



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 2 OF 2017 (O.S.)

IN THE MATTER OF AN APPLICATION FOR ORDERS SEEKING

THE DELIVERY OF A CASH ACCOUNT

BETWEEN

WANYORORO FARMERS CO. LTD.....PLAINTIFF

AND

EVANS EZEKIEL WAFULA SIMIYU.....1ST DEFENDANT

BERNARD CHEGE..... 2ND DEFENDANT

EDGAR D. WASHIKA OCHIMA T/A

E. WAFULA & ASSOCIATES ADVOCATES..... 3RD DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

1. The Plaintiff filed this suit against the defendant on the 8th of February 2017 through the originating summons seeking the following orders:-

(i) The Defendant by a date to be fixed by this Honourable Court do deliver up a cash account of the funds received from the Attorney General in the sum of Kshs 97,096,042.15/- paid on 1st of December 2014 and 15th of August, 2015 in settlement of a claim filed by the Plaintiff against the Attorney General vide Nakuru HCC No. 821 of 1993.

(ii) **The Defendant do pay the Plaintiff the said sum plus interest at commercial rates as from the date of receipt until the determination of this application.**

(iii) **In default of payment on delivery of the cash account, the Defendant be ordered to appear before this Honourable Court to show cause why they should not be disciplined under Section 56 of The Advocates Act for being guilty of professional misconduct.**

(iv) **The Defendant to pay for the costs of this suit.**

PLAINTIFF'S SUBMISSIONS

2. The Plaintiff stated that the following facts were not in dispute:

i. The Plaintiff engaged the Defendant as their Advocates on the 23rd of October 1993.

ii. The Defendant was engaged to represent the Plaintiff in Nakuru **HCC No. 821 of 1993 Wanyororo Farmers Ltd v The Attorney General & others.**

iii. The Defendant in settlement of the Plaintiff's claim received on behalf of the Plaintiff Kshs 97,096,042.15/- in two instalments from the Attorney General.

iv. The Plaintiff did not receive the said payment or a portion thereof from the Defendant.

3. The Plaintiff called two witnesses who told the Court that they were directors of the Plaintiff.

4. The Plaintiff availed two witnesses. **PW1 Geoffrey Mutahi Ndegwa** who is a director of the plaintiff; he adopted his affidavit dated 7th February 2017 as evidence. He testified that the firm of **Evans Ezekiel Wafula Simiyu** the Advocate was acting for the plaintiff.

5. He further testified that he later learnt that he was paid kshs.97 Million.

He testified that **Simiyu Advocate** in paragraph 6 of his affidavit stated that he agreed with the Attorney General to settle this matter at a sum of kshs.39,196,042.15 plus costs and interest at court's rate. He testified that the Advocate pursued settlement and on 28th February 2015, the sum was duly paid and he informed directors of the plaintiff company.

6. He stated that the directors never sat to direct the Advocate how to disburse the money and that he is not aware of any formal

communication from the Advocate to the company involving the directors of the progress of the money. He further testified that he was not aware of any arrangement for the Advocate to retain interest and costs.

7. He refuted **Wilson Nyonji Kimani's** allegations that the Advocate acted in accordance with their instructions. He said no money was received by the company from the Advocate. He confirmed that at page 5 of plaintiff's documents is a letter of engagement of the Advocate by the company dated 23rd October 2012. He confirmed that it has 4 signatures and company seal.

8. PW1 testified that the letter dated 8th October 2013 at page 7 of the documents has a clause indicating that client agrees they are entitled to principal sum and interest and costs to be paid to **Advocate Ezekiel Wafula**; that the people who signed are **Wilson Nyonji Kimani** and **Joseph Gatere**; that **Joseph Gatere** is a non-member and non-director. He said the document was not consented to by the directors and it should have been accompanied by special resolution of the company signed by various directors not a single individual.

9. He testified that at page 8 **Joseph Gatere** acknowledges receiving kshs.2 Million. He said the company did not authorize the payment. He said the money should have been received by the Advocate and paid to the company and that the company did not authorize **Mr. Wafula Advocate** to pay **Joseph Gatere**. He confirmed that kshs.2 Million was paid to **Joseph Kaguru Karenga** who is the chairman of the company. He said he was not aware of any instruction by the company to pay him neither is there any indication that he was receiving the money on behalf of the company. Further at page 11 is payment of kshs.2.5Million to **James Karugu Karega** which was not also authorized; and at page 12 is payment of kshs.3 Million to **Joseph Waweru Gatere** which was not also authorized; further at page 13 is payment of Kshs.1.5 Million to **Eliud Ndungu Thuo** which was not authorized by the company.

10. PW1 testified that the Advocate has never communicated to the company concerning the above payments. He said before filing this suit the company secretary sent a demand letter to **Wafula Advocate**, which he never responded and has not given the company any accounts as to what happened to the money.

11. On cross-examination by **Mr Washika** for the defendant, PW1 said he has been a director for the company since 1993 and was only out between 1997 and 1998. He said a document from registrar of companies attached to his affidavit confirm that he is a director. He stated that at the time the Advocate was engaged, all the people listed were directors except three who are deceased. He however said that he had a problem with the letter of engagement because Joseph was not a director and it does not coincide with resolution.

12. PW1 stated that he participated in resolution to appoint the firm of Wafula Advocate, he said he saw the addendum through the police; that the DCI gave them the document after getting it from the AG. He said he later learnt that **Joseph Waweru Gatere** purchased a plot from a member. He said **Wanyororo Farmers** is a land purchasing company and that they paid for shareholding and divided land in 1974 and that members were free to sell their plots. He said title deeds were issued in 1984. He said **Joseph Gatere** is a landowner in **Wanyororo Farmers** but not a shareholder.

13. In further cross-examination, PW1 said Mr. Wafula was supposed to deposit money in the company account. He said in the letter of engagement, there is no account set out. He said he learnt from the DCI in the year 2015 that the money had been paid. He said he was not aware of minutes of 29th March 2016 and signatures are all forgeries. He said he is not aware of resolution at page 16 and that it is not the company's resolution.

14. On re-examination, PW1 said he was not aware of the meeting of 29th March 2016. He said he is not aware of any communication from **Wafula Advocate** after the judgment. He said he has not seen any minutes from the company giving **Mr. Wafula** instructions on how to disburse the money.

15. **PW2 Eliud Ndungu Thuo** who is the secretary and director of **Wanyororo Farmers Company Limited** said it is a land buying company. He confirmed PW1 is a shareholder and director of the company and that **Wilson Nyonji Kimani** is a director and treasurer of the company. He confirmed that the company appointed **Evans Wafula Simiyu** as the Advocate of the company. He adopted affidavit dated 13th April 2017 as his evidence.

16. PW2 confirmed that the company appointed **Wafula Advocate** to claim money from the Government and the Government agreed to pay but the Advocate took the money. He said the Advocate never communicated to the company on the settlement; that they learnt about it when

one of them went to the Attorney General and got the documents. He said they never sat as a board and instructed the Advocate how to pay the money. He said **Joseph Waweru Gatere** was a shareholder but not a director. He said he may have purchased shares from a shareholder but he was not a board member. He said there were no instructions from the company to the Advocate to pay kshs.2 Million that he received.

17. He further stated that the company never authorized payment of kshs.2 Million to the chairman **James Karega** same to payment of Kshs.2 Million to **Wilson Nyonji**.

18. PW2 also confirmed that he received kshs.1.5 Million from the Advocate. He confirmed that he was not receiving on behalf of the company and the company never authorized the payment. He said they agreed with the Advocate that Advocates/client's bill of costs was kshs.13Million and the company has no problem with the kshs.13Million; he said the balance after deducting the said kshs.13Million should have been deposited in the company account. He confirmed that the account has been dormant since 2009.

19. On cross examination, he said the company opened one account in Equity Bank and the District Administrator and District Commissioner opened accounts in Standard Chartered Bank and National Bank; he said they never wrote to Wafula Advocate informing him of the Account opened in Equity bank but he also never wrote to the company asking for the account. He said at some point District Administration took over the company but management was returned to them after a court case.

20. He said he was the secretary of the company when they agreed to engage **Wafula Advocate**. He said **Joseph Waweru Gatere** was a friend to the chairman **Wilson Nyonji**. He said he signed as a friend of Wilson Nyonji and their interest was to have the money released. He said they were given addendum dated 8th October 2013 and it was signed by **Wilson Nyonji** and **Joseph Waweru Gatere** who is now deceased. He confirmed that he received kshs.1.5 Million but it was not for the company. He said they talked to the treasurer to ask the lawyer to loan them the money as they waited for payment from the Government. He said they had worked for long using their money. He said they promised to refund the money once money was paid. He said it is not true to say the money given to them was for the company as they were to refund. He said from 1993, they were using their money to pursue this case. He said the minutes at page 14 are genuine; that the signatures are genuine.

21. PW2 said when Wilson learnt of payment of money, he never informed directors. He said it was his secret with the Advocate. He said minutes at page 14 and 15 were written at the Advocate's office.

22. On reexamination, he said the document at page 7 was signed by **Wilson Nyonji** and **Joseph Gatere**. He said Gatere had no authority to sign company documents and that the company rejected the addendum. He said if the Advocate demand the money he was given, he would pay it back; he said it is a debt he borrowed. He said he had not also been told the Government had paid money. He stated that the Advocate had not informed them that the money had been paid.

23. PW2 said the meeting of 29th March 2016 was done in the Advocate's office. He said he had gone to the office with the chairman and the secretary on being sent by the DCIO. He the DCIO had learnt that members had complained over the money. He added that by 29th March 2016, the Advocate had been paid by the Government; that the minute were written in the Advocate's office by his secretary and Wafula Advocate is listed as one of the members. He said the intention of the minutes was to cover the money as the police were doing investigations at that time. He said money payed out as per defendant's documents is kshs.13Million.

24. Defence availed one witness **Wilson Nyonji Kimani**. He adopted his witness statement dated 3rd April 2017 as evidence. He testified that he has been treasurer of **Wanyororo Farmers** since the year 2000. He also confirmed that he is one of the directors in the company. He confirmed that **Ezekiel Wafula** is the Advocate of the company. He confirmed signing the letter instructing the Advocate. He said the secretary **Eliud Ndungu** and **James Karega** also signed the letter and the 4th signatory is **Joseph Gatere**. He said they were all directors of the company. He confirmed that in the defendant's documents is the addendum to the letter. He said the addendum has his signature and Gatere's signature. He said he had permission of the chairman and secretary to sign the documents.

25. He confirmed that he was given kshs.2 Million after conclusion of the case. He confirmed that the chairman, secretary and Gatere were also paid. He denied knowledge of a meeting of 13th January 2017 and stated that he never received notice of the same. He said it was a board meeting and its only directors who attend.

26. On cross-examination, DW1 confirmed that it is the directors of **Wanyororo Farmers** who appointed **Ezekiel Wafula**. He confirmed that **Advocate Wafula** was paid kshs.97,096,042.15 on behalf of the company and the payment was compensating the company for property destroyed by provincial administration. He said the company was informed of the payment in writing. He said it was in the year 2014 though he could not recall the date. He said it was him who received the letter. On being asked about availability of the letter, he said it is at his home. He further said the Advocate did not write to them asking for account to deposit the money. He acknowledged being paid kshs.2 Million by the Advocate. He confirmed that the payments made to them individually by the Advocate was not authorized by the company; that company never wrote to the Advocate instructing him to pay them individually. He confirmed that a total of kshs.3 Million was paid out as follows:-

1. Joseph Waweru..... kshs 2M
2. James Karega..... kshs 4.5M
3. DW1..... kshs 2.5M
4. Joseph Waweru Gatere..... kshs 3 M
5. Eliud Ndungu..... kshs 1.5M

TOTAL..... Kshs 13 M

NET BALANCE..... Kshs 84 M

27. DW1 said he does not know who was paid kshs.84 Million. He confirmed that the plaintiff never wrote to **Wafula Advocate** instructing who he was to pay kshs.84Million. He confirmed that the company agreed that the Advocate's fee was to be paid kshs.13M. He said the agreement was signed and sealed by directors and company seal fixed. He said **Joseph Gatere** was representing **Margaret Wambua** who was deceased. He said there was no meeting held to elect **Joseph Gatere** as director. He also confirmed that in the addendum, he was the only director who signed it.

He confirmed that members did not elect Joseph Gatere as director; that his name is not registered as member/shareholder. He also confirmed that the addendum does not have company seal. He further said there is no letter authorizing him to go to the Advocates office to do an addendum and there is no mention of **Wanyororo Farmers** in the addendum. He said he was not aware of the meeting of 13th January 2017 but he confirmed that 4 directors attended and 2 directors gave apologies. He said the company has about 4000 members and since the case was concluded, they have not called for a meeting to inform them of the outcome of the case. He said they informed members that they were paid kshs.13Million. He said he did not know how they informed them. He confirmed that members went to report at Nakuru Police Station. He confirmed that he and Wafula Advocate have been charged with criminal offence. He agreed that it is the right of members to know where the money went.

28. On reexamination, he confirmed that directors received money from the Advocate. He said they were called to go for the payment. He said the letter of engagement is signed by four directors and stated that all the four

directors were paid. He said Joseph Gatere was a director in the company, he confirmed the addendum is dated 23rd October 2012. He also said that the plaintiff and Wafula Advocate have no issues pending. He said Wafula Advocate does not owe the plaintiff, he said he does not know why only him and Advocate who were charged yet the other directors were paid.

PLAINTIFF'S SUBMISSIONS

29. In submissions dated 10th June 2019, the plaintiff summarized evidence adduced in court as captured above and referred court to the case of **Francis Mugo & 22 others v James Bress Muthee & 3 others [2005] eKLR** the gist of the case being that the choice of Counsel is the prerogative of the party to a suit, it must be borne in mind that in the discharge of his office, an advocate has a duty to control his client, a duty to his opponent, a duty to the Court, a duty to himself and a duty to the state as well.

30. Further in the case of **National Bank of Kenya Limited v E. Muriu Kamau & another [2009] eKLR** the gist of the case being that every person who enters into a legal profession impliedly agrees to bring himself to a reasonable degree of care skill, thus what is required on an advocate is a fair, reasonable and competent degree of skill... There is plainly a duty on all advocates to exercise exceptional care in handling matters on behalf of their clients.

31. The Plaintiff further submitted that it trusted the Defendant to handle their case and receive proceeds of the judgment on their behalf and thereafter forward the same to the Plaintiff for the benefit of members but instead proceeded to pay off a few of the directors monies allegedly owed to them without any resolution from the Plaintiff and retained the balance. Further, that the director who gave the consent was not mentioned and it is clear from evidence of PW2 and DW1 that the Defendant was acting for the benefit of the directors and not the Plaintiff and he breached his duties to the Plaintiff and the trust imposed on him by the Plaintiff.

32. The Plaintiff submits that the seriousness of the breach of trust is so severe amounting to criminal offence. The letter of engagement clearly stated that the fees payable to the Defendant was Kshs 13,000,000/-. He proceeded to unlawfully pay another sum of Kshs 13,000,000/- as follows:

- (i) Joseph Wawere Gatere Kshs 2,000,000/- and Kshs 3,000,000/- member
- (ii) James Kaguru Karega Kshs 2,000,000/- and Kshs 2,000,000/- director
- (iii) Wilson Nyonji Kimani Kshs 2,000,000/- director
- (iv) Eliud Ndungu Thuo Kshs 1,500,000/- director

The Defendant did not appear in Court to explain the circumstances under which the payments were done.

33. The Plaintiff submitted that even though the Court was to allow the claims paid to the persons and the Kshs 13,000,000/-that was the Defendant's legal fee, the total amount of money remaining out of the Kshs.97,096,042.16/- would be Kshs.71, 096,042.16 that was not accounted for. They further submitted that the Defendant had sought to negotiate the matter out of court but made no efforts to do so. He waited until the hearing on 25th April 2019 to disclose that they had made payments to the directors and nowhere in the acknowledgement states that the payments were made on behalf of the Plaintiff.

34. Plaintiff further referred to the case of **Farid Ahmed Swaleh & another v**

Mohamed Faki Khatib Practicing as **Khatib & Company Advocates [2017] eKLR** where the court held that where an advocate as an officer of the Court can be seen to resist basic duty of rendering accounts to a client, the moment originating summons was filed, it was only honourable that the sought accounts be provided.

35. The Plaintiff stated that the Defendant could not hide under the umbrella of the advocate-client confidentiality when the services and the fee payable were so specific and contractual in nature and if anything, the Defendant is in breach of the agreement dated 23rd of October 2013. The dispute is between the advocate and client. The client is demanding accounts. The Defendant must comply and render accounts. On a balance of probabilities, the Plaintiff submit that they have established its case before the Court, they pray that the Court do proceed and enter a judgement in favour of the Plaintiff as sought and they also pray for the costs of the suit.

DEFENDANT'S SUBMISSIONS

36. The Defendants in their submissions dated 26th of July 2019 and filed on the 29th of July 2019 raised the following issues:-

a. Whether the entire suit is frivolous, vexatious and otherwise an abuse of the Court process as being contrary to the provisions of **Section 45 (1), (2), (2A) and (6)** of the **Advocates Act** as there exist

agreements between the Defendants as advocate and the Plaintiff as client setting out the Defendant's fee.

b. Whether the Addendum dated 8th of October 2013 is valid and binding on the Plaintiff.

c. Whether the entire suit is fatally defective for being supported by the affidavit of **Geoffrey Mutahi Ndegwa** being a stranger and not authorised person in the Plaintiff Company.

d. Whether the entire suit is frivolous, vexatious and otherwise an abuse of the Court process as the Plaintiff is estopped from seeking prayers on the face of its application.

e. Whether the present suit seeking delivery of cash account is frivolous and vexatious as the Plaintiff has already illegally and procedurally acquired copies of the Defendant's account statements from the police with whom they act in cahoots and the same is adduced by **Geoffrey Mutahi Ndegwa** as annexure GMN 5 on the 7th February 2017.

37. The defendant submitted that the suit is frivolous, vexatious and otherwise an abuse of the Court process for being contrary to the provisions of **Section 45 (2) and (2A)** of the **Advocates Act** as read with **Order 52 Rule 3 (1)** of the **Civil Procedure Rules** and referred to the case of **County Council of Nandi v Ezekiel Kibet Rutto & 6 others [2013] eKLR** where the court held that frivolous pleadings completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. Vexatious pleading is a pleading whose only purpose is to annoy or irritate the other party to the suit.

38. The Defendant further submit that the Plaintiff witnesses acknowledge receipt of the decretal sum but the present application seeks from the defendant the entire decretal sum plus interest at commercial rates as from the date of the receipt until determination of this application; that the prayer seeks to set aside the entire advocate retainer agreement dated 23rd of October 2012 admitted and the addendum thereto dated 8th of October 2013.

39. On Validity of the Addendum dated 8th of October 2013 defendant submit that **Wilson Nyonji Kimani** and **Joseph Waweru Gatere** (deceased) were a proper agent of the Plaintiff as set out in **Section 45 (1)** of the **Advocates Act** as they set itself out to be in a position to engage the Defendant/Advocate; defendant rely on the principle of ratification as in the case of **Royal British Bank v Turquand (1856) 6 E & B 327** which was cited with approval in the case of **East African Safari Limited v Anthony Ambaka Kegode & another [2011] eKLR** where the court held that this rule is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agent of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus where the articles give power to borrow with sanctions of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanctions has in fact been obtained. He may assume that it has and if he is acting *bona fide* he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained.

40. The Defendant states that the addendum was firstly executed by the treasurer of the company as acknowledged by the Plaintiff's witness. The second witness to the addendum was an agent of the Plaintiff who was presented by the Plaintiff's directors as a co-director of the Plaintiff having been present and executed the initial retainer agreement. The addendum was ratified by the full board of directors on the 29th of March 2016 thus curing any alleged irregularities with the Addendum.

41. On argument that the entire suit is fatally defective suit for being supported by the affidavit of **Geoffrey Mutahi Ndegwa** being a stranger in the Plaintiff's Company, defendant submitted that substantive chamber summon application was supported by the affidavit of **Geoffrey Mutahi Ndegwa** who testified as PW1 who asserted to be a director in the company though not listed on the CR 12 dated 29th April 2016 and on re-examination he stated that the CR 12 dated 29th of April 2016 made reference to him as **Mutaru Ndegwa** and alleged that there was an error apparent on the face of CR 12.

42. The Defendant further submitted that there was no document presented by the Plaintiff supporting the assertion that **Geoffrey Mutahi Ndegwa** is a director or that the name **Mutaru Ndegwa** as appearing in the CR 12 dated 29th April 2016 refers to **Geoffrey Mutahi Ndegwa**.

43. Defendant referred to **Order 4 Rule 1 (4)** of the **Civil Procedure Rules** and the case of **Britind Industries Limited v APA Insurance limited [2017] eKLR** where the court held that the resolution of the Plaintiff's board of directors authorizing **Mr. Santosh Kumar Singh** to swear the verifying affidavit and to file this suit has not been filed and/or otherwise provided as required by **Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010**. The Defendant submits that the Plaintiff cannot present such authority as it has already placed before this Court on the 8th of February 2017 being minutes and resolutions that do not authorize **Geoffrey Mutahi Ndegwa** to swear the affidavit.

44. Further that in the case of **Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR** the court held that where a suit is to be instituted for and on behalf of a company; there should be a resolution to that effect. They referred to **Section 134 (1) of the Evidence Act** and stated that **Geoffrey Mutahi Ndegwa** and **Eliud Ndung'u Thuo** have not satisfactorily proved to be clothed with the appropriate authority of the client to waive this privilege and in the case of **Director of Public Prosecution v Tom Ojienda t/a Prof Tom Ojienda & Associated Advocates & 3 others [2019] eKLR** on estoppel on account of executed acknowledgements and discharge vouchers for full and final payment.

45. Defendant submitted that the Court should be able to lift the corporate veil to examine the real issues in contention. They refer to the case of **Post Bank Credit Limited (in Liquidation) v Nyamangu Holdings Limited [2015] eKLR** the gist of the case being that because of its artificial nature, a company acts through human person, namely, the director, officers, shareholders and corporate manager etc. They stated that the signed discharge vouchers constituted a contract couched in clear and unambiguous terms with no room for misunderstanding it; that the Plaintiff has benefitted from the services of the Defendant and now wishes to negate the addendum to the Retainer Agreement in its entirety which will perpetuate a fraud against the Defendant and is against public interest.

46. Defendant referred to the case of **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR** the gist of the case being that the execution of the discharge voucher constituted a complete contract and the case of **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** the gist being that the parties agreed that the payment of the amount stated in the settlement agreement would absolve the Appellant from any further claims.

47. On illegally and procedurally acquired copies of the Defendant's statement of account the defendant submitted that prayer 1 on the face of the application is spent as the Plaintiff has in its possession the Defendant's statement of accounts for account number 0082113249001 Chase Bank. The statement of account was produced in the Affidavit of **Geoffrey Mutahi Ndegwa**. The accounts were submitted procedurally contrary to Article 31 of the Constitution.

ANALYSIS AND DETERMINATION

48. There is no dispute that the **Wafula Advocate** was appointed by letter dated 23rd October 2012 to represent the Plaintiff in a claim for compensation of its property destroyed by provincial administration. It is not also disputed the Government compensated the Plaintiff's company with kshs.96,196,042.15 which was paid through the company **Advocate Evans Ezekiel Wafula Simiyu**. It is not also disputed that the company agreed with the Advocate to be paid kshs.13Million as legal fees. Both the Plaintiff and Defendant's witnesses confirmed this.

49. I consider the following as issues for determination.

- i. Whether the addendum to instruction letter dated 8th October 2013 was authorized by the company (plaintiff).
- ii. Whether the company authorized payment of kshs.13M to 5 directors.
- iii. Whether any money is owing to **Elija Wafula Advocate**.

(i) (Whether the addendum to instruction letter of Advocate wafula dated 23rd October 2012 is valid.

50. The instruction letter of **Advocate Wafula** dated 23rd October 2012 is not disputed. What need to be answered is whether addendum dated 8th October 2013 is valid. Was meeting that gave rise to the addendum to instruction letter authorized by the company? DW1 confirmed that the meeting **of 29th March 2016** was held at the Advocate's office; he also confirmed that he is the only director who signed the minutes and that **Joseph Gatere** who signed the minutes was not a director; he said the said **Joseph Gatere** was representing one **Margaret Wambua** who was deceased. He agreed that no meeting was held to authorize money paid to him and the four other persons (directors). He confirmed that members never elected **Joseph Waweru** as director. He also confirmed that the addendum does not have company seal.

(ii) Whether the company authorized payment of kshs.13 Million to 5 directors.

51. The plaintiff's witness PW2 who were directed confirmed that together with other directors and **Joseph Waweru Gatere** they were paid money by the Advocate in their personal capacity. He confirmed being paid kshs.1.5Million. This is the same case with the defence witness DW2. He confirmed that he was paid kshs.2Million by the Advocate after conclusion of the case. He confirmed that there was no authorization of the company to pay them. He said he informed members of the company of the outcome of the case but never availed the letter in court. DW1 confirmed that the Advocate did not pay the balance of kshs.84,196,042.15 to the company.

(iii) Whether any money is owing from the defendant to the plaintiff.

52. It is disputed that the government paid compensation of kshs.98, 196,042.15 to the Plaintiff, the defendant who was acting as Advocate for the Plaintiff's company; this was confirmed by defence witness (DW1). Apart from the money paid to directors totaling kshs.13Million there is no prove of payment of the balance of kshs.84,196,042.15. The Kshs.13 Million as per evidence adduced was not authorized by the plaintiff. There is no members' resolution or any other document from the company authorizing the defendant to pay the directors. Even if the directors spent their own money following up the case as alleged, the issue should have been tabled before company meeting for members to decide whether to reimburse them and how.

53. The kshs.13Million was therefore irregularly paid to the directors. As for the balance of kshs.84,196,042.15 the Advocate has failed to demonstrate how he dealt with it. There is no prove that the money paid as compensation by the Government through the defendant reached the defendant neither was it disbursed with plaintiff's instruction.

54. The defendant apart from adducing evidence to the effect that directors were paid amounts adding up to kshs.13,000,000 and that he was entitled to legal fees of kshs.13,000,000, there is no evidence that he paid the plaintiff any money from the compensation paid by the Government through his law firm. He never disputed his entitlement of legal fees of kshs.13Million. There is explanation of how the balance of the compensation money was utilized.

55. From the foregoing, I find that kshs.96,196,042.15 less legal fees of kshs.13Million is owing from the defendant to the plaintiff.

56. FINAL ORDERS

- 1. Judgment is hereby entered for plaintiff against the defendant for kshs 84,196,042.15.**
- 2. Interest on 1 above at court's rate from the date of filing this suit.**
- 3. Costs to be paid by defendant to plaintiff.**

Judgment dated, signed and delivered email at Nakuru This 30th day of April 2020.

TO:

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RACHEL NGETICH JUDGE

Counsel for Applicant

Counsel for Respondent