



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. APPLICATION NO. 698 OF 2003(OS)**

**SIMON ONDORO ..... APPLICANT**

**- Versus -**

**JANE MORAA T/a J.M. ADOGO & CO. ADVOCATE ..... RESPONDENT**

**J U D G M E N T**

The plaintiff, Simon Ondoro, was on the 28th June 1996 hit by motor vehicle registration number KUR 516 along Mombasa/Malindi road and seriously injured. He instructed JANE MORAA ADOGO t/a J.M. Adogo & Co. Advocates (“the defendant”) to file a suit for compensation. The defendant filed Mombasa CMCC No. 391 of 1997 and obtained judgment for sh. 450,000/= general, 1,600/= special damages and sh. 30,000/= costs.

The defendant in that case did not pay the decretal sum and the defendant herein, according to the plaintiff, instructed Mr. Nyaribo to file a declaratory suit against the insurer of the vehicle. A declaratory suit Mombasa CMCC No. 3966/2002 was filed against M/s. United Insurance Co. Ltd. by M/s. Nyamboye Nyaribo & Co. Advocates and judgment was obtained for sh. 814,370.75 which sum according to the plaintiff has been paid to M/s. Nyamboye Nyaribo & Co. Advocates. Not a penny of that sum has been paid to the plaintiff. After visiting M/s. Nyamboye Nyaribo & Co. Advocates several times without being paid, the plaintiff decided to sue the defendant. That resulted in this suit brought by way of Originating Summons under Order 19 Rules 1 and 2 and Order 52 Rule 4 of the Civil Procedure Rules in which the plaintiff seeks orders compelling the defendant to pay to him the said sum of sh. 814,370.75 or alternatively that the defendant gives an account of the said sum failing which she be arrested and committed to civil jail.

The defendant filed a replying affidavit and denied liability adding that no money has been paid to her on behalf of the plaintiff. She said that after she failed to recover the decretal sum in CMCC No. 391/1997 the plaintiff sought the services of Mr. Charles Nyamboye, then a partner in the firm of Mburu Nyamboye & Co. Advocates, who asked for the plaintiff’s file. She exhibited to her affidavit a letter dated the 28th February 2002 signed by Mr. Charles Nyamboye seeking to know if the defendant had any objection to M/s. Mburu Nyamboye & Co. Advocates taking over the conduct of the case on behalf of the plaintiff. The defendant had no objection but asked for their costs. Thereafter according to the defendant the plaintiff went to her and personally took his file to his new advocates on the understanding that her fees together with sh. 15,000/= she had advanced to the plaintiff was going to be paid.

During the hearing of the case the plaintiff opted to give viva voce evidence. In cross-examination by Mr. Mogaka for the defendant he admitted that he swore the verifying affidavit in support of the declaratory suit - CMCC No. 3966/2002. He also admitted that no money has been paid to the defendant by him or by anybody else on his behalf. If anything it is the plaintiff who owes the defendant sh. 15,000/= she advanced to him.

My understanding of the scope of Order 52 Rule 4 is that an advocate will be ordered to give an account of money paid to him by the client by way of deposit for some work to be done for the client or for onward transmission to a third party. An advocate will also be required to account for money paid to him by a third party for and on behalf of the client. In this case the plaintiff admits that he has not paid any money to the defendant and that nobody else has paid any money to the defendant on his behalf. The reason why he has brought these proceedings against the defendant is because, according to him, the defendant is the one who instructed M/s. Nyamboye Nyaribo & Co. Advocates to file the declaratory suit and therefore the defendant is liable to account to him for any money paid on his behalf to M/s.

Nyamboye Nyaribo & Co. Advocates. The issues for my determination are therefore whether or not the defendant who instructed M/s. Nyamboye Nyaribo & Co. Advocates to sue on behalf of the plaintiff and if so whether or not the defendant is liable to the plaintiff.

I saw the demeanor of the plaintiff while testifying before me. When asked about the verifying affidavit in support of the declaratory suit he first denied having signed it but when pressed on it he admitted having signed it on the understanding that the matter was handed over to those advocates by the defendant. If he held the defendant liable why did he have to go to M/s. Nyamboye Nyaribo & Co. Advocates several times for payment? Before going to Mr. Nyaribo, on his own testimony, the plaintiff had sought help from M/s. Swaleh & Co. Advocates. I am satisfied that the plaintiff himself took his file from the defendant and instructed M/s. Nyamboye Nyaribo & Co. Advocates to file the declaratory suit. If it is the defendant who had instructed those advocates on behalf of the plaintiff Mr. Nyamboye could not have needed to write to the defendant and ask if she had any objection to his taking over the matter. The defendant is therefore not liable to account to the plaintiff for money paid to M/s. Nyamboye Nyaribo & Co. Advocates.

Accordingly I dismiss this case with costs to the defendant.

**DATED this 27th day of February 2004.**

**D.K. Maraga**

**Ag. JUDGE**