



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

Civil Case 380 of 2005 (OS)

THE KENYA HOSPITAL ASSOCIATION.....PLAINTIFF/APPLICANT

VERSUS

LUIS WAHOME (Trading as)

L. WAHOME & COMPANY ADVOCATES.....DEFENDANT/RESPONDENT

RULING

This Amended Originating Summons brought by the Kenya Hospital Association (hereinafter called the client) against Luis Wahome T/A L. Wahome & Co. Advocates (hereinafter called the advocate) under Order XXIX Rule 1 Order LII Rules 4 (1) (a), (b), (c), (e), 2 and 10 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following main orders:-

- 1) That the advocate do pay forthwith to the client the sum of KShs.500,000.00 together with interest thereon at 12% p.a. from 28.2.2005 until payment in full and the sum of KShs.130,000.00 together with interest at 12% p.a. from 3.11.2003.
- 2) That the advocate do furnish to the client a Statement of Accounts for all matters it has been handling on behalf of the client.
- 3) That the advocate do deliver to the client a list of the money which the advocate has in his possession or control on behalf of the client and that the same be paid to the client.
- 4) That the advocate do deliver to the client all the documents relevant to all the matters which he has been handling for the client.
- 5) That the costs of this suit be awarded to the client.

The application is supported by an affidavit sworn by one Eshban Githiaka the client's Director of Finance in which are deponed matters constituting the grounds of the application and a further affidavit sworn by the same Director containing additional grounds. To the supporting affidavit are annexed letters from the client to the advocate requesting for its files and money collected by the advocate on its behalf and other letters from the client to two of its debtors evidencing payment of money by the debtors to the advocate. Also annexed is a copy of a letter from the advocate confirming payment of KShs.500,000.00 by one of the client's debtors a Mr. Sayed Kadeem Hussein Shah in HCCC No.1778 of 2001. The copies of the following documents are also annexed.

- (a) A consent letter dated 13.1.05 in HCCC No.1778 of 2001 The Kenya Hospital Association – vs –

Sayed Kadeem Hussein Shah.

(b) A cheque dated 17.1.2005 for KShs.500,000.00 payable to the advocate.

(c) A letter from the advocate to M/s Rombo & Co. Advocates dated 1.3.2005 acknowledging receipt of KShs.500,000.00.

To the further affidavit are annexed copies of the following documents:-

(1) A letter dated 3.10.2003 from one Rev. Javan Ommani indicating that he had paid to the advocate KShs.50,000.00 and 4 post-dated cheques of KShs.70,000.00 towards settlement of his debt to the client.

(2) A letter dated 24.10.2005 from the advocate advising the client that he was checking his records to confirm the position.

(3) A letter dated 3.11.2003 from the client expressing concern over the advocate's failure to provide status of work done and demanding payment of money remitted to the advocate by the debtor.

The advocate has opposed the application upon grounds set out in a replying affidavit sworn on 12.9.2005. It is deponed inter alia that the advocate vigorously pursued judgment in favour of the client against Sayed Kadeem Huseein Shah and even after obtaining judgment, he kept the client updated through his assistant one Ms. Jane Munene. The advocate further depones that his decision to accept installments was prudent in view of the debtor's economic status. The advocate swears that he does not owe the client any money but to the contrary it is the client who owes him unpaid legal fees in respect of various matters all amounting to KShs.945,936.00.

I heard submissions on the Originating Summons on 23.5.2007. The Learned counsels appearing highlighted the positions taken by their respective clients as stated in their respective pleadings. I have considered the pleadings, the affidavits, the annexures and the submissions of counsel. Having done so, I take the following view of the matter.

On the client's claim for KShs.500,000.00, there is no dispute that indeed the advocate received the sum on behalf of the client. The documents annexed by the client have indeed not been challenged by the advocate. The advocate received the payment on 28.2.2005 as evidenced by his own receipt of even date. That payment was in terms of a consent contained in annexure EG 6 dated 13.1.05 which clearly stated that an appeal filed by the debtor had been withdrawn and payment of the decretal amount would be made in installments. Yet on 28.2.2005 the advocate in his letter of that date addressed to his client stated that the sum of KShs.500,000.00 had been a "**part payment towards depositing decretal amount ... pending appeal.**" That was clearly not candid of the advocate. By that date he had signed the consent letter aforesaid vide which the appeal was withdrawn. The client was clearly entitled to that sum.

With regard to the advocate's argument that he was entitled to KShs.422,308.00 as his fees for acting for the client in the case against Sayed K. H. Shah, the position has since changed with his costs having been determined by Hon. Mary Kasango J in HC. Misc. Application No.591 of 2005 at KShs.285,390.00. The advocate has not appealed against that decision. In my view, the advocate is entitled to that sum but cannot hold the entire sum of KShs.500,000.00 on any other basis. His allegation that the client owes him KShs.532,628.00 on the basis of annexure "**LW4**" cannot be a basis for continuing to hold on to sums paid in HCCC No.1778 of **2001 (The Kenya Hospital Association – vs – Sayed Kadeem Hussein Shah)**. The advocate is at liberty to have his fees taxed. He does not claim that the client will be unable to pay him any additional fees found due on taxation. Indeed, there is no evidence that prior to filing this Originating Summons the advocate had made any demand for the said fees.

With regard to the claim for KShs.130,000.00 the advocate has not filed any response thereto. The factual position given by the client in its further affidavit sworn on 4.4.2006 is therefore uncontroverted. There is therefore no reason why the advocate should be permitted to continue holding onto that sum either.

In the oral submissions on behalf of the advocate, counsel stated that he would furnish further accounts if so ordered.

In the end, I make the following orders:-

- 1) The advocate do pay to the client the sum of KShs.214,610.00 together with interest thereon at 12% per annum from 28.2.2005 until payment in full and the sum of KShs.130,000.00 together with interest thereon at 12% per annum from 3.11.2003 until payment in full.
- 2) The advocate do furnish to the client a statement of Accounts for all matters he has been handling on behalf of the client within the next 60 days.
- 3) Any sums due to the client be paid within the same period.
- 4) The advocate do deliver to the client all documents relevant to the matters it has been handling for the client within the same period.

Costs of this Originating Summons be borne by the advocate.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Wetende Ms for the client.

F. AZANGALALA

JUDGE

13/7/07