



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 463 of 2007 (O.S.)**

**DR. JOHN KARUNGAI NYAMU ..... 1<sup>ST</sup> PLAINTIFF/CLIENT**

**ELIZABETH WANGUI KARUNGAI.....2<sup>ND</sup> PLAINTIFF/CLIENT**

**VERSUS**

**MUU & ASSOCIATES ADVOCATES.....DEFENDANT/ADVOCATE**

**RULING**

The plaintiffs have by Chamber Summons dated 7<sup>th</sup> September, 2007 expressed to be brought under **Order XXXVI Rule 12** of the **Civil Procedure Rules** sought this court's order to compel the Defendant to pay Kshs.3,158,670/- to the Plaintiff's Advocate or to deposit the same in court. In default of said order, the Plaintiffs seek execution to issue against the Defendant. There are four grounds cited on the fact of the Chamber Summons in support of the application which are as follows:

- (a) The Defendant acted for the Plaintiffs as an advocate in a transaction for the sale of their property known as L.R. No. 7795/38.
- (b) Acting in his capacity as the Plaintiffs' advocate the Defendant received the sum of Kshs.14,248,670 as part the purchase price of the said property from M/s Musyimi & Co. Advocates who were acting for the purchaser.
- (c) After making various payments at the direction of the Plaintiffs the Defendant withheld a sum of Ksh.3,158,670 which is due to the Plaintiffs and which he has refused to pay over to them or to their current advocates.
- (d) It is the interests of justice that the Defendant do deliver to the Plaintiff a cash account in respect of

the said funds and pays over the same to the Plaintiff's current advocates and/or deposits the same in court.

The application is supported by the affidavit sworn by the 1<sup>st</sup> plaintiff dated 7<sup>th</sup> September, 2007 and annexures thereto and a supplementary affidavit by the same Plaintiff dated 20<sup>th</sup> November 2007.

The application is opposed. The Defendant, an Advocate of the High Court of Kenya has filed a replying affidavit in response to the application.

The gist of the Plaintiffs' application is that the Plaintiffs instructed the Defendant Advocate to act for them in the sale of a property, L.R. No. 7792/36, registered in both the Plaintiffs' names. After receiving the purchase price of Kshs.14,248,670/- the Plaintiffs instructed the Defendant to pay out Kshs.11,090,000/-. The balance of Kshs.3,158,670/- is still being held by the Defendant, allegedly for sums owed to him by the Plaintiffs. The Defendant admits as such in a letter to the Plaintiff's current advocate marked "JKN6" in the Plaintiffs affidavit.

The Plaintiff argues that the Defendant's act of withholding the sum of Kshs.3,158,670/- was not justified and was illegal. The Plaintiff's further contended that their request to have the Defendant's bill of costs taxed has gone unheeded.

**Mr. Wanyohi** for the Advocate in response to paragraphs 12, 14, 19, 20, 45, 51, 52, 55 and 58 of the replying affidavit urged the court to find that since there was no written agreement for payment of the alleged various fees as required under **Section 45** of the **Advocate's Act** the Defendant cannot withhold the sums in question as lien.

In response to paragraphs 37, 42, 46, 48, 49, 50 and 51 of the Defendant's replying affidavit, **Mr. Wanjohi** urged court to consider paragraph 48 of the supplementary affidavit in which the 1<sup>st</sup> Plaintiff admits that indeed the Advocate was entitled to fees once ascertained. **Mr. Wanjohi** relied on the case of **Jack and Jill supermarket Limited vs. Gitonga Kimani & Another Milimani Misc. Appl. No. 388 of 2002** where **Osiemo, J.** held:

*"Even assuming the Defendant acted for the Plaintiff in the said 11 matters, the Defendant having not taxed its bill, the sum payable is not due for immediate payment and in the circumstances the Defendant is not entitled to a lien over the monies held by it on behalf of the Plaintiff in respect of a sale transaction involving the Plaintiff's property known as L.R. No. 209/11925.*

*Counsel for the Plaintiff further submits that since all the Plaintiff wants is to have the said sum deposited to Court, the Defendant will not suffer any prejudice. All in all, I am satisfied that acting by the Defendant in the alleged 11 matters does not give rise to a lien."*

**Mr. Kisaka** opposed the application on behalf of the Defendant Advocate. Learned Counsel submitted that the Applicant was seeking summary judgment in the instant application and that it was not in tandem with the prayers in the originating summons. **Mr. Kisaka** urged the court to find that order sought would dispose of the suit, which ought not to be allowed. **Mr. Kisaka** submitted further that the amount alleged to be held by the Advocate was in dispute. Counsel submitted that while the advocate admits holding Kshs.2,774,820/- as per paragraph 35 of the replying affidavit, the Plaintiffs' Advocate wrote to the defendant as per letter at page 58 of the Plaintiffs' bundle of exhibits seeking Kshs.2,698,670/-. **Mr. Kisaka** stated that the two figures were at variance with the sum claimed in the instant application. Counsel urged the court to order for taxation of the bills as provided under **Order LII Rule 4(3)** of the **Civil Procedure Rules** and submitted that indeed all the bills had been filed and that only their taxation was being awaited.

**Mr. Kisaka** urged Court to distinguish the instant suit with the cited authority of **Jack & Jill Supermarket Limited**, supra, on grounds that the instant suit was an originating summons while the cited case, the matter before court was an originating summons.

I have considered this application together with submissions by counsel. I have also considered the affidavits filed by both parties together with the annexures thereto. Having taken the above into consideration I do find that there is no dispute that:

- i) The Advocate, the Defendant herein was instructed by the Plaintiff's to provide legal services to them.
- ii) The two parties did not have any written agreement on the fees chargeable or payable to the Advocate.
- iii) The Advocate has not had this Bill of Costs taxed.
- iv) The Advocate is holding monies which came to him on behalf of the Plaintiff's herein.

The matter is very simple. **Section 48(1)** of the **Advocate Act** stipulates:

***“Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint for believing that the party chargeable there with is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.”***

It is clear from the foregoing 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 by the court. The client has exercised its rights under **Order LII rule 4(1)(d)** of **Civil Procedure Rules** which stipulates thus:

***“O. LII. r.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 personal representative, make an order for-***

***(a).....***

***(b).....***

***(c).....***

***(d) The payment into or lodging in court of any such money or securities.”***

The Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien, at least no such law has been cited to the court. What the Advocate is doing by holding onto the Plaintiffs' monies, is irregular and the court cannot condone the same.

In order to protect the money held by the Advocate on behalf of the Plaintiffs/Clients, I order as follows:

- a) The Advocate does lodge with this court Kshs.3,158,670/= within 7 days from date herein.**

**b) The Advocate to proceed to file and serve upon the Plaintiffs or his Advocate the Bills of Costs, within a reasonable time.**

**c) The Advocate do have the Bill of Costs taxed by the Deputy Registrar as soon as it is practicably possible.**

**d) Any party to apply to Court for directions as to the application of the amount deposited in Court after all the Advocates Bills of Costs are taxed.**

**e) The costs of this application be to the Plaintiffs/Clients.**

**Dated at Nairobi, this 12<sup>th</sup> day of March, 2008.**

LESIIT, J.

JUDGE

**Read, signed and delivered, in the presence of:**

Mr. Wanjohi – Advocate for the Plaintiffs/Clients

Mr. Kisaka - Advocate for the Defendant/Advocate

LESIIT, J.

JUDGE