



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 109 OF 2015 (O.S)

1. FARID AHMED SWALEH

2. HANS JURGEN ZAHLTEN.....PLAINTIFFS

VERSUS

MOHAMED FAKI KHATIB practicing as

KHATIB & COMPANY ADVOCATES.....RESPONDENT

R U L I N G

1. The plaintiffs, FARID AHMED SWALEH and HANS JURGEN

HANLTEN took out an originating summons dated 5/8/2015 and supported by the Affidavit of the first plaintiff and sought from the court orders that:-

i) THAT, the Defendant do deliver up a cash account for monies received on behalf of the Plaintiffs.

ii) THAT, a declaration be issued that the Defendant is holding monies due to the Plaintiffs.

iii) THAT, Defendant do pay the Plaintiffs sum of Kshs.6,799,000/= which was excess from the sale of parcel No. KILIF/MTWAPA/79 KILIFI in which the Defendant received over Kshs.15,799,000/= minus his reasonable legal fee for conveyance.

iv) THAT, the cost of this application be provided for.

2. The brief facts founding the suit according to the plaintiffs were that the 2nd plaintiff instructed the defendant, as an advocate, to sell by public Auction that property situate within Mtwapa area and known as Kilifi/Mtwapa/79. At a public auction said to have conducted on the 26/8/2010, the 1st plaintiff emerged the highest bidder and purchased the property at Kshs.7,799,000/= which sum the 1st plaintiff paid to the defendant.

3. Upon conclusion of the sale but before transfer in favour of the 1st plaintiff, the said 1st plaintiff once again engaged the defendant to sell a subdivision of the same property to one HILAA ABDULLAH AMIN for Kshs.8,000,000/= and pleads that the said sum was equally paid to the defendant therefore making an aggregate sum received by the defendant to be Kshs.15,799,000/=. Of that sum, the plaintiff

contend that the defendant only paid to them a sum of Kshs.9,000,000/= thus leaving a balance of Kshs.6,799,000/= unpaid which the defendant has refused to account for to the plaintiffs. Those same facts were reiterated in the Affidavit in support of the originating summons and documents marked FAS 1-4 being the newspaper advert, summary of cheque payments by the 1st defendant, cheque summary payment by the said HILAA ABDULLAH AMIN and copies of the original title as well as for the subdivisions were all exhibited by the plaintiffs.

4. When served with the originating summons, the defendant did file a Replying Affidavit in which the fact that he was retained to sell the property by public auction on account of the 2nd defendant was admitted including the fact that the property was advertised in the newspapers on 10/8/2010 and a sale conducted on the 26/8/2010.

5. The defendant however denied the fact that the 1st plaintiff bought property at Kshs.7,799,000/= and paid for same in full and clarified that the purchase price was indeed Kshs.11,000,000/= out of which the 1st plaintiff paid a deposit of Kshs.3,000,000 and issued three cheques totalling Kshs.2,000,000/= but requested that the cheques not be banked as he was waiting to get financed by Diamond Trust Bank Ltd and the 3 cheques were never banked. It is then added that the 1st plaintiff met difficulties in paying the balance of purchase price hence agreed with one Hilla Abdullah Amin to purchase a portion of the property at Kshs.8,000,000/= and not Kshs.9,000,000/= as contended by the 1st plaintiff. The purchase price by Mr. Hilla Abdallah Amin was paid in instalments of Kshs.4,000,000/= and Kshs.2,000,000/=. The defendant then adds that he received a total of Kshs.12,799,000/= which he disbursed out in the sum of Kshs.12,982,240. The defendant denied receipt of Kshs.7,799,000/= from the 1st defendant. He exhibited to court, the sale agreement to the 1st defendant at Kshs.11,000,000/=: agreement of sale by the 1st plaintiff to Mr. Hilla Abdallah Amin at Kshs.8,000,000/= and a discharge voucher signed by the 2nd defendant acknowledging receipt of Kshs.9,800,000/= and confirming that he retained no further claims against the defendant. That acknowledgment is dated 1/2/2011.

6. Faced with the assertions that the 2nd defendant had discharged the Advocate from further claims, the 1st plaintiff filed a supplementary affidavit to argue that there was no agreement to pay commissions to anybody nor was there need for commissions to the advocate who was paid fees and that the commission allegedly recovered by the advocate was excessive and outrightly above the fees permitted under the Remuneration Order. The 1st plaintiff then sought to challenge the allegations that the cheques for Kshs.2,000,000/= were never banked and exhibited his bank statements from Diamond Trust Bank to show that two cheques totalling Kshs. 1,000,000/= were indeed presented and paid by the 1st plaintiff's bank on the 6/10/2010.

7. On 10/11/2015, the parties appeared before court to argue the originating summons but with the prodding from the court agreed to try an alternative dispute resolution before Mr. Maurice Ouma Advocate. Indeed parties appear to have attended before that advocate on 9/12/2015 presented their sides of the story and the advocate did file his findings in court on the 19/2/2016. In his findings, he did return a verdict that both 1st plaintiff and the defendant agree that the defendant did receive on both transaction a total of Kshs.13,399,000/= out of which he accounted for the sum of Kshs.12,982,240/=; that not being a registered estate agent he could not charge commission on sale of land and further that such an agreement was never evidenced in writing; that the two cheques each for Kshs.500,000/= were duly paid out of the 1st plaintiffs account and that the parties needed to agree on fees payable and lastly that there be further inquiry on the sum of Kshs.1,982,240/= being commissions and advocates fees for sale to Hilla Abdallah Amin. I understand the advocate as mediator to have determined that the defendant as an advocate needed to account to the plaintiffs in the sum of Kshs.1,982,240/=.

8. When the parties attended court after the verdict by Mr. Ouma was filed in court, they were not able to adopt it as a consent as had been contemplated because the defendant sought to have the matter heard by way of oral evidence tested cross examination. The court in giving directions on the way forward did order that:-

“Mr. Khatib, the defendant files a statement of accounts of receipts and disbursements on the sum received on account of the subject transaction within 30 days from today. Let the finding by Mr. Ouma Advocate be taken into account”.

9. Pursuant to that order, Mr. Khatib did file a supplementary affidavit not a statement of accounts on 23/9/2016. In that affidavit, the defendant now introduces a different dimension to the dispute. The defendant now asserts that although the sum outstanding was Kshs.10,49,841.70, the 2nd defendant was keen to recover a total of Kshs.5,500,000 and any sums in excess thereof would go to one said Mohammed Mwijaa as an agent. The defendant adds that the 1st plaintiff then agreed to pay the agent the sum of Kshs.1,000,000/= but could not pay at once and was in fact unable to pay the balance of purchase price having paid Kshs.3,899,000/= (999,000/= + 1,900,000/= + 1,000,000/=) hence introduced a buyer of a portion of the property at Kshs.8,000,000/= to help raise the balance of purchase price.

10. In that supplementary affidavit, the advocate now admits having received Kshs.13,399,000/= paid out to the 2nd plaintiff Kshs.10,300,000/= retained his fees and disbursements of Kshs.853,240/= commission of Kshs.600,000/= to Mohammed Mwijaa Kshs.1,000,000/= and auctioneers Kshs.700,000/= to him he has fully accounted for the sum received and the summons therefore ought to be dismissed. These are the facts disclosed by the parties upon which the court must come up with a determination.

Issues for determination

11. i) How much did the defendant receive as an advocate for the plaintiff with regard to the sale of the disclosed property.

ii) Has the defendant furnished true and accurate accounts of all the sum received?

iii) If (ii) above is answered in the negative, should the defendant be compelled to furnish cash accounts.

Analysis and determination

12. This is a classic example where an advocate as an officer of the court can be seen to resist basic duty of rendering accounts to a client. The moment the originating summons was filed, it was only honourable that the sought accounts be provided. Instead the counsel has taken court into a long and winding journey and in circles during which time contradictory affidavits and proposed accounts have been exhibited to court all doing very little to resolve the dispute. That is to this court a total dereliction of duty to court imposed on the advocate by virtue of his profession and oath of office as now encoded under section IB Civil Procedure Act.

13. That notwithstanding however, the fact that there were two sales in not in dispute. Even the sale of a subdivision of the property by the 1st defendant and the price thereof is not disputed. What seems to be in contention is the sale price to the 1st plaintiff and whether or not the said 1st plaintiff did pay the purchase price in full.

14. From the papers filed, even though the defendant contends that the property was sold to the 1st plaintiff by a public action, the documentation availed to support such sale says otherwise. The law of sale by auction as I understand it is that upon the fall of the hammer the purchaser must pay at least 25% of the purchase price. Therefore if there was an auction sale on 26/8/2010, the 1st plaintiff was expected and indeed duty bound to pay, if the sale was at Kshs.11,000,000/=, at least Kshs.2,750,000/= on the date of the auction. What emerges from the affidavits filed by the defendant is that the sum in the aggregate of Kshs.2,899,000/= was paid twice on the 3/8/2010 and 23/8/2010 days before the scheduled auction. That alone would have vitiated the sale if one, say the registered proprietor, was to challenge it.

15. The second anomaly is that while it is maintained that the sale was on 26/8/2010 by public auction, and such a sale need to be between an auctioneer and the buyer, there is no agreement as such nor a certificate of sale pursuant to Rule 15 of the auctioneers rules. Instead there is exhibited an agreement of

sale dated 9/9/2010 some 13 days after the scheduled auction date. In that agreement, the sum of Kshs.3,000,000/= is acknowledged to have passed hands upon execution, yet the latest schedule of payment exhibited by the advocate himself in the supplementary Affidavit does not show that sum had been paid by the date.

16. The third discrepancy, I find unsettling is that the advocate in his Supplementary Affidavit is adamant that the 2nd defendant was content to receive a total of Kshs.5,500,000/= yet there is yet another assertion that the same defendant was paid a total of Kshs.9,800,000/=. One may wonder for what reason was he being paid in excess of what he had instructed to be realized.

17. Those discrepancies notwithstanding, and with the tacit concession by the 1st plaintiff that the cheque for Kshs.1,000,000/= dated 4/10/2010 was never presented and paid, (the bank statement exhibited in the further affidavit did not reveal it to have been presented and paid), it is reasonable to accept the defendant's position that the sum of Kshs.5,799,000/= and not 7,399,000/= was paid by 1st plaintiffs. I say Kshs.5,799,000/= was paid because in the Supplementary Affidavit, a schedule of cheque payment is given as at 25/1/2011. The Replying affidavit says that a sum of Kshs.400,000/= was paid on behalf of the 1st plaintiff on the 21/10/2011. That sum when taken together with the sum received from HILLA ABDULLAH AMIN in the sum of Kshs.8,000,000/= make a total sum received by the defendant to be Kshs.13,799,000/.

18. Of that sum, I find that the 2nd plaintiff did acknowledge payment of Kshs.9,800,000/= and payment of Kshs.1,200,000/= as fees to advocate and auctioneer making a total of Kshs.11,000,000/= thereby leaving a balance of Kshs.2,799,000/= to be accounted for. This I do accept even though the 1st plaintiff feels the sum charged for fees of the advocate and auctioneer are exorbitant. I say I am prepared to accept that acknowledgement because the 2nd plaintiff must be taken to be the best custodian of his rights including right to property which give him the right to deal with the property in the manner he deems fit. In that context, if he accepted that the advocate be paid 700,000/= and auctioneer Kshs.500,000/= who is the 1st plaintiff to challenge him?

19. I would accept it, additionally, notwithstanding that he seems to have discharged the advocate on the basis that the advocate only received Kshs.11,000,000/= and not 13,799,000/= as conceded in the supplementary affidavit by the defendant.

20. This leads me to the finding that the defendant advocate did received on behalf of the plaintiffs the sum of Kshs.13,799,000/= out of which he has accounted for the sum of Kshs.11,000,000/= and needs to account for the balance of Kshs.2,799,000/.

21. Of that sum, not accounted for, the defendant has averred that he did serve a fee note dated 2/2/2011 upon the 1st plaintiff and the said plaintiff has not controverted such assertion. I consider that fee note duly supported by the Stamp Duly Declaration Assessment And Pay In slip for Kshs.240,140/=, to be reasonable. I therefore find that the advocate has further accounted for the sum of Kshs.383,240/= thereby leaving a sum of Kshs.2,415,760/= outstanding and due for accounts.

22. It is not difficult to get this sum from the accounts provided by the defendant and dated 21/9/2016, those accounts have deliberately concealed the payment of Kshs.400,000/= on 21/10/2011 thereby revealing only Kshs.13,399,000/= as the total received. The same accounts also allege payment to the 2nd plaintiff the sum of Kshs.500,000/= on 8/2/2011 when by the 1/2/2011 the same plaintiff had confirmed to have no further claim against the defendant. The question one may wish to ask is for what reason was the 2nd plaintiff being paid after he received his entitlement in full? One get the impression that the accounts dated 21/9/2016 are not genuine accounts but were deliberately made for this suit and after the negotiations before MAURICE OUMA advocate had proved unpalatable to the defendant. They are therefore not authentic accounts and the court rejects the same for final accounts. Additionally, having owned up to the total received to be more than what the 2nd had discharged them from, the defendant ought not be allowed to the accounts of 21/9/2017 now alleging commissions as paid out to agents.

23. As was correctly pointed out by Mr. Ouma Advocate in his finding which the defendant close to ran away from, such payment if made needed to have been supported by documents of payment. However even then one needs to get a justification that the agent being so paid was an estate agent in terms of section 18 of the Estate Agents Act. Short of such, the payment cannot be sustained without one risking the court being seen to lend credence and legitimacy to an agreement made contrary to the dictates of a statute.

24. Upto this level, it is enough to reiterate that a court of law cannot do so but must always remind itself of its duty to shy away from being part of any contract made against the public policy as coded in a statute. The words of the Court of Appeal in *Kenya Ports Authority vs Fadhil Juma Kisuwa*[2016] *eKLR* quoting the decision in *Homan vs Johnson* is of great guidance in this regard. The court said:-

“No court will lend its aid to a man we find his cause of action – upon an immoral or an illegal Act”

25. I have said enough to lead me to the conclusion that the plaintiff has shown a good case for true and authentic accounts to be rendered. Let the defendant do render a true, accurate and authentic accounts to the plaintiffs within 30 days from today and in default let the sum of Kshs.2,415,760/= be paid to the plaintiffs within 10 days after the end of 30 the days calculated from today. In other words, if no true, accurate and authentic accounts will have been rendered to the plaintiffs by the 19/3/2018 then the defendant must pay to the plaintiffs the said sum of Kshs.2,415,760/= together with at least therein of 14% from the 1/2/2011 till payment in full before the 29/3/2018. Should there be a default to pay following failure to render accounts as aforesaid the plaintiff shall be at liberty to execute for recovery thereof.

26. Since the plaintiffs have succeeded as against the defendant, I award to the plaintiffs the costs of this suit.

Dated and delivered at Mombasa this 16th day of February 2018.

P.J.O. OTIENO

JUDGE