



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 1036 OF 2000**

***MOSES KIPKOLUM KOGO* ..... *PLAINTIFF***

***VERSUS***

***NYAMOGO & NYAMOGO ADVOCATES* ..... *DEFENDANTS***

**JUDGMENT**

**On Originating Summons dated 30.6.00**

I have before me an Originating Summons filed under order LII r 1(a) (b), 4(2) CPR seeking for orders that the plaintiff be paid money's due to him by the defendant.

The plaintiff, Moses Kipkolum Kogo was the original client to the firm of advocates of Nyamogo & Nyamogo & Co.

The plaintiff acts in person. He sues Nyamogo & Nyamogo & Co. as defendants for failing to deliver their accounts and pay him for sums due to him.

Moses Kipkolum Kogo (herein referred to as Kipkolum Kogo) was involved in a serious motor vehicle traffic accident on the 30.10.89. He was a passenger travelling in vehicle Reg KWB 296.

He suffered sever and serious injuries. He had a phonological disorder of speech, impaired tongue movement, which was due to permanent injury in the segment of the motor speech area of his brain.

He filed Hccc 4925/89 and sued one of the drivers. His advocate then was M/s Robson Harris & Company Advocate. Then Kipkolum Kogo changed advocates to M/s Meshack Obura and company advocates. As will be later seen their remuneration for the work done was:-

Robson Harris and Co. Advocates Ksh.48,717.80

Meshack Obura & Co. Advocate Ksh.25,000/-.

On the 27.11.96 M/s Nyamogo & Nyamogo filed a notice of change of advocate whereby they took over the conduct of the case.

A full trial was held before the Hon. Justice Mr. J.V. Juma. The trial commenced on the 25.2.98 and concluded on the 31.3.98 when judgement was delivered. The following award was made to Kogo:-

1) General Damages Pain suffering and loss of Amenities Ksh. 75,000/-

2) Special Damages

a) Aga Khan Hospital Ksh. 35,253/-

b) Doctors Fee Ksh. 16,500/-

3) Claim for Loss of Wages disallowed for lack of proof. Gross total Ksh. 801,453/-

Costs and interest was also awarded.

Being dissatisfied with the courts judgement and award, Kogo instructed M/s Nyamogo & Nyamogo to file an appeal to the court of appeal.

This was duly done by the said advocates in Civil appeal 74/98. Moses Kipkoklum Kogo Vs David Malakwen CA 74/98

The court of appeal case was heard by the bench of Shah, Lakha & Owuor JJA.

In their decision dated the 5th of November 1998 they held that the decision by Juma J was “plainly right”. They dismissed the appeal on the 5th of November, 1998.

M/S Nyamogo & Nyamogo & Co. Advocates taxed their bill of costs in the High court case through the Miscellaneous application file No.420/99.

They also taxed their costs in the civil appeal 74/98 heard in the court of appeal through High court miscellaneous case 28/00 (The court of appeal taxation being done by the registrar of the High Court).

By March 1999, the plaintiff Kogo became impatient. He filed a notice to act in person and demanded his award direct from the First Assurance Co. Ltd, an Insurance Company. He received a letter dated the 26th March, 1999 whereby he was notified inter alia:-

“Please note that your claim has already been settled for Ksh.950,526/- (all inclusive) and our cheque No.04487 dated 22nd February 1999 dispatched to your lawyers by our advocates on the 1st March, 1999”

On the 8th of November, 1999 at 4.40 p.m. the bill of costs for the High Court Civil case No.4925/89 was taxed in Misc. App Hccc 420/99 by the Principal Deputy Registrar at Ksh.146,769/-.

On the 24th of March 2000 at 2.40 p.m. the court of appeal, appeal case was taxed by consent at Ksh.100,000.

Prior to the taxation that took place on 24th of March 2000 the parties had appeared before Hon. Justice Aluoch. She made certain Orders concerning money held by M/s Nyamogo & Nyamogo & Co. Advocates. The proceedings together with the typed copies went missing from her file. On the 20.1.00 she made orders that portion of the decretal sum deposited in the court by M/s Nyamogo & Nyamogo be released to Kogo. The decretal sum in the high court was ordered deposit in court by Githinji, J.

Thereafter Kogo waited until 5th of July 2000 when he filed this subsequent suit under Order LII CPR praying that he be paid the same due to him.

This was a situation where the insurance company had paid M/s Nyamogo & Nyamogo & Co. Advocates. The bill of costs was completed by March 2000. (I believe the reasons of delay was due to the advocates filing their bill of cost in the court of appeal for taxation instead of the High court).

Kogo claimed that he should be paid the balance of the decretal amount. Mr. Nyamogo claimed that he is infact owned Ksh.100,000/- by Kogo and is in the process to execute.

I am now left with task to make appropriate orders as to these accounts. I had made an earlier ruling requiring Mr. Nyamogo to produce his accounts. He did so. Kogo also outlined his accounts.

I have established hat Kogo has a right to come to this court an file a suit under Order LII r 1(a), (b) & 4(2) CPR seeking for the advocates accounts and to be paid. Order LII r 1(a) - (e) reads:-

“Where he relationship of advocate and client exists or has existed, the court may on the application of the client or his legal representative make an order for:-

- a) The delivering by the advocate of a cash account.
- b) The payment or delivery up by the advocate of money or security.
- c) The delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the application.
- d) The payment into or lodging in court of any such money or security.
- e) The delivery of papers and documents which the client is entitled.”

I requested Mr. Nyamogo to deliver his accounts. He did so as follows:- “Statement of account rendered”  
No. Particulars Amount charged Amount deducted

1. Decretal amount plus interest Ksh.885,044.00/-
  2. Costs awarded in Hccc No.4925/89 ` Ksh.146,769.00/-
  3. Costs awarded in civil appeal 74/99 Ksh.239.200/-
  4. Cost & Retained in court on behalf of former advocates Ksh. 73,717/80
  5. Amount released to the applicant by Justice Aluoch on 20th December, 1999 Ksh.425,357.20
- 885,044/- Ksh.885,044/00”

I was not able to follow this accounts. I referred the parties back to the Principal deputy Registrar who rightly held that he had no jurisdiction to hear the matter under Order LII CPR.

I expected from M/s Nyamogo & Nyamogo & Co. Advocates to attach the bill of costs and payment receipts as an explanation to the account.

Kogo, on the other hand by profession has had some accounting training. He rebutted the accounts submitted by M/s Nyamogo & Nyamokgo & Co. Advocates and gave the following amounts due to him.

1 Amount paid by first assurance Co.

Ltd to the Respondent	Ksh.950,526/-
Less amount released by the court	Ksh.425,357.20
	Ksh.525,168.80

Accrued Interest 12% of 950.526

January-July 2000	Ksh. 45,056.75 Ksh.669,671.55
Less taxed bill of costs	
Misc.420/99	Ksh.146,769.00
Misc 28/00	Ksh.100,000.00
Balance due to Kogo	Ksh.422,902.55

He all along recognised funds of Ksh.73,717/80 to be released to the previous lawyers, that had been deposited in court.

The accounts that I have come up from the submissions and what is on the court file is as follows:- Hon. Justice Juma awarded on the 31.3.98 a total loss sum of Ksh.801,753/-. The insurance company paid to the advocates M/s Nyamogo & Nyamogo & Co. Advocates Ksh.950,526/-. This is a difference of Ksh.148,773/-. I do not know why M/s Nyamogo and Nyamogo & Co. advocates did not give a break down of this sum and how it was arrived at. If it was costs and interest it would have been of great assistance to the court and the litigant acting in person. a figure of Ksh.885,044/- was instead reflected. There is no dispute that the High Court Civil case 4925/89 was taxed at Ksh.146,769/-. This was agreed to by Kogo. I have confirmed from the taxation file 420/99 that this figure is correct There was also no dispute that former advocates were owed Ksh.48,717.80 and Ksh.25,000/- respectively. This makes a total of Ksh.73,717.80 and is still held on their behalf. What Kogo wants is that this amount be released to him under regulation 62A of the advocates remuneration order Cap.16 which states:- “Where there has been a change of advocates, the advocate finally on record shall draw a single bill for the whole of the matter in respect of which costs have been award 2. .... 3. ....”

The sum owed to the other advocates is said to be retained in court. I do not see any prejudice to the plaintiff on this. It is further not disputed that a sum of Ksh.499,075 was deposited in court by M/s Nyamogo & Nyamogo & Co. Advocates. Out of this, Hon. Lady justice Aluoch ordered that Ksh.425,357.20 be paid to Kogo. The balance of Ksh.73,717.80 be retained in court for the two former advocates. What I find as misleading in civil appeal 74/99 whereby M/s Nyamogo & Nyamogo & Co. Advocates claimed they were awarded costs in that appeal of Ksh.239,200/-. The true position is that in the taxation fee Miss App.28/2000 the advocate and Kogo agreed by consent that he taxation be Ksh.100,000/-. Kogo on the other hand did not speak of being paid Ksh.139,200/-. During taxation Kogo agreed he received this amount by way of payment.

The ksh.100,000/- due to be executed by Nyamogo & Nyamogo & Co. Advocates concerns the civil appeal file 74/99. It was misleading to reflect a sum of Ksh.239,200/- as this amounts to double accounting. In summary I compute the accounts as per the following schedule (reflecting each item the date, particulars of the case, amount taxed, amount held by the advocate and the amount paid to the client to date, namely:- Item Date Particulars Amount Amount held Amount paid of Case No. taxed by advocate to client to date \_\_\_\_\_

1. 31.3.98 Hccc 4925/89

- suit award

Ksh 801,753

2. 1.3.99 Hccc 4925/89

Insurance Company

Ksh.950,526 paid to advocate

interest and costs

3. 3.4.99 Hccc 4925/89 orders

by Githinji J to deposit

in court Ksh.449,753/-

and file bill of costs

4. 20.12.99 Missing proceedings Ksh.425,357.20

Orders by Aluoch J for

release of ksh.425,357.20

to plaintiff. Ksh.73,717/- to be deposited in court.

5. 8.11.99 Misc appl. No.420/99 Ksh.146,769/- at 4.40 p.m.

6. 5.11.98 CA 74.98 Court of appeal

7. 24.3.00 Misc.appl 28/00 Ksh.100,000/- at by consent

2.40 pm.

8. 24.3.00 at Misc.appl 28/00 Ksh.139,200/- 2.40.p.m.

I therefore find in summary:-.

A): The amount paid to the advocate by the insurance company inclusive of costs and interest on the 1.3.99 Ksh.950,526/-

B) Less taxation Ksh.146,769 Ksh.100,000/- Ksh.246,769/- Ksh.703,757/- Less amount paid into court Ksh.449,753/- Less sum admitted receiving during taxation Ksh.139,200.00 Total Ksh.114,804/- Say Ksh.120,000/-

B) The plaintiff has been paid (except item C)

a) Ksh.425,357.20

b) Ksh.139,200./-

c) Ksh.120,000/-

Total Ksh.784,557.20

C: Sum still held by court by court 73,717.80 (included in total sum paid in court)

I would hereby enter judgement for the plaintiff as prayed and order that the defendant pay the sum due.

As there is the element of interest I note that money kept in a client account should not be charged interest. The plaintiff cannot claim this unless otherwise persuaded.

As such the plaintiff has been brought to court on the balance of the sum owing.

This shall accrue interest to 12% from the date of filing of this suit say Ksh.120,000/-.

Dated this 28th day of September, 2000 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**