

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

Misc Appli 322 of 2006

ABDALLA MWAKAMSHAAPPELLANT

VERSUS

HAMZA JIWAJI T/A HAMZA JIWAJI ADVOCATERESPONDENT

R U L I N G

Abdalla Mwakamsha, took out an originating summons pursuant to order XXXVI rule 1 of the civil Procedure Rules in which he sought for an order directing Hamza Jiwaji T/a Hamza Jiwaji Advocate to pay the applicant a sum of Kshs.75,900/- being the judgment sum in Mombasa H.C.C.C. No. 893 OF 1980. Abdalla Mwakamsha filed an affidavit in support of the originating summons. Hamza Jiwaji has filed a replying affidavit to resist the motion. It is the submission of the applicant that Hamza Jiwaji received the judgment sum from Mansur Satchu esquire of Messrs Atkinson Cleasby and Satchu Advocate for Kalimunda Gerald the defendant in Mombasa H.C.C.C. No. 893 of 1980. Immediately after the judgment was delivered on 3rd March 1989. He now claims that despite receiving the money his erstwhile advocate has refused to release the money to him.

On the other hand Mr. Jiwaji advocate has contended that he has never been paid the decretal sum because it became difficult to execute the decree when the defendant relocated to Rwanda. The learned advocate annexed to his affidavit in reply correspondences in respect of complaints raised by the applicant.

The background of this dispute is easily obtainable from the pleadings now before this court; It is a fact that the applicant herein was involved in a road traffic accident on the 23rd day of February 1989 which occurred near Mariakani when motor vehicle registration No. G.K. 767K in which he was a passenger collided with Lorry Registration No. AB 2800 while pulling trailer No. L.A. 0115 while being driven by one Kalimunda Gerald. The applicant through the firm of Hamza Jiwaji Advocate sued Kalimunda Gerald for damages for the injuries he suffered vide Mombasa H.C.C.C. No. 983 of 1989. At the end of the trial the applicant was awarded judgment in the sum of Kshs.75,900 on 3rd March 1989. It is the belief of the applicant that his advocate received the money but has refused to pay him hence he should be ordered to release the money. The applicant has cited the provisions of Order XXXVI of the Civil Procedure Rules. This in my humble view is not the relevant provision of the law in such disputes. The applicant has therefore started from the wrong footing thus rendering his originating summons incompetent.

The relevant law is under the provisions of Order LII of the Civil Procedure Rules. The applicant cannot claim the defence of ignorance because he took it upon himself to file an application hence the principle of *volenti non fit injuria* will apply here. In any case ignorance of the law is not a defence. Even assuming that the applicant was competently before this court, then it is incumbent upon him to prove on a balance of probabilities his claim. The applicant is required to show that payments of the decretal sum was paid to his erstwhile advocate. In this case no cogent evidence was given to prove that. There is evidence that the applicant had lodged a complaint before the Advocates Complaints Commission sometimes in 1994 and the Commission came to the conclusion that Mr. Hamza Jiwaji did not receive the judgment sum in a letter addressed to him and copied to Hamza Jiwaji dated 24th June 1994. The complaints commission in effect cleared Hamza Jiwaji advocate of any wrong doing under section 60(1) of the Advocates Act (Cap 16 Laws of Kenya). The position now remains the same that respondent did not receive the judgement money.

What appears from the dispute is that the applicant being a disappointed client has embarked on a personal vendetta against his erstwhile advocate. This in my view amounts to harassment of the advocate by a client who cannot take bitter legal advice kindly. A court of law cannot allow its officers or any litigant for that matter to be unjustifiably harassed. The path and course the applicant has taken in this dispute amounts to an abuse of the court process which this court must put to a stop otherwise advocates will not freely practice law. Let the applicant vent his anger on the right person and leave the Respondent to discharge his duties as an advocate.

The end result is that the motion is struck out and dismissed for being incompetent and without merit. Costs shall be paid by the applicant to the Respondent.

Dated and delivered at Mombasa this 4th day of October, 2006.

J.K. SERGON

J U D G E