



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.38 OF 2016 (OS)

IN THE MATTER OF: THE CIVIL PROCEDURE (2010)

AND

IN THE MATTER OF: ADVOCATES CLIENT ACCOUNT

BETWEEN

AHMED MOHAMED SALEH BAGHA.....APPICANT

VERSUS

LEO KATUGA T/A KATUGA & CO. ADVOCATES.....RESPONDENT

RULING

1. The Applicant, **AHMED MOHAMED SALEH BAGHA** filed **Originating Summons** dated **7th November, 2014** under **Order 52 rule 2** of the **Civil Procedure Rules (2010)**, **Sections 1A, 1B** and **3A** and **63(e)**, all of the **Civil Procedure Act (Cap 21)** and all other enabling provisions of the law, wherein he sought for the following questions:-

a) Whether the Applicant commissioned the respondent to receive purchase monies in respect to the sale of parcel known as LR No.4702 (Original 219/2) Section II MN from prospective purchasers.

b) Whether the Respondent received payment from the purchasers of all that parcel known as LR.No.4702 (Original 219/2) Section II MN on behalf of the applicant.

c) Whether the Respondent remitted all monies received by him from the purchase to the Applicant.

d) Whether the Respondent was paid his legal fees.

2. The same is supported by the Affidavit sworn by the Applicant and annexures attached thereto. The gist of the matter is that the Applicant gave written instructions to the Respondent who partly-performed the services by collecting deposits from respective purchasers who are in occupation of the land belonging to the Applicant and has refused to account for the amounts received, surrender the original title to the Applicant or his advocate on the premise that he has not been paid his legal fees.

3. The Respondent opposed the said **Originating Summons** by filing **Grounds of Objection** dated **15th June, 2015** in which he stated that the suit is bad in law, brought under wrong provisions of law, the claim is misconceived in law and is an abuse of the court process, hence the same should be dismissed with costs.

4. The Respondent further filed a **Notice of Preliminary Objection** dated the same day whereby he raised **two (2) Grounds of Opposition** that:-

a) The entire suit is bad in law and fatally defective or the same has been presented under the wrong provisions of law.

b) From the foregoing, the Respondent prays that the suit herein be dismissed with costs.

5. The firm of M/S Chala & Company, Advocates applied to withdraw from acting for M/S Kahiga & Company Advocates vide an application dated **28th January, 2018** which application was allowed.

6. The Respondent, then acting in person filed a **Notice of Motion** dated **11th March, 2019**, which was seeking to have the proceedings and or delivery of Judgment scheduled for **26th March, 2019** together with the *ex parte* proceedings stayed and order for a *denovo* hearing of the suit made. The same was argued and a Ruling delivered by this Court on **2nd September, 2020** dismissing the same with costs thus paving the way for the disposal of the main suit which had proceeded for hearing and submissions filed. On **15th December, 2020**, the matter was fixed for Judgment on **30th Marc, 2021**.

7. The Applicant had filed her submissions with regard to the **Originating Summons** dated **3rd December, 2018**, which were adopted.

8. According to the Applicant, he does not doubt his instructions to the Respondent vide his letter dated **18th June, 2013**. He contended that the Respondent had the full mandate upon payment of his legal fees. He confirms that receipt availed showed that the amount collected was Kshs.1,005,000/= and stated that the said amount has not been remitted to him. He claimed that the demanded legal fees had been paid to the Respondent vide annexure-4. The court is therefore being asked to allow the application as the same is said to be uncontroverted.

9. The Applicant has relied on the decision in the case of **Maurizio Dalpiaz –vs- Lahuri Jethanand Manghnani & 3 Others[2010] eKLR**, where the court ordered the Advocates to pay and deliver up documents and the case of **Sylvester Hausa –vs- James Okao T/A Okao & Co. Advocates & 4 Othrs [2014] eKLR**.

Analysis and Determination

10. I have read through the application and the documents in support of the same together with the submissions filed by the Applicant. I have also taken into consideration the statute and case law relied upon. I find that the only questions for this court to answer are (c) and (d), the Applicant having conceded to the first two questions in the **Originating Summons** dated **7th November, 2014**.

11. On the outset, my view is that this is not a matter that falls under **Section 45** of the **Advocates Act** as the Section deals with matters of legal fees where the same is determined by an agreement and there has arisen a dispute over it. The Section has laid down elaborate procedure for which to enter an agreement for fees.

12. Turning to the fact that have been presented to this court, I find that there are receipts that were issued by the Respondent indicating that he had received monies from purchasers totaling to a sum of Kshs.1,005,000/=. The item is not contested. The applicant has demonstrated that the Respondent received monies from the purchasers, which he alleges he (Respondent) has not remitted to him. Again, this information has not been rebutted.

13. I also read through the Respondent's application dated 11th March, 2019 and found that there was no reliance on the fact that money has been paid to the Respondent. I therefore find and hold that money has not been paid to the Applicant.

14. As regards the allegation that the amount of Kshs.415,000/= has been paid as legal fees, exhibit 4 which displays receipt numbers 38 for Kshs.200,000 states that payment was received towards survey fees. The same applied to receipt number 389 for Kshs.100,000/= and receipt number 394 for Kshs.100,000/=. From these, I find and hold that what was paid to the Respondent was not legal fee.

15. The orders that the Applicant seeks are those that the Advocates Act (Cap 16) Laws of Kenya authorizes the court to make. Having found and held that legal fees had not been paid, the order that comments itself is that the Respondent is hereby directed to file a Bill of Costs to be taxed by the **Taxing Master** within **30 days** from the service of the order of this Court.

16. The court having found that the Respondent has not rendered an account of payments to the Applicant, it is hereby ordered that the Respondent renders an account of all monies received on behalf of the Applicant within 30 days from the date of service of this Order.

Orders accordingly.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 30TH DAY OF APRIL, 2021.

D. O. CHEPKWONY

JUDGE