



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 325 OF 2003

MISS LUCY PETER MUNYWOKI.....PLAINTIFF

V E R S U S

1. MR. NOEL WEISS.....1ST DEFENDANT

2. BARCLAYS BANK OF KENYA LTD.....2ND DEFENDANT

R U L I N G

In this case there is dispute between advocate and client on the question of fees for services rendered.

The firm of Obara Advocate seek to restrain the settlement of the suit by consent of parties claiming Kshs.150,000/- that their fees be paid first. There is no order as to who is to pay the said fees either their client or the opposite party. No taxation has been done on Advocate/Client Bill.

The Applicant says that Section 52 Advocates Act empowers an advocate to retain client money pending taxation. No bill has been filed yet.

The dispute arose when on 5.1.2004 the 1st Defendant Mr. Noel Weiss appointed M/s Obara & Obara firm to act for him in this suit.

The 2nd Defendant, Barclays Bank appointed A.B. Patel & Patel Advocates to act for them on 6/1/04.

On 11/2/2004 the 1st Defendant the Applicant's client filed change of advocates and decided to act in person. On the same day (11/2/2004) the client entered into consent with other parties which was filed in court on the same day. The effect of the consent was that the suit was to be marked settled upon payment of the moneys as stated in the consent. No provision was made for the payment of the costs of the advocates of the 1st Defendant – Obara & Obara.

Much later on 2/4/2004 the Applicants filed this Notice of Motion seeking to restrain the entering of judgment in terms of the said consent and that the 2nd Defendant (Barclays Bank) be ordered to pay the Applicant's costs of Kshs.150,000/- out of the disputed moneys, alternatively, if money already released, the 2nd Defendant be ordered to pay the said sum as costs to the advocates on the grounds that the advocates client (1st Defendant) refused to pay costs to his advocate and the parties have settled the matter without involving the 1st Defendant's advocate and further, that their client – 1st Defendant, resides in France and has no assets in Kenya and the advocates intended to recover costs from the money deposited in the bank.

I have perused the record and it is clear the firm of Obara was dismissed from acting on 11/3/2004. And the consent settlement does not provide for advocates costs for 1st Defendant.

In these circumstances, there is no basis upon which the court can order costs in favour of the Applicant. There is no material laid before the court to warrant such an order at this stage.

The grounds of opposition state that the firm has no longer any locus standi in the matter as instructions were withdrawn by their clients. Also that the Applicants costs having not been part of settlement should be paid by the 1st Defendant – their clients, and their remedy is against their client. This appears to me to be the correct position. The court's power to award costs in a suit is in the discretion of the Judge dealing with the matter and the power is governed by the provisions of Section 27 Civil Procedure Act. The discretion has to be exercised when there is material before the court to enable a decision to be made. In this case the advocates have not shown any material to enable me to decide on the issue. They simply say that they were appointed and should be paid costs by 2nd defendant (not their client) or from the funds held by it which is disputed.

In the affidavit of 2nd Defendant's officer it is sworn that the money was paid out in terms of the consent order. I have pointed out that this application was delayed. The court cannot therefore order the payment of costs from the said deposit. There is no order binding upon the 2nd Defendant to pay.

In the circumstances, I find this application has no merit and the same is dismissed with costs.

Dated this 23rd day of July, 2004.

JOYCE KHAMINWA

J U D G E

23/7/04

Read in presence of: Mr. M. Shah

N/A for Applicants