



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE 41 OF 1996**

**DAVID LOMUTONI NAPALPONG.....PLAINTIFF**

**versus**

**S.F. CO LTD.....DEFENDANT**

**RULING**

The plaintiff herein sued the defendant herein seeking damages for injuries sustained in an accident involving the plaintiff and the defendant. Judgment was given in the plaintiff's favour. It is on record that the plaintiff's counsel was paid money in satisfaction of the decree which he has not passed onto the plaintiff. The plaintiff/applicant sought leave of this court to act in person and he was granted that leave. He then applied for a notice to show cause why execution should not issue against the former counsel for the sum of 545,222.40 which he has received on behalf of the plaintiff. The plaintiff's former counsel was ordered to attend court but he did not and instead he appeared by counsel.

In his representations to this court counsel for the plaintiff's former counsel submitted that section 40(1) of the CPA presupposes that a notice to show cause is to be issued where there is a decree in existence which is not the case herein as there is no decree between the plaintiff and his former lawyer on record. That the applicant should have filed a miscellaneous cause in order to ascertain what is due to the counsel and to himself, that the court is functus officio as far as this suit is concerned and the proceedings cannot be opened, that these proceedings which have been brought by the applicant in the same file where his rights between him and the defendant were litigated is a nullity and that being the case then the notice to show cause be stayed so that the applicant taxes his bill against the advocate and thereafter he can execute for what has been found to be due to him.

In response to that the applicant submitted that he filed a miscellaneous application and that is when this court advised him to issue notice to show cause in this matter and so he is properly before this court.

On the court's assessment of the matters herein it is clear that there is no dispute that the applicant/plaintiff has judgment in his favour. He asserts that his counsel was paid the full decretal sum which he has not paid out to the plaintiff/applicant. Indeed the applicant had filed a miscellaneous application seeking payment of the decretal sum to him by his advocate. But this court found that that step was premature as the notice to show cause was to be issued first. The advocate herein has not shown that he does not hold the money due to the plaintiff. Instead the advocate's counsel says that the procedure invoked is improper as the client is supposed to tax his bill. There is nothing on record to show that the client is supposed to tax the bill. The client is not in a position to know what item is to be charged or how a bill is to be prepared and lodged. It is the advocate who should have done this. There is nothing to show as to why counsel has not filed his bill for taxation since the matter was concluded herein. He cannot use that as an excuse to hold on to his client's money and hold the client at ransom. I was not referred to any rule or provision of law which says that a client seeking to retrieve his money unreasonably or unlawfully withheld by the counsel has to take the trouble to tax the bill between him and his advocate. On the contrary it is the advocate who should move the court to tax his bill. He has not done so for no apparent reason and so he has not shown good cause as to why he should not release the decretal sum to the plaintiff. The plaintiff is entitled to move the court to recover the same.

It is correct that the advocate concerned is not a party to the proceedings herein and so drawing up the

decree and enforcement of the same may not be possible and so the applicant/plaintiff is now at liberty to move the court by way of a miscellaneous application to have the amount due enforced as a decretal sum against the advocate as he has not shown cause as to why he should continue holding the said amount.

2. The applicant/plaintiff will have costs of this application.

Dated read and delivered at Eldoret this 29<sup>th</sup> day of June 2001.

R NAMBUYE

JUDGE