



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**CIVIL CASE NO. 226 OF 2002 (O.S)**

**MAHINGA FARMERS LTD.....1<sup>ST</sup> PLAINTIFF**

**ALLAN NJOROGE KURIA.....2<sup>ND</sup> PLAINTIFF**

**SARAH WAITHITA MUTHONI.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**DOMINIC MUKUI KIMATTA T/A KIMATTA & CO. ADVOCATES.....DEFENDANT**

**JUDGMENT**

1. At all material times in 1998 the plaintiffs herein were clients of the defendant who had retained him to act for them in **Nakuru HCCC NO 108 of 1998 – Mahiga Farmers Co. Ltd & Others -vs- Harun Karanja Githariko & Others**, in an application for injunction.

2. By a ruling of the court delivered on the 27<sup>th</sup> May 2002, the injunction application was allowed in favour of the plaintiffs, on condition that a sum of Kshs.230,000/= be deposited in court within ten(10) days.

3. The plaintiff's claim that before the 10 days expired, the gave to the defendant the sum of Kshs.230,000/= for onward transmission and deposit to court but that the defendant failed to deposit the money, and continued to hold it without any justification, and upon request for refund, the defendant has failed to refund the same holding it as lien for his fees.

4. It is the plaintiff's claim that the defendant cannot hold the said money on lien as it was paid for a specific purpose. The failure by the defendant to pay and/or refund the said sum of Kshs.230,000/= to them is the subject of this Originating Summons (O.S) dated 28<sup>th</sup> August 2002 and filed on even date.

5. The defendant swore and filed a Replying Affidavit in opposition to the Originating summons on the 18<sup>th</sup> December 2006 and filed on the 8<sup>th</sup> March 2007.

The defendant's disposition is that his law firm received only Kshs.200,000/= out of which he paid to one Gilbert Kabage, who was the 1<sup>st</sup> plaintiff's agent, and that the said Kabage undertook to pay the defendant's legal fees from the proceeds of sale of the two plots, subject of the case Nakuru HCCC No. 108 of 1998.

6. It is further deponed that the 1<sup>st</sup> plaintiff instituted a case, **Nakuru HCCC No 1 of 1998** which was dismissed with costs of Kshs.50,000/= to the defendant, which he offset from proceeds as per their agreement, and as such, the advocate avers that he holds no funds at all in favour of the 1<sup>st</sup> plaintiff.

7. By the originating summons, the plaintiffs seek the following orders:

i. *The defendant to deliver a cash account of the sum of Two Hundred and Thirty Three Thousands Kenya shillings (Kshs.233,000/=) paid by the plaintiffs to the Defendant for onward transmission court as per the court order of 27<sup>th</sup> May 1998 in HCC NO.108 of 1998.*

ii. *The Defendant do pay to the Plaintiffs or this honourable court the sum of Kshs.233,000/= being the sum received in the aforesaid case plus interest thereon at 14% per annum from May 1998.*

iii. Delivery to the plaintiffs and to this honourable court a list of funds which the

Defendant has received for and on behalf of the plaintiffs in respect of the aforesaid case and on account thereof.

iv. Costs of this suit be borne by the Defendant.

8. Despite numerous attempts for an out of court amicable settlement initiated by the court, the parties have failed to agree, and urge the court to determine the issues in controversy.

Upon evidence adduced both parties, filed submissions.

I have considered the statements recorded and filed by the advocate on the 27<sup>th</sup> September 2018 and by the 1<sup>st</sup> plaintiff's secretary one Gilbert Kabage dated and filed on the 16<sup>th</sup> May 2017.

## 9. ISSUES FOR DETERMINATION

(1) Whether the 1<sup>st</sup> plaintiff has legal capacity to institute this suit.

(2) Whether any money was deposited with the Advocate by the 1<sup>st</sup> plaintiff in respect of **Nakuru HCCC No.108/1998**, its purpose, and if so, how much.

(3) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs made a deposit of Ksh.200,000/= to the advocates law firm, and its purpose.

(4) Whether the 1<sup>st</sup> plaintiff paid taxed costs of Ksh.149,520/= to the advocate in respect of the case **Nakuru HCCC NO. 181 of 2002**.

(5) Whether the 1<sup>st</sup> plaintiff paid taxed costs to the advocate in respect of **Nakuru HCC 108 of 1998** taxed at Kshs.45,000/=, and **Nakuru Misc. Appl. No 97 of 2000** taxed at Kshs.50,000/=

(6) Whether the advocate has a right of lien over the money paid to his law firm for other purposes other than legal fees.

## 10. Analysis and findings

I have seen the three certificates of costs in favour of the Advocate, against the 1<sup>st</sup> plaintiff in the sum of Kshs.244,520/= and the statement of accounts prepared and filed by the Advocate in respect of the three court cases/applications.

11. In his evidence before the court, the 1<sup>st</sup> plaintiff's secretary Gilbert Kabage testified to having paid, by cheque Kshs.150,000/= to Kimatta & Company Advocates, with the balance of Kshs.80,000/= to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, for the Advocate to obtain a title deed for the plot sold to them by the 1<sup>st</sup> plaintiff. It was his evidence that receipt for the payment was given to him by advocate Kimatta but did not have it.

12. The said Gilbert Kabage further testified and confirmed there being a certificate of costs in the sum of Kshs.149,520/= in respect of the various cases that was not paid by the 1<sup>st</sup> plaintiff. It was his evidence that the Advocate ought to return the money paid to him by the company, and seek his legal fees from the company, but again told the court that the **1<sup>st</sup> plaintiff was wound up on 11<sup>th</sup> June 1996** with no assets or plots.

13. To counter the 1<sup>st</sup> plaintiff's evidence, Mr. Kimatta advocate testified as DW1. He relied on his recorded and filed statement, and the replying affidavit as his evidence in chief.

It was his evidence that Mr. Kabage PW1 had no authority from the 1<sup>st</sup> plaintiff to represent it, and that he acted for the company in two cases **HCCC No.108/1998 and HCCC Misc Application No.181/2002** and that no fees was paid by the company in respect of his legal services. He however admitted receipt of the money paid by cheque of Kshs.150,000/= which he accounted in his statement of accounts – DExt 1 which he used to offset his legal fees as taxed in the sum of Kshs.149,000/=.

**14. I shall herebelow interrogate the legal capacity, the locus standi of the 1<sup>st</sup> plaintiff to sustain this suit against the defendant.**

Mahinga Farmers Co. Ltd (1<sup>st</sup> plaintiff), by admission of PW1, Gilbert Kabage, its then secretary, was wound up on the 11<sup>th</sup> June 1996, before this Originating Summons was filed.

Mr. Kabage swore the affidavit in support of the Originating Summons on behalf of the company which he testified to have been wound up before filing of this suit. He did not produce any authority from the company to represent it in court for reasons that it was non-existent, and "dead".

15. It is trite that a dead person or entity cannot bring a suit against any person other person – **Grace Wanjiru Munyinyi –vs- Gedion Waweru Githinji & 5 Others (2011) e KLR**, unless through a legal representatives of his estate. This applies to a wound up and non-existent company as is the case with the 1<sup>st</sup> plaintiff.

16. The winding up of the company testified to by Mr. Kabage was voluntary. No official Receiver or liquidator were appointed to manage the affairs of the company pursuant to provisions of the of the Company’s Act.

17. The 1<sup>st</sup> plaintiff cited **Nakuru ELC No. 433 of 2017 Private Development Company Limited –vs- Rebecca Ngonyo & Samuel K. Macharia** to urge that the company (1<sup>st</sup> plaintiff) could not give any resolution or authority for the institution of the suit as it was wound up.

The circumstances are in this case are different. The company thereof was “alive” and “existing.” as opposed to the 1<sup>st</sup> plaintiff who was “dead” before institution of the suit. It is therefore not relevant.

18. The authority, **East African Safaris Ltd –vs- Antony Ambaka Kegode & Another, Civil Case No. 345/2004** also falls by the way, circumstances being different, and similar to the other, **Private Development Co.** (Supra).

Like in the case **Emmanuel Sichangi Chooge & 2 Others –vs- Fanuel Walekwa & Another (2014) e KLR**, the 1<sup>st</sup> plaintiff acted as if the company had not been wound up and therefore alive, with full legal capacity to sue.

19. It therefore follows that anything done in the name of the non-existing company the, 1<sup>st</sup> plaintiff, is null and void, and of no consequence.

Without doubt, the 1<sup>st</sup> plaintiff had no *locus standi* to bring the present suit on behalf of the wound up company.

20. The Supreme Court of Kenya in the case Kenya **Power Lighting Co. Ltd –vs- Benzene Holdings Ltd t/a Wyco Paints (2016) e KLR**, cited with approval **Fort Hall Bakery Supply Co. –vs- Fredrick Muigai Wangoe (1959) EA 474** where it was rendered that

*“The party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence ---*

*Non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existence, and therefore incapable of maintaining the action, it cannot allow the action to proceed....”*

21. The same holding was applied in the case **Elijah Sikano & Another –vs- Mara Conservancy & Others HCCC No. 37 of 2013**

**That being the uncontroverted fact and positon, I find that the 1<sup>st</sup> plaintiff having been non-existent, at the time this suit was filed could not maintain the suit against the defendant.**

**It is therefore dismissed.**

22. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, upon considering the pleadings that bind them, I find no verifiable claim against the defendant.

They did not swear any affidavits in support of the originating summons nor did they testify to urge their claim if any.

23. The defendants/Advocate testified that he obtained titles to the plots they sought from the company, long before it was wound up.

They did not testify to having paid any money to the advocate as legal fees or otherwise.

The plot in issue was **Plot No. Kabazi/Kabazi Block 2/198.**

24. A pleading that is not supported by credible and cogent evidence cannot stand. It is trite that he who alleges must prove, and mere statements without proof are of no evidential value – **Section 107-109 Evidence Act.**

25. In its totality, I find no merit at all in the originating summons. The plaintiffs have fallen short of discharging the burden of proof against the defendant which is upon a balance probability.

In the premises I find no merit whatsoever in the originating summons filed on the 28<sup>th</sup> August 2002. It is dismissed with costs to the defendant.

Orders accordingly.

**Delivered, signed and dated this 30<sup>th</sup> Day of January 2020.**

.....

J.N.MULWA

JUDGE