



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 589 OF 2000

JAMES KITHUKA NDOLA PLAINTIFF

VERSUS

WAMBUA KENZI & 2 OTHERS DEFENDANTS

RULING

JAMES KITHUKA NDOLA (plaintiff) was lawfully walking along Jomo Kenyatta Avenue Mombasa on the 27th July 1994 when motor vehicle registration number KTB 354 owned and driven by DAHIR JUMA MOHAMMED (defendant) knocked him down, as a result of which he sustained a double fracture of the left tibia, for which he sought medical treatment.

The plaintiff held the defendant responsible for this accident, for driving at an excessive speed under the circumstances, failing to exercise any and/or proper look out, failing to break or swerve or to control the said vehicle in a prudent manner so as to avoid the said accident. Due to the aforesaid matters the plaintiff suffered injury and loss and claimed compensation from the defendant through a law firm of B.W. KENZI & CO ADVOCATES (respondents). When liability was denied, Mr B W Kenzi Advocate instituted a civil case number 511 of 1995 in the Chief Magistrate's court on 10th April 1995 against the defendant claiming general damages for pain and suffering and loss of amenities, and special damages in the sum of Ksh. 6,830/= made up of medical report Sh. 2000/=, medical expenses Sh. 4,730/= and police abstract Sh. 100/= I have called for and perused pleadings and proceedings in the Chief Magistrate's civil case no. 511 of 1995 and I find that summons to enter appearance was issued on 10th April 1995 and served on the 19th April 1995 by Mr. Charles Mutinda, process server, upon the defendant's wife at their home and she acknowledged that service by signing on the reverse side of the original summons, which is in the file. A return of service is filed.

The defendant failed to enter appearance and defence. Thereupon on 2nd May 1995 the respondents filed a request for judgement under Order ISA Rules 3,4 &5 of the Civil Procedure Rules.

The pleadings also show that the firm of M/s ABOO & CO ADVOCATES drew up a memorandum of appearance on 27th July 1995 and filed it on 28th July 1995. No other pleadings is filed. But on 6th February 1996 the respondents invited Ms Aboo & Co Advocates to meet their representative in the civil registry on 20th February 1996 at 10.00 am with a view to fixing the case for hearing by consent. No proceedings are recorded to have been held on 20th February 1996. There is however an endorsement on the court file cover showing that the case had been listed for hearing on the 6th May

1996. The record of proceedings further shows that the case was marked S.O.G. on that 6th May 1996.

Going by the proceedings and pleadings in that court file, that suit has not been concluded. I have directed the Chief Magistrate to keep that file safely in the registry under lock and key till the conclusion of this matter.

Before me now is an originating summons filed on the 30th November 2000 by the same plaintiff through his advocate S.P. Master seeking the following orders to issue against the respondents namely:-

“1. That the said Wambua Kenzi and Munyao Kenzi of Ms Kenzi & Kenzi Advocates do within 15 days deliver up the entire case file in CMCC NO. 511 of 1995 including all the correspondence exchanged by the said Kenzi & Kenzi Advocates with Ms Aboo & Company Advocates for the defendant therein and with the Fidelity Shield Insurance Co. Limited and the correspondence exchanged with the applicant.

2. That the Respondents herein be made to pay all the costs of and incidental to this application.”

This application is supported by the applicant's affidavit and submissions made by Mr Master Advocate. Essentially the plaintiff's case is that the said civil suit in the Chief Magistrate's court Mombasa was filed by the Respondents on his instructions, that the suit was never heard in court although he had been called by the Respondents for the hearing on several occasions, that he lodged a complaint with the Advocates Complaints Commission on the 23rd September 1999 the Respondents failed to respond to his request to know the fate of the said case; that on 5th June 2000 the Respondents forwarded to him their statement of account Ref No. MSA/195/M/95AC dated 22nd September 1999 and a cheque dated 10th June 2000 in the sum of Ksh. 66,240/=; and finally that he now wants the entire file from the Respondents relating to his case in order to ascertain what type of action was filed by the Respondents, why and how was the settlement negotiated and what was the amount of special and general damages awarded or agreed upon between the respective advocates and when was the consent judgement recorded (if any).

The plaintiff further submits that, as the respondents have collected their professional dues, they must release the entire case file to him which they have so far refused to do, and that they have even refused to give him photocopies thereof. Mr Masters has relied on Order 52 Rule 4(1)(e) of the Civil Procedure Rules and HALSBURY'S Laws of England, 3rd Edition Vol. 36 Page 73 Subsection 4 paragraph 103. Essentially the law is that where the relationship of an advocate and client exists or has existed the court may, on an application of the client or his legal representative, make an order for the delivery of papers and documents to which the client is entitled to. If an advocate alleges that his costs have not been paid, then the court will order for taxation and payment of the same, or security of costs and protection of the advocate's lien, as the court may think fit.

The provision cited in HALSBURY'S (supra) reads:

“SECTION 4 – DOCUMENTS 103 OWNERSHIP AND USE OF DOCUMENTS

Documents coming into existence in the course of business transacted under a retainer, and either prepared for the benefit of the client or received by the Solicitor or agent for the client belong to the client. But documents prepared by the Solicitor for his own protection or benefits and letters written by the client to the Solicitor, belong to the Solicitor.”

In their submissions before me Mr. Wambua Kenzi has stated that the plaintiff's application is frivolous, and otherwise is an abuse of the court process for lack of clarity. He said the plaintiff has requested for the entire file to be given to him and yet there are documents, papers and letters therein which are for their protection, in particular since there is a case pending before Advocates Complaints Commission. I have given due consideration to this matter. The plaintiff's application is clear and plain.

He wishes to be given papers which were either prepared by the Respondents for his benefit in the business transacted under the retainer or which were received by the advocate for his benefit in their capacity as his agents. In my holding those documents belong to the plaintiff and should be released to him.

If there are documents or letters prepared by the Respondents for their own protection or benefit then my holding is that those belong to the Respondents.

In my further holding, where an advocate is instructed to institute civil proceedings on behalf of a client, enters into negotiations with a view to recording a settlement out of court, then any documents prepared or letters written or minutes of meetings drawn, relating to those negotiations are the property of the client because they were prepared or written for the benefit of the client. The advocate remains only an agent and the client remains the principal in the course of those negotiations. Indeed the said negotiations for a settlement out of court must all along be done with strict instructions from the client.

For the above reasons, the objection raised by the Respondents is hereby rejected and dismissed, while the prayers in this originating summons are granted with costs to the plaintiff.

It is so ordered.

Dated and delivered at Mombasa this 19th June 2003

A.G.A. ETYANG

JUDGE