REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 257 OF 1993

MEENYE & KIRIMA ADVOCATES ....APPLICANT

AND

MM (suing on behalf of MFM, a minor)....................................1ST RESPONDENT

VS

DENIS MBICHI MBOROKI...2ND RESPONDENT

R U L I N G

1. This is a ruling on the Motion on Notice dated 18/07/2007 by the applicant made pursuant to ***Order L Rule 1 and Order XLIV Rule 1 (1) of the Civil Procedure Rules***. The applicant seeks the review, correction and/or the setting aside of the ruling made on 28/06/2007.

2. The grounds upon which the application was grounded were set out in its body and the supporting affidavit of **Moses N. Kirima** sworn on 18/07/2007. It was contended that there are apparent errors on the face of the record. These were that; firstly, there is no requirement in the Advocates Act that an advocate's clients' account and monies thereon do earn interest. Secondly, that the Court has no supervisory powers over an advocates' tax returns to make any findings on remittance or otherwise of VAT or any other taxes.

3. Although the application was served, there was no replying affidavit that was filed in opposition thereto. The firm of **L. W. Wang'ombe & Company, Advocates** which was on record for the respondent was allowed to cease acting by an order of this Court (Mrima J) of 04/09/2019.

4. Thereafter, the matter came up for hearing on 25/11/2019 when the Court directed that the respondent be personally served with the application and hearing notice. The respondent was served on 23/12/2019 but he neither filed any response to the application nor did he attend Court on 21/01/2020. On the said date, the respondent did not attend Court and the Court directed that the application be determined by way of written submissions.

5. The applicant submitted that; according to ***the Advocates Act,*** an advocate is not liable merely by virtue of the advocate - client relationship to account to any client for interest received on the monies deposited in a client account unless the client instructs the advocate to deposit the money in an interest earning account, which is not so in this case.

6. That in the impugned ruling, it was directed that the money deposited in the applicant's account earned interest which was erroneous and ought to be set aside. Moreover, that the court has no supervisory powers over an advocate's tax returns to give it jurisdiction to make findings on remittance or otherwise of VAT or other taxes. The authority of **Gunjan S. Patel v Simon Kamere P/A M/S Kamere & Co. Advocates [2011] Eklr,** was relied on in support of those submissions.

7. The issue for determination is ***whether the review is merited***. ***Order XLIV Rule (1),*** now ***Order 45 Rule (1) of the Civil Procedure Rules*** provides the grounds for which a review or a court order or decree may be warranted. The three grounds are; discovery of new and important matter or evidence which was not within one's knowledge, error apparent on the face of the record and any other sufficient reason. The applicant's review is grounded upon errors apparent on the face of the record.

8. The first error is that the applicant is not liable for interest received on the monies deposited as the same was not deposited in an interest earning account. The law relating to interest on client's money is set out in ***the Advocates (Deposit Interest) Rules*** made under ***Section 83 of the Advocates Act CAP 16***. ***Rule 2 to 5*** thereof stipulates as follows: -

> ***"(1) …***
>
> ***(2) Except as provided by these Rules an Advocate*** ***is not liable by virtue of the relation between the Advocate and the client to***

<u>account to any client for interest received by the Advocate on moneys deposited in a client account</u> being moneys received or held for or on account of his clients generally.

(3) When an Advocate receives for or on account of a client money on which, having regard to all the circumstances (including the account and the length of time for which the money is likely to be held), interest ought in fairness to the client to be earned for him, the Advocate shall take instructions from the client concerning the investment of that money.

(4) An Advocate is liable to account to a client for interest received on moneys deposited in a client account where the moneys are deposited in a separate designated account.

(5) In these Rules, "separate designated account" means, a deposit account in the name of the Advocate or his firm in the title of which the word "Client" appears and which is designated by reference to the identity of the client or matter concerned."

9. In the case of **Gunjan s. Patel v Kamere & Co <u>Advocates [2011] Eklr,</u>** Emukule J observed: -

"Clearly however, an Advocate is not liable merely by virtue of the relationship of Advocate and client to account to any client for interest received by the Advocate on moneys deposited in a client account.

The reason for this rule is, I think clear enough. An Advocate's Client account or sometimes referred to as "trust account" is a general non-interest earning account on which an amalgam of all client moneys are deposited and applied or cheques drawn on it, as per the various client's instructions or transactions. According to the custom of banks, interest is paid on term deposits or minimum balances. It is not practicable in a fast moving account with daily transactions to keep term deposits or minimum balances as the sums in the client account will keep fluctuating on a daily basis. That, I think, is the basis of non-liability under rule 2 of those rules.

Rule 3, caters for situations, usually, where large sums of moneys are involved and the transaction is likely to take sometime. In those situations, and they will be far and between, and usually in high octane law firms, it behoves the Advocate to seek instructions from the client on the deposit of the moneys to earn interest pending completion of the transaction.

In situations where the client instructs the Advocate to deposit the moneys in an interest earning account, the duty of the Advocate is to deposit the moneys into a "separate designated account", in the Advocate or his firm's name clearly titled "client" and designated by reference to the client or matter in question (rules 4 & 5)."

10. In the present case, the Court observed on interest as follows: -

"The money due to the plaintiff must have been kept by Meenya & Kirima Advocates in a client's account which earned interest as required by the law."

11. From the foregoing, the Court must have presumed that the money was in a client's account which earned interest. There was no such suggestion by the respondent. Indeed, the applicant has stated that the monies were not deposited in an interest earning account but in a general client's account. The law is clear that an advocate may not be liable to account to a client for interest on an advocate's clients' account. Liability to account will only arise if the client or court specifically instructs the advocate to deposit monies in an interest earning account. In this regard, it was an error on the part of the Court to hold that the monies had earned interest.

12. The second error was contended to be that the court has no supervisory powers over an advocates' tax returns so as to make any findings on remittance or otherwise of VAT or any other taxes. In the impugned ruling, the court had observed that: -

"I also find that though M/s Meenye & Kirima are claiming 15% VAT, there is no documentary proof by the said advocates confirming payment of the V. A. T amount to the Kenya Revenue Authority. The V. A. T amount is therefore not deductible by Meenye & Kirima Advocates."

13. The applicant alleges that it spent a certain amount of money on VAT of which it seeks to be reimbursed. The applicant being the one who alleges ought to have proved that it actually made disbursements on behalf of the respondent to the tune of Kshs. 45,106/-. Section 107 of the Evidence Act refers.

14. From the record, all that the Court did was to decline to award the applicant the 15% VAT claimed since there was no prove of such expenditure. Even in the present application there was no evidence to show that such amount was expended either on the amount paid by the respondent or on his behalf. In this regard, it is clear that the Court did not in any way interfere with the applicant's tax returns as alleged.

15. From the foregoing, the application is meritorious only to the extent that the applicant is not liable to account for any interest on the amount as ordered by the Court.

16. It follows that the ruling delivered on 28/06/2007 is hereby varied as to interest. The amount due will be as follows: -

a) Amount admitted and executed against by Meenye & Kirima Advocates - Kshs.1,321,411/-

b) Less

i) Advocates' fees - Kshs. 300,705/-

ii) Court fees - Kshs. 50,612/-

iii) Monies collected on 10/3/97,

24/12/97 and 27/1/2000- Kshs. 457,350/-

Kshs. 808,667/-

Amount payable by Ms. Meenye

And Kirima Advocates Kshs. 512,744/-

17. Due to the time taken ever since the dispute on the money due arose, approximately 20 years now, I direct that the said sum of Kshs.512,744/- be paid forthwith to the next friend. For the avoidance of any doubt, the said sum of Kshs. 512,744/- shall henceforth attract interest at Court rate from the date of this ruling until payment in full.

18. It is upon the firm of Meenye and Kirima, Advocates to look for the next friend and effect the said payment as soon as practically possible.

19. Each party to bear own costs.

DATED and DELIVERED at Meru this 14th day April of 2020.

A. MABEYA

JUDGE