



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC CIVIL APPLICATION NO. 141 OF 2013 (OS)
FLORENCE NYAGUTHIE MURAGE.....CLIENT/ APPLICANT
VERSUS
RUMBA KINUTHIA & COMPANY ADVOCATES.....ADVOCATE
RULING

On the 30th of January 2014, this Court gave a ruling directing the parties to proceed with the pending applications. Parties complied. Justice Waweru gave a consolidated ruling on the 3rd April 2014 for the Notice of Motion dated the 23th of May 2013. In the application dated the 23rd May 2013 the applicant sought to review, set aside and /or vary the judgment of Hon. Justice Waweru entered on the 20th of May 2013 and all consequential orders emanating therefrom.

Parties thereafter appeared before this court and direction were given that the application dated the 12th of May 2013 be heard. A ruling on the said application has been given dismissing the said application for being incompetent. The subject of this ruling is the Originating summons dated the 5th June 2013. It is brought under Section 1A, 1B and Section 3A of the Civil Procedure Act, to Order 52 rule 4 of the Civil Procedure Rules. The applicant seeks the following orders;

1. That the Court be pleased to order the delivery by the advocates of the cash account owing to the applicant.
2. That the Court be pleased to order the immediate release/ delivery of Kshs. 1, 318,483. 50 to the applicant being the proper amounts held by the respondent on behalf of the applicant.
3. Those costs of the application be borne by the respondent.

The application is premised on the following grounds;

- i. The judgment in favor of the applicant in a previous miscellaneous application no.1411 of 2004 was passed on the 21st July 2010 by the Honorable Justice Okwengu awarding the applicant Kshs. 1,698,559.50. This amount is the award, interest plus costs.
- ii. The relation between the applicant and the respondent in the aforementioned suit broke down, because of the respondent's intent to withhold more money than would be required of them.
- iii. The respondent's bill of cost that exceeded the amount provided for by the advocates remuneration order thereby necessitating Taxation of costs.
- iv. On the 19th of February 2013, the ruling on the taxation on the matters was delivered in chambers by the learned Deputy registrar. The bill were taxed and allowed as against the applicant in the sum of Kenya Shillings Three Hundred and eighty thousand and eighty six shillings (Kshs.

380,076) only.

- v. On 20th May 2013 judgment in favor of the respondents to execute the bill of costs was entered in miscellaneous application no. 141 of 2013.
- vi. The respondent is therefore entitled to Kshs. 380,076/- and is required to deliver Kshs. 1,318,483.5 to the applicant of the judgment money which the respondent is still holding.
- vii. The respondent has refused to acknowledge the same and the prescribed time for filing any reference has since lapsed. The respondent is therefore still holding the money unlawfully.
- viii. The respondent is indebted to the applicant by holding her award. The applicant is therefore entitled to institute proceedings for the taking of accounts pursuant to Order 52 Rule 4 of the civil procedure.

The application was opposed. Mr. Rumba Kinuthia the Managing Partner in the Respondent's firm deposed as follows; that the amount awarded to the applicant was Kshs. 1,500,000/- and not Kshs. 1,698,599/-; that judgment of Justice Okwengu was very clear and unambiguous; that he has acted in good faith throughout the process; that the applicant has failed to disclose material facts; that the application is misconceived, premature, mischievous, vexatious and an abuse of the court process and he states his reason as follows that;

- i. The issue of Taxation is pending before the Court and the respondent is fully aware of this fact.
- ii. The application is founded on blatant and grave falsehoods e.g. the false assertion under Oath in paragraph 3 that the respondent was awarded a sum of Kshs. 1,698,559.50 whereas she was actually awarded Kshs. 1,500,000/-. That he is not aware of the Bill of Costs that she drew up for the award of the costs she is vaguely alluding to.
- iii. On the 7th March 2013 the Respondent and her co-conspirators lodged a formal complaint to the Law Society of Kenya
- iv. After representations were made by both sides, the LSK on the 19th of June 2013 dismissed the Respondents Complaint, observing in the Ruling, inter alia, that **"we note that the matter is still in court and we urge you to await the outcome of the court"**.
- v. It is clear from the provisions of Order 52 Rule 5 (3) under which the Motion has been brought that the issue of costs must be settled before the issue of delivery of accounts can be contemplated.

Counsels agreed that this matter Misc. Civil Application can be a test case for the other cases related to this one. The said cases being Misc. Civil Application Case Nos. 142/13, 734/13, 735/13, 736/13, 737/13, 738/13 and 744/13.

On the 4/11/13 Counsels made oral submissions. Mr. Ligunya reiterated what is deposed in the applicant's affidavit. He referred to various annexures and submitted that the respondent has no business holding the money that the respondent should state what they think is the decretal sum, the costs and how it is distributed. Mr. Okindo relied on the affidavit of Mr. Kinuthia, he relied on the provisions of Order 52 Rule 4 (3) and sought the dismissal of the application. In response Mr. Ligunya stated that the respondent has not been following up on their applications and that the applications are meant to wood wink the court.

As I consider this application it is not in dispute that the respondent's applications for review and enlargement of time have been dismissed. The applicant's monies awarded to her in the judgment delivered on the 21st of July 2010 have not been paid to her by the respondent to date. I have considered the reasons given by Mr. Kinuthia and I find them unpersuasive. Any issue of costs is settled by an advocate filing a Bill of Costs. That was done by the respondent and a ruling was given. Order 52 Rule 4 (3) shields the respondent. However the respondent cannot hold on to money that was awarded to the applicant just because his costs have not been paid. The applicant just like him is entitled to the fruits of her judgment. The respondent disputes the figures the applicant claims but has failed to disclose why the sum has not been paid less the fees, which was taxed. Under Order 52 Rule 4 any of the parties can move to court seeking various orders; Order 52 Rule 4 provides as follows ;

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.

The applicant's issue is that the respondent is holding her money without a justifiable cause. I do recognize that an advocate is entitled to his fees and his client the fruits of her judgment. 4 years is a long time to determine what the respondent's costs should be, no wonder the applicant filed a complaint with the Law Society of Kenya. Any advocate should endeavor to settle a client's account and the issue of his costs within the shortest time possible . A reasonable thing to do is to say this is what you were awarded by the court, these are my costs as per the advocate's remuneration order and this is the balance due to you. Matters such as this one should not take the length of time it has taken . The issues between the parties in this matter are being prolonged for no good reason and to settle the issues between them I make the following orders that;

1. The advocate shall deliver a cash account owing to the applicant within the next 21days from the date of this ruling.
2. Once that is done the amounts awarded by the Taxing Master as cost due to the respondent shall be deducted and the balance of the sums shall be deposited in a joint bank account to be held in the name of both counsels.
3. The applicants shall move the court for an order of release of the said amounts in the event that the respondent fails to pursue filing a reference in the various taxations.
4. Costs of the application to the applicant

Orders accordingly.

Dated signed and delivered this 12th Day of November 2014

R. E. OUGO

JUDGE

In the presence of :-

.....For the Applicant

.....For the Respondent

.....Court Clerk