



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: Madan, Wambuzi & Law JJ A)

CIVIL APPEAL NO 44 OF 1977

BETWEEN

SEVERINO AMBALE MAKOBA.....APPELLANT

AND

JOGINDER SINGH BEHAN.....RESPONDENT

JUDGMENT

Madan JA The appellant engaged the professional services of the respondent, who is a practising advocate, to look after the appellant's interest in certain contentious civil proceedings for a fee of Shs 2000 which he duly paid to the respondent. The appellant lost his case in the High Court. He alleged professional negligence against and sued the respondent in the Court of the Senior Resident Magistrate, Kisumu, for a refund of the fee paid by him to the respondent, plus a further sum of money said to have been spent by him. The appellant's suit against the respondent was dismissed by the Senior Resident Magistrate who held that, on the evidence as a whole, the appellant had failed to establish his claim. The appellant complained against the respondent to the Law Society of Kenya also which cleared the respondent of any wrong-doing in his handling of the appellant's matter. The appellant's appeal to the High Court against the decision of the Senior Resident Magistrate having been dismissed, he has appealed to our Court.

The respondent would be entitled to payment of his professional fee for services rendered, but only if the agreement to pay it is in writing as required by the provisions of section 49(1) of the Advocates Act which enacts:

Subject to section 50 of this Act ... an advocate and his client may ... (b) before, after or in the course of any contentious business in a civil Court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in Court or both ... and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorised in that behalf.

No agreement in writing for the payment of a fee to the respondent as advocate was produced in the Senior Resident Magistrate's Court or in the High Court signed by the appellant or his agent duly authorised in that behalf. The appellant's oral agreement to pay a fee of Shs 2,000 to the respondent is therefore not binding upon him; if not paid, the respondent could not successfully sue for the recovery of it even though the fee was expressly agreed to be paid by the client. The fee of Shs 2,000 was, however, paid and receipts given therefor by the advocate.

The important question is whether a client who has paid an agreed fee under an oral agreement to an advocate is entitled to claim a refund of it?

In my opinion he is not in a case like the present one where there was good consideration for it in the shape of professional services provided by the advocate as it came out in the evidence in the Court of the Senior Resident Magistrate. It would be manifestly unjust to compel an advocate who has rendered services to his client to refund the fee paid to him by a client because it was not paid under an agreement in writing; section 49 does not intend restitution in the circumstances as they existed in this case.

From what the appellant has said to us in Court he seems to suffer from a genuine sense of grievance, and he could have been more courteously treated by the respondent.

I would dismiss the appeal. As Mr Malik for the respondent has not asked for costs, there will be no order. Wambuzi and Law JJ A agreeing, it is so ordered.

Wambuzi JA. I agree that this appeal must fail. The question before us is essentially of fact whether the consideration has failed. The two courts below concurrently came to the conclusion that the appellant in effect received the services he paid for. I concur in the order proposed by Madan JA.

Law JA. It is clear from the evidence that the respondent, an advocate, collected a fee of Shs 2,000 to represent the appellant in a civil suit in Nairobi. The respondent considered the matter and gave the appellant certain advice. He also did a certain amount of work in connection with the suit. There was no failure of consideration for the payment of the Shs 2,000 by the appellant, and I agree that he is not entitled to recover that sum. I agree that the appeal must fail, and I concur in the order proposed by Madan JA.

Appeal dismissed.

Dated and delivered at Kisumu this 15th June 1978.

C.B MADAN

.....

JUDGE OF APPEAL

S.W.W WAMBUZI

.....

JUDGE OF APPEAL

E.J.E LAW

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR