



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 148 OF 2019**

**JACQUILINE NJOROGE.....APPLICANT**

**-VERSUS-**

**EVANS ONGICHO P/A ONGICHO AND COMPANY ADVOCATES..RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> May, 2020)

**JUDGMENT**

The applicant filed an originating summons on 07.11.2019 through Kamau Kuria & Company Advocates. The application was under Order 52 rule 4 of the Civil Procedure Rules and which provides:

1. Where the relationship of advocate and client exists or has existed the court may, on 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 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 application was for orders and declarations as follows:

1. A declaration that no special agreement allowing the respondents higher fees than allowed by the Advocates Remuneration Order exists in respect of services rendered to her between May and July 2019 when the respondent acted for the applicant in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd.**
2. A declaration that the respondent does not have a lien on the applicant's papers, documents and files.
3. An order that the respondent delivers up to the applicant her file in respect of **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd.**
4. An order that the respondent pays or refund to the applicant Kshs.2, 980, 000.00 less his fees as per the Advocates' Remuneration Order.

5. An order that the respondent furnishes a cash account in respect of Kshs. 2, 980, 000.00.
6. An order that the respondent do pay to the applicant all money in the custody or control of the respondents on behalf of the applicant.
7. An order that the respondents do deliver a bill of costs in respect of services rendered to the applicant.
8. An order that the respondent do pay the applicant's costs.

The application is based upon the applicant's supporting affidavit attached on the application and his further supporting affidavit filed on 28.11.2019 and further upon the following grounds:

1. The respondent acted as advocate for the applicant together with 19 other claimants in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd.** The claimants in that case were employees of the respondent.
2. The claimant was entitled to be paid Kshs.2, 980, 000.00 as her terminal benefits and the same was received on her account by the respondent during the pendency of that cause.
3. On 19.07.2017 the Court made orders in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd** thus, **“In conclusion the application dated 25.06.2019 and filed on 26.06.2019 is hereby determined with orders:**

**1. The application is dismissed with costs.**

**2. Taking all circumstances of the case into consideration, the Kshs. 29, 103, 892.50 paid in the claimant's advocates' bank account No. 2023782521 in the name of Ongicho-Ongicho & Company Advocates at Barclays Bank Queensway Branch, Nairobi shall not be disbursed, expended or utilised until after the close of 23.07.2019 and as a measure for parties to have time to study this ruling and appreciate its full effect.”**

4. Upon completion of the litigation, the respondent was entitled to fees payable under the remuneration order.
5. Since 23.07.2019 the respondent has refused to pay the applicant Kshs.2, 980, 000.00 less his fees.
6. An advocate is a special agent under a duty to account to the client for all monies received on her account.
7. On 18.10.2019 the applicant through her advocates demanded that her said Kshs. 2, 980, 000.00 be paid to her within 7 days but the same has not been paid.

The respondent appointed Ogado & Company Advocates to act in the matter and opposed the application by filing on 26.11.2019 the replying affidavit of Evans A. Ongicho Advocate. The grounds of opposition are urged as follows:

1. The Originating Summons lacks substance as it does not disclose any cause of action and is premature.
2. The applicant has delayed the matter by sending several demand letters through separate advocates and to the Advocates Complaints Commission.
3. The applicant has not disclosed documents and files she supplied to the respondent and the application is meant to harass and intimidate the respondent.
4. The applicant was at the center of a dispute between her employer's company directors and filed affidavits in Miscellaneous 393 of 2017 and which shows that she does not deserve any payments as she paid herself and could not account for a sum of Kshs.4, 000, 000.00 in her custody and control.
5. The applicant has not come to court with clean hands even in her application she had intentionally skipped filing first page of her employment contract or letter to show the date she was employed and salary.
6. During meetings between advocates of the parties and especially that of 31.05.2019 it became apparent that the applicant owes the employer sum way above her claim and therefore a set off.
7. The applicant is bent to unjustly enrich herself by making the application especially that she worked from February 2018 to September 2018.
8. The meeting of 31.05.2019 with legal representatives of the company's directors and read with section 19(1) (b) of the Employment Act, 2007 the claimant's dues is being held and a set off by the employer and the same information is well within the applicant.

9. The application is a nonstarter, filed in the wrong forum and the same ought to be dismissed with costs.

Submissions were filed for the parties. The Court has considered all the material on record and the parties' respective cases and makes findings as follows.

**First**, it is submitted for the respondent that the Court lacks jurisdiction to hear and determine the suit commenced by way of the originating summons under Order 52 Rule 4 because it is a specialized court as per Article 162 (2) of the Constitution and section 12 of the Employment and Labour Relations Court Act. For the applicant it is submitted that under rule 32 (2) of the Employment and Labour Relations Court (Procedure) Rules it is provided that rules on execution of an order or decree shall be in accordance with the Civil Procedure Rules. The Court finds that the present dispute arises from the satisfaction of the decree in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd** . The Court further considers that the Court which passes a decree is responsible for matter of satisfaction of the decree. As submitted for the applicant this Court applies the Civil Procedure Act and Rules in matters of execution and satisfaction of decrees and orders. Section 13 of the Employment and Labour Relations Court Act provides that a judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act. The order in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd** was that the respondent disburses, expends or utilize the decretal sum held in the respondent's account including paying to the applicant her dues under the decree. The Court therefore returns that towards satisfaction of the decree and order in that case, the applicant was entitled to move the Court by application under the relevant provisions of the Civil Procedure Rules and the Court enjoys the relevant jurisdiction to hear and determine the application.

**Second**, there is no dispute that the applicant was one of the claimants in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd** where a consent judgment was entered between the claimants and the respondent therein (the employer) for payment of a sum of **Kshs.29, 103, 892.50** out of which the applicant was entitled to **Kshs.2, 980, 000.00**. It is now submitted for the respondent that the applicant has not been paid her due decretal amount by the respondent herein (in whose account the decretal amount was deposited) on account of an alleged set off attributable to alleged payment by the applicant to herself of Kshs. 4,000,000.00 while in her employer's service. It is further submitted that the employer is entitled to withhold the decretal sum under sections 19 and 45 of the Employment Act, 2007. It should be obvious, as submitted for the applicant, that it is not for the respondent herein to review the terms of the decree and orders in the said cause 305 of 2019 and it is an obvious conflict of interest for the respondent to purport to urge the employer's case in a manner that is clearly outside the applicant's instructions to the respondent when the respondent acted for her in cause 305 of 2019. The Court finds that the issue of set off as urged for the respondent having not been part of the consent and proceedings in cause 305 of 2019 cannot become a consideration in settling the applicant's decretal sum therein. Accordingly, the Court returns that the applicant is entitled to the decretal sum less the due respondent's legal fees as may have been agreed upon and there being no agreement shown, as determined in accordance with the Advocates' Remuneration Order. In that respect, the applicant is also entitled to an account in respect of the decretal sums held by the respondent on her behalf and the payment.

**Third**, as urged for the respondent the applicant has not specifically identified the papers, documents and files in respect of which prayers have been made in the instant case and the prayers will therefore collapse. In particular, the Court considers that the primary substance and prayer of the application was satisfaction of the decretal sums in issue and the findings by the Court in that regard should sufficiently meet the ends of justice. **Fourth**, as the applicant has succeeded in her application, the respondent will pay costs of the application.

In conclusion, judgment is hereby entered for the applicant against the respondent for:

1. The declaration that no special agreement allowing the respondents higher fees than allowed by the Advocates Remuneration Order exists in respect of services rendered to her between May and July 2019 when the respondent acted for the applicant in **Nairobi Employment and Labour Relations Court in Cause No. 305 of 2019 Jackson Mutiso Mwalili and 19 Others –Versus- Radio Frequency Systems Ltd**.
2. The order that the respondent pays or refund to the applicant Kshs.2,980, 000.00 less his fees as per the Advocates' Remuneration Order.
3. An order that the respondent furnishes a cash account in respect of Kshs. 2, 980, 000.00.
4. An order that the respondent do pay to the applicant all money in the custody or control of the respondents held on behalf of the applicant by 01.07.2020 failing interest to run thereon at court rates from the date of this judgment till full payment.
5. An order that the respondents do deliver forthwith a bill of costs in respect of services rendered to the applicant.
6. An order that the respondent do pay the applicant's costs herein.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 29<sup>th</sup> May, 2020**.

**BYRAM ONGAYA**

**JUDGE**