



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc. App. 1639 of 2007

JULIA OPONDO OKERE.....APPLICANT

VERSUS

ONYANGO OLOO T/A

ANYANGO OLOO & CO. ADVOCATES...RESPONDENTS

J U D G M E N T

The applicant, Julia Opondo Okere has brought this suit by way of originating summons seeking to compel the respondent, Onyango Oloo t/a Onyango Oloo & Company Advocates to pay to her the sums of Kshs.840,101.10 and Kshs.250,000/= respectively which were paid to the respondent on account of the applicant. The suit is brought under the provisions of Order LII Rule 4(1), (b), (c), (e), 4 (2) and 10 of the Civil Procedure Rules. The originating motion is supported by the annexed affidavit of the applicant. Although the respondent did not file any papers in reply to the application, under Order LII Rule 10 (2) of the Civil Procedure Act, the respondent is allowed to make representations to the court at the hearing of the suit. Directions were taken and this suit was fixed for hearing before this court. It was agreed that the hearing of the summons would proceed by way of submissions.

Mr. Ombwayo for the applicant submitted that the applicant had instructed the respondent to act on her behalf in an accident claim. The applicant was injured in an accident involving two vehicles. The respondent filed suit on behalf of the applicant at the Chief Magistrate's Court – Nairobi (Milimani). The suit is Nairobi CMCC No.9982 of 2002. Judgment was entered in favour of the applicant for the sum of Kshs.2,695,245/=. Liability was apportioned between the owners of the two motor vehicles that were involved in the accident at the ratio of 70:30. The applicant annexed a copy of the judgment and a copy of the consent apportioning liability in her affidavit in support of the originating motion. According to the applicant, one of the owners of the motor vehicle that was involved in the accident was dissatisfied with the decision of the trial magistrate and duly appealed to the High Court. The appeal is still pending determination. Meanwhile, the defendant, who was satisfied with the decision of the trial magistrate, paid to the respondent the decretal sum of Kshs.840,101.40. It was submitted that the respondent has to date not paid the applicant the said amount.

Mr. Ombwayo further submitted that when the application for stay pending the hearing of the appeal was heard by the trial magistrate in respect of the third party, who had appealed against the decision of the trial court, a sum of Kshs.250,000/= was ordered to be paid to the applicant. According to the applicant, the said amount was paid to the respondent. Despite making several requests to the respondent to release the said amounts to her, the respondent failed to pay her hence the applicant's decision to file the present suit. Mr. Ombwayo submitted that a sum of Kshs.1,676,822/64 is deposited in a joint interest

earning account in the names of the respondent and the firm of Mungai, Muriu & Company Advocates who are on record on behalf of the third party who appealed to the High Court. Mr. Ombwayo submitted that the applicant is dissatisfied with the manner in which the respondent had acted on her behalf in the matter and had instructed to another advocate to take over the conduct of the suit.

Meanwhile, the applicant craved for an order of this court to compel the respondent to release the amount that he was currently holding on account her account. Mr. Ombwayo submitted that the respondent had refused to pay any monies to the applicant despite the respondent paying numerous visits to his office. He submitted that the court should at least order the respondent to release to the respondent the amount that was ordered to be paid by the trial Magistrate as the costs of future medical treatment. Mr. Ombwayo submitted that there was no reason why the respondent continues to withhold the said amount received on behalf of the applicant. He urged the court not to be persuaded by the respondent's assertion that he was holding the said amount as a lien on account of his costs. He prayed for the application to be allowed in its entirety.

Mr. Onyango Oloo, the respondent, opposed the suit. He admitted that he had received the sum of Kshs.600,000/= and Kshs.250,000/= respectively on behalf of the applicant. He however submitted that the sum of Kshs.250,000/= was deposited with him by the third party who had appealed against the decision of the trial magistrate as security for costs. He denied that he had unlawful or without any justification held onto any sum due to the applicant. He submitted that he had been instructed to act on behalf of the applicant in several suits. He listed the suits as, Nairobi CMCC No.9982 of 2002, Nairobi Misc. Civil Application No.1465 of 2005, and Nairobi HC Civil Appeal No.431 of 2005. He submitted that in all the above suits, he had not been paid his legal fees by the applicant. He maintained that he was ready to pay the applicant provided that his costs were settled. He took issue with the procedure adopted by the applicant in seeking relief before this to court.

In his view, the applicant should have brought an application under Order III rule 9 (a) of the Civil Procedure Rules. He submitted that if the applicant felt aggrieved that the decretal sum had not been released to her, she should have sought the Advocate-Client's bill of costs to be taxed. He maintained that this court cannot order him to pay the applicant until and unless are costs are paid. He maintained that this court should therefore order that the decretal sum be paid to the applicant subject to the taxation of the Advocate-Client's bill of costs. He maintained that the applicant's suit was in the circumstances, premature and misconceived and should be dismissed with costs.

I have carefully considered the rival arguments made by the parties to this suit. The issue for determination by this court is whether the applicant established a case to enable this court grant the orders prayed in her suit. Certain facts are admitted in this suit. It is admitted that there exists an Advocate-Client relationship between the applicant and the respondent. It is further admitted that the applicant instructed the respondent to act on her behalf in respect of an accident claim. The respondent filed a suit at the Chief Magistrate's Court, Nairobi i.e. Nairobi CMCCC No.9982/2002 (Milimani). Upon conclusion of the case, the Chief Magistrate ruled in favour of the applicant and awarded her the sum Kshs.2,695,200/45 being general damages for pain, suffering and loss of amenities on account of the injuries that the applicant had sustained and on account of special damages that the applicant incurred in seeking treatment after the said accident. The defendant paid to the respondent its portion of the decretal sum.

According to the applicant, the respondent was paid the sum of Kshs.840,101/10. The third party was dissatisfied with the decision of the trial magistrate. It duly filed an appeal to the High Court. The appeal is still pending hearing and determination. The third party was ordered to deposit the amount of Kshs.1,676,822.80 in a joint –interest earning account in the names of the respondent and the counsel for the third party pending the hearing and determination of the appeal. The respondent admits that he was paid the sum of Kshs.600,000/= by the defendant and the sum of Kshs.250,000/= by the third party. He claims that the said sum of Kshs.250,000/= was paid to him by the third party as security for costs pending the hearing of the appeal.

The respondent has not released a single cent of the amount that he received on account of the

applicant. The respondent told the court that he had retained the said amount of Kshs.850,000/= as lien pending the taxation of his advocate-client bill of costs. I have considered the reason advanced by the respondent for his failure to account for the said amount received to the applicant. The said reason is untenable in law. The respondent was required to charge and release the amount to the applicant once he received the same from the defendant. The respondent was required to charge and deduct his fees in accordance with the Advocates Remuneration Order and then pay the balance of the decretal sum to the applicant. The respondent does not have any right recognized by law to hold on any monies that he receives on account of his client in his capacity as an advocate.

From the submission made in this suit, it is evident that the respondent has conducted himself in the most unprofessional manner in failing to pay the applicant the sum that was awarded to her on account of the injuries that she sustained when she was involved in the road traffic accident. If the respondent is of the view that the issue of his costs may be disputed by the applicant, he is at liberty to file an advocate-client bill of costs before court for taxation. So far, the respondent has not deemed it appropriate to take such action. He has held on the decretal sum for nearly three (3) years without any legal reason. If the element of interest is included, the respondent now owes the applicant a substantial amount. In any event, there is still a substantial sum which remains deposited in court pending the hearing and determination of the appeal filed by the third party. The respondent's costs will still be secure in the event that he obtains a taxation of costs in his favour.

Taking into consideration the totality of the facts of this case, I hereby hold that the applicant has established her case under the provisions of Order LII of the Civil Procedure Rules. She has established that the respondent is holding the money which he received on her account in respect of Nairobi CMCCC No.9982 of 2002 (Milimani). The respondent received the said amounts of Kshs.840,101.10 from the defendant and Kshs.250,000/= from the third party in his capacity as the advocate of the applicant. As an advocate, the respondent is liable to account for the said amount received to the applicant. He is required to deliver up payment to the applicant. There is no legal reason why the respondent has withheld the said amount from the applicant. In the circumstances of this case, the respondent had no legal right to hold on the said amount received on account of the applicant as lien pending taxation of his advocate-client bill of costs.

The court ordered the respondent to pay to the applicant an initial sum of Kshs.500,000/= when this court concluded hearing submissions made by the parties to this suit on 7th May, 2008. The respondent was required to pay the said amount within seven (7) days of the said order. This court further orders the respondent to pay to the applicant the balance of the sum of Kshs.350,000/= which he admitted holding on account of the applicant. He hereby directed to pay the said sum of Kshs.350,000/=, within fourteen (14) days of today's date. In total the respondent shall pay to the applicant the sum of Kshs.850,000/=. There is a balance of the decretal that the respondent has been allowed to retain pending taxation of his advocate-client bill of costs. If the respondent shall default in settling the said amount by Kshs.850,000/= ordered paid to the applicant within the stipulated period, the applicant shall be at liberty to execute against the respondent.

The applicant shall have the costs of this suit.

DATED at NAIROBI this 21st day of May, 2008.

L. KIMARU

JUDGE