



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 76 OF 2020 (OS)

IN THE MATTER OF: THE ADVOCATES ACT, 2012

IN THE MATTER OF: DELIVERY UP OF THE TITLE NUMBER CR.29190 WITH RESPECT TO THE PARCEL OF LAND BEING LAND REFERENCE NUMBER 9933 SECTION 1 MAINLAND NORTH AND CR. 29303 WITH RESPECT TO LAND REFERENCE NUMBER 9892 SECTION 1 MAINLAND NORTH BY THE DEFENDANT RESPONDENT.

-BETWEEN-

OCEAN VIEW PLAZA LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

GOR CHITRANJAN BHANUPRASAD AND

GOR SHISHIR SOORYAKANT BHANUPRASAD

TRADING AS C.B GOR & GOR ADVOCATES.....RESPONDENT

JUDGMENT

1. **Ocean View Plaza Limited** (the Applicant) commenced this suit by way of Originating Summons against its former advocate **C.B Gor & Gor Advocates** (the Respondent) for the following orders:-

a) Spent;

b) That the Defendant/Respondent be ordered to forthwith deliver to the Plaintiff/Applicant CERTIFICATE OF TITLE NUMBER CR.29190 with respect to the parcel of land being Land Reference Number 9933 Section 1 Mainland North and CR. 29303 with respect to Land Reference Number 9892 Section 1 Mainland North.

c) That the Defendant/Respondent be ordered to file taxation proceedings with respect to any dispute bills within seven (7) days.

d) That the Plaintiff/Applicant deposit in court the sum of Kshs.5,000,000/= as security for disputed bills pending hearing and determination of the Defendant/ Respondent's taxation proceedings.

e) That the costs of this application be provided for.

f) That the Honourable Court be Pleased to make such further or other orders, as it may deem just and expedient in the circumstances of this case.

2. The Application is brought pursuant to the provision of Section 47 (1) of the Advocates Act, Order 37 Rule 14, Order 52 Rules 4(1) (b) (e) and (2) and (3), Order 52 Rule 10, all of the Civil Procedure Rules, Sections 1A, 1B and 3A all of the Civil Procedure Act, Articles 50 (1) and 159 (2) both of the Constitution of Kenya, 2010 and all other enabling laws.

3. The Originating summons is supported by the 37 grounds set out on the case of it and in an annexed affidavit sworn by the Plaintiff's Director, **Naresh Manilal Kotak** on 10/3/2020, forming the basis of the claim herein by the Plaintiff/Applicant as against the Defendant/Respondent, which I hereby set out as a facts of this case as pleaded in the following terms:-

4. It is alleged that the Plaintiff/Applicant is the registered proprietor of the parcels of land referenced as **Title Number CR.29190** with respect to the parcel of land being **Land Reference Number 9933 Section 1 Mainland North** and **CR. 29303** with respect to **Land**

Reference Number 9892 Section 1 Mainland North (hereinafter referred to as the suit Property).

5. That in the year 2014, the Plaintiff desired to sell the suit properties and consequently procured the services of the Defendant/Respondent for purposes of the intended sale and indeed surrendered to the Defendant Title Number CR. 29190.
6. However, the intended sale did not proceed since the intended purchaser, Ideal Location Ltd cancelled the transaction. The Plaintiff then opted to sue Ideal Location Ltd vide **Mombasa H.C.C.C No.83 of 2010** but the matter was settled vide a consent agreement to the effect that the sale would proceed upon the Plaintiff rectifying an error on the face of the title deed.
7. The Plaintiff alleges that its efforts to rectify the error in terms of the consent have been defeated owing to the fact that the Defendant has refused to release the original certificate of titles on account of exercising the advocate's right of lien until the agreed fees is paid.
8. According to the Plaintiff, on 9/7/2019 the Defendant firm of advocate had instructed the Plaintiff to pay a total sum of **Kshs.2,000,000/=** as agreed fees. It is averred that the Plaintiff however paid a total sum of **Kshs.2,510,000/=** to the firm of **M/S Oraro & Company advocates** who acted together with the Defendant in the matter to cater for the fees. That notwithstanding, the Plaintiff avers that the Defendant raised yet another bill in the sum of **Kshs.2,534,575/=** with respect to litigation in **Mombasa H.C.C.C No.83 of 2010** and **Kshs.2,475,440/=** as alleged conveyance fees despite the fact that the conveyance did not materialize in 2014.
9. Later, owing to the high charges by the Defendant, the Plaintiff avers that it opted to appoint the firm of **M/S CMS Daly and Inamdar Advocates** to proceed with the rectification of the title and as well as the completion of the conveyance transaction. On 12/2/2020, **M/S CMS Daly and Inamdar** gave an undertaking to the Defendant that it would pay its legal fees since the Plaintiff had deposited with it (M/S CMS Daly and Inamdar) an equivalent amount of **Kshs.5,000,000/=**. It is alleged that the Defendant failed to release original certificates of title even after the undertaking and vide a letter dated 25/2/2020, the Defendant averred that it would proceed to taxation.
10. The Plaintiff avers that the Defendant has as a result infringed its right and also delayed the rectification of the certificates of title in terms of the consent between the Plaintiff and the purchaser.
11. Be that as it may, the Plaintiff averred that its transaction advocates **M/S CMS Daly and Inamdar Advocates** executed the conveyance agreement and may incur liability if it fails to complete the conveyance by rectifying the error on the titles. Lastly, it is averred that the Defendant will suffer no prejudice if it releases the original titles to the Plaintiff and the claimed costs will be covered by the sum the Plaintiff will deposit in court.
12. In a further affidavit sworn by the Plaintiff's director, **Naresh Manilal Kotak**, on 7/9/2020, the Plaintiff deponed that it had made a payment of **Kshs.2,440,000/=** to the Defendant on the understanding that the Defendant was acting on its behalf in **Mombasa H.C.C.C No.83 OF 2010**. However, vide a mention notice dated 24/7/2020, the Plaintiff learnt that only the firm of **M/S Oraro & Company** was on record on its behalf and not the Defendant herein hence it is not entitled to claim any fees or exercise any right of lien over the titles in its custody. The Plaintiff even adds that the defendant is estopped from raising any bill of costs with respect to **Mombasa H.C.C.C No.83 of 2010** for the reason that there exists no advocate-client relationship between them.
13. The Defendant on the other hand, opposed the Originating summons vide a replying affidavit dated 17/3/2020 and a further affidavit dated 11/9/2020. Both affidavits are sworn by **Chitraranjan Bhanuprasad Gor**. He deponed that apart from the block bills exhibited by the Plaintiff in the present application, the Defendant Advocates' law firm is still owed fees and disbursements by the Plaintiff in another matter it handled on behalf of the Plaintiff being **High Court ELC No.353 of 2015**. That he was instructed by the Plaintiff's director to take over **Mombasa H.C.C.C No.83 of 2020** from **Ms. A.B Patel & Patel Advocates** but after briefing the Plaintiff on the fact that his law firm does not conduct court hearings, the firm of **M/S Oraro and Company Advocates** was appointed to act jointly with the Defendant in the said matter.
14. Despite the fact that the Plaintiff was advised on the manner in which fees are computed vide emails dated 8/8/2019 and 9/8/2019, the Defendant's firm of advocates has not yet filed its bill of costs for taxation in **Mombasa H.C.C.C No.83 OF 2010** although it is entitled to fees for the work it did in the said case. The Deponent was also concerned that the Plaintiff had not advised on who would be acting on its behalf for purposes of taxation given that the Plaintiff's directors are based in the United Kingdom.
15. The suit herein was canvassed by way of written submissions pursuant to directions issued by this court on 30/7/2020. Both parties obliged by filing their respective submissions. The Plaintiff filed its first set of submissions dated 14/8/2020 on 19/8/2020 and further submissions dated and filed on 7/9/2020. The Defendant on the other hand filed his first set of submissions on 27/8/2020 and further submissions dated 11/9/2020 on 28/9/2020. Those submissions were orally highlighted on 6.10.2020 with **Mr. Gathu** representing the Plaintiff and **Mr. Omollo**, advocate representing the Defendant.
16. The submissions by both parties' advocates mirrored the pleadings namely the originating summons and supporting affidavit, the further affidavit and the Replying affidavit and the further replying affidavit which I need not replicate here as they are well captured in the facts of this case as restated above.
17. However, I wish to note the key stands held by each side. In that regard, **Mr. Gathu** counsel for the Plaintiff reiterated that the Defendant is not entitled to hold the documents because an advocate's right to hold lien over subject titles accrues after taxation of costs and that is not the case here, because and if there is any bill of taxation filed, the same has not been served upon the Plaintiff.
18. The Counsel further asserted the view that the Plaintiff has shown that it is capable of settling costs which may be claimed on taxation by offering to deposit **Kshs.5,000,000/=** with the court and a further undertaking of **Kshs.5,000,000/=** issued in favour of the Defendant. According to **Mr. Gathu**, as it stands, the Defendant and the firm of **M/S Oraro and Company, Advocates** are estopped from raising bills

and taxing their costs during the pendency of the matter.

19. On part of the Defendant, **Mr. Omollo** submitted that the Defendants expect to be paid a total of **Kshs.8,672,996/=** by the Plaintiff as costs arising out of the various matters they acted on their behalf. Therefore, as a precondition to releasing the certificates of title, the Plaintiff should deposit a total sum of **Kshs.8,672,996/=** in a joint interest-earning account of both advocates for the Applicants and the Respondents.

Analysis and Determination

20. I have given due consideration to the originating summon application herein, the affidavits sworn in support and in opposition thereof as well as the submissions by both parties. I have also given due consideration to the vast authorities that have been cited by the parties in their submissions and the relevant law with regard to the issues arising herein. What is required to be decided on is whether the Plaintiff is entitled to the prayers sought as set out in the Originating Summons. To wit;

- a) *Whether the Defendant should be ordered to deliver to the Plaintiff the Certificates of Title Numbers CR. 29190 and CR. No. 29303;*
- b) *Whether the Defendant should be ordered to file taxation proceedings with respect to any disputed bills?*
- c) *Whether the Plaintiff should be allowed to deposit a sum of Kshs.5,000,000/= in court as security for the disputed bills if the court finds in affirmative with respect to prayer No. (a).*
- d) *Who should bear the costs of the suit*

21. From the pleadings alluded to above, the affidavit evidence and annexures attached to the affidavits, it is undisputed that the Plaintiff had instructed the Defendant to act on its behalf for purposes of selling the suit properties to Ideal Location Limited a consequence of which the Plaintiff deposited Certificates of **Titles Numbers CR. 29190 and CR. No. 29303** with the firm of Advocates. It is also a common ground that the intended sale did not materialize owing to an error on the titles which parties later on agreed to rectify. The Plaintiff however submitted that despite numerous demands, the Defendant has refused to submit the original certificates for rectification. The question which raises an alarm at this point is whether the defendant was justified in withholding the clients title documents?

22. In response, the Defendants maintain that they are holding onto the Plaintiff's original documents in exercise of their right of lien over them for unpaid legal fees for the services rendered to the Plaintiff. It was submitted that the Defendant represented the Plaintiff in **Mombasa H.C.C.C No.83 OF 2010** where the Plaintiff had agreed to sell the properties subject to the two certificates of title at a consideration of **Kshs.135,000,000/=** and the legal fees resulting thereof have not been settled. Further, that the Defendant had earlier handled a matter on behalf of the Plaintiff being **Environment and Land Case No.353 of 2015** and the resultant fees are not yet settled.

23. Conversely, the Plaintiff contends that the Defendant has never acted on its behalf in **Mombasa H.C.C.C No.83 OF 2010**. That in the said suit the Defendants services were only procured for purposes of effecting a sale which did not materialize and there is no basis of demanding any legal fees leave alone the fact that **Mombasa H.C.C.C No.83 of 2010** is still pending.

24. The Plaintiff further avers that the certificates of title were deposited with the Defendant for a particular purpose and not as a security whatsoever for any outstanding legal fees. According to the plaintiff, advocates fees only becomes due after it is taxed by the court if it is disputed. And since there was no taxation in this case, there is no basis of exercising the right of lien. The Plaintiff relied on the case of **Simon Njumwea Maghanga Vs Joyce Jeptarus Kagongo (2013) eKLR**, where the court in relying on Section 48(1) of the Advocates Act, held that an advocate's fees are not due until his bill of costs has been served on the client and where it is not settled, until it is taxed by court.

25. The Defendant's counsel maintains that the Applicant was made aware of the unpaid legal fees vide the block bills annexed on the affidavits and failed to settle them. He added that the Plaintiff ought to settle a sum of **Kshs.8,672,996/=** on account of the unpaid legal fees and the court should order the same to be filed in a joint account for the advocates on record as a precondition of releasing the titles. On lien he relied on **Halsbury's Laws of England 3rd Edition Vol 24 at page 271** which reads that;

"A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the Chattel are satisfied".

26. To this end, I have no doubt that the intended sale for which the Defendant's services were procured was not carried out to completion owing to an error on the certificates of the titles. There is also no dispute that **Mombasa H.C.C.C No.83 OF 2010** which relates to the intended sale transaction is still pending. However, vide a letter dated 9/7/2019 by the Defendant, it is intimated that the Defendant would settle for **Kshs.2,000,000/=** as costs and contends thereof have not been objected to. Needless to say, the certificates of titles which are withheld by the Defendant are the basis upon which **Mombasa H.C.C.C No.83 of 2010** can be concluded if the error on the titles is rectified.

27. In my view, if the Defendant is still acting together with **M/S Oraro & Company, advocates** as it purported, then it is under the duty to finish the business for which they were retained and not to raise the issue of fees at this stage. I fortify my view with an excerpt in **Halsbury's Laws of England, 4th Edition paragraph 114**, where the author states that;

"a solicitor is a skilled person, and it would be of no use to employ him except for the purpose of taking all the steps necessary to bring the suit to an end. If that is the nature of his employment, his contract is an entire one to carry on the action to its

conclusion.

28. It is also clear that there was no agreement on fees as the Defendants submitted and in my view the Defendant can still demand for his fees as provided for under Section 45 of the Advocates Act. It was however averred that there is a subject bill of costs vide **Miscellaneous Civil Application No.75 of 2020** which this Court cannot comment on at this point since it has not had the benefit to go through the alleged bill of costs, the reason being that the Defendant has not annexed the same in any of its responses to the application under consideration. I believe those bills are the pivot of the Defendant's view that he expects to be paid a sum of **Kshs.8,672,996/=** to account for costs on legal services rendered to the Plaintiff.

29. In my respectful view, whether the Defendant will be paid the said of **Kshs.8,672,996/=** can only be ascertained after taxation as envisaged under **Section 47(1)** of The **Advocates Act** if no agreement is reached under Section 46 of the said Act. It is only until then that a right of lien can be exercised. For the aforesaid reason, this court finds that there was no justification for the defendant to purport to exercise a lien over the title documents to the property in question.

30. I am also conscious to the Plaintiff's willingness to settle the bills lodged against it and eventually offered to deposit with court a sum of **Kshs.5,000,000/=** as security. Over and above that, this court is mindful that there is an undertaking by the firm of **Ms. CMS Daly & Inamdar Advocates** to secure the release of the original titles.

31. I am also of the view that if the Defendant is allowed to continue holding the certificates of titles to the properties under question, then it would even defeat the essence of which the Defendants were retained by the Plaintiff. In the circumstances therefore, the exercise of the court's discretion tilts in favour of the Plaintiff.

32. Accordingly, the Originating Summons dated 10/3/2020 is hereby allowed and the following orders issue:-

a) The Defendant/Respondent herein do deliver up to the Plaintiff original Certificate of Title Number CR.29190 with respect to the parcel of land being Land Reference Number 9933 Section 1 Mainland North and CR. 29303 with respect to Land Reference Number 9892 Section 1 Mainland North within 14 days hereof.

b) The Defendant to expedite the disposition of taxation proceeding with respect to the bills in dispute and have them served upon the Plaintiff's advocate, Ms. Anne Wamithi & Company Advocates.

c) That the Plaintiff deposits in Court the sum of Kshs.5,000,000/= as security for disputed bills within 21 days hereof and serve the Defendant with the deposit slip to be issued.

d) That each party bear their own costs of this suit for the reason that the suit is a win-win situation.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 16TH Day of DECEMBER, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.