

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

Misc 178 of 2008

POSTAL CORPORATION OF KENYA.....PLAINTIFF

VERSUS

BETTY ANGATA KHASAKHALA t/a

MWENESI & ASSOCIATES ADVOCATE.....DEFENDANT

JUDGMENT

Originating Summons dated 21.02.2008 seeks orders to compel the Defendant to render a true and fair account of all the monies received by the Defendant on behalf of the Plaintiff in respect of the discharge proceeds of property known as Nairobi/Block 97/450 Outering Road, wherein the Defendant has acted for the Plaintiff in his capacity as the Plaintiff's Advocate. And that the Respondent do pay and deliver up to the Plaintiff the sum of Kshs.720,000 /= being the money received on 01.08.2005 as discharge proceeds of conveyance in respect of all parcel plot No. 2573/11/MN Mombasa from Timamy & Co. Advocates. And that in default of payment within 14 days of the court judgment be entered against the Defendant in the sum of Kshs. 720,000 /= together with compound interest thereon at the rate of 25 % p.a from 1st August 2005 until payment in full.

Directions have been taken and the order made that the Originating Summons be determined by affidavit evidence.

On the day fixed for hearing of this application, the Defendant did not attend and was not represented though hearing notice had been served. The Plaintiff's Advocate sought to proceed in Defendants absence. The court attention was drawn to the Replying affidavit filed by Defendant where it is sworn that she was out of the country and the cheque was erroneously banked in the wrong account by her employee. It is also sworn that the Defendant has not raised her fees to finalize the conveyance as instructed and in addition Plaintiff owes money on instructions given on other matters. And since the Plaintiff filed a complaint with Advocates Complaints Commission, she has lost goodwill and is not receiving work as before.

The Plaintiff submits that the statements contained in the Replying affidavit are no defence to the claim. In further Affidavit, the Plaintiff states that no fee notes have been forwarded and in any case the Defendant is at liberty to tax her bills and enforce payment.

Upon perusing the affidavit in reply filed by the Defendant and the two affidavits filed by the Plaintiff, I find that Defendant admits having received the money claimed by Plaintiff. She claims fees on several matters but no specific amount is claimed. The Defendant has not taxed any bill for such costs and has not made any effort to enforce payment.

The Plaintiff swears it is willing to pay fees to the Defendant, but that the Advocate has no lien on the funds now claimed. I have considered the submissions made by Counsel and the circumstances of this dispute. I find the Defendant is bound to deliver a cash account to the Plaintiff as provided under the provisions of Order 52 Rules 4(1) (a) (b) and 2 Civil Procedure Code.

In view of the claims by Advocate and the provisions of Rule 4 (3) of the said order I enter judgment for Plaintiff against the Defendant as prayed under prayer 1 and Prayer 2 of the Originating summons, on condition that the Plaintiff shall file an undertaking to pay to the Defendant her taxed and certified bills of

costs within the next 14 days judgment is entered herein in terms of prayer 3 of Originating Summons for the payment of Kshs. 720,000 /= but however, with interest at court rates not as claimed but at 12 %.

In view of Advocates claims for fees no costs are awarded.

Orders accordingly.

DATED this 4th day of November 2008.

JOYCE N. KHAMINWA

JUDGE