



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT NO. E029 OF 2020

IN THE MATTER OF

SECTIONS 55 AND 56 OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA

AND

IN THE MATTER OF

ORDER 52 RULES 4 AND 7 OF THE CIVIL PROCEDURE RULES

BETWEEN

KLAUS MILINSKI.....APPLICANT

AND

KENNEDY OGERO MOKAYA.....1ST RESPONDENT

MOKAYA OGUTU & COMPANY ADVOCATES.....2ND RESPONDENT

RULING

[1] The Originating Summons dated **17 December 2020** was filed herein on **16 December 2020** by the applicant, **Klaus Miliinski**, pursuant to **Sections 55 and 56** of the **Advocates Act, Chapter 16** of the **Laws of Kenya** and **Order 52 Rules 4 and 7** of the **Civil Procedure Rules**. It seeks orders that:

[a] The respondents do pay to the applicant the sum of **Kenya Shillings Five Million (Kshs. 5,000,000/=)** with interest at court rates (12%) from **17 January 2021** to date, together with costs;

[b] The respondents engaged in professional misconduct in withholding monies due to their client, the applicant herein.

[2] The Summons was premised on the grounds that there existed an Advocate/Client relationship between the applicant and the respondent in which the respondent acted for the applicant in a sale of land transaction involving land known as CR. 29858; and that in the course of their relationship, the respondents received **Kshs. 5,000,000/=** as proceeds of the sale of a portion of the subject land, which they have to date withheld and neglected to pay to the applicant. It was further the contention of the applicant that, in spite of notice to sue and an existing decree passed in his favour, the respondents have failed to remit the said amount to him.

[3] The court record shows that, although the Summons was duly served on the respondent along with Summons to Enter Appearance and Notice of Summons, no action was taken by the respondents to defend the suit. The Affidavit of Service sworn by **Nelson Mwachambi Nyiro** on **22 April 2021** confirms such service and has, annexed to it, copies of the Notice of Summons, duly served and stamped in acknowledgment of service by and on behalf of the two respondents by the firm of **Mokaya Ogutu & Company Advocates**.

[4] The record further shows that although the respondents were duly notified of the hearing date of **27 September 2021**, they failed to attend court; whereupon the hearing date of **18 October 2021** was taken. Again, in spite of service, there was no appearance for or by the respondents. An affidavit of Service sworn by **Joseph M. Kithome** was filed herein on **6 October 2021**, confirming that counsel for the respondents were duly served with a Hearing Notice for **18 October 2021**. Indeed, a copy of the Hearing Notice, duly served, signed and stamped by the firm of **Kamoti Omollo & Co. Advocates**, was exhibited to the Affidavit of Service in proof of service. Accordingly, the matter proceeded *ex parte* pursuant to **Order 12 Rule 2** of the **Civil Procedure Rules** on the basis of the facts deposed to by the applicant in his Supporting Affidavit.

[5] Having perused and considered the Originating Summons and its Supporting Affidavit, it is manifest that there existed an Advocate/Client relationship between the applicant and the respondents; and that the applicant engaged the respondents to handle a conveyance in respect of the sale and subdivision of his property known as **CR. 29858, Section 1/MN** in favour of one **Mbaruk Ayub Ali**. A copy of the Sale Agreement was exhibited as **Annexure A** to the applicant's Supporting Affidavit. The said Agreement was evidently drawn by the 2nd respondent and signed by the applicant in the presence of the 1st respondent.

[6] At paragraph 2 of the Supporting Affidavit, the applicant deposed that, whereas the agreed purchase price was **Kshs. 13,000,000/=** he received only **Kshs. 8,000,000/=** through the respondents. He therefore averred that the respondents withheld **Kshs. 5,000,000/=** which they received on his behalf from the purchaser; and in support of his assertions, the applicant annexed copies of documents to his Supporting Affidavit in support of his assertions. The documents include a copy of a Statement made by the 1st respondent for purposes of **Mombasa Judicial Review Case No. 35 of 2019: Republic vs. The Chief Magistrate Mombasa, Ex Parte Kennedy Mokaya**, wherein the 1st respondent admitted that the purchaser's advocates paid out a total sum of **Kshs. 12,600,000/=** and that they remitted only **Kshs. 8,000,000/=** to the applicant.

[7] The applicant further relied on the Judgment passed in his favour for **Kshs. 5,000,000/=** against the respondents in **Mombasa Chief Magistrate's Civil Case No. 2185 of 2016: Klaus Milinski vs. Kennedy Mokaya and Mokaya Ogutu & Company Advocates**; as well as the Ruling made by **Hon. Mabeya, J.** in **Mombasa Judicial Review Case No. 35 of 2019** by which the learned Judge quashed the proceedings and Judgment in **Mombasa CMCC No. 2085 of 2016** and directed the applicant to pursue his grievance by way of an Originating Summons under **Order 52 Rule 4** of the **Civil Procedure Rules**.

[8] It is therefore instructive that there is already a determination in **Mombasa High Court Judicial Review Case No. 35 of 2019** as to the existence of an Advocate/Client relationship between the applicant and the respondents and a finding of fact to the effect that the respondents had wrongfully withheld monies due to the applicant, who was the interested party in that suit. The Court (**Hon. Mabeya, J.**) further held that:

"...the applicant has held the interested party's finances for nearly 7 years. That is unacceptable. I agree with the submission of the advocate for the interested party that even the present application must have been an afterthought or a gimmick to continue holding the subject monies..."

[9] Accordingly, orders were granted by **Hon. Mabeya, J.** thus:

"...since justice looks at both sides, the applicant cannot be allowed to continue keeping the interested party's monies ad infinitum. I allow the application on the following terms:-

a) **An order of certiorari hereby issues removing to this Court, and quashes the proceedings, judgment and all consequential orders made in Mombasa CMCC No. 2085 of 2016.**

b) **I direct that the applicant does proceed to have his bills of costs taxed within 60 days. The interested party is at liberty to forthwith commence any proceedings under Order 52 Rule 4 of the Civil Procedure Rules.**

c) **Due to the length the issue of the said monies have been held, the said sum shall start to attract interest at court rate upon the expiry of the aforesaid 60 days.**

d) **The applicant has been successful in these proceedings. However, due to the way he has delayed the resolution of this whole matter, he will be entitled to only half of the costs."**

[10] In the light of the foregoing, and for the reason that this suit is entirely undefended, I have no hesitation in finding that the applicant has proved his claim on a balance of probabilities and that he is indeed entitled to the prayers sought by him. Accordingly, it is hereby ordered that:

[a] A declaration be and is hereby issued declaring that the respondents engaged in professional misconduct in withholding monies due to their client, the applicant herein.

[b] The respondents do pay to the applicant the sum of **Kenya Shillings Five Million (Kshs. 5,000,000/=)** with interest at court rates (12%) from **17 January 2021** to date, together with costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER, 2021

OLGA SEWE

JUDGE