



REPUBLIC OF KENYA

INT THE HIGH OF KENYA AT MOMBASA

CIVIL SUIT NO. 46 OF 2016 (OS)

MWANZIA MUSELAAPPLICANT

VERSUS

CHRISTINE M KIPSANG & CO. ADVOCATESRESPONDENT

RULING

1. Through an Originating Summons dated 17th May, 2016 brought under Order 52 rule 4 (1) (a), (b), (c), (d) and (e) of the Civil Procedure Rules 2010, the applicant seeks the following orders:-

(i) That the defendant as the Advocate for the plaintiff in Resident Magistrate Civil Suit No. 2179, **Mwanzia Musela vs Kensalt Ltd** to deliver the cash account he (sic) received on behalf of the plaintiff/applicant;

(ii) That the defendant/respondent as the advocate of (sic) the plaintiff in RMRCC No. 2179 of 2010 Mombasa, to make payment or delivery cash account (sic) to the plaintiff/applicant herein;

(iii) That the defendant/respondent to deliver to the applicant a list of monies which the respondent has in his (sic) possession or in control on behalf of the applicant which monies the respondent received on behalf of the plaintiff/applicant;

(iv) That the defendant/respondent to deliver up of papers and documents to which the applicant is entitled;

(v) That the court do order that the respondent to comply with the above within the next (14) days from the date of issuing of this order in default of which judgment be entered in favour of the plaintiff against the defendant/Respondent; and

(vi) That the costs of this application be borne by the defendant/respondent

The application is supported by the affidavit of Mwanzia Musela dated 17th May, 2016. At the hearing of the said application, the applicant appeared in person and requested the court to grant the orders sought.

ANALYSIS AND DETERMINATION

The issues that call for determination are:-

(i) If the applicant is entitled to the orders sought under Order 52, rule 4 (1) (a) to (e) of the Civil Procedure Rules; and

(ii) If the applicant is entitled to costs of this application.

2. The applicant in his supporting affidavit deposes that he instructed the law firm of Christine M. Kipsang & Co. Advocates to act on his behalf in RMCC No. 2179 of 2010 and that he has been awaiting settlement for almost 4 years to no avail.

3. In paragraphs 4, 5 and 6 thereof, he asserts that he wrote to the said law firm on 4th April, 2016 but his judgment award of Ksh 450,000/= has not been settled, yet the defendant in the said case advised him that his claim was paid to his Advocate Christine M Kipsang & Co Advocates.

3. The respondent herein entered appearance on 29th May, 2016 and filed a replying affidavit on the said date. The said law firm was not represented in court when this matter came up for hearing. A perusal of the respondent's affidavit reveals that the defendant in RMCC No. 2179 of 2010 filed an appeal, being HCCA No. 25 of 2014, **Kensalt Ltd vs Mwanzia Musela**, which is yet to be prosecuted.

4. In paragraph 5 thereof the deponent states that although the applicant wants his money, she had informed him that the decretal cheque was deposited in a fixed deposit account in the joint names of the Advocates, pending the hearing and determination of the Appeal.

5. The application herein is anchored on the provisions of Order 52, rule 4 (1) of the Civil Procedure rules, which provides as follows;

“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) delivery by the advocate of a cash account;

(b) the payment or delivery up by the advocate of money or securities.

(c) the delivery of 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 into court of any such money or securities.

(e) the delivery up of papers and documents which the client is entitled.

(2) Applications under this rule shall be by originating summons supported by affidavit and shall be served on and advocate.

(3) If the advocate alleges that he has a claim for costs the court may make such order for taxation and payment, thereof and the protection of the advocate's lien if any as the court deems fit.”

6. It was held that the scope of originating summons is limited in the case of in the case of **Kenya Commercial Bank Limited vs Osebe** (1982) KLR 296, where the court held that:-

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expenses of bringing an action. The procedure is not intended for determination of the matter that involve a serious question. The procedure should not be used for determining disputed questions of fact...”

7. It is clear that the applicant is being economical with the truth in that he withheld material information from this Court about the existence of Mombasa HCC Appeal No. 25 of 2014 which is pending hearing. It is apparent that he is aware that the decretal amount was Kshs 450,000/= as he has stated so in his affidavit. Due to the appeal that is pending hearing in the High court, I decline to grant orders for the release of the decretal sum that is being held in an interest bearing account by Advocates for the parties in

the said appeal. I also decline to grant an order against the respondent for delivery up of papers and documents which the applicant is entitled to, as the respondent's fees have not been settled by the applicant.

8. It is my finding that in the interest of justice, transparency and accountability, the applicant is entitled to the following orders, which I hereby grant-

(i) Delivery by the respondent of a cash account of monies received arising from the judgment in Resident Magistrate Civil Suit No. 2179 of 2010;

(ii) Delivery by the respondent of a list of the money or securities which the Advocate has in her possession or control on behalf of the applicant; and

(iii) Each party will bear its own costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of September 2016.

NJOKI MWANGI

JUDGE

In the presence of:

..... Applicant

.....for the Respondent

.....Court Assistant