



REPUBLIC OF KENYA



**Shariff & 3 others v Simiyu Johnson Masinde t/a Masinde & Co. Advocates (Commercial Suit E002 (O.S) of 2024) [2024] KEHC 5450 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
COMMERCIAL SUIT E002 (O.S) OF 2024**

**DK KEMEL, J**

**MAY 17, 2024**

**BETWEEN**

**NAZMUDIN SHARRIF ..... 1<sup>ST</sup> PLAINTIFF  
ALTAF SHARRIF ..... 2<sup>ND</sup> PLAINTIFF  
FIROZ SHARRIF ..... 3<sup>RD</sup> PLAINTIFF  
ARIF SHARRIF ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**SIMIYU JOHNSON MASINDE T/A MASINDE & CO.  
ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff's originating summons dated 25<sup>th</sup> January, 2024 seeks the following reliefs;
  - a. The defendant do render an account of all funds received in settlement of the judgment delivered on 4<sup>th</sup> October, 2018 in Bungoma HCCC No. 85 of 2005 between *Nazmudin sherrif, Altaf Sharrif, Feroz Sharrif, Arif Sharrif v Kenya Power & Lighting Co. Ltd* and to provide to court the financial records and bank statemnts in proof of the funds received, and their status.
  - b. The defendant to forthwith pay to the plaintiffs/applicants all funds received in settlement of the judgment on 4<sup>th</sup> October, 2018 in Bungoma HCCC No. 85 of 2005 between *Nazmudin sherrif, Altaf Sharrif, Feroz Sharrif, Arif Sharrif v Kenya Power & Lighting Co. Ltd* including but not limited to, any principal amount, interest accrued, and any other ealted fees or disbursements received by the firm.
  - c. The defendant do bear costs of this application.



- d. Interest on (b) and (c) above.
2. The 1<sup>st</sup> plaintiff swore an affidavit deponing that the defendant represented the plaintiffs in Bungoma HCCC No. 85 of 2005 between *Nazmudin sberiff, Altaf Sharrif, Feroz Sharrif, Arif Sharrif v Kenya Power & Lighting Co. Ltd* (hereinafter the suit) which resulted in judgment dated 4<sup>th</sup> October, 2018 where the plaintiffs were awarded Kshs 17, 068, 889/- in special damages and Kshs 500,000/- in exemplary damages.
  3. That to date they have received a paltry sum of Kshs 5,000,000/- and the balance being unlawfully held by the defendant which has been remiss in providing financial records and bank statemnts of payments it has received from the defendant in the suit. That they run a book supplies business and urgently need the money to offset debt owed to key suppliers which is hindering their business. That the supplier has threatened legal action if the money is not paid by them.
  4. The defendant filed a response inter alia stating that the advocates for KPLC had indicated they would file and appeal although none was filed. That the deceretal sum was paid in three tranches and a sum of Kshs 22,215,178/- was transferred from the escrow account held in the joint names of the Advocates pending the intended appeal.
  5. That the sum of Kshs 45,000,000/- is subject to 16% VAT payable by the respondent upon taxation of the Advocate/Client bill of costs. He depones that the deposit of the money to Cytonn was made in good faith and to insulate the funds from Kenya revenue Authority which had placed notices on the Advocate's accounts.
  6. That the process of liquidating the funds from Cytonn was affected when the company went into liquidation and that by disclosure, he has a professional indemnity to the tune of Kshs 10,000,000/ which can settle the plaintiffs as they await settlement of Cytonn creditors.
  7. The application was disposed of by way of written submissions. The plaintiffs duly filed their submissions dated 18<sup>th</sup> March, 2024 which have been considered. There were no submissions by the Defendant.

### **Analysis and Determination**

8. Having perused the application, the reply thereto and the submissions on record, the issue for determination is whether the plaintiff has made a case to warrant the issue of the orders sought.
9. I have perused the reply by the defendant which indeed is an admission of the fact that the law firm represented the plaintiffs in Bungoma HCCC No. 85 of 2005 which was determined in their favour vide judgment of the court delivered on 4<sup>th</sup> October, 2018 wherein the sum of Kshs 17,068,889/- in special damages and Kshs 500,000/- in exemplary damages were awarded. That to date, the defendant has only remitted Kshs 5,000,000/- to the Plaintiffs.
10. From the defendant's reply, Johnson Masinde Simiyu deposed that indeed the money was paid to them in three tranches and deposited into an escrow account in the names of both advocates pending an anticipated appeal by KPLC. The appeal was never filed. That the money was withdrawn and deposited with Cytonn. That it has been hard to redeem the money from the said Cytonn as the company went into liquidation and the cerditors are yet to be paid.
11. In their submissions, the plaintiffs state that under Order 52 rule 4(a) and (b), the defendant being trustee is under an obligation to account for the money and hold the money awaiting instructiojs from the trustee. The Order states thus;



- (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—
  - (a) the delivery by the advocate of a cash account;
  - (b) the payment or delivery up by the advocate of money or securities;
  - (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 applicant;
  - (d) the payment into or lodging in court of any such money or securities;
  - (e) the delivery up of papers and documents to which the client is entitled.
12. From the summons and the reply thereto, it is plainly clear that the plaintiffs were not involved or gave instructions to the defendant to invest the decretal sum with Cytonn. The defendant in his supplementary affidavit seems to suggest that it will pay the plaintiffs once the creditors of Cytonn are paid.
13. I find no basis for the above contention in that the advocate being the plaintiff's agent is under obligation to hold the money awaiting instructions by the client on what to do with the money. The firm in this case derogated from the clear statutory obligation placed on him. In any case, the Defendant ought to have been courteous by engaging the client over the said monies and seek the client's consent to deposit the monies with a different entity namely Cyton. The Defendant vide his supplementary affidavit has alluded to the fact that he has a professional indemnity to the tune of Kshs 10, 000, 000/ which can be resorted but has not gone ahead to lodge a claim for it or engage his insurers over the same so that the Plaintiffs are assuage somewhat. The arrangement between the Defendant and Cyton has nothing to do with the Plaintiffs. The Defendant is still accountable to the Plaintiffs by virtue of the relationship of Avocate/Client. The defendant therefore has no option but to accede to the demands or claims by the Plaintiffs.
14. In view of the foregoing observations, i have no difficulty in finding that the plaintiffs have established a case against the Defendants on a balance of probabaility warranting the issue of the orders sought. In the circumstances, the originating summons dated 25<sup>th</sup> January, 2024 has merit. The same is allowed as prayed.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF MAY 2024.**

**D.KEMEI**

**JUDGE**

In the presence of :

Ochieng for Plaintiffs

No appearance Wasilwa for Defendant

Kizito Court Assistant

