

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT NO. E005 OF 2024(OS)
IN THE MATTER OF ADVOCATE/CLIENT RELATIONSHIP

BETWEEN

HANNINGTON KAMAU GATUA.....CLIENT/PLAINTIFF

VERSUS

ROBERT HYDER NDUBI T/A

ROBERTHYDER NDUBI & CO ADVOCATES.....ADVOCATE/DEFENDANT

JUDGMENT

1. The Originating Summons dated 18th June, 2024, was filed herein on 15th July, 2024, by the Plaintiff/Client, Hannington Kamau Gatua, pursuant to Order 52 Rules 4(1)(a) and (b) of the Civil Procedure Rules. It seeks orders that:-

a) That the Defendant, Robert Ndubi and Company Advocates, do pay the Plaintiff, Hannington Kamau Gatua, the sum of Kenya Shillings Two Hundred Thousand(Kshs.200,000) as general damages and Kenya Shillings Six Thousand and Ten (Kshs. 6010) as special damages and costs of the suit being the decretal sum that was awarded to the Plaintiff as per the Judgement that was delivered on the 6th November, 2020 by Hon. Y.I Khatambi(PM) in Nakuru CMCC 1102 of 2019-Hannington Kamau Gatua V Benard Njenga Ng'anga.

b) That the Defendant herein be Ordered to render an account and pay the decretal amount, costs and interest now standing at Kshs 200,000 as General damages and Kshs. 6010 as Special damages.

c) Costs of this Application be borne by the Advocate/Defendant.

2. The Summons is predicated upon the Supporting Affidavit of the Plaintiff, Hannington Kamau Gatua, sworn on 18th June 2024. The Plaintiff deposes

that Judgment in Nakuru CMCC No. 1102 of 2019: Hannington Kamau Gatua v Benard Njenga Ng'ang'a was delivered by Hon. Y.I. Khatambi (PM) on 6th November 2020, awarding the Plaintiff General Damages of Kshs. 200,000 and Special Damages of Kshs. 6,010, together with the costs of the suit.

3. Being dissatisfied with the award on quantum, the Defendant, Benard Njenga Ng'ang'a, preferred an appeal, being ***Nakuru High Court Civil Appeal No. 13 of 2020: Benard Njenga Ng'ang'a v Hannington Kamau Gatua.***
4. Pending the determination of the appeal, the decretal sum was deposited into a joint interest-bearing account held in the names of the respective advocates then on record: M/S Robert Ndubi & Company Advocates for the Plaintiff, and M/S Kimondo Gachoka & Company Advocates for the Defendant.
5. The said appeal was heard and subsequently dismissed for lack of merit by the High Court on 31st May 2023. Upon the dismissal of the appeal, the Plaintiff sought the release of the decretal sum, but the same was not forthcoming.
6. Consequently, the Plaintiff instructed his current advocates, M/S Karanja Mbugua & Company Advocates, to pursue the recovery of the funds. Despite several demand letters being issued to both M/S Robert Ndubi & Company Advocates and M/S Kimondo Gachoka & Company Advocates, the said funds have to date not been released to the Plaintiff.
7. The Plaintiff further states that his former advocates have, since the dismissal of the appeal on 31st May 2023, made several unfulfilled promises to remit the funds. The persistent failure to account for or release the decretal sum has necessitated the institution of these proceedings.
8. The Plaintiff contends that the continued withholding of the decretal sum is unreasonable, unlawful, and a breach of fiduciary duty. Accordingly, the Plaintiff prays for an order of this Honourable Court directing the immediate release of the said funds to the account of his current advocates.

9. The Defendant Advocate opposed the Application by his Replying affidavit sworn on 8th July, 2024, stating that his firm was formally instructed by Hannington Kamau Gatua on 7th October, 2019, to handle a personal injury claim arising from a road traffic accident.
10. Under their agreement, the firm was entitled to deduct one-third of the general damages as legal fees. He states that his office initially funded the costs for the P3 form, police abstract, NTSA records, and medical reports to file the suit, Nakuru CMCC No. 1102 of 2019.
11. Following the trial, the court awarded a total of Kshs 206,010, which was reduced to a net sum of Kshs. 185,409 after a 10% contribution deduction. Within the special damages award of Kshs. 6,010, the Advocate clarifies that Kshs 5,000 was for a medical report and Kshs. 550 for a motor vehicle search paid by his office, while only Kshs 460 represented the Plaintiff's own treatment expenses.
12. When the Defendant appealed the judgment in Nakuru High Court Civil Appeal No. 13 of 2020, Mr. Ndubi continued to represent the Plaintiff. He deposes that as a condition for a stay of execution during that appeal, the Defendant deposited Kshs. 122,790 into the court, rather than into a joint account between the opposing Advocates as previously alleged.
13. On 28th November, 2023, his office sent the official court deposit receipts to the Plaintiff's new advocates, Karanja Mbugua & Company Advocates, to allow them to process the release of those funds to the Plaintiff because the new firm took over the matter in October 2022.
14. Mr. Ndubi asserts that he cannot verify if they have since received that money from the court. He maintains that his firm retained only Kshs. 57,624, which he believes is the full extent of his firm's entitlement under their fee agreement. Finally, he suggests that if the money remains unpaid, the Plaintiff should request the original deposit receipt from the Defendant's Advocates, Kimondo Gachoka & Company Advocates.

15. By consent, the parties agreed to canvass the Originating Summons by way of written submissions. However, only the Plaintiff complied.

Plaintiff's Submissions

16. While rehashing the prayers sought in the Application and the grounds thereof, the Plaintiff argues that the Defendant herein failed to account for the full decretal sum, costs, and interest arising from the judgment in Nakuru CMCC No. 1102 of 2019.
17. He argues that while the court awarded a net sum of Kshs. 185,409 plus 14% interest and costs, the Defendant only acknowledges a court deposit of Kshs. 122,790. The Plaintiff points out that the Defendant admits to retaining Kshs. 57,674, but has failed to explain why this amount was deducted or whether it was intended for fees or disbursements. It is argued that the Defendant cannot simply declare a fee of Kshs. 57,674 without providing a Certificate of Taxation or a formal Advocate-client Bill of Costs to support such a deduction.
18. For that argument, he relies on the case of ***Mohammed & another v Salim Mwadumbo t/a Mwadumbo & Co. Advocates(Civil Appeal case E667 of 2021 [2025] KEHC 1020(KLR)***, in which Mongare J stated that an advocate must exhibit a fee agreement or a Certificate of Taxation to justify paying legal fees to themselves from client funds.
19. Further reliance is placed in the case of ***Shariff & 3 others v Simiyu Johnson Masinde t/a Masinde & Company Advocates(Commercial Civil Suit E002 of 2024 [2024] KEHC 5450(KLR)*** where while citing Order 52 Rule 4(a)&(b) of the Civil Procedure Rules, D.K. Kemei J, emphasised that the court has the authority to compel an advocate to deliver a cash account and remit all money held on a client's behalf.
20. Consequently, the Plaintiff urges the court to order the Defendant to render an honest account of all funds received from the insurance company and to release the balance to the Plaintiff.

Analysis and Determination

21. This Court has considered the Originating Summons, Affidavits by both parties and the submissions filed by the Plaintiff. The issue for determination is whether the Defendant should be compelled to pay the Plaintiff the decretal sum awarded by the trial court.
22. The record clearly indicates the existence of an Advocate-Client relationship between the parties. Indeed, the Defendant admits as much in his Replying Affidavit, affirming that he received formal instructions from the Plaintiff on 7th October 2019 to act for him in Nakuru CMCC No. 1102 of 2019. That is further supported by the instruction note drawn by the Defendant's firm and signed by the Plaintiff, which is annexed to the Replying Affidavit as "RN-1."
23. The judgment, annexed as "RN-2," confirms that the Plaintiff was awarded general damages, a sum of Kshs. 200,000/- plus special damages of Kshs. 6,010/-, making a total of Kshs. 206,110/- less 10% contributory negligence, hence the final award was Kshs. 185,409/-.
24. The Plaintiff maintains that he has not received any portion of these funds. Conversely, the Defendant contends that while the Plaintiff was indeed awarded the stated sum, he deducted Kshs. 57,624/- as his legal fees and deposited the remainder of Kshs. 122,790/- into court.
25. The Defendant further asserts that he no longer owes the Plaintiff any money, arguing that the Plaintiff's current advocates were provided with the original court deposit receipts via a forwarding letter dated 28th November 2023. To support this position, the Defendant exhibited the said forwarding letter, a request for payment addressed to Directline Assurance Company Limited dated 15th March 2021, and a court deposit receipt confirming that the actual deposit was made on 26th March 2021 and a formal receipt issued by the court on 29th March 2021.
26. Order 52 Rule 4(1) of the Civil Procedure Rules states that;-

“(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.”

27. Further, Section 80 of the Advocates Act states as follows:-

“Any person being an Advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an Advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence...”

28. In *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* [2015] KECA 274 (KLR), the Court of Appeal held:

“Advocates in addition to being professionals, are officers of the court and play a vital role in the administration of justice. In our legal system, the Advocate/Client relationship has long been recognized as fiduciary relationship in which the Client places his or he confidence, faith, reliance and trust in the Advocate, whose aid, advice, opinion or protection is sought from time to time. The Client gives the Advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the Advocate..... the forgoing emphasizes that an Advocate must at all times act in the best interest of his Client... that failure to account for funds held by an Advocate on behalf of a Client is in fact a criminal offence.”

29. While Section 45 of the Advocates Act (Cap 16) stipulates that a valid, duly executed agreement, free from illegality or unreasonableness, precludes the need for taxation, it does not grant an advocate immunity from accountability.
30. In this case, the Advocate has failed to provide a clear breakdown or justification for how the cited figures for fees and the amount deposited in Court were determined.
31. Furthermore, the Advocate's attempt to delegate the recovery of court-deposited funds to the Plaintiff's successor Advocate is untenable. An advocate in conduct of a matter, who knows that decretal sums have been deposited for their client's benefit, maintains a professional duty to facilitate the release of those funds upon the conclusion of an appeal. Once the appeal was dismissed, any legal impediment to payment was removed, rendering the decretal sum immediately payable to the Plaintiff.
32. Consequently, the Defendant Advocate's effort to shift this burden entirely to the new counsel is misconceived. While current counsel may handle the formal application for release, the former Advocate cannot evade his fiduciary obligations by pleading ignorance regarding the status of the funds.
33. He is required to provide a full, coherent and proper accounting of the flow of funds; specifically, what was received, what was, with justification, deducted and what was deposited in court. Further, he is to show what affirmative steps were taken to protect the client's interests. But he has failed to do so.
34. In light of the foregoing, this Court is satisfied that the Plaintiff has proved his claim on a balance of probabilities. Accordingly, the Originating Summons is hereby allowed as prayed.

Dated, signed and delivered at Nakuru this 13th Day of April, 2026.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Wangui h/b for Mr Karanja Mbugua for Plaintiff/ Applicant

Ms Bosibori for Defendant/ Respondent

Erickson, Court Assistant

ORIGINAL