



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 273 OF 2015 (O.S.)

THE TRUSTEES OF ACK ST JOSEPH

PARISH NGARA (Suing through the)

CHURCH COMMISSIONERS FOR KENYA.....APPLICANT

VERSUS

OBURA MESHACK OKOTH t/a MESHACK

OKOTH OBURA & CO. ADVOCATES.....RESPONDENT

JUDGMENT

INTRODUCTION

1. In its Originating Summons (hereinafter referred to as “O.S.”) dated and filed on 16th December 2008, the Applicant sought the following reliefs against the Respondent:-

- 1. THAT an order be made that the Respondent do deliver a cash account in respect of all the monies paid to him as an advocate in respect of the purchase of land known as L.R. 209/12371 particulars whereof are within the Respondent’s knowledge.**
- 2. THAT the Respondent do refund to the Applicant any monies that may be found to be due from him upon rendering the said account.**
- 3. THAT the Respondent do pay interest on all the monies found due from him at such rates, not being less than the court rates that this Honourable Court may direct.**
- 4. THAT the Respondent do pay the costs of this application together with the interest thereon at court rates.**

2. In response to the said (O.S.), the Respondent swore a Replying Affidavit on 29th April 2016. It was filed on 30th May 2016.

3. The Applicant’s Supplementary Affidavit that was sworn on 26th August 2016 by Rev Alex Otieno was filed on 31st August 2016. Its List of Witnesses, Witness Statements and Bundle of Documents were filed on 1st December 2016. It filed a Supplementary List of Witnesses and Witness Statements on 25th September 2018.

4. Directions on the hearing of the O.S. were given by Thurania Jaden J on 12th July 2017 where she directed that the matter would proceed by way of *viva voce* evidence.

5. The Applicant’s Written Submissions were dated 30th November 2018 and filed on 3rd December 2018 while those of the Respondent were dated 19th December 2018 and filed on 9th January 2019.

6. The parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

7. The Applicant's case was that it retained the Respondent to act as its advocate in a transaction in which it was purchasing a parcel of land namely, L.R. No 209/12371 (hereinafter referred to as "subject property") from one Irene Wakini Njeru (hereinafter referred to as the "Vendor") for a purchase price of Kshs 1,450,000/= being ten (10%) per cent of the purchase price of Kshs 14,500,000/=.
8. It instructed the Respondent to rescind the Sale Agreement whereupon the Vendor refunded the entire deposit of the purchase price. However, despite written demand the Respondent had failed to deliver a cash account and/or refund the monies received by him as a trustee on its behalf. It was its contention that the Respondent had acted inconsistently with his position as a trustee profiting from the trust.
9. It pointed out that the Respondent had withheld its monies on account of fees which were yet to be ascertained, if at all, through the billing (**sic**) and taxation process. It averred that the Respondent's fees ought to be determined in a different forum.
10. It therefore urged this court to order him to deliver an account in respect of the refund of the sum of Kshs 1,450,000/= and that if the amount was found due, the same to be repayable with interest at court rates from 5th September 2009, the date the Respondent received the said sum.

THE RESPONDENT'S CASE

11. The Respondent admitted that he acted for the Applicant for the purchase of the aforesaid parcel of land and it remitted the sum of Kshs 1,450,000/= to the firm of M/S Muriu Mungai & Co Advocates who were acting for the Vendor.
12. He stated that the Applicant had also in the year 2010 instructed him to act for it in respect of an extension of lease of L.R. No 209/2820/13 Ngara valued at Ksh 30,000,000/=. He said that he was still pursuing the extension of the said lease.
13. He stated that he was also instructed to evict squatters on the said parcel of land. He averred that he embarked on the eviction of the said squatters and a sum of Kshs 500,000/= was paid.
14. It was his contention that the Applicant had never paid him towards those instructions and that whereas he was a staunch devotee of the ACK, he was not a charitable organisation and his expense had to be paid. He therefore urged this court to dismiss its O.S.

LEGAL ANALYSIS

15. The Applicant called three (3) witnesses to testify in support of its case. These were Rev Alex Otieno Rev Charles Kamama and Henry Kimani Muchoki (hereinafter referred to as "PW 1", "PW 2" and "PW 3" respectively). The Respondent did not call any witnesses and/or adduce in evidence any documents in support of his case.
16. In their evidence PW 1, PW 2 and PW 3 reiterated the facts that had been set out in the Affidavits in support of the Applicant's O.S. They were emphatic that the Respondent ought to be ordered to refund the sum of Kshs 1,450,000/= together with interest thereon from 5th September 2009.
17. During Cross-examination, PW 1 admitted that he was not yet a Vicar at the Applicant's Church and never attended any meeting regarding the transaction herein. At the time, he was at St Christopher's Parish Mathare North. He got to know of the said transaction when he became a Vicar at the Applicant's church.
18. During his Re-examination, he stated that he got to know of the details of the transaction when he took over from his predecessor.
19. When he was Cross-examined, PW 2 stated at the time the Applicant entered into the transaction of the subject property, he was the Chair of the PPC and that the Respondent never furnished the Applicant with its fee note. It was his evidence that the Applicant never agreed to the Respondent deducting his fees from the sum of Kshs 1,450,000/=.
20. During his Re-examination, he stated that he was the one who handed over the matter to PW 1 as he was the Vicar at the material time of the transaction.
21. In his Cross-examination, PW 1 told this court that he was aware of the transaction herein but not any other transactions and that he sat in the PPC. When he was Re-examined, he confirmed that the issue of the Respondent withholding the sum of Kshs 1,450,000/= was discussed but that he had never rendered a statement of accounts.
22. Having considered the oral and documentary evidence, it was not in dispute that there was an Advocate-Client relationship between the Applicant and the Respondent and that the Respondent was refunded a sum of Kshs 1,450,000/= being ten (10%) per cent of the Purchase price of the subject property.
23. What was in dispute was whether or not the Respondent could exercise a lien over the said sum without rendering a statement of accounts.
24. The Respondent relied on the case of **Booth Extrusions (Formely) Booth Manufacturing Africa Ltd vs Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Co Advocates [2014] eKLR** where it was held that:-

“... it would be unfair for a party to enjoy the result of an advocates’ hard work without paying the advocate and then let the advocate seek payment elsewhere when payment could be easily gathered through the lien.”

25. It was his assertion that he had rightly exercised his right to lien and that the right to lien was only waived where terms thereof were violated by either party, which he submitted had not happened in this case.

26. This court fully associated itself with the case of **National Bank of Kenya Ltd vs Kangethe George Joseph & Another [2015] eKLR** that was relied upon by the Applicant in which it was held that the defendant therein could demand his fees as provided for under the Advocates Remuneration Order but that he not exercise a lien over the title documents to the property therein.

27. It also fully associated itself with the holding of the case of **Booth Extrusions (Formely) Booth Manufacturing Africa Ltd vs Dumbeya Nelson Muturi Harun t/a Nelson Harun & Co Advocates** (Supra) in which it was held that an advocate who was holding a client’s money could exercise a lien over the same until such time that his fees had been paid in full.

28. However, it was the considered view of this court that the right to exercise a lien is not to be exercised arbitrarily. It is not absolute. It must have a basis. As the Applicant also correctly submitted, the Respondent could not purport to exercise a lien over the sum of Kshs 1,450,000/= without having notified it of the fees that were due to him.

29. As there was already a sour relationship between the Applicant and the Respondent regarding the transaction over the subject matter, the Respondent could not continue purporting that the said relationship continued to exist because the Applicant had never withdrawn instructions.

30. Notably, the Respondent did not adduce any evidence to prove that there were other transactions it was acting for the Applicant. In the absence of such evidence, this court came to the firm conclusion that the Applicant’s case was not rebutted and/or remained uncontroverted and that it had proved its case on a balance of probability.

DISPOSITION

31. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Originating Summons (O.S) dated and filed on 16th December 2008 was merited and the same is hereby allowed in terms of Prayer Nos (1), (2) and (3) therein as follows:-

- 1. THAT an order be and is hereby made that the Respondent do deliver a cash account in respect of all the monies paid to him as an advocate in respect of the purchase of land known as L.R. 209/12371 particulars whereof are within his knowledge.**
- 2. THAT the Respondent do refund to the Applicant any monies that may be found to be due from him upon rendering the said account.**
- 3. THAT the Respondent do pay interest on all the monies found due from him at, at court rates from 5th September 2009 until payment in full.**

32. The Respondent shall bear the Applicant’s costs of the Originating Summons (O.S.).

33. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May 2019

J. KAMAU

JUDGE