instruct the Respondent to deposit the sum due to him per his letter of 29<sup>th</sup> July 2003.

The Respondent claimed that there were other matters he wished to confirm from his Nakuru Officers, in which he acted for the Applicant. That averment remained a claim merely, it had no particulars so that the Respondent's fees remained at Sh 155,910/= and was paid in full in the matter set out in the Applicants' letter of 29<sup>th</sup> July 2003, and reiterated in the paragraphs 4 and 5 of the Applicant's Supporting Affidavit.

The Applicant is therefore entitled to the sum of Ksh 1,288,405/= of which the Applicant acknowledges receipt of Ksh 848,403.75, leaving a balance of Shs 440,000/= out of which shs 400,000/= is held in a joint deposit account in the names of the Applicant's and Respondent's Advocates. A sum of Kshs 40,000/= is still held by the Respondent. I direct that the said sum of Kshs 40,000/= be paid forthwith by the Respondent to the Applicant's Advocates, I also direct that the sum of Shs 400,000/= held in deposit at Transnational Bank Ltd. Nakuru Branch, in the joint names of the Applicant's and Respondent's names, be released forthwith to the Applicant's Advocates for onward transmission to the Applicant, or held against his instructions.

Noting the apparent confusion among both counsel on the question of Advocates (*Deposit Interest*) Rules, I direct that each party shall bear its own costs.

There shall therefore be orders accordingly.

**Dated, delivered and signed at Nakuru this 13<sup>th</sup> day of October, 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**