



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 441 OF 2012 (O.S)**

**PATRICK AYISI INGOI.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE NZOERA MULAMA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MADHAV BHALLA *t/a* TAIBJEE & BHALLA ADVOCATES.....DEFENDANT**

**AND**

**MAHMOOD KHAN *alias* KAKA MAHMOOD KHAN.....1<sup>ST</sup> THIRD PARTY**

**DINA MAHMOOD KHAN.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

1. These proceedings, commenced as Originating Summons, were continued as though begun by way of Plaint (Order 37 Rule 19 of the Civil Procedure Rules).

2. In it Patrick Ayisi Ingoi (the 1<sup>st</sup> Plaintiff or Ayisi) and Florence Nzoera Mulama (the 2<sup>nd</sup> Defendant) sue Madhav Bhalla *t/a* Taibjee & Bhalla Advocates, an Advocate of the High Court of Kenya (the Defendant or Advocate), for the following prayers:-

1. That the Defendant Advocate do deliver to the Plaintiffs cash account for the sum of Kshs.36,000,000/=

2. That this Honourable Court do compel the Defendant Advocate to pay to the Plaintiffs the sum of Kshs.10,150,000/= being the amount the Plaintiffs are entitled to or to deposit the same in Court within seven days from the date of the order and in default thereof execution to issue against the Defendant Advocate.

3. That the costs of this suit be awarded to the Plaintiffs.

3. In the course of the proceedings the Advocate took out third party proceedings against Mahmood Khan alias Kaka Mahmood Khan and Dina Mahmood Khan (the 3<sup>rd</sup> party). Whether the taking out of those proceedings were necessary will be answered shortly.

4. The story by Ayisi is that sometimes in March 2007 he was approached by the second 3<sup>rd</sup> Party and one Abid Mahmood Khan who claimed to be directors of a company known as Radhas Investments Company (Radhas) to purchase LR No. 209/2657 registered in the name of the Company and situated within the central business district of Nairobi City. After viewing the property and negotiations, a purchase price of Kshs.80,000,000.00 was agreed. Following that tentative agreement, the said directors took Ayisi to the office of the Advocate whom he (Ayisi) was advised would be handling the transaction on behalf of the vendors.

5. It is the case of the Plaintiffs that the Advocate informed Ayisi that the vendors wanted the sale effected by way of transfer of shares in the company instead of the property. It is also alleged that as Ayisi did not have his own Advocate, the Advocate suggested that he would act for both parties. A suggestion acceded to Ayisi and his co-purchaser.

6. Ayisi depones that a sale Agreement was duly signed on 2<sup>nd</sup> March 2007 (PA1 2) and that on 9<sup>th</sup> March 2007 he paid a Bankers cheque of Kshs.20,000,000.00 in favour of the Advocate's firm plus a further sum of Kshs.11,000,000.00 in cash making a total of Kshs.31,000,000.00. That on or about 12<sup>th</sup> March 2007, on the instructions of Advocate, Ayisi alleges to have paid a further sum of Kshs.5,000,000.00 through the Advocates offices.

7. It is impleaded by Ayisi, and it is also his testimony, that it was after paying the said sum of Kshs.36,000,000.00 that he discovered that a prohibitory order issued in Civil Suit No. 981 of 1994 had been registered on 26<sup>th</sup> April 1995 against the title by City Council of Nairobi (PA1 4). He states that in light of this, he sought a refund of the money deposited on account of total failure of consideration and the Advocate promised that he would seek instructions from his clients.

8. That on 19<sup>th</sup> October 2007, upon demand by Ayisi, the Advocate paid him Kshs.2,000,000.00 while Dina Khan paid him Kshs.500,000.00 (PA1 5).

9. That on 5<sup>th</sup> November 2007, out of desperation to recover the money, Ayisi signed a letter stating that he had opted to avoid the Agreement and to forfeit Kshs.9,000,000.00 to the transferors and to pay legal fees to the Advocate (PA1 6). That on the same day, the Advocate prepared a second letter in the name of the transferors which they signed agreeing that Kshs.16,000,000.00 had been directly paid to them even though all payments had been made in the Advocates office (PA1 7).

10. That on 6<sup>th</sup> November 2007 he returned to the Advocate who informed him that he had only Kshs.6,200,000.00 which was disbursed as per the letter of even date prepared by the Advocate (PA1 8). As Ayisi was acquiring a property in Muthaiga North where there was an outstanding balance of Kshs.3,336,620.00, he instructed the Advocate to pay the balance to the vendors Advocates. This was done. There is a letter of 20<sup>th</sup> November 2007 from the Advocate to the firm of Mohamed Madhani & Co. Advocates (PA1 9).

11. It is the Plaintiffs' further case, that in demanding the balance of the money, the Advocate told him that as far as he was concerned the balance was Kshs.5,000,000.00 and he was ready to issue a cheque for the amount on condition that Ayisi signed an acknowledgement to the effect that it was in full and final payment. That although Ayisi disputed the computation he and the 2<sup>nd</sup> Plaintiff nevertheless signed the acknowledgement (PA1 10).

12. It was Ayisi's testimony that, he later instructed M/s Thuita Kiiru & Co. Advocates to file a criminal complaint with the Criminal Investigation Department against Mahmood Khan who was the agent of the transferors but following a meeting in the Advocates office the complaint was withdrawn (PA1 11). That on the same day the Advocate called him to his office and told him that his clients had mandated him to pay him Kshs.6,250,000.00 in full and final settlement and that by accepting the same the Plaintiffs would waive all claims against him.

13. In paragraph 25 of the supporting affidavit, the Plaintiff make a raft of allegations of omission and negligence on the part of the Advocates. Yet as this suit is not a claim for professional negligence it may be needless to rehash them.

14. The Advocates Defence is in his replying affidavit sworn on 1<sup>st</sup> August 2012.

15. He states that he received a sum of Kshs.20,000,000.00 being deposit payable by the Plaintiffs for the purchase of shares of the company and they were given possession of the property even though they had not paid the balance.

16. In respect to the prohibitory order it was the Defence and testimony of the Advocate that the existence was revealed to the Plaintiffs when the initial negotiations were ongoing. That at any rate that order would not stop or hinder the transfer of shares to the Plaintiffs.

17. It was the Defence of the Advocates that it is the Plaintiffs who called off the transaction as they were caught up in a scandalous pyramid-scheme and their accounts and funds frozen. That on 19<sup>th</sup> October 2007, the Plaintiffs requested to be released from the Agreement and negotiated the terms of separation which included that they would bear the Advocates legal costs of Kshs.800,000.00 and forfeit an agreed amount to the vendors.

18. So as to safeguard the interests of the vendors, the Advocate ensured that the amount paid was acknowledged in writing by Kaka and the vendors (MB 4). And that thereafter the vendors gave them instructions through their letter dated 5<sup>th</sup> November 2007 as follows:-

Dina Mahmood Khan

NAIROBI.

5<sup>th</sup> November 2007

Taibjee and Bhalla Advocates,

NAIROBI.

Dear Sirs,

Re: Sale of Radhas Investments Limited

We refer to our previous instructions and to the meetings with Mr. Kaka Khan.

We confirm that we have received payment of Kshs.16,000,000/= from the purchasers directly through Mr. Kaka Khan and that the amount agreed as forfeited to us with all costs and expenses and rent is Kshs.9,000,000/= and as such we are to refund to you (on a/c of the purchaser) the sum of Kshs.7,000,000/=

As agreed, the purchaser shall pay all your costs and fees directly as well.

We shall only be able to make payment of the refund once we have re-sold the building and we shall advise you of this in due course.

In view of the foregoing, you may now release the funds you are holding back to the purchasers and we release you from all obligations to us.

Thank you for your co-operation.

Yours faithfully,

DINA MAHMOOD KHAN and ABID MAHMOOD KHAN

19. The Advocate then gives an account of Kshs.20,000,000.00. He also states that of the balance refund of Kshs.7,000,000.00, the Plaintiffs agreed to forfeit kshs 250,000.00 and the remainder was paid out as follows-

Patrick A. Ingoi (CQ 000252) - Kshs.3,375,000.00

Florence N. Mulama (CQ 000253) - Kshs.3,375,000.00

20. As to Mahmood Khan (the 1<sup>st</sup> third Party) he swears an affidavit on 3<sup>rd</sup> December 2018 in which he takes a position similar to that of the Advocate.

21. Three witnesses testified in support of the Plaintiffs' case. These are the 1<sup>st</sup> Plaintiff, Peter Kariuki Njiiri and James Nduru Ngari. The Advocate testified in his Defence and the 1<sup>st</sup> third party gave evidence on behalf of the third party. While the witness gave lengthy evidence, it is now clear to me, having understood the nature of the case before me that much of the evidence fell outside the scope of the dispute. Much time and energy was spent on discussing the manner in which the Advocate represented the parties to the sale Agreement and whether or not he was partial in his conduct and negligent in his work. This in my view was unnecessary as the Plaintiffs' claim, as stated earlier, was not of professional negligence. The Plaintiffs do not crave any damages and have simply sought that the Advocate delivers an account of Kshs.36,000,000.00 allegedly paid to him by them and secondly that he be compelled them pay Kshs.10,150,000.00 .

22. So as to resolve these twin issues the Court's task is to answer the following questions:-

- a) How much money was deposited by the Plaintiffs to the Advocate?
- b) Whatever the answer to (a) above, has the Advocate accounted for that money?
- c) Is the Advocate liable to pay to the Plaintiffs Kshs.10,150,000.00?
- d) Is there any liability on the part of the third party?
- e) What is the proper order on Costs for the main cause and the third party proceedings?

23. There is no consensus between the Plaintiffs and the Advocate as to how much money was deposited with the Advocate. Ayisi, on his own behalf and that of his co-plaintiff, states that on 9<sup>th</sup> March 2007, he paid Kshs.20,000,000.00 by way of bankers cheque in favour of the Advocate firm and a further sum of Kshs.11,000,000.00 in cash. Then on 12<sup>th</sup> March 2007;

“I paid through his office Kshs.5,000,000.00 in cash thus making a total amount received as deposit towards the purchase of the property to be Kshs.36,000,000.00”.

24. The Advocate maintains that his firm was only paid Kshs.20,000,000.00 and only after the Agreement fell through did he learn that the Plaintiffs had paid a further sum of Kshs.16,000,000.00 directly to “Kaka” Mahmood Khan.

25. The testimony of the Plaintiffs own witness, Mr. James Nduru Ngari (PW3), does not support the Plaintiffs proposition. Ngari is the person who put the Plaintiffs and the 3<sup>rd</sup> Party together and was present when Ayisi made the deposit to the Advocate. This is what he says in black and white in his written statement:-

[14] At that juncture Mr. Ayisi handed to Mr. Bhalla the banker's Cheque for Kshs.20,000,000/= and plus cash of Kshs.1,000,000/= which was given to Mr. Khan and thereafter we left the office after Mr. Bhalla promised to prepare the agreement for the parties to

come and sign the following day.

[15] After about four days I spoke with Mr. Ayisi and he confirmed that he had signed the agreement and that he had paid an additional Kshs.15,000,000/= cash to Mr. Khan

26. He reiterates the contents of his witness statement in his oral testimony.

27. Mr. Khan himself testified;

“I have accounted for Kshs.16,000,000.00 paid to me directly”.

28. Mr. Khan corroborates the evidence of the Advocate and that of Mr. Ngari (the Plaintiff witness) and so on this crucial matter the evidence of Mr. Ayisi stands in isolation. The easy answer to the first issue is that the firm of Taibjee & Bhalla Advocates received a sum of Kshs.20,000,000 from the Plaintiffs as deposit for the sale of shares. It is only this amount, Kshs.20,000,000.00, that the said firm can be asked to account for.

29. But before examining whether the Advocate has properly accounted for this sum, I pay attention to one matter. The position of the third parties is that they have duly accounted for Kshs.16,000,000.00 paid to them by the Plaintiffs. This finds support from the testimony of Peter Kariuki Njiiiri (PW2) whom the purchasers later instructed to represent them in the transaction. This is what he says about the letter of 7<sup>th</sup> November 2008 (D. Exhibit Page 31);

“Letter signed by both Plaintiffs in offices of Bhalla. I witnessed the letter as advocate of the Plaintiff. This settled matter between Plaintiffs and third parties”.

30. This is what that letter reads:-

Patrick Ayisi Ingoi and Florence Nzoera Mulama

NAIROBI.

7<sup>TH</sup> November 2008

Taibjee & Bhalla Advocates

NAIROBI.

Dear Sirs

Re: Purchase of Radhas Investments limited and L.R. No. 209/2657, Nairobi.

We refer to the above matter and to the various discussions with yourselves.

In consideration of us receiving the sum of Kenya Shillings Six Million Seven Hundred and Fifty Thousand (Kshs.6,750,000/=) in full and final settlement of all claims of whatever nature that we may have in this matter, we hereby confirm that we have withdrawn all complaints made by ourselves on behalf of ourselves to the police or any other authority and that this letter may be recorded in the police records for that purpose.

In this respect, we request that you make payments as follows:

1. Kshs.3,375,000/= in favour of Patrick Ayisi Ingoi
2. Kshs.3,375,000/= in favour of Florence Nzoera Mulama

We thank you for your intervention in this matter.

Yours faithfully

Patrick Ayisi Ingoi (Signed)

Florence Nzoera Mulama (Signed)

Witness P. K. Njiiiri Advocate

31. Clearly then from the point of view of the Plaintiffs the only matter that can be outstanding is that between them and the Advocate, which this Court has found to be Kshs.20,000,000/= paid to the Advocates has been accounted for.

32. In paragraph 16 of the Replying Affidavit the Advocate gives the following account for the sum of Kshs.20,000,000/=;

[16] That as agreed the refunds of the deposit on the purchase price were made as per the following summary:-

- Paid to Dina M. Khan cash Cheque for - Kshs.500,000/=

Patrick A. Ingoi (CQ 000048 replaced with CQ 000049)

- Paid Patrick A. Ingoi & Florence N. Mulama - Kshs.2,000,000/=

(CQ 000168)

- Paid Florence N. Mulama (CQ 0000173) - Kshs.2,000,000/=

- Paid Patrick A. Ingoi (CQ 000169) - Kshs.2,000,000/=

- Paid image Motors A/C Patrick A. Ingoi - Kshs.2,200,000/=

and Florence N. Mulama (CQ 000172)

- Paid Patrick A. Ingoi & Florence N. Mulama - Kshs.2,067,380/=

(CQ 000177)

- Paid Mohamed Madhani A/c Patrick A. Ingoi - Kshs.3,332,620/=

& Florence n. Mulama (CQ 000178)

- Paid Patrick A. Ingoi (CQ000181) - Kshs.2,500,000/=

- Paid Florence n. Mulama (CQ 000182) - Kshs.2,500,000/=

- Agreed Fees & Expenses to Taibjee and Bhalla - Kshs. 900,000/=

**TOTAL Kshs.20,000,000/=**

33. Proof of the above payments (of course excluding agreed fees) are produced in D Exhibit Pages 14-29. I did not hear the Plaintiffs dispute those payments and this Court accepts the Advocate's evidence.

34. As to the question of legal fees of Kshs.800,000/=, the Advocate relies, partly, on the letter of 19<sup>th</sup> October 2007 (D. Exhibit Page 8) authored by the Plaintiffs. It reads:-

Patrick Ayisi Ingoi &

Florence Nzoera Mulama

NAIROBI

19<sup>th</sup> October 2007

Taibjee and Bhalla Advocates,

NAIROBI

Dear Sirs,

Re: Purchase of Riadha's Investments Limited

We refer to the above matter and hereby irrevocably instruct you as follows:-

1. For reasons beyond our control, we are unable to complete this transaction and pay the vendor as agreed.
2. We request that we be released from all our commitments in this matter to the vendors and yourselves.

3. We would also request that all sums paid to yourselves now be refunded to us less the following:-

a) All your legal fees and costs in respect of both parties amounting to Kshs.800,000/=

b) The amount agreed as forfeiture in favour of the sellers.

Subject to the foregoing kindly release to us the balance.

We again confirm that these are our final and full instructions in this matter.

Yours faithfully,

Patrick Ayisi Ingoi (Signed)

Florence Nzoera Mulama (Signed)

35. This Court has considered the evidence of the Plaintiffs. This letter, of 19<sup>th</sup> October 2009, is not one of those that Ayisi says were written by them in desperation. It is therefore easily accepted by this Court as the Plaintiffs' unequivocally agreement that from the sum paid to the Advocate, the Advocate would retain Kshs.800,000/= as fees.

36. So the sum of Kshs.800,000/= is accounted for and all that remains is Kshs.100,000/=. On this, the Advocate explains that although the agreed legal costs for the transaction were Kshs.800,000/= (See paragraph 10 of the witness statement of Mr. Bhalla) , there is then the letter of 20<sup>th</sup> November 2007 in which the Plaintiffs agreed to pay the Advocate a further sum of Kshs.100,000/= for his role in settling the matter. This was in addition to the agreed legal fee of Kshs.800,000/= (D. Exhibit Page 13). This November letter, again, is not one of the letters which the Ayisi claim was written out of desperation or because of undue influence.

37. And even if that allegation had been made, such an allegation is serious as it attempts to defeat the contents of the written word. This Court, indeed the law, would have expected succinct proof of the allegations. The letter was signed by both Plaintiffs and the Court would have expected both signatories to testify that it was written and signed under circumstances that its contents should be disregarded. Only Ayisi testified. It was not explained to this Court why the 2<sup>nd</sup> Plaintiff would not testify to corroborate the account. I hold the allegations to be unproved.

38. In the end even the difference of Kshs.100,000/= has been accounted for.

39. Ultimately the Court finds that the Plaintiffs' suit was entirely unmeritorious and is hereby dismissed with costs to the Defendant.

40. As to the third party proceedings, I hold them to have been wholly unnecessary. No claim or indemnity flowed from the Third Parties to the Defendants. At most the Third Parties would have made good witnesses for the Advocate, as indeed the testimony of the 1<sup>st</sup> Third Party proved to be. The Advocates should have simply called them as witnesses or sought Court summons to attend as witnesses. It was unnecessary to burden them with the costs of defending third party proceedings. Those costs must be met by the Defendant. Those are the orders of the Court.

**Dated, Signed and Delivered in Court at Nairobi this 21<sup>st</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Nganga for Defendant

Mwinzi holding brief Kisaka for Plaintiff

Sakimpa holding brief for Okeyo for 3<sup>rd</sup> Parties

Court Assistant: Nixon