



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL SUIT NO. 474 OF 2007

(ORIGINATING SUMMONS)

IN THE MATTER OF SALE OF LAND REFERENCE NUMBER 12502 KWALE DISTRICT

AND

IN THE MATTER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA) AND THE SUCCESSION ACT (CAP 160 LAWS OF KENYA)

AND

IN THE MATTER OF AN APPLICATION FOR PAYMENT OF MONEY IN THE HANDS OF AN ADVOCATE

BETWEEN

ORIENTAL COMMERCIAL BANK LIMITED

(FORMERLY THE DELPHIS BANK LIMITED).....PLAINTIFF

VERSUS

PRADEEP IAN MAKHECHA (sued as the

Administrator of the Estate of Hasmukh

Pranjivan Makhecha trading as

MAKHECHA & COMPANY ADVOCATES).....1ST DEFENDANT

MAKHECHA & COMPANY ADVOCATES2ND DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 18th October 2019, filed by the 1st defendant/applicant. The application is brought under the provisions of section 1A, 1B, and 3A of the Civil Procedure Act, Order 1 Rule 9, Order 45 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. The applicant seeks for orders that; judgment dated 12th June 2015 and delivered on 21st July 2015, be hereby partially reviewed to substitute the 2nd defendant/judgment debtor, being the firm of Makhecha & Company Advocates, with the 3rd respondent, the firm of Makhecha & Gitonga Advocates, as the 2nd defendant/judgment debtor in the matter. That, upon granting of that prayer, the 1st defendant/applicant be forthwith fully discharged/ struck out from these proceedings. The costs of the application be borne by the respondents and the court grants any other order it deems fit. The application is supported by an affidavit on the face of it sworn on the even date by Pradeep Ian Makhecha.

3. However, before the application was filed, the parties had brought to the attention of the court, that, the main issue in this matter is to set off; the amount taxed against the plaintiff in the sum of approximately; Kshs. 2,000,000 in favour of the 1st defendant/applicant.

4. However, the plaintiff argues that the money was paid to the 2nd defendant's through their lawyers, M/s Virginia Shaw & Company Advocates, eight (8) years ago. However, the counsel representing the 1st defendant/applicant informed the court that, she was not aware of that payment.

5. Consequently, the parties agreed by consent to explore an amicable settlement of the matter. At the same time, the plaintiff's counsel informed the court that, the plaintiff had moved to enforce his rights in Succession Cause No. 1515 of 2006 and prayed that this matter be stayed pending the determination of that cause. The court was also informed that, the 2nd respondent firm had been wound up and the business taken over by the firm of Makhecha & Gitonga Advocates and that, Mr. Gitonga is not a party in this matter.

6. The court directed the parties, to file a brief write-up on their respective positions in this matter. On 21st November 2019, the counsel appearing for the 1st defendant/applicant informed the court that, the 2nd defendant had filed an application to stay the succession cause and there is another application to join in all the parties.

7. Be that as it were, I have considered the write-ups filed in court by the plaintiff and the defendants and I find that, the main issues in this matter are:-

a) Who is liable to pay the plaintiff the sum claimed? Is it the 1st defendant or the 2nd defendant and/or the firm of Makhecha & Gitonga Advocates?

b) Whether, the sum taxed in favour of the 2nd defendant were duly paid to the 2nd defendant?

8. The plaintiff holds the view that, the 1st defendant, as the administrator of the Estate of the deceased is liable to pay the sum claimed. The 1st defendant on the other hand, holds the view that, pursuant to the agreement entered into for transfer of the firm of Makhecha & Company Advocates from the deceased's estate to the firm of Wambugu Gitonga trading as Makhecha & Gitonga Advocates, it is the 2nd defendant who is liable to settle the plaintiff's claim.

9. That the 1st defendant's argument is based on the fact that, after the said agreement, Wambugu Gitonga took over the management of the 2nd defendant and informed the Law Society of Kenya as such. That, Mr. Wambugu successfully had the various bills of costs taxed in his favour as confirmed by the plaintiff pursuant to services rendered during the lifetime of the deceased. Further, the ex parte judgment against the 1st defendant was set aside on the basis of lack of proper service through a ruling delivered on 4th April 2019.

10. I have considered the submissions by the parties and I find that, for the issues outlined herein to be adequately and fairly determined, the firm of Makhecha & Gitonga Advocates must be a party to these proceedings. That will enable the hearing and determination of the application dated 18th October 2019. In that case, the party who wishes to pass liability to that law firm should file the appropriate application for the firm to be enjoined and list the matter for directions accordingly.

11. It is so ordered

12. **Dated delivered and signed in an open court this 27th day of January 2020**

G.L. NZIOKA

JUDGE

In the presence of:-

Ms. Jemutai holding brief for Mr. Bundotich for the plaintiff/deed holder

Ms. Omamo for the 1st defendant

Ms. Munyiri for Mr. Shaw for Wambugu Gitonga

Dennis-----Court Assistant