



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT NO. 139 OF 2003 (O.S.)**

WALTER SITONIK TISIA.....APPLICANT

VERSUS

PHILIP CHABEDA.....RESPONDENT

**RULING**

The Originating Summons dated 18/9/2003 came up for directions on 12/11/2003.

The Respondent has filed a replying affidavit sworn on 18th September, 2003. The Advocates for the respective parties are agreed on the directions which they want the court to give except one. The Applicant wants the Respondent to deposit a sum of Kshs.107,000/- in court within 30 days or such other time as the court may deem appropriate. He wants this money to be deposited before the matter is heard. He did not state any reasons for that but relied on a ruling delivered in **H.C.C.C. No. 259 of 2001 (O.S.) WILSON SAINA –VS- JOSHUA C. CHERUTICH T/A CHURICH & CO. ADVOCATES** where Justice S.C. Ondeyo ordered the Defendant to deposit in court a sum of Kshs.155,361/- in a similar matter as this one.

The Plaintiff claims it engaged the Defendant as an Advocate to render services and paid the Defendant a total of Kshs.107,000/- but the Defendant did not render proper services. The Plaintiff therefore seeks a refund of that money together with interest at 14% P.A. from 5/11/2002 until payment in full.

The Defendant states that sometimes in September 2001 or thereabouts he held brief on behalf of another firm wherein a plaint was filed on behalf of the Plaintiff in respect of Nakuru H.C.C.C. No. 371 of 2001. He further states that in January 2002 the Plaintiff instructed him to file a suit in Narok Law Courts, which he did, and obtained the prayers that the Plaintiff wanted. He says that he had been paid only Kshs.23,000/- for fees and disbursements and that he did not at any time agree to refund that money to the Plaintiff.

The Plaintiff contends that it paid the Defendant Kshs.107,000/- and has attached several receipts to the affidavit sworn in support of the Originating Summons. It has even exhibited copies of letters which it sent to the Defendant demanding refund of the sum of Kshs.107,000/-.

I cannot say anything more about the parties allegations and counter allegations at this stage since I am merely required to give directions.

Can the Defendant be compelled to deposit in court the sum of Kshs.107,000/- at this stage? I do not think

so. The matter is yet to be heard and to compel him so to do may be prejudicial to his case. Besides, the Plaintiff has not advanced any reasons as to why the court should make that order. There is no allegation made against the Defendant that he is about to abscond from the jurisdiction of this court or that he would be unable to repay that money in the event that the Plaintiff succeeded in its matter. This is a monetary claim like any other and there has to be a compelling reason before a court can order a party in a suit to deposit in court the amount in dispute.

I therefore proceed to give the following directions:-

1. The Originating Summons dated 18/9/2003 together with the affidavit of Walter Sionik Tisia be treated as a plaint. 2. The Respondent's replying affidavit sworn on 18th September, 2003 be treated as a Defence.
3. Viva voce evidence to be taken during the hearing of the matter.
4. The Applicant to appear and give evidence as the Plaintiff and be at liberty to call witnesses.
5. The Respondent to appear and testify as the Defendant and be at liberty to call witnesses.
6. The matter to be heard in Nakuru High Court before one Judge.
7. Costs shall be in the cause.

**DATED** and delivered in Nakuru on this 14th day of November, 2003.

**DANIEL K. MUSINGA**

**JUDGE**

Ruling delivered in open court in the presence of:-

1 Mr. Karanja for the Plaintiff

2 Mr. Ombati holding brief for Cheche for the Defendant