

MUINDE MUTUKUPLAINTIFF

VERSUS

RICHARD NJIRU MBOGO *t/a* NJIRU MBOGO & CO. ADVOCATES....DEFENDANT

R U L I N G

Originating Summons brought under **Section 3A Civil Procedure Act, Order 36 Rule 3, Order LII Rule 4, Civil Procedure Rules.** Orders sought:-

- 1. That the respondent be compelled by orders of this court to pay to the applicant Kshs.441,387.86 plus interest from the date of accrual at market rates;***
- 2. That the respondent do render a complete account for the sum of Kshs.950,000/= received by him on account and for the use of the plaintiff/applicant in his capacity as the applicant's advocate.***

The application is supported by affidavit of the applicant and a further affidavit sworn on 18/9/2008. The plaintiff gave instructions to the defendant to pay the bank/chargee or to give undertaking to pay Kshs.441,387/86 to liquidate a loan unpaid plus any interest outstanding. The defendant /respondent failed to honour the undertaking. The said sum was recovered by chargee by deductions from the plaintiff's salary. The plaintiff's terminal benefits were also taken by the bank/chargee to offset the loan. The plaintiff was employed by chargee.

Later the plaintiff engaged another advocate to deal with the defendant. The two advocates discussed the matter and agreed the amount outstanding was Kshs.706,220/58 which defendant agreed to repay the money but paid only small installments. The outstanding amount is sworn to be Kshs.639,019/82.

That it is sworn the correct claim is now Kshs.323,142/80 after deducting the amount of decree paid. Decree arises out of judgment of this court on 11/10/06 in the sum of Kshs.441,387/86. Later on 27/9/2006, the defendant/decree-debtor moved the court to set that judgment aside. The judgment and all consequential orders was set aside on 20/12/2006.

The parties set down for hearing on 2/4/2009. Eventually arguments were heard inter partes. The defendant indicated that at the time (OS) suit was filed, he had paid Kshs.385,000/= by cheques. Further, defendant paid Kshs.371,579/=. The plaintiff was paid Kshs.50,000/= and the balance being Kshs.129,703/= was disbursed by him in cash as indicated in affidavit of defendant sworn on 7/12/2005 paragraph 8.

Defendant admits that Kshs.441,708/= was not released because Kenya Finance Bank was closed with all defendant's money. It is sworn that the Kshs.385,000/= was paid to plaintiff's lawyers after filing suit. This amount is the same mentioned above that was paid after negotiations. The sum of Kshs.237,500/= referred to only plot is not substantiated.

Therefore, a sum of Kshs.622,500/= is to be deducted from the account. Interest was at the rate of 12% principal and interest to-date of filing suit is calculated as Kshs.706,220/=. That figure would be 706,220/= x 12%. The plaintiff states that if money the plaintiff alleges to have paid to him a balance being Kshs.323,142/80 plus Kshs.60,000/= auctioneers' charges, there would be no prejudice to be suffered by defendants.

I agree the calculation of the plaintiff are correct. The figures given by the defendant are not correct. They differ from affidavit to affidavit. He says the only amount outstanding is interest.

I therefore enter judgment against the defendant in favour of the plaintiff in the sum of Kshs.323,142/80 plus Kshs.60,000/= auctioneers' charges being a total of Kshs.383,142/80 plus interest at court rates of

14% p.a. from date of judgment until payment in full.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 26th day of October 2009.

JOYCE N KHAMINWA

JUDGE