



REPUBLIC OF KENYA



Omusala & another v Kiyondi Nyachae Advocates (Miscellaneous Application E068 of 2024) [2024] KEHC 16890 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E068 OF 2024
F WANGARI, J
NOVEMBER 21, 2024**

BETWEEN

JENNIFER KANINI OMUSALA 1ST APPLICANT

FELIX ONYANGO 2ND APPLICANT

AND

KIYONDI NYACHAE ADVOCATES RESPONDENT

RULING

1. The Applicants filed the Originating Summons dated 25/04/2024 seeking for various orders summarized as herein below;
 - a. A declaration that there was no special agreement on legal fees between the Applicants and the Respondent.
 - b. That the Respondent be ordered to pat to the Applicants the decretal sums in Mombasa CMSS No. E533 of 2023 where judgment was entered in favour of the Applicants.
 - c. That in the alternative to the above, the Respondent do deliver a Bill of Costs for taxation purposes.
 - d. That an order be issued to have the Respondent remit the decretal sum awarded in the lower court less the taxed costs within 7 days of issuing the order.
 - e. Costs of the summons be assessed and paid within 7 days.
2. The Originating Summons was supported by the affidavits sworn by the Applicants herein dated 26/4/2024 with annexures thereto. The Respondent filed a Replying Affidavit dated 27/05/2024 opposing the Originating Summons.



3. The Respondent faulted the procedure of filing the O.S by the Applicants, as there were contentious facts. The case of *Mukokinya M'arithi v Patrick Munkiri Kabandu* [2021] eKLR was relied on in support of its case.
4. The Respondent did not deny that the suit in the lower court was determined in favour of the Applicants herein, where the Respondent was the advocates on record. There was an oral agreement between the parties where the advocate was to retain 30% of the decretal sum plus costs.
5. It was stated that after deducting the legal fees, the balance was payable to the Applicants. He attached the tabulation of the legal fees chargeable to each Applicant and the balance was available to the Applicants.
6. The court directed that the O.S be disposed of by way of written submissions. Both parties complied by filing their rival submissions which I have duly considered.

Analysis and Determination

7. I have considered the pleadings and the submissions. In my view, the following issues are for determination;
 - a. Whether the O.S was properly filed before this court.
 - b. Whether the O.S is merited.
 - c. Who bears the costs
8. On the first issue, the Respondent stated in the Replying Affidavit that the Applicants ought to have filed a complaint before the Advocates Disciplinary Tribunal instead of filing the Originating Summons. The Applicants seeks to have the Advocate release the decretal sum, and in addition, to have a bill of costs delivered for taxation so as to determine the legal fees payable.
9. Section 47 of the *Advocates Act* which provides as follows;
 47. Power of court to order advocate to deliver his bill and to deliver up deed
 - (1) The jurisdiction of the Court to make orders for the delivery by an advocate of a bill of costs, and for the delivery up of or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the Court.”
10. Further, Order 52, Rule 4 of the Civil Procedure Rules provides as follows;
 4. Power to order advocate to deliver accounts and documents
 - (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.”
11. In addition to the above, I do concur with the submissions by the Applicant that the Originating Summons are properly filed before this court, and this court has jurisdiction to make a determination on the same.
12. On the merits of the case, it is not in dispute that the Applicants were successful in the case before the Magistrate's court. It is expected that judgment in the Magistrate's court having been in the favour of the Applicants, the decretal sum ought to have been released to the Applicants.
13. On the other hand, the Advocate is entitled to fees for the professional services rendered. It is not in dispute that the legal fees is payable. The dispute is on the legal fees due to the Respondent. The Applicants demand that the Respondent do deliver a Bill of Costs for purposes of taxation, and the decretal sum awarded in the lower court be released less ta taxed amount.
14. The Respondent states that there was an oral agreement that it retains 30% of the decretal sum plus costs. Just like in written contracts, oral contracts are legal and binding. However, whenever there is a breach, it can be difficult to prove the same.
15. In this case, the Applicants have disputed that there was such a contract. Other than the mere statement that there existed an oral contract, there was no proof of the existence of the said oral contract, e.g. via correspondences or documentary evidence, hence the need for filing of the bill of costs to make a determination on the legal fees payable.
16. Some of the orders being sought by the Applicants can only be determined upon the discernment of the legal fees payable. The Originating Summons shall be determined partially with the final determination being made in due course.
17. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- i. The Originating Summons dated 24/04/2024 is allowed on the following terms.
 - a. That the Originating Summons is properly on record and this court has jurisdiction to determine the same.
 - b. That a declaration is hereby issued that there was no special agreement for legal fees between the Applicants/ Clients and the Respondent/ Advocate.
 - c. That the Bill of Costs be drawn and served upon the Applicants within the next 30 days.
 - d. Mention to confirm compliance on 04/03/2025.
 - ii. Costs to abide the outcome of the final determination
- Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF NOVEMBER, 2024.

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F. WANGARI



JUDGE

In the presence of;

Amakobe Advocate h/b for Maingi Advocate for the Applicants

Ndwiga Advocate for the Respondent

Brian, Court Assistant

