



Masha v James Gekonge Mouko t/a Mouko And Co. Advocates (Civil Suit 14 of 2021) [2023] KEHC 20454 (KLR) (11 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 14 OF 2021
SM GITHINJI, J
JULY 11, 2023**

BETWEEN

PAULINE KADZO MASHA APPLICANT

AND

**JAMES GEKONGE MOUKO T/A MOUKO AND CO.
ADVOCATES RESPONDENT**

RULING

1. By Originating Summons dated August 9, 2021, brought under, sections 1A, 1B & 3A of the *Civil Procedure Act*, and order 52 rule 4 of the *Civil Procedure Rules 2010*, the Applicant claimed from the Respondent; -
 1. That the honourable court be pleased to order James Gekonge Mouko t/a Mouko and Company Advocates to account for the sum of Kshs 339,151/- which came to him by virtue of advocate-client relationship.
 2. That the honourable court be pleased to order the Respondent to deposit the aforesaid sum into the court's bank account.
 3. That the advocate's fees due to the respondent be determined as per the fee agreement in place and paid from the aforesaid amount and the balance thereof be released to the Applicant.
 4. That the costs of this suit be borne by the respondent.
2. The amount claimed was alleged to be security deposited with the court on September 5, 2005 for the Applicant's appearance in Malindi PMCC No 308 of 2005, Irene Mueni Kithunga v Pauline Kadzo Masha. The Applicant's claim was that upon dismissal of that suit on May 30, 2017, she instructed her then advocate, the Respondent, to apply for the release of the security. That the Respondent collected the security from the court sometime in November 2017 but has since refused to release the same to



the Applicant. According to the Applicant, the agreement was that the Respondent would retain only KShs 50, 000/- from the security deposit in the event that the Applicant's case was successful.

3. In support of her case, the Applicant swore an affidavit on August 5, 2021 wherein she explained the background to her claim. She produced a copy of the security deposit receipt, copy of an undated written instructions to the Respondent, copies of correspondence between the Applicant and the Malindi Chief Magistrate dated October 14, 2020 and November 9, 2020 and a copy of affidavit sworn by the Respondent on September 29, 2017 seeking release of the security.
4. The Respondent filed a notice of preliminary objection and grounds of opposition both dated August 27, 2021. The basis of the preliminary objection is that this matter was prematurely filed since the suit at the lower court is yet to be finalized by recouping costs from the plaintiff therein; that there is no record of any agreement between the parties herein; and that the OS did not meet the requirements under Order 54 Rule 4. The grounds of opposition mirrored those raised in the preliminary objection. To the Respondent, the application is bad in law, vexatious, an abuse of the court process and made in bad faith to harass the Respondent as no demand notice was made prior to filing it.
5. On February 21, 2023, the Court directed the parties to file written submissions. The Applicant filed her submissions but the Respondent did not. I have duly considered the affidavit in support of the Summons, grounds of opposition, preliminary objection raised and the submissions on record. It is pertinent that I first address the notice of preliminary objection since a preliminary objection rightly raised may determine a suit at a preliminary stage.
5. It is now settled that preliminary objections are on pure points of law. The ingredients of preliminary objections are as were stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, where it was held that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

6. The preliminary objection as raised herein does not in my view meet the threshold highlighted in the Mukisa biscuit case [supra]. The issues raised herein are on disputed facts which have to be ascertained by way of evidence. The Respondent contest that the OS does not meet the requirement under Order 54 rule 4, however there is nothing to substantiate that ground and there is no such provision under the Civil Procedure Rules, 2010. For this reason, I see no merit in the preliminary objection.
7. The suit was brought pursuant to Order 52 Rule 4 which provides: -

Power to order advocate to deliver accounts and documents [Order 52, rule 4.]

- (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.

- (2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.
- (3) 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 protection of the advocate's lien, if any, as the court deems fit.

8. In the present case, it is undisputed that there existed an advocate-client relationship between the Respondent and the Applicant respectively. The Applicant gave evidence that she paid a security deposit in relation to a suit before the lower court which was ultimately dismissed on May 30, 2017. There is clear evidence of admission by the Respondent as seen in the affidavit sworn by the Respondent on September 29, 2017. In that affidavit, the Respondent deposed that the Applicant indeed deposited the sum of Kshs 339,150 as security, and that the Respondent was to retain Kshs 50,000/- as legal fees upon conclusion of that suit. The balance, the Respondent was to keep for the Applicant until her return from Italy.
9. This is clearly an admission that there were sums due from him which he was bound to account for to the Applicant. The Respondent's allegation that the suit at the lower court is yet to be concluded is baseless. Indeed, the letter from the Chief Magistrate dated November 9, 2020 confirms that the security was collected by the Respondent. There is therefore no reason why the advocate, Respondent herein, should continue holding onto that sum.
10. Given the above, I am convinced that the Applicant has proved her case to the required standard. I allow the application in the following terms; -
- 1. The Respondent deposits to this court's bank account, the sum of Kshs 289,151/- being the balance upon deducting the agreed legal fees within 15 days for onward transmission to the applicant herein.
 - 2. Costs be borne by the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF JULY, 2023.

S.M. GITHINJI

JUDGE

