



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 3066 OF 1986**

**PENINA ANZAYE ..... APPLICANTS**

**VERSUS**

**NAIROBI DELUX SERVICES..... RESPONDENTS**

**RULING**

On 18th August, 1988, and upon the application of the plaintiff/applicant then represented by the firm of advocates – Simiyu, Wetang’ula & Co, whom I shall henceforth refer to as the first advocates, I sanctioned and approved terms of settlement of the claim of the applicant and her children including minors, in HCCC No 3066/88 against the respondent arising out of a motor accident which cause the death of the applicant’s husband. The respondent was represented at the time, by Mr Siagi from the firm of Advocates – K Mwaura and Co, whom I shall henceforth refer to as the second advocates. The settlement provided for the payment of a total amount of 219,120/=, 216,000/= being for general damages and 3,120/= as special damages of the general damages, 154,000/= was to be paid to the Inter Africa Credit Finance Ltd for the benefit of the minor children of the applicant. The rest was to go to the applicant and her then adult son and daughter. Three months later, Mr Wetan’gula of the first advocates applied for and obtained the release of 219,000/- to the first advocates for distribution in accordance with the settlement order. The second advocates paid to the first advocates by separate cheques the amounts to be paid to the applicant and her children under the settlement order, but they were returned to the second advocates who then paid the whole amount into Court by one cheque. The first advocates then wrote to the court on 25.10.88, for the release of the money to them so that they could comply with the settlement order. But could they not have achieved the same laudable result with the separate cheques that the second advocate had earlier sent to them. It would seem from what transpired afterwards that the first advocates wanted the money paid to them in their own name so that they could, instead of implementing their much vaunted intention to comply with the settlement order, misapply the money to their own use. Apart from the affidavits of the applicant which I shall revert to later, I am fortified in this view by the fact that there is nothing in the file of this matter, which there should have been, to show that the amounts due to the minor dependants of the applicant were invested in the joint names of the Registrar of the High Court and the minors as provided in the settlement order.

The present application dated 3.12.1990, has been brought for me to review and set aside my order made on 18.8.1988, and not on 17.8.1988, as mistakenly stated in the related notice of motion. This understandable and inconsequential mistake stems from the extracted order which, although it states that the application for the sanctioning and approval of the settlement was heard before me on 18.8.1988, and granted on that same day, goes on obviously mistakenly, to state that the extracted order was issued by the Deputy Registrar on 17.8.1988. This of course, could not have been so and what really matters is the date on which I made the orders. The mistaken reference to 17.8.1988, does not matter since a copy of my

extracted settlement order is itself annexed to the applicant's affidavit in support of the application. The mistake is a matter of form only and not of substance. This supporting affidavit dated 22.11.1990, is to the effect that prior to the suit HCCC 3066/86 being filed by the first advocates, the applicant, had instructed M/s Pandya & Talati, Advocates, whom I shall henceforth refer to as the Third Advocates, to sue the respondent for damages for herself and her children arising from the death of her husband in a motor accident. The third advocates brought the required suit under the Law Reform Act and Fatal Accidents Act, against the respondent in HCCC 160/85 a year before the one brought by the first advocates. The former suit was filed in the High Court on 11.2.1985, and on 20.3.1985, the second advocates as instructed by the respondent's insurance company, entered appearance for the respondent which was also endorsed to be served on the third advocates. An amended plaint was filed on 27.1.1986, but before then, the second advocates had on 22.3.1985, filed a defence on behalf of the respondent which was endorsed to be served on the third advocates. And so, it can be said that by 20.3.1985, the second advocates were very much aware of the suit brought by the third advocates which was prior to the one brought by the first advocates and filed in 1986. The present file does not contain the plaint filed by the first advocates, but according to the applicant's supporting affidavit, the applicant having been approached by the firm, Mawenzi Allied Investigators and Agents which can only be described as ambulance chasers, that they would help her recover damages from the respondent faster, not unnaturally, agreed to their suggestion that she should instruct the first advocates to act for her. She signed a letter to that effect and the first advocates then brought the suit HCCC 3066/86 which from the application for the approval of the settlement, was for damages by the applicant against the respondent, under the Law Reform Act and Fatal Accidents Act and involving the same circumstances and issues as the suit brought by the third advocates. Having given her instruction to the first advocates, the applicant heard no more about the matter until sometime after September 1989, when she was informed by the third advocates that the matter had been settled between the respondent and the first advocates on her behalf for 219,120/= which had been done without any reference to her and what is more, neither she nor her children had received a single cent from the first advocates.

Annexed to the applicant's supporting affidavit are correspondence between the first, second and third advocates which show that prior to the settlement of the applicant's claim, there had been in 1987, exchange of letters between the first, second and third advocates to the effect that the second advocates after perusal of their files, had noted that separate suits had been filed by both the first and third advocates and asking them by letter dated 28.7.1987, written by one of their partners a Mr Nyuthe, to let them know which one of them had been properly instructed so that they could deal with them. The first advocates had then written on 16.9.1987, to the second advocates to say, *inter alia*, that they need not in the meantime, file a defence as the suit filed by the third advocate was the prior one and that the third advocates should prosecute their suit. This letter was copied to the third advocates. In reply to this letter, the second advocates again through Mr Nyuthe, asked the first advocates then to withdraw their suit if they had no instructions otherwise the second advocates would seek to have struck out one of the suits filed on behalf of the applicant. The second advocates copied this letter also to the third advocates and the Insurance company of the respondent. The third advocates then wrote to the second advocates a letter dated 29.9.1987, and copied to the first advocates, in which they stated that their suit HCCC 160/85 having been filed well within time, they would resist any application to strike it out. Negotiations, it seems, were then carried out between the second advocates and the third advocates which culminated in Mr Kirumba Mwaura a partner in the second advocates, writing to the third advocates on 2.6.1989, that they had instructions and it could only have been from the respondent's insurance company, to settle the applicant's claim for 769,000/=. In reaching this figure, account had been taken of a letter from the employer of the applicant's husband, setting out his emoluments at the time of his death and prospects etc and when he would have been eligible to retire.

But more was yet to come. On 15.9.1989, the self same Mr Kirumba Mwaura for the second advocates, now wrote to the third advocates that unbeknown to him, the applicant's claim against the respondent had already been settled within the context of HCCC 3066/88 (sic) which had been filed by the first advocates, by another partner in the second advocates, Mr Nyuthee. But this is the very same advocate who, having noticed that two separate suits namely, HCCC 160/85 and HCCC 3066/86, had been filed on behalf of the applicant against the respondent by the third advocates and the first advocates respectively, had properly at that time, written to the first advocates respectively, had properly at that time, written to

the first advocates and to the third advocates the letters of 28.7.1987, already referred to seeking clarification as to their standing in the matter, and his further scathing letter of 23.9.1987, also already referred to, to the first advocates, suggesting that they should withdraw their suit if they had no instructions and also that the second advocates would apply to have one of the suits struck out. And so what was the motive behind the contradictory steps then by taken by Mr Nyuthe without any cogent change in the existing circumstances, to negotiate with the first advocates and not the third advocates?" when it is considered that the respondent's insurer must have been aware of the two suits filed and of the negotiations that went on with respect to both suits, that the first advocates had on 16.9.1987, written to the second advocates and copied to the third advocates, that the third advocates should, because their suit was first in time, continue to prosecute their suit and that the second advocates need file no defence to the suit filed by the first advocates, and that the settlement reached in HCCC 3066/86 was for the comparatively paltry sum 219,120/= whilst that in HCCC 160/85 was for 769,000/=, the sordid motive is not too difficult to discern. And it is also not too difficult to see why the second advocates negotiated with the first advocates behind the back of the third advocates and took improper advantage of the confusion created by the applicant's action in instructing two sets of advocates.

To all this, the second advocates have filed the following grounds of objection:

- “1. The application is frivolous, vexatious and misconceived.
2. That the application is intended to delay the administration of justice
3. That there has been undue and unreasonable delay in seeking review as the order sought to be set aside was made on 17th October, 1988, over two and half years ago.
4. That the discretion of the Court in review and setting aside should be exercised judicially and justifiably.
5. That the discretion of the Court in review and setting aside should be exercised judicially and justifiably.
6. That the injustice and hardships complained of on which the application is based are as a result of the plaintiffs misdeeds.
7. As the plaintiff disowns these proceedings, she should proceed by way of a separate substantive suit, to declare this suit and all orders thereto a nullity and the defendant will take a preliminary objection on this issue”.

It is true that the third advocates were informed in September, 1980, of the settlement reached between the first advocates and second advocates and that the application was not filed until 22.2.1991, but I do not think that his delay is unreasonable and should affect the validity of the application having regard to the particular circumstances surrounding the application. Upto now, the amount awarded as damages to the applicant and her children have not, it seems, even been paid to them or for their benefit and it is not too late to put things right if I am to find that gross injustice and great wrong have been done. Furthermore, there is no rule which limits the time within which an application like the present one, may be made. Far from the application being intended to delay the administration of justice, it has been brought to see that justice is done and advantage not taken of an ignorant woman and her children. It may be that the applicant has brought her suffering upon herself, but can it be said that she is responsible for her predicament if I so find, that the first advocates and the second advocates deliberately, wrongly or unprofessionally dealt with each other when they both knew that this should not have happened? I would say not. In my view, the application for review has been properly brought. And now to consider the replying affidavit sworn not one would have thought, by Mr Nyuthe whose act in negotiating a settlement of the claim with the first advocates is at the centre of the application, but rather by Mr Kirumba Mwaura. This affidavit to my mind, would have had greater credibility with me had it been sworn by Mr Nyuthe. The only reason I can think of for this strange tactic is that since it is clear from the correspondence annexed to the affidavit of the applicant that Mr Nyuthe must have known that both the first advocate and

the third advocates had filed identical suits in the matter and further, that the steps taken by the first advocates in this matter were not only dubious, but time barred, Mr Nyuthe would find himself in a most difficult position to explain his subsequent unprofessional conduct after he had begun so well as appears from the annexed correspondences, in being scrupulous and critical at the actions of the first advocates, in this matter. The only feeble and vague explanation for this is what is deponed in Mr Mwaura's affidavit that there had been a telephone conversation which had changed the situation.

For these same reasons too, I am unimpressed with the contents of Mr Mwaura's replying affidavit and his explanation regarding the mix up of files and reference numbers. Mr Nyuthe the other partner knew, if Mr Mwaura did not, of the two suits and I have not been shown anything tangible to account for the change of Mr Nyuthe's initial critical stand on the role of the first advocates. This is enough. And in any case, it is not Mr Mwaura's action in dealing with the third advocates which is at stake here. It is that of Mr Nyuthe and the first advocates.

I have been urged to review my orders of 18.8.1988, which had been obtained under unsavoury circumstances particularly since they involved minor children whose interest and welfare this Court holds dear. It has also been demonstrated that they would have obtained a great deal more than was obtained for them, if it had not been for the unprofessional conduct of the first advocates and the second advocates. Section 80 of the Civil Procedure Act gives me unfettered discretion to review my orders. It would seem that this unfettered discretion is limited by the provisions of o 44 rule 1 which sets out three grounds on which a review may be granted. These are the discovery of new and important evidence which after the exercise of due diligence could not be produced at the time when the order was made, the existence of some mistake or error on the face of the record, or for any other sufficient reason. This last ground to my mind, restores my unfettered discretion. In this case of *Wangechi Kimita v Wakibiru* [1982-88] I KAR 977, Nyarangi JA considered the phrase.

“for any other sufficient reason”,

and had this to say:

“I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly s 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words ‘for any other sufficient reason’ need not be analogous with the other grounds specified in the order”.

Order 31 rule 7 under which the first advocates applied for the sanction of the settlement on behalf of the minor children of the applicant's deceased husband, requires the leave of the Court expressly recorded in the proceedings before any agreement or compromise can be entered on behalf of the minors. It means that a special duty is imposed on the Court to ensure that whatever settlement or compromise is proposed, it is, having regard to all the known surrounding circumstances at the time, a settlement or compromise that will be most beneficial to the minors concerned. So if there is, as in this case, a settlement for the much higher sum of 769,000/= instead of that of 219,120/= by the same parties, the minors should, if the fault cannot be said to be that of the applicant's not be denied the opportunity of obtaining the higher settlement. The objective of order 31 rule 7 is to ensure that minors received what in the circumstances, is just and that all relevant known surrounding circumstances must be made known to the Court. When the settlement between Mr Nyuthe and the first advocate was reached they all knew all of the existence of the prior suit brought by the third advocate which had not been withdrawn. They all knew that the suit filed by the first advocates was time barred. They all knew that Mr Nyuthe had expressed suspicion about the representation of the applicant by the first advocates which suspicion there is nothing in the file and in the replying affidavit to show that it had been allayed. They all knew that the respondent had not filed a defence to the suit because of the contents of the first advocates' letter of 16.9.1987. These facts should all have been brought to my attention when the approval for settlement was sought. They were deliberately kept from me and this is wrong. If these facts had been brought to my attention, I certainly would not have approved the settlement.

The first and second advocates also owed an additional duty to the Court to inform me and this they well

knew, that there was in existence the prior identical suit filed by the third advocates between the same parties and for the same reliefs. If this position had been made known to me, I would also under s 6 of the Civil Procedure Act not have proceeded with the application brought by the first advocates to sanction and approve the settlement. The following provisions of s 6 need only to be reproduced here:-

“6. No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

Apart from anything else, a deception has been practiced on me and which led to my making order of 18.8.1988, sanctioning a settlement involving minors, which I would not otherwise have done. Having considered the authorities cited to me and the submissions made by counsel, I think that I would be justified in reviewing my previous order and setting it aside under o 44 r 1 of the Civil Procedure Rules and s 3A of the Civil Procedure Act. And so the orders that commend themselves to me, are to set aside my order of 18.8.1988, sanctioning the terms of settlement set out in the originating summons filed by the first advocate on 17.8.1988, and all payments or steps taken thereunder. The present application of course, succeeds with costs for the applicant. It is so ordered.

Dated and Delivered at Nairobi this 29<sup>th</sup> day of April, 1993

**A.M. AKIWUMI**

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**JUDGE**