



**Katana v Joseph Kiborus Tarus t/a Tarus & Company Advocates (Civil Suit E068 of 2023) [2024] KEHC 16921 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 16921 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E068 OF 2023**

**F WANGARI, J**

**MAY 2, 2024**

**BETWEEN**

**JACKSON ZIRO KATANA ..... PLAINTIFF**

**AND**

**JOSEPH KIBORUS TARUS T/A TARUS & COMPANY  
ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted suit against the Defendant through Originating Summons dated 16/8/2023 seeking for the following orders;
  - a. That this Honorable Court be pleased to order the Defendant to deliver up accounts from 14/10/2021 in respect to the decretal sum he received in Mombasa CMCC No. 1151 of 2017 - Jackson Ziro Katana v Pater Africa Limited & Thomas Shiunde Shikunze and Mombasa HCCA No. E091 of 2021, Pater Africa Limited & Thomas Shiunde v Jackson Ziro Katana.
  - b. That this Honorable Court be pleased to order the Defendant to pay the Plaintiff the sum of Kshs. 2,720,550/= together with interest at court rates from 14/10/2021 being the decretal sum paid to the Defendant in both Mombasa CMCC No. 1151 of 2017 - Jackson Ziro Katana v Pater Africa Limited & Thomas Shiunde Shikunze and Mombasa HCCA No. E091 of 2021, Pater Africa Limited & Thomas Shiunde v Jackson Ziro Katana.
  - c. That costs be provided for.
2. The Originating Summons was supported by an affidavit dated 16/8/2023 with annexures thereto. The Defendant did not respond to the summons and the matter was deemed as unopposed. Despite the matter being unopposed, this being a court of record, the matter shall be determined on merits.



3. The Plaintiff filed submissions and despite service upon the Defendant, no submissions were filed by the defence.

#### **Plaintiff's case**

4. The Plaintiff had engaged the legal services of the Defendant Law Firm, in pursuit of recovery of damages arising from a road traffic accident where the Plaintiff suffered injuries, loss and damage.
5. A suit was filed against Pather Africa Limited & Thomas Shiunde in Mombasa CMCC No. 1151 of 2017, where judgment was entered in favour of the Plaintiff for Kshs. 2,391,400 together with costs and interests. A copy of the judgment was annexed as an exhibit.
6. The Defendants in the above case filed an appeal in Mombasa High Court Civil Appeal No. E091 of 2021, where the matter was settled and file closed. Proceedings dated 19/9/2022 were annexed as an exhibit.
7. The decretal sum had been deposited in an escrow account as security for the appeal. The Plaintiff expected the money to be released to him, but he came to learn that the said decretal amount was split into 2, Kshs. 1,312,790, was paid to the firm of the Defendant's law firm and the balance of Kshs. 1,407,760 being paid to the firm of C.B Gor & Gor Advocates. The Plaintiff do not know why the money was shared between the two firms of advocates.
8. The Plaintiff engaged the services of Paul O. Buti Advocates demanding for the release of the entire decretal sum to him, but there was no response, hence necessitating the filing of this suit.

#### **Analysis and Determination**

9. I have considered the Plaintiff's pleadings, and the submissions. In my view, the following issues are for determination;
  - a. Whether the plaintiff's case has merits
  - b. Who bears the costs
10. On the merits of the case, it is not in dispute that the Plaintiff was successful in the case before the Magistrate's court and in the appeal. Though there are no terms of settlement before this court on appeal, it is expected that judgment in the Magistrate's court having been in the favour of the Plaintiff, the decretal sum ought to have been released to the Plaintiff.
11. The Plaintiff having filed this suit had the burden of proof. In the case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), Mativo J (as he then was) stated as follows;

“(26) “Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be



dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.”

12. It is not clear why the decretal amount deposited in the escrow account was split between the Defendant and the firm of C.B Gor Advocates. The Defendant was duly served with these proceedings but chose not to defend the suit. If there was any claim against the Plaintiff by the Defendant, the Defendant had the opportunity to do so. I find that the Plaintiff has discharged the burden of proof on its claim against the Defendant.
13. On the issue of costs, under Section 27 of the *Civil Procedure Act*, the court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The Defendant did not defend the suit, and there is no justification as to why the decretal sum in issue has not been released to the Plaintiff. Costs are awarded to the Plaintiff.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Originating Summons dated 16/8/2023 has merit and is hereby allowed.
  - b. Costs awarded to the Plaintiff.Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Plaintiff present in person

N/A by the Defendant

Barile, Court Assistant

