



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT No.293 Of 2013

B E T W E E N:

RAFIQUE EBRAHIM.....PLAINTIFF

-VERSUS-

WILLIAM OCHANDA T/A

OCHANDA & CO ADVOCATES.....1ST DEFENDANT

OCHANDA ONGURU & CO ADVOCATES.....2ND DEFENDANT

R U L I N G

1. This Matter comes before the Court on the Application of the Defendants dated and filed on 6th November 2014. It seeks the following Orders:

“1. THAT Leave be granted by the Honourable Court to join the following to these proceedings as defendants:

1. *Onsando Ogonji & Tiego Advocates*
2. *Print Avenue & Company Limited*
3. *Wagunda & company Advocates*
4. *Flavian Justus Mwangi*
5. *Ombati Otieno & Opondo Advocates*
6. *John Kamau Kanyonyo*
7. *Christine Mutinda*
8. *Claire Mokeira*
9. *Teresia Wamuyu Kinyua*
10. *Martin Gitmuma Ntoiti*
11. *Rachel Wanjiku Kamweru*
12. *Joel Otieno Mitemo*

13. *Eunice Wanjiru Ngunjiri*
14. *Nancy Nyanguthie Macharia*
15. *Cyrus Mungai Njuguna*
16. *Exekiel Wafula Wasike*
17. *Hilda Gesare Mogire*
18. *John Kinuthia Njenga*
19. *Edward Mungai Mburu*
20. *John Muchori Kinyua*
21. *Alice Wambui Njenga*
22. *David A. Kikuyu*
23. *Hakim Portipolios Ltd*
24. *Hezra Mitoko Ojuka*
25. *Catherine Wairimu*
26. *Joseph Ndichu Kahonge*
27. *Margaret Wairimu Kibera*
28. *Mary Mukami WArui*
29. *Irene W Kamau*
30. *Gerald N. Kariuki*
31. *David Njoroge Kairu*
32. *Dundee Development Ltd*
33. *Nelson Ngumba Njuguna, and*
34. *Phoebe Jepchirchir Nyangweso*

2. *THAT the costs of this application be provided for.*”

2. The current application is preceded by a Suit commenced by Plaintiff. From the Court file it appears that the Plaintiff was amended around 1st August 2013. The Amended Plaintiff seeks the following prayers:

“a) To have a full and true accounts of all the moneys as received and utilized by the Defendants

b) A refund of all the remaining funds to the Plaintiff by the Defendants

c) Title Deeds held by the Defendants on behalf of the Plaintiff, if any

d) Costs of this suit

e) Interest on b) and c) above.”.

3. In addition to the Suit the Plaintiff filed an Application for certain interlocutory orders including a mandatory injunction for a full account of all monies received from the Plaintiff during 2010 as well as a mandatory injunction compelling the 1st Defendant to surrender to the Plaintiff all the title deeds he holds on behalf of the Plaintiff. That Application was heard by Hon J. Havelock J and he delivered his Ruling shortly before

his retirement.

4. On 30th October 2013, the Learned Judge made an order granting prayer 3 of the first application, namely, THAT the 1st Defendant is compelled to provide the Applicant with a full and true accounts all the monies the Defendant received from the Plaintiff in the year 2010/2011 pending the hearing and determination of this suit. In relation to Prayer 4 of the Notice of Motion, (seeking a “mandatory injunction compelling the Defendant/Respondent herein to surrender to the Applicant, all the Title Deeds he holds on behalf of the Plaintiff pending the hearing and determination of [the] Application”), the Learned Judge declined to make an order because if there was unpaid fees, the Advocate was entitled to exercise a lien. The Account was to be produced within 60 days of the Ruling. That period would have expired on or about 28th January 2014. It was not complied with on that date.

5. The present Application is Supported by the Affidavit of the First Defendant WILLIAM OCHANDA ONGURU. In it he indirectly admits that he was at the material times and Advocate as he accepted Instructions from the Plaintiff to render certain professional services. The Application relies principally on the ground that the intended defendants hold the titles to the properties and joining them as parties will assist the Court to determine the issues and determine the dispute effectively and completely. The Application was brought under a Certificate of Urgency stating that the main suit was due for hearing 10 days later and the date had been taken ex-parte. Given that the Ruling of Hon Havelock J had been delivered more than 12 months previously, raising the question why the application was not brought earlier.

6. On 7th November 2014, the Application came before this Court for Hearing. The Defendant/Applicant was ordered to file and serve on each Intended Defendant the Application together with an Affidavit clarifying why each of the Intended Defendants should be joined to the suit. That was to be done by 4pm on 11th November 2014. The order was not complied with. It seems to have been served on some of the list of 34 but not all. None of them have since expressed any interest in joining the Proceedings. Therefore the reasons for joinder must be substantiated.

7. The First Defendant did file a “Further Affidavit” dated 12th November 2014 and filed it on the next day. From the Affidavit of Service, it seems that only the Plaintiff’s Advocates were served with the Further Affidavit. Therefore the Defendants have not complied with the Order of 7th November 2014. The Plaintiff is also complaining that the Order of Justice Havelock has similarly not been complied with.

8. Following numerous delays when one or other Party was not ready to proceed the Court directed the Parties to file Written Submissions in sequence. They did so and they also declined the opportunity to highlight when the matter was finally on 21st April 2016. Unfortunately, the Defendant’s Submissions did not reach the Court file in time for the Ruling to be delivered on the due date. However copies were provided by the Parties later.

9. Dealing with the substantive issues. The Defendant is seeking leave to join 34 Parties. The onus is on the Defendants to satisfy the Court that such persons are appropriate Parties. The Defendant/Applicants are not seeking to call these persons as witnesses but for those persons to be made parties to the suit. **Order 1 Rule 3** of the **Civil Procedure Rules 2010** provides:

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

10. In relation to each of the 34 Intended Defendants the Applicants must satisfy the Court that they are appropriate parties to the suit. The Further Affidavit states at paragraph 3 “THAT it will be for the interest of justice to join the Thirty Fourth (34) parties because it will help the court to decide on all the issues in dispute once and for all.” Paragraph 7 of the Supporting Affidavit states; “THAT no party will suffer any prejudice if the orders sought herein are granted.”

11. The First Defendant has admitted that the firm of Messrs Ochanda Onguru & Co Advocates were instructed by the Plaintiff. The exact terms of that retainer are a matter of fact and therefore a matter for trial with the benefit of hearing evidence. What the Defendants do admit is an Advocate Client relationship. That is a fiduciary relationship that includes certain rights and obligations. One obligation required of an advocate is a duty of confidentiality. The Client is also entitled to legal professional privilege. The advocate as an agent and a fiduciary is also obliged to provide an account of monies received. The advocate is entitled to be paid for services rendered. In order to be paid, the Advocates Practice Rules require an advocate to raise a Bill of Costs which must be served on the Client. In this case the Defendants before Hon J. Havelock J. asserted a lien for unpaid fees. The Defendant has filed a “List and Bundle of Documents” it does not include a single fee note nor bill of costs. Therefore the amount of work done and fee charged and/or outstanding can only be conjecture at this stage. The Plaintiff in its Replying Affidavit claim that the Supporting Affidavit contains falsehoods showing mala fides. However, the Advocate Client relationship is admitted. It seems the Brookside Property is the subject of the Suit.

12. The Defendant was directed to set out in a Further Affidavit the grounds and reasons for joinder of each of the list of 34. At paragraph 12 of the Further Affidavit it is the 1st Defendant’s sworn evidence “*THAT it would be just to join to the proceedings PHOEBE JEPCHIRCHIR NYANGWESO who was selling to the Plaintiff Loresho property LR NO 90/584-586 and Brookside property LR NO 1370/111/130 to which payments of Kshs21,629,582/= was paid to her particulars whereof are detailed in the Defendant List of documents already on record*”. There is nothing before the Court whether a sale agreement, transfer, certificate of land search or anything else that could demonstrate that Ms Nyangweso was in fact the owner of those two properties as alleged. There is nothing to suggest that the Plaintiff would have any remedy against her. In the circumstances at best she would be a witness. The Defendants Bundle which is not paginated contains a petty cash voucher which suggests Ms Nyangweso was paid Kshs.1,000,000/- (one million shillings) on 17th March 2010. That contradicts the Further Affidavit as set out above. It also contradicts paragraph 4 of the Replying Affidavit filed on 10th October 2013 where it was stated, again on oath “*THAT it is true that the Plaintiff/Applicant engaged the firm of Ochanda Onguru & Co Advocates to do for him paper work and formalize land purchase transactions but at no time did I negotiate directly with any vendors on any transaction.*” The Deponent further avers “*THAT in all cases, the Plaintiff/Applicant was acting directly with the vendors, third parties and agents unknown to myself*”. The same applies to the other Intended Defendants named. The Defendants have therefore failed to substantiate their case. Further, the

contradictory evidence demonstrates an absence of clean hands.

13. In relation to the joinder of a number of advocates as parties, it makes no sense at all. Those advocates are the agents of disclosed principles. The Plaintiff has not claimed any remedy that could be levied against the Sellers nor their Advocates. In the circumstances, their joinder cannot be justified in the interests of justice. Any such joinder would be contrary to the overriding objective.

14. For the reasons set out above, the Application is dismissed with costs. The Court further orders that the Defendants shall comply with the Order of Hon J. Havelock J within 30 days. In addition the Defendants are ordered to lodge with the Deputy Registrar of the Commercial and Tax Division all original title deeds and sale agreements they hold pending further order of the Court, also within 30 days. Penal Notice attached.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered, signed and dated this 23rd day of January 2018

In the Presence of:

Patrick – Court Clerk

Counsel for the Applicant: Mr Ochieng holding brief for Mr Amako

Counsel for the Respondent: Mr Ms Musyoki