



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 2 OF 2019 (O.S)

IN THE MATTER OF: AN APPLICATION FOR AN ORDER AGAINST AN ADVOCATE TO DELIVER CASH ACCOUNTS BY CLIENT

FATUMA ABUD FARAJ.....APPLICANT/CLIENT

-VS-

FRANCIS KADIMA T/A KADIMA & COMPANY

ADVOCATES.....RESPONDENT/ADVOCATES

JUDGMENT

1. Fatuma Abud Faraj (the Applicant herein) commenced this suit by way of originating summons dated 24/1/2019 against her former advocates **M/S Kadima & Company Advocates** (the Respondent herein) for the following orders: -

a. The Defendant do deliver up cash account for monies Kshs. 250,000/= received by him as instruction fees to watch brief for the applicant in;

i. Criminal Case No. 785 of 2016 Republic –vs- Marline Coram Pownal;

ii. Criminal Case No. 2319of 2016 Republic –vs- Rose Faith Mwawasi; and

iii. Criminal Case No. 1072 of 2016 Republic –vs- Saumu Njuma.

b. That a declaration be issued that the Defendant is holding monies due to the Applicant.

c. That the Defendant do pay to the Plaintiff a sum of Kshs. 250,000/= which he had received as instruction fee to watch brief for the Plaintiff but no work was done at all.

d. Cost of this application be paid for.

2. The said Originating Summons Application is brought under Section 1A, 1B and 3A of the Civil Procedure Act cap 21 and Order 52 Rule 4 of the Civil Procedure Rules 2010, Laws of Kenya and all enabling provisions of the law.

3. It is supported by facts stated in the affidavit sworn by **Fatuma Abud Faraj**, the Plaintiff/Applicant herein on 24/1/2019 and on the 11 grounds set out on the face of the application which form the basis of the claim by the Plaintiff/Client as against the Respondent/Advocate. Hereunder, the facts of the case as pleaded are set out in the following term: -

4. The Plaintiff/Applicant pleaded that vide an agreement dated 21/4/2017, she instructed the Respondent/Advocate to watch her brief in three (3) criminal matters as articulated at paragraph (1) above and paid instruction fees of Kshs. 500,000/=. However, owing to some financial constraints, the Applicant withdrew the instructions before the cases came up for hearing and communicated to the advocate to that effect vide a letter dated 31/5/2017.

5. That despite various reminders the advocate refused and continues to refuse refunding the Applicant/Client the instruction fees prompting the Applicant to launch a complaint to Law Society of Kenya (LSK) vide a letter dated 1/8/2017. She averred that LSK reverted through a letter dated 18/8/2017 and advised the Respondent/Advocate to file a bill of costs within 60 days but the directions were not obliged with.

6. Just like any other contract, the Applicant alleges that the Advocate should honour a contract which has been lawfully terminated by refunding the client the money she paid.

7. Based on those facts the Applicant/Client seeks the court to intervene and order the Respondent/Advocate to pay back the money.

8. In response to assertions by the Applicant, the Respondent filed a Replying Affidavit sworn by Francis M.O. Kadima on 8/2/2019. In that affidavit, the Respondent/Advocate contended and maintains that the Applicant signed Advocate/Client's Agreement dated 26/8/2011 and paid part of the agreed fees as annexed in her affidavit. That it is the Applicant who is in breach of the said agreement and now claims refund of fees which is not in any way owed to her. It was then contended that what the Applicant deponed was not true because contrary to her assertions, the Respondent/Advocate has filed a bill of cost vide **High Court Misc. Civil Application No. 281 of 2017**.

9. In answer to the Respondent/Advocate assertions, on 6/3/2019 the Applicant filed a further affidavit dated 5/3/2019. She deposed that since there was an agreed fees in respect of legal fees payable, the agreement is binding pursuant to Section 45 of the Advocates Act and the matter cannot proceed for taxation. She added that the Bill of Costs annexed to the replying affidavit is only meant to mislead the court since the same relates to a totally different case being Succession Cause No.200/2015. In the said suit, it is averred that the Applicant had also paid a sum of Kshs. 250,000/= as instruction fees but later on withdrew the instructions. The bill was taxed but upon filing a reference, the High Court ordered the Respondent/Advocate to pay back the money. To date (sic) that order has not been complied with by the Advocate herein.

10. On three occasions, the court granted the parties liberty to file and serve written submissions but on the 9/11/2020 when the matter came up for confirmation of filing of submissions and highlighting, only the Plaintiff/Client had filed her submissions. She then moved the court by requesting for a ruling date because in her view, the Respondent was only interested in delaying the matter. Her submissions mirrored her pleadings namely, the originating summons, supporting affidavit and the supplementary affidavit which I need not replicate here as they are well captured in the facts of this case as restated above.

Analysis and Determination

11. Having read the pleadings filed and heard the parties on their respective submissions, I have also read the entire record on the file. I find that the key issue for determination is whether the Respondent/Advocate should be ordered to refund the entire amount of Kshs. 250,000/= paid to it or not.

12. However, before venturing into that endeavor, it will be noted that the Applicant had raised an objection that the advocate could not proceed with taxation in this matter because there was an agreement on the legal fees payable in the matter.

13. Section 45 of the Advocates Act requires that there be proof in writing of the agreement between the Advocate and the Client. The record before me shows that there is a letter dated 9/5/2017 addressed to the Respondent/Advocate by the Applicant. It also bears a stamp of the Respondent firm of advocates and reads as follows... (I will quote the part which is relevant)

“...you have served me with your fee notes and for all the three matters I agree and commit to pay Kshs.500,000/= in total for all the three matters keep me informed”

14. There is also an instruction note prepared by the Respondent and signed by the Applicant on 21/4/2017. It indicates that the Applicant had paid a sum of Kshs. 250,000/= as instruction fees out of the agreed total fees of Kshs. 500,000/=. In my view, when such an agreement of instruction fees is presented before Court, that agreement binds the parties and there is no recourse to renegotiate or renege the Agreement but to comply with the terms of the agreement. As such the matter cannot be ordered to proceed for taxation.

15. The question then becomes, should the Respondent/Advocate now be ordered to refund the amount paid to it as instruction fees on account that the no work was ever done on the matters instructed?

16. The Respondent did not plead on whether he performed some work as instructed or not. Instead he deponed that it is the Applicant who reneged the agreement between the parties and further that the firm does not owe her any money beyond the instruction fees. Although the Applicant submitted and maintains that no work was done but admits having instructed the firm of M/S Kadima & Company Advocates to represent her on three matters I wish to associate myself with the dicta in the case of **Peter Furmetz v James G. Mouko T/A Mouko & Company Advocates [2015] eKLR** which I am agreeable with. The court observed as follows:

“However, this court cannot at this moment decide that no work was done. As I have already indicated, the taking of instructions entails payment of a certain fee. This means to keep in check clients who hope from one legal office to another giving instructions and quickly withdrawing such instructions after having received a different legal opinion from another counsel.”

17. Likewise, in this matter the Applicant does not deny having instructed the firm of Kadima & Company advocates to watch her brief in three criminal matters, she was obliged to pay a certain fees to the said firm on account of taking down the instructions.

18. In the circumstances I direct that the Respondent/Advocates do refund to Applicant/Client Kshs. 100,000/= but not the entire sum as claimed in the originating summons.

19. Consequently, I enter judgment in favour of the Applicant/Client as against the Respondent/Advocate in the sum of Kshs.100,000/=

It is so ordered.

Dated, Signed and Delivered at Mombasa this 8th Day of February, 2021.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling

has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE