REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1574 OF 2001 (O.S)

**MIKE MAINA AND 5 OTHERS……...…….PLAINTIFF**

**VERSUS**

**OWINO OKEYO & CO., ADVOCATES……DEFENDANT**

**RULING**

The six applicants filed an originating summons against the Respondent firm of Advocates for the determination of the following questions:

1 Whether the respondent is entitled to a lien on the applicants files

2 Whether the respondent should hand over the applicants files to their new advocates upon their professional undertaking to return them to the respondents upon conclusion of the on going litigation.

3 Whether the Respondent should release to the applicants their files upon undertaking to pay them costs

4 Whether the respondent should release to the applicants their files upon furnishing such security for taxed costs as this Honourable Court may deem fit to order and for ORDERS that:

(a) The Respondent do forthwith surrender to the applicants the files listed in exhibits SN3 and SN4 attached to Mr. Njuguna's affidavit herein

(b) The Respondent do deliver such cash accounts in respect of

(i) Sale of Lelyet

(ii) All payments made to it between 1996 and 2001

(c) The Respondent do pay the applicants the funds due to them

The originating summons is erroneously brought under Order LIII Rule 4 Civil Procedure Rules. It should have been brought under Order LII – the Advocates Act. It is clear from the nature of the application that applicants advocates intended to bring the application under Order LII Rule 4 Civil Procedure Rules. The error has not caused any prejudice to the respondent. An application cannot be refused merely by reason of failure to state correctly the order by virtue of which the application is made. (Order L Rule 12 Civil Procedure Rules). If the originating summons is infact a suit, then, the citing of the wrong provision of the law under which suit is brought is a mere technicality which cannot defeat the suit. (Order V Rule 12

Civil Procedure Rules). I will deem the originating summons as brought under Order LII Rule 4 Civil Procedure Rules.

When the originating summons come for hearing on 21.2.2002 Mr. Stephen Owino Advocate a Partner in the Respondents firm said:

> "I am ready to release the files on condition that I take Photostat copies of the files to enable me to prepare a cash account and provide it as prayed. They have to pay the photocopying charges. Further I am ready to provide cash account as prayed in prayer 4(b) of the Originating summons. Prayer 4(c) will have to wait the taxation of the various bills of costs which I have already filed in court. We claim shs 25,237,488/30 as costs. The release of the files is on condition that they provide guarantees to pay what may be found due to me after taxation"

Dr. Kamau Kuria for the applicants replied as follows

> "The offer relating to furnishing security apart, we accept the offer except the payment of photocopying charges. He is the one who requires the photocopies The request for security is unacceptable because the exercise of lien is always subject to the control of the court which seeks to balance the interest of the advocate and his former client"

A consent order followed in the following terms:

> "By consent, the originating summons to be heard only on the issue of the security to be provided by the applicant and on the issue of photocopying charges"

The hearing on the originating summons resumed on 8.3.2002. Dr. Kamau Kuria made oral submissions but he did not finish his submissions.. It was then agreement by consent that the hearing do go on the basis of pertinent materials on record and that the application do continue by way of written submissions. Time with which each counsel was to file and serve written submissions was spelt out. The applicant's counsel filed and served the written submissions in time. The respondents counsel did not prepare any written submissions. On 20.3.2002, he asked for more time upto 15.4.2002 to file and serve the written submissions. He was given time upto 10.4.2002. On 10.4.2002, respondents counsel asked for more time saying that he had been sick. The court gave him upto 16.4.2002 on condition that if he defaulted in filing and serving written submissions on or before 16.4.2002, the court do proceed to fix a date for the Ruling.

Suit was to be mentioned on 17.4.2002. Respondents counsel submitted that applicants counsel had gone beyond the scope of the agreed issues in his written submissions. He stated that there was no way he could be able to respond to the submissions filed as they go beyond the scope of what was agreed. He prayed that he be allowed to file a replying affidavit and the matter be heard wholly.

Dr. Kamau Kuria did not accept that he had gone beyond the agreed issues. He suggested that Mr. Owino's submissions of the day be treated as substitute to written submissions and that the court do proceed to write a judgment.

By Order LII Rule 4(2) an application under Rule 4(1) Civil Procedure Rules has to be made by originating summons supported by an affidavit. By order LII Rule 9(2) Civil Procedure Rules, the respondent is not required to enter appearance or file a replying affidavit. He can be heard without filing either of the two. In the present case, the respondent elected not to file a replying affidavit upon the service of the summons. The respondent entered appearance on 5.10.2001 The originating summons came for hearing almost 5 months later.

The respondent did not find any need of filing a replying affidavit within that time. The Respondents counsel had the applicants written submissions for over 3 weeks but on two occasions be applied for extension of time within which to file the written submission. The respondents counsel did not specify the objectionable parts of the written submissions. He did not apply for the written submissions or any part of it to be expunged from the record. He is well aware that the court has the ability to identify and discard

any irrelevant or prejudicial matter. He did not offer to make oral submissions instead of written submissions. The applicants counsel has only relied on parts of the affidavits of Mr. Stanley Njuguna and on some documents annexed to the affidavit to support the applicants case that the case for providing a guarantee has not been made out. As I said earlier, Respondent counsel had the applicants affidavit and documents for 5 months before the originating summons came for hearing. He elected not to file a replying affidavit to the Originating summons and was ready to defend the application without a replying affidavit when the application came for hearing on 21.2.220.

In my view, there is nothing objectionable in the written submissions. Before the application was heard on 21.2.2002, the respondent in answer to the application stated that he was ready to release the files and to provide cash account. He stated further that the release of the file was conditional on his taking Photostat copies and on condition that applicant provides guarantees to pay what may be found due to Respondent after taxation of the bills of costs already filed.

Thus, the Respondent has already agreed to release the files and to provide cash account the basis of the originating summons. The only issue pending for determination is whether or not applicant should provide the guarantee or provide any other security and the issue of payment of photocopying charges.

From the foregoing it seems to me that the request by respondents counsel to file a replying affidavit and for the application to be heard de novo is an after thought and made without good faith and is intended to come further delay in the determination of the application. The respondents counsel must be deemed to have declined to address court on the two issues agreed, to be determined. I will proceed to adjudicate on the two issues.

By order LII Rule 4(e) Civil Procedure Rules, the court has jurisdiction to order the delivery of papers and documents to which a client is entitled where the relationship of an advocate and client exists or has existed. Order LII Rule 3 Civil Procedure Rules provides:

> "If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protections of the advocates lien, if any, as the court thinks fit"

In the present case, it is conceded that the relationship of an advocate and client existed. It existed until the applicants terminated it by a letter dated 23.7.2001. The applicants requested for the return of the files. The applicants letter dated 13.8.2001 (Exhibit SN4) shows that respondent has been acting for applicants in forty matters most of them relating to court cases. The respondent reacted by sending fee notes for Kshs 25,237,488/30 Respondent admitted that about shs 940,000 had been paid to the respondent.

The applicants disputed the fee notes and denied that they owed the respondent any fees. The applicants, instead, claimed that it was the respondent who owed the applicants some money. By a letter dated 18.9.2001 – annexed to Mr Stephen Owino's replying affidavit sworn on 5.10.2001, the applicants advocate's requested respondent to forward the files to them upon the advocates "professional undertaking to use them in connection with the ongoing litigation and return them upon completion of the litigation so that respondents

> "lien over them may be preserved"

Mr. Owino for Respondent stated on 21.2.2002 that he has already filed various bills of costs which are pending taxation He is willing to release the files on condition that applicants provide guarantees to pay what may be found due to him after the taxation.

Dr. Kamau Kuria for the applicants submitted that an advocates professional undertaking in terms of his letter dated 18.9.2001 is sufficient to protect the respondents lieu. I have been guided by the case of Ismail versus Richards Butler {1986} 2 ALL ER 505.

The remedy sought is equitable in character. Whether the remedy will be given and on what terms depend

on the nature of the case, the stage which the litigation has reached, the conduct of the advocate and the client respectively and the balance of hardship which might result from the order the court is asked to make. The overriding principle is that the court should make such an order as is most conducive to interest of justice and that in order to do so it is necessary to weight upto matters viz:

> (a) That a litigant should not be deprived of material relevant to the conduct of his case and so driven from judgment seat if that is the result of permitting a lieu to be sustained and
>
> (b) Litigation should be conducted with due regard to the interest of courts own officers who should not be left without payment for what is justly due to them.

I have considered the circumstances of the present case. There is no evidence that before the termination of the relationship respondent had sent any fee note to the applicants which applicants had failed to pay. The relationship appear to have been very excellent. Indeed applicants had paid close to shs one million as legal fees to the respondent without coercion.

Most of the fees notes were raised after the applicants terminated the relationship.

The fees notes have been disputed by the applicants necessitating the respondent to file various bills of costs for taxation. At the present, applicant have not admitted owing respondent any sum of money as legal fees. The amount payable to the respondent if any, has not been ascertained by the process of taxation. In view of the fact that the fees notes are disputed, the process of taxation may take long. There is also the possibility that other proceedings may take place after the taxation such as the process of enforcement.

The respondent has not shown why an advocate undertaking is not sufficient to preserve his lieu. The respondent has not shown that a bank guarantee is necessary to protect his lien. As all of the fee notes are disputed it is difficult to ascertain the amount to be secured by a bank guarantee. The respondent has not shown that applicants are incapable of paying the amount which may be certified due. Mr. Njuguna deposes that he and his wife are the sole share holders in 2rd, 3rd, 4th 5th and 6th applicants. Marble Arch Hotel ltd is a very substantial investment. Applicants counsel has referred to fee note dated 1.3.99 which shows that the 2nd applicant purchased several properties at a price of shs 300,000,000

From the fee notes, it is clear that applicants had given the respondent a large volume of business. It seems to me from the foregoing that applicants are not ordinary clients. They appear to be endowed with substantial means and are capable of paying any sums that may be found due to the Respondent. It also appears that in the event of the applicants failing to pay, any judgment may successfully be enforced by execution. The respondent is holding about 40 files belonging to the applicants. Applicants exhibit SN4 shows that litigation has not been closed in most of them. From the above circumstances, I am satisfied that the respondents lien will be adequately protected by the usual Advocates Professional undertaking In any event, applicants are possessed of substantial means and respondent can successfully execute any decree which may be passed against the applicants.

The demand for a bank guarantee for shs 25 million is oppressive in the circumstances of the case and is likely to delay the release of files with the probability that applicants may suffer injustice in the pending litigation. For the foregoing reasons, I allow the application dated 14.9.2001 with the costs to the extent that and I order that:

> 1.The Respondent do forthwith surrender to the applicants or to applicants advocates M/S Kamau Kuria & Kiriaitu Advocates the files listed in exhibit SN3 and SN4 of Mr. Njugunas supporting affidavit upon the applicants Advocates professional undertaking to return them to the respondent upon conclusion of the on going litigation and Upon the applicants undertaking to pay the taxed costs if any.
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> 2. The respondent do deliver such cash account in respect of

(i) Sale of Lelyet

(ii) All payments made to it between 1996 and year 2001 within 90 days.

3. Prayer 4 of the application to be heard after the accounts are provided.

4. Respondent to meet its own costs of photocopying

E. M. Githinji

Judge

11.6.2002

Dr. Kamau Kuria present

Mr. Owino present

Mr. Owino

I apply for stay of execution pending filing of a formal application for stay of execution pending appeal

E. M. Githinji

Judge

Dr. Kamau Kuria

No objection for 7 days

E. M. GITHINJI

JUDGE

Order:

1. Execution of orders made today is stay for 7 days

2. Mention on 20.6.2002 – 2.30 for fixing hearing date of the intended application

3. Ruling to be typed and certified copies be provided to the respective advocates.

**E. M. GITHINJI**

**JUDGE**

**11.6.2002**