



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Misc Appli 832 of 2004

ELIZABETH MBALA MWANGETIPLAINTIFF

VERSUS

HAMZALI JIWAJI t/a HAMZAALI JIWAJI ADV.DEFENDANT

R U L I N G

Elizabeth Mbala Mwangeti, hereinafter referred to as the Applicant took out an originating summons pursuant to Order LII rule 4(1) and Order XXXVI rule 12 of the Civil Procedure rules in which she prayed for an order directing one Hamzaali Jiwaji hereinafter referred to as the Respondent to deliver to her a cash account of Kshs.126,988.30. The applicant filed an affidavit in support of the originating summons. The Respondent on his part filed a replying affidavit to resist the originating summons.

The history behind this suit appears to be straightforward. On the 26th day of May 1994, the applicant herein was involved in a road traffic accident while traveling as a passenger on motor vehicle registration No. KAB 537R along Voi-Mwatate Road. The motor vehicle was at the time owned and driven by one Juma Mwasaru. The motor vehicle was insured by United Insurance Company Ltd. As a result of the accident the applicant suffered head injuries. She then instructed Hamzaali Jiwaji practicing as Hamzaali Jiwaji Advocates to pursue a compensatory claim against the owner of the motor vehicle. This culminated to the filing of Mombasa P.M.C.C. No. 3950 of 1995 between Elizabeth Mbala Mwangeti and Juma Mwasaru. The suit gave rise to the judgment of 29th March 1996 in which the applicant was awarded a global sum of Kshs.80,610/- as damages plus interest and costs. Judgment was entered by the consent by the advocates of the litigants. It would appear United Insurance Co. Ltd failed to honour its insured's claim and this prompted Juma Mwasaru to inform the applicant to file a declaratory suit against United Insurance Co. Ltd. This culminated to the filing of Mombasa P.M.C.C.C. No. 5806 of 1997 between Elizabeth Mbala Mwangeti and United Insurance Co. Ltd. It would appear when United Insurance Co. Ltd. received summons in respect of the declaratory suit, it paid the sum of Kshs.80,610 on the 18th day of December 1997. It also paid a further sum of Kshs,46,378.30 to settle the entire sum arising out of the two suits on the 6th day of July 1998. That is the brief background of the dispute now before this court.

The applicant now wants this court to invoke its jurisdiction under order LII rule 4(1) to direct the Respondent deliver the cash account of Kshs.126,988.30 to her. It is her contention that the Respondent ceased to communicate with her the moment he was paid the decretal sum despite having visited his officers. She claimed that she was told that the court file had disappeared and this prompted her to visit the subordinate court's civil registry on 4/10/2004 which she managed to trace and peruse the file. It is then that she discovered that the matter had been settled 6 years back yet the Respondent kept on telling her lies. She admitted receiving a statement of account on 15th October 2004 after of course confronting

the Respondent with her new discovery about the mystery of her file with the registry. She has rejected the account and now wants this court to issue an order directing the Respondent to deliver fresh one to her.

On his part, Mr. Hamzaali Jiwaji has opposed the application claiming he has already done what the applicant is praying to this court to order him to do. He accused the applicant of being frivolous vexatious and mischievous.

Most of the facts in this case are settled and undisputed. To begin with, I am satisfied that there exists an advocate client relationship between Elizabeth Mbala Mwangeti (Applicant) and Hamzaali Jiwaji (Respondent). It is therefore right at this stage to state that the originating summons is properly before this court. There is also no doubt that the two suits before the subordinate court were settled and the decretal sum received by the Respondent in two instalments i.e. on 18th December 1997, Kshs.80,610/- and on 6th July 1998 another sum of Kshs.46,378.30 making a total sum paid to be Kshs.126,988.30. It is not denied by the Respondent that he has been mean to the applicant over information regarding the settlement of the suits.

I agree with the applicant that the Respondent was awoken and alarmed when he learnt that the applicant has discovered that the decretal sum had been paid a long time ago. This prompted him to write the letter dated 19.10.2004 purporting to ask her to comment on two statements forwarded to her. There is no evidence as to when the statements were forwarded to the Respondent. The position is worsened by the fact that the statements were not dated or signed by the Respondent.

The picture I get from this matter is that the conduct of the Respondent towards the applicant in strict sense amounts to professional misconduct. He has blatantly refused to correspond with his client. He has failed to account to his client. I appreciate the fact that the Respondent has a lien over the decretal sum by virtue of his professional fees. If that was the reason for his inertia to release the funds received by the applicant then why wait for about six (6) years to correspond to the client. I believe the Respondent is well versed with the provisions of the law governing the determination of advocate/client bill of costs. The Respondent has not filed any application to determine his fees despite the fact that he is aware that there is a dispute over the unsigned and undated statement account. I have been urged to make an order directing the Respondent to deliver a cash account of the decretal sum. In the simple language of the applicant if I understood her well, to order the Respondent to pay her the full decretal sum less the amount due to the Respondent on account of Professional fees. The applicant attempted to supply from the bar a certified copy of a certificate of taxation which showed that the Respondent is entitled to received a sum of Kshs.20,985/- on account of party to party costs. I do not think the document was properly presented to this court. The applicant can only do so through an affidavit. I will therefore ignore it so that it does not prejudice my decision. Even if the documents were to be admitted in evidence I do not think it will assist the applicant because what is due to the Respondent is an amount arising out of advocate/Client bill as opposed to party to party costs.

After a careful consideration of the matter, I do not think it is safe at this stage to make the order proposed by the applicant. The decretal amount has already been ascertained. The amount payable to the Respondent is in dispute. Had the amount been ascertained I would have made the order right away.

I have said enough in this matter. The whole saga is that there is mistrust between the advocate and the client. I think a fair order to make in the circumstances of this case is the order specified under Order LII rule 4(1)(d) and sub rule(3) of the Civil Procedure rules.

In the end the originating summons is allowed in the following terms:

(i) The Respondent is ordered to deposit with the Deputy Registrar of this court a sum of Kshs.126,988/30 within the next 30 days from the date hereof pending the outcome of the determination of advocate/client bill of costs.

(ii) The advocate/client bill between the applicant and the Respondent should be filed and served by

the Respondent within 15 days from the date hereof.

(iii) The Advocate-client bill stated in (ii) above should be fixed for hearing on priority basis within a period of 21 days from the date hereof.

(iv) The Deputy Registrar to release the decretal sum of Kshs.126,988/30 to the applicant less the amount due to the Respondent as ascertained by the Advocate(client bill in (ii) above

(v) Costs of this Originating Motion is given to the applicant. To avoid the matter delaying further, I still award her costs assessment at Kshs.5,000/- on account of this Originating Summons.

Dated and delivered at Mombasa this 24th day of March 2006.

J.K. SERGON

J U D G E

In open court in the presence of

Mr. Obara h/b Wanyonyi for the Respondent and the applicant in person.

Court:

Copy of the proceedings and ruling be given to the parties upon payment of the requisite fees.

Sergon, J