REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Suit 277 of 2004

IN THE MATTER OF: NYAWIDA DICKSON ORUKO PRACTISING AS

ORUKO IMENDE & KIRIKO ADVOCATES AND

RECOVERY OF LEGAL FEES,

IN THE MATTER OF: ORDER LII RULE 4(1) AND (3) OF THE CIVIL

PROCEDURE RULES, SECTION 3A OF THE CIVIL

PROCEDURE ACT AND SECTION 56 OF THE

ADVOCATES ACT AND ALL ENABLING PROVISIONS OF THE LAW

BETWEEN

EVELYN HAYOZ ……...…… PLAINTIFF

VERSUS

NYAWIDA DICKSON ORUKO
……..DEFENDANTS

J U D G M E N T

This is an application by way of originating summons by the plaintiff against an advocate of the High court of Kenya under the provisions of inter alia, Order 52, Rule 4(1) and (3) of the Civil Procedure Rules for the following orders:-

1. That the Defendant/Respondent do within 14 days deliver to this court a cash account of all moneys received by himself or his firm of M/s Oruko, Imende & Kiriko Advocates from the applicant in respect of the institution of two law suits against Messrs Matoke and Muller respectively.

2. The Defendant/Respondent do pay the Plaintiff/Applicant forthwith Shs.198,000/- received by him as legal fees i.e. in respect of the purported defamation cases against Messrs Matoke and Muller.

3. The Defendant/Respondent be condemned to pay interest at the rate of 20% until the date of

payment or at such other rate this Honourable Court may deem fit to grant.

4. The Defendant/Respondent be ordered to waive any claimable Advocates costs in view of his total disregard of professional ethics by failing to institute any suit despite his numerous undertakings to do the same even on receipt of the demanded legal fees and or effect change of user in respect of KWALE/DIANI/1328.

5. The Plaintiff/Applicant do have leave and or be at liberty to execute forthwith in the event of default by the Defendant/Respondent.

The Originating Summons is supported by an affidavit sworn by the plaintiff on 15th April 2004. It is detailed and has numerous exhibits.

The Defendant filed a Replying Affidavit sworn on 29th April 2004 opposing the plaintiffs claim.

I have considered the plaintiff's claim and the response by the defendant. I have also considered the submissions by counsel and authorities filed.

After careful perusal of the evidence, I have extricated the simple facts of this case and tried my best to avoid to be bogged down or the vision of the court to be blurred by the acrimony of the parties over the unusual advocate-client relationship between the parties and the distasteful and at times unprofessional language in the correspondence.

By a letter dated 27th August, 2003, The defendant as an advocate advised the plaintiff to file suit against a Mr, Matoke and a Mr. Andreas Muller for defamation against the plaintiff. He sent a Deposit request note for a sum of Kshs.188,000/- made up as follows:-

Filing suit against Muller for damages for over Shs. 1 million:

Filing Fees……72,500.00

Deposit in fees ……..20,000.00

Service Fees ……..... 1.500.00

94,000.00

Filing Fees against Mr. Johnson Matoke for damages of over 1 million:

Filing fees……72,500.00

Deposit on fees ……20,000.00

Service Fees …….1,500.00

94,000.00

GRAND TOTAL 188,000.00

On 2.10.2003, the plaintiff wired a sum of Kshs.198,000/- to the defendant to file the two suits.

The Defendant by an e-mail dated 15.10.2003 finally acknowledged receipt of the money by stating inter alia:

"**Hi Eve,**

……

Thanks for the money, I have kept it until we get the correct information before we file the suit. Everything is ready. Cheers and sorry for all the pain.

Yours Dickson."

Just before the said date and receipt of the money the Defendant on 7.10.03 wrote an e-mail in which he inter alia:

"……

Otherwise I have prepared all the papers in the Muller-Matoke Case and I will send all the documents immediately I have filed.

On the money issue it seems the bank in Kenya are very slow because it was reflected in my account that there is a cheque deposited on 6th October, which will clear on 11th October. So I have to wait another one week. ……"

It was therefore quite strange that the Defendant should tell the plaintiff that on 15th October 2003 after receiving the money that he would file the suit after getting the correct information. From the correspondence exchanged, the plaintiff became exasperated by the defendant's failure to inform her of what action he had taken. In an e-mail dated 11.12.03, almost three months after receiving the deposits of filing fees and legal fees she wrote:-

"**Hello Dickson**

……

As follows I give clear order for further jobs.

1…….

2…….

3……

4……

5.Before you send files to court I want to read all! Its not in our interest if you make mistakes like these ……..……

6. ……..

I hope you accept my orders because I am your client and I pay for your efforts no body else. Therefore I decide what works are to do for me and please I decided when the works must be done.

Please confirm this e-mail that you accept all points at that you are doing NOTHING without my clean order.

In the meantime, I wish you good luck and hope for understanding.

Sincerely yours

Evelyne."

It is clear from this e-mail, the plaintiff as a client of the defendant instructed him to send to her the draft pleadings "BEFORE" he filed the same in court. She demanded that he confirms that he was to do "NOTHING" without her clear orders. I find that by 11th December 2005, the plaintiff had instructed the Defendant not to file the two suits until she had seen and read the draft pleadings.

The Defendant responded to the plaintiff's e-mail on 10th December 2003 as indicated in the plaintiff's e-mail of 11.12.03. He therefore did receive the said instructions not to file any suits before sending the drafts to the plaintiff.

On 16th March 2004 the Defendant sent an e-mail to the plaintiff which reveals and confirms that indeed by the said date no suits had been filed. The plaintiff responded the next day on 17.03.04 by an e-mail that was emphatic as it was categorical – "no lawsuits", It reads as follows:-

"**Good morning Dickson,**

I got your e-mail dated 16/03/04.

I gave very clear information about Eddy on 8.10.03.

You accepted my info with mail 15/10/03 also very clear. Read also my mails 11/11/03 and 20/11/03 and yours 4/12/03. Specifically in my mail 11/12/03 I gave very clear instructions (no law suits) My e-mail 26/01/04 shows my instructions about your handling and promises. Read very good your mail 23.02.04. (I have all documents/you are the client and therefore the boss).

Mr. Bryant knows everything; he has all mails between us and he has my power of attorney.

SO PLEASE RESPECT MY ORDER AND GIVE MR. BRYANT NEXT WEDNESDAY ALL COPIES OF DOCUMENTS, PROOFS, LETTERS AND COURT SUITS YOU CONFIRMED HAVE ITS.

After that we will soon forward that you can also do your job.

Regard Everlyne."

It appears that there was no response from the Defendant otherwise the plaintiff and Defendant would have mentioned it. This being the last letter and instructions, the Defendant as an advocate had his final instructions from his client the plaintiff regarding the intended suits.

The plaintiff in effect made a final challenge to her advocate to produce the court papers to prove that he had filed the suits before. There was no reply. No suits had been filed. As a result, there were to be no suits as ordered by the plaintiff as a client with regard to the money deposited with the defendant.

The defendant in response placed before the court copies of two suits filed for and on behalf of Eddy Wanje Ziro against John Matoke and Andreas Muller on 29th April 2004. He contends that by these he had executed the instructions given to him.

It is to be noted that by the time these suits were filed, the present Originating organizing summons had already been filed. It is my view and finding that the Defendant had no authority or instructions to file the two suits on the basis of the instructions given in October 2003 by the plaintiff and on the basis of the

deposit of Shs.198,000/-. If he had any instructions then it was not from the plaintiff herein and only possibly from Eddy Wanje Ziro. The plaintiff had ordered stoppage of filing of the two suits the basis upon which the sum of Shs.198,000/- had been deposited with the defendant. In fact from the correspondence, the plaintiff had withdrawn instructions from the defendant and appointed another advocate, - Mr. Bryant through whom she wanted the defendant to communicate. She said that he knew everything and had her power of attorney. The Defendant had already been fired by the plaintiff as advocate and he had no authority to purport to utilize the deposit of shs.198,000/- to institute suits for Eddy Wanje as previously intended.

After considering all, I do find that there existed a relationship of advocate and client between the defendant and the plaintiff. It did not matter that in the course of acting for her, he was to also act for Eddy Wanje who was the proposed plaintiff in the defamation cases and for which the deposits were made. The defendant could not disburse the monies without authority of the plaintiff. The Defendant was retained by the plaintiff to act for her in an agreed manner and the defendant did accept the retainer.

However, no suits were filed within a reasonable period and the plaintiff expressly drew instructions and ordered that no suit be filed in effect using her deposits. I do hold that the defendant could not have used the sum of Shs.198,000/- in filing of any suits from 11.12.03. There must be authority to utilize the said monies towards filing the said suits on the date the suits were filed respectively. In the case of GER –v- MARMANET: FOREST CO-OPERATIVE & CREDIT SOCIETY LTD (1988) 1 KLR 229, it was held by the Court of Appeal that:

- **When a person says that he has instructed an advocate to act for him, what he means is that he has retained the professional services of an advocate in relation to a particular transaction or business and he has in consequence become that particular advocate's client.**

- **For an alleged payment to constitute a valid discharge from his duty to account to his client, he would have to prove that such payment was made with the authority of the respondent.**

- **An advocate who receives money on his client's behalf or as the said person's advocate is an under an obligation to account to the respondent for the money as his client.**

The defendant in his defence contended that he did other work for the plaintiff in relation to land. However, he does not claim costs in respect of such services if any in these proceedings. In fact in his affidavit he expressly says in paragraph 22 that the sum of Kshs.198,000/- as shown in his "Bank Statement to be for the case against Muller and Matoke which was the defamatory case and not the land case."

Having said the foregoing, Justice Njagi in his ruling on 17.10.08 on the question of security for costs raised questions about the timing and filing of the two suits. He observed:-

"**Under O.LII Rule 4(1) of the Civil Procedure Rules, the Court has power to order an advocate to deliver Cash account where the relationship of advocate and client exists or has existed. Whether that relationship exists or has existed between the parties herein is the main focal point of decision at the trial of the suit. Without deciding that issue with any finality at this stage, I first note that the two suits in question were both filed in court on 29th April 2004 which was exactly two weeks after the filing of the originating summons on 15th April 2004. This begs the question of whether the two suits would have been filed any time soon if it were not for the prodding by the Originating summons."**

I wish to answer the said question now that the issue is before me and directly in issue. The answer is that firstly, the defendant no longer had instructions to file the two suits and they were suits without authority of the plaintiff in so far as the finance or deposit was condemned. Secondly, yes, the filing of the suits were certainly prodded and filed due to the filing of this proceedings two weeks earlier. It was intended to cover up the Defendant's clear ineffectiveness, disobedience of instructions and possible negligence. The defendant not only failed to carry out instructions by his client but acted

unprofessionally by failing to inform his client of the true position from time to time, carried out acts of material non-disclosures and Suppressed of material information due to the client. The defendant misrepresented to the plaintiff as to the true position of instructions given. The defendant became patronizing and even rude to his client. Of seriousness is that the filing of the aforesaid cases, if at all he purported to use plaintiff's deposit with him and the timing amounted to an abuse of the court process.

On this ground the court would disallow any costs to the defendant for any work done of which there is no proof before instructions was stopped. He deserves no costs for such conduct.

Finally, it is the duty of the court to strongly reprimand the Defendant as an advocate of this court and member of the legal profession for his use of horrific foul language and abuse of his own client and intended defendants in a most unfair manner. This is unbecoming conduct on the part of an Advocate of the High Court of Kenya. It was certainly in excess of his professional duties, unprovoked and not done under authority of his client. The malicious innuendo and racists remarks in his replying affidavit (paragraph 4) regarding his client the plaintiff are shocking and sad that it is coming from one who purports to be an officer of this court. He is lucky that he himself is not the subject of a libel suit.

I do hereby grant prayers 1, 2 and 3 save that the interest shall be at court rates from 1st February, 2004 being a reasonable time from the date which notice of cessation of instructions was given.

I do grant an order in terms of prayer 5. I do hereby also grant prayer 6.

Orders accordingly.

Dated and delivered at Mombasa this 30th day of October 2009.

M. K. IBRAHIM

J U D G E

In the presence of Ms. Adagi holding brief for Mr. Noorani for the plaintiff.

Mr. Nyabena for the Defendant.