



REPUBLIC OF KENYA



KENYA LAW
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Methodist Church of Kenya (Mtwapa Branch) v Kenga and Company Advocates (Originating Summons E004 of 2021) [2023] KEHC 27618 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 27618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS E004 OF 2021
F WANGARI, J
SEPTEMBER 29, 2023**

BETWEEN

METHODIST CHURCH OF KENYA (MTWAPA BRANCH) PLAINTIFF

AND

KENGA AND COMPANY ADVOCATES DEFENDANT

JUDGMENT

1. The Plaintiff instituted suit against the Defendant through Originating Summons dated 25/1/2021 and filed on 26/1/2021 seeking for the following orders;
 - a. That the Defendant having been an advocate and acting on the best interest of the Plaintiff be ordered to remit to the Plaintiff a total sum of Kenya Shillings One million (Ksh.1,000,000) which had been deposited with the Defendant on the basis of an Advocate/Client relationship and in terms of the compensation from Alfred Msanzu Ndoro.
 - b. That the Defendant be ordered to pay the Plaintiff interest on the sum of Kenya shillings One Million (Ksh.1,000,000) at a rate convenient to this court.
 - c. That the Defendant do bear the costs of this application.
2. The Originating Summons was supported by an affidavit dated 25/1/2021 with annexures thereto. The Defendant filed a Replying Affidavit dated 15/3/2021 denying that the Plaintiff had the locus standi to initiate this suit, nor owing the amount as claimed by the Plaintiff.
3. The Defendant thereafter through a Notice of Motion dated 7/7/2021 sought to have this Originating Summons struck out with costs for failing to disclose a reasonable cause of action. The application was found untenable and was dismissed through a ruling delivered on 12/8/2022 by Hon. Justice Olga Sewe. The matter was fixed down for hearing with each party calling one witness each.



Plaintiff's case

4. The plaintiff called its Vice-Chairman as its sole witness, Simon Furaha Mwaringa. He adopted his Supporting Affidavit to the Originating Summons dated 25/1/2021 as his evidence in chief. In summary, he deponed that the Plaintiff Church had engaged the legal services of the Defendant Law Firm, in pursuit of a donation of land and a further Ksh. 1,000,000 by one of their church member, Alfred Msanzu Ngoro. He further stated that the donors advocate M/s Stephen Oddiaga & Co. Advocates wrote to the Defendant stating that the funds would be released by end of July, 2012. Thereafter, the Defendant went silent despite threats of a civil action against them for failure to release the money to the plaintiff, hence filing of this suit. He relied on documents produced as evidence as per the annexures to the Supporting Affidavit.
5. On cross examination, the witness said the Trustees of the church are based in the headquarters in Nairobi, and they had the mandate to file any suit on behalf of the church. He said that since the Trustees were not assisting them, they decided to file the suit as the Mtwapa Branch church. He said he was not aware of any pending case concerning the money. He later admitted that he was aware of a suit filed in Kilifi Court but the defendant did not give them any information concerning the same.

Defendant's case

6. The defence witness William Chengo Kenga, an Advocate of the High Court of Kenya adopted the contents of his Replying Affidavit dated 15/3/2021 as his evidence in chief. He stated that he was appointed as a legal counsel by Methodist Church of Kenya, Kilifi Synod, to handle all their legal matters. He denied that the Plaintiff appointed him as their advocate.
7. He admitted that he was instructed to file a suit for purposes of pursuing the Ksh. 1,000,000 being compensation money. The advocate for Alfred Msanzu Ngoro, M/s Oddiaga & Co. Advocates had forwarded to him 2 cheques of Ksh. 500,000 each but which were dishonored, hence leading to the filing of Kilifi PMCC No. 271 of 2016. After filing of the suit, he was not given any further instructions and the matter is still pending in court. The produced documents in support of his case as per the annexures to the Replying Affidavit.
8. On cross examination, he reiterated the contents of his evidence in chief. He added that the cheques were dishonored for lack of funds. He stated that he was still waiting for further instructions on the matter pending before Kilifi Court.
9. After the close of both the plaintiff's case and the defence case, the parties were directed to file and serve their written submissions. Only the Defendant complied by filing of the submissions dated 11/7/2023. The Plaintiff did not file their submissions despite being granted more time to do so.

Analysis and Determination

10. I have considered the parties' pleadings, the oral evidence and the Defendant's submissions. In my view, the following issues are for determination;
 - a. Whether the plaintiff had the locus standi to file this suit
 - b. Whether the plaintiff's case has merits
 - c. Who bears the costs
11. On the first issue, the Defendants submitted that the Plaintiff did not have the locus standi to file this suit as they were not the instructing clients. He relied on the Letter of Appointment dated 2/2/2009,



by the Methodist Church in Kenya, Kilifi Synod. The Plaintiffs on the other hand said they instructed the Defendant to pursue the claim of Ksh. 1,000,000.

12. I have perused through the pleadings and documentary exhibits relied by the parties. Paragraph 4 and 5 of the Replying Affidavit by the Defendant witness states as follows;

“(4) That I am an Advocate of the High Court of Kenya practicing as such in the name and/or style of Kenga and Company Advocates, Mombasa and as regards these proceedings, I was instructed by the Chairman, Secretary and Treasurer of Mwtapa Methodist Church to file a suit for recovery of a sum of Ksh. 1,000,000 being compensation for a church structure that had been demolished and to be rebuilt on portions of land being Plot Nos. Kilifi/Mtwapa 481, 1269, 1098 and 1097, which said instructions were executed on 18th October, 2016 through the filing of a civil suit being PMCC No. 271 of 2016 (Kilifi).

(5) That therefore as he regards paragraphs 2 to 7 of the said affidavit, it is true that I was instructed as herein above stated but upon failing the suit, the Plaintiff failed to give me further instructions in the matter, including instructions on service of summons to enter appearance and the Pleadings herein claiming that they were in direct contact with the Defendant in the said suit.”

13. Further to the above, the Defendant annexed to his Replying Affidavit is the letter dated 2/12/2020 by the Plaintiff to the Defendant confirming the instructions to the defendant as its advocate. The Defendants cannot deny that the Plaintiff was its instructing client. I find that the Plaintiff has the *locus standi* and a right to have its dispute heard before this court.

14. On the merits of the case, it is not in dispute that the Plaintiffs were in pursuit of compensation which included the one million shillings. The defendant was instructed to follow up on the payment. The Plaintiff though in the pleadings they claim that the Defendant had received the said money, during hearing, the Plaintiff's witness admitted that he could not tell if the money was paid or not.

15. The Defendant gave documentary proof on the correspondences between it and M/s Oddiaga & Co. Advocates over the payment of Kshs. One million. After the two cheques amounting to Ksh. 1 million bounced due to lack of fund, a suit in Kilifi PMCC No. 271 of 2016 was filed. A copy of the Plaintiff dated 19/8/2016, Verifying Affidavit and Plaintiff's List of documents were produced by the Defendant.

16. The Plaintiff having filed this suit had the burden of proof. In the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), Mativo J (as he then was) stated as follows;

“(26) “Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant



fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.”

17. The Plaintiff failed to produce either oral or evidential evidence that the Defendant did receive the money on its behalf as claimed. On admission by the Plaintiff witness, it was not clear if the money was paid or not. The Defendant through the documentary evidence has proved that the money was never paid to him. I find that the Plaintiff has failed to discharge the burden of proof on its claim against the Defendant.
18. On the issue of costs, under Section 27 of the *Civil Procedure Act*, the court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The Plaintiff is a Church and it is the leaders of the church who brought this suit. If the plaintiff is condemned to pay costs, the burden to make contributions towards settling the costs would be transferred to the innocent faithful who may have no idea that this suit even exists. I therefore exercise the discretion of this court and order that each party do bear its own costs.
19. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Originating Summons dated January 25, 2021 is without merit and is hereby dismissed;
 - b. Each party to bear its own costs.Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2023.

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F. WANGARI

JUDGE

In the presence of;

Khavuchi Advocate h/b for Obonyo Advocates for the Plaintiff

Kenga Advocate h/b for Chengo Advocate for the Defendant

Barile, Court Assistant

