



Njehia v Ngare t/a Kilonzo & Aziz Co Advocates (Environment & Land Case 135 of 2021) [2023] KEELC 21058 (KLR) (16 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21058 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 135 OF 2021
LL NAIKUNI, J
OCTOBER 16, 2023**

BETWEEN

FRANCIS NJEHIA APPLICANT

AND

AZIZ M NGARE T/A KILONZO & AZIZ CO ADVOCATES RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgement of this Court pertains to the Originating Summons dated May 3, 2021. The suit is based on a fairly straight forward matter with plain and clear issues being a settlement of the purchase price from sale of land through the Purchasers Advocate. Hence, it was disposed off at a very short session. From the face value, the Court almost tended to assume that the matter at hand tend to tilt more on the Commercial division of the High Court or the Advocates Disciplinary Committee or Commissions by the Law Society of Kenya or the Attorney General offices rather than before this Court. The membrane on the subject matter is very thin. Nonetheless, be that as it may, taking that the transaction involved a sale of land and based on the under the provisions of section 13 of the *Environment & Land Act*, No. 19 of 2011, to wit:- “to deal with any disputes in relation with environment and land” the arguably court is clothed the Jurisdiction and has decided to reluctantly entertain the case altogether.
2. The suit was brought by the applicant herein under the provisions of Order 37 Rule 14 of the *Civil Procedure Rules*, 2010 and sections 3A of -the *Civil Procedure Act*, cap. 21.
3. The respondent opposed the originating summons upon service through a Replying affidavit sworn on July 10, 2022.



II. The applicant's case

4. The applicant sought for the following orders:-
 - a. Whether or not the respondent Acted for and on behalf of the applicant in a transaction of Sale occurred on or before November 20, 2013 or not?
 - b. Whether or not the respondent owed the applicant sum of Kshs. 4,800,000/= part thereof or not? 4,800,000/=pa
 - c. Whether the respondent received the sum of Kshs. 4,800,000/= for and on behalf of the applicant or not?
 - d. If the answer to (3) above is in the affirmative, how much is due and owing to the applicant?.
 - e. Who is to bear the cost of the Application.

5. The Originating Summons was supported by the 7th paragraphed affidavit sworn by Francis Njehia, the applicant herein on May 3, 2021 where she averred that:
 - i. In the year 2012, he sold part of his land belonging to his relative at a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13, 500,000/-). The Title thereof was hypothecated in the Bank to secure payment.
 - ii. The Advocate promised to pay instantly. However, the Advocate alluded to a misfortune which hindered him to pay. Instead, they entered into a Memorandum of Understanding. Annexed herewith is the Memorandum of understanding and marked it as "FN 1".
 - iii. On December 21, 2016, the Advocate paid off a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) being a debt he owed to the Bank to wit Equity Bank. Annexed in the application is the acknowledgement note and mark the same as "FN - 2".
 - iv. On November 20, 2013, the Advocate painstakingly paid a further sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=), which he acknowledged receipt.
 - v. It became apparent that he had either squandered the amount and was unwilling to pay. This prompted the applicant to write two demand letters dated January 13, 2021 and February 21, 2021, which yielded naught.
 - vi. So far the payments made were as follows:-

Amount due and owing Kshs 4,800,000/-

Less paid

 - i. 20th November, 2013 Kshs 500,000/-
 - ii. Sundry Payment Kshs 712,000/-

Amount Due Kshs 4,088,000/-

III. The Defendant's/respondent's case

6. The defendant, Musa Ngare Aziz filed an 12 paragraphed Replying Affidavit dated July 10, 2022 opposing the application on the following grounds: -



- a. He never practiced in the name and style of “Kilonzo & Aziz Co. Advocates” but he did practice in the name and style of “Aziz & Associates Advocates.
- b. He contested the draft undated and unsigned agreement annexed to the supporting affidavit and stated that the same never, in law crystallize any enforceable agreement between parties therein and should be treated as a nullity.
- c. He denied being indebted to the applicant to the tune of a sum of Kenya shillings Four Million Eight Hundred Thousand (Kshs. 4,800,000.00/=) as he shall hereunder prove.
- d. On the 21st day of December 2016, parties herein expressly ratified any agreements they previously had setting out fresh terms. However, the applicant had cleverly not brought out the contents of the said agreement this court with a view to misrepresent and mislead the Honourable court.
- e. Pursuant to the agreement of December 21, 2016, the respondent had, on diverse dates remitted several installments towards settlement of the agreed debt to the tune of a total sum of Kenya Shillings Two Million Six Nineteen Thousand Five Sixty Five Hundred (Kshs. 2,619,565/=).
- f. Further to the foregoing, the correct balance from the said agreed amount, less amount paid now stood at a sum of Kenya Shillings Two Million One Eighty Thousand Four Thirty Five Hundred (Kshs. 2,180,435/=).
- g. Further to the foregoing, and since the onset of the global Covid 19 pandemic, the respondent had been experiencing a serious financial issues. That he had at all material times been in touch with the applicant making frantic attempts to liquidate the said payments.
- h. The respondent was still committed to the settlement of the said debt and was always amenable to the out of court settlement.
 - i. Parties having entered into a contract then the applicant’s action if any should be vide a suit from recovery of the balance and not through an Originating Summons.
- j. The affidavit was in opposition of the instant Application and the Orders sought therein.

IV. Submissions

7. On November 3, 2022 while all the parties were present in Court, they were directed to have the Originating summons dated May 3, 2021 be disposed of by way of written submissions and all the parties complied.
8. Pursuant to that, and by the time of penning down this Judgement, only the applicant had filed their Written Submission. The respondent never obliged and hence the matter will be decided on its merits. On May 8, 2023 a Judgement date was reserved on Notice by the Honourable Court accordingly.

A. The Written submissions of the applicant

9. On April 3, 2023 the applicant through the firm of Messrs. Gichana Bw’omwando & Co Advocates filed his written submissions. Mr, Gichana Advocate commenced his submission by stating that the applicant herein filed an Originating Summons dated May 3, 2021, wherein he raised five pertinent questions:-



- a. Whether or not the respondent Acted for and on behalf of the applicant in a transaction of Sale occurred on or before November 20, 2013 or not?
 - b. Whether or not the respondent owed the applicant sum of Kenya Shillings Four Million Eight Hundred Thousand (Kshs. 4,800,000/=) part thereof or not?
 - c. Whether the respondent received the sum of Kenya Shillings Four Million Eight Hundred Thousand (Kshs. 4,800,000/=) for and on behalf of the applicant or not?
10. The originating summons was supported by the Affidavit of the applicant sworn on the July 10, 2021, and the annexures marked as 1, 2 and 3(a),(b) and (c).
 11. According to the Learned Counsel, the gist of the originating summons was seeking an answer to the vexed questions raised in the Originating Summons on whether or not the respondent acted for and on behalf of sale in a transaction of sale made on or before November 20, 2013 or not. It was pertinent to note that, the applicant was relying entirely and trusted the Advocate to sale a piece of Land by handing over all the necessary documents. The total purchase price for the sale of the property was for a sum of Kenya Shillings Thirteen Million Five Twenty Thousand (Kshs. 13,520,000/=) and the title was hypothecated to the Bank. The Learned Counsel informed Court that at some point the Advocate for the purchaser indicated that he had fallen into some misfortune and was unable to pay off the whole amount. In the course of time, he entered into a Memorandum of Understanding dated December 21, 2016, and started paying the amount in bits. For instance on December 21, 2016, he settled a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) as and when demands were made as could be seen in annexure 3(a),(b) and (c) he continued to do so.
 12. The Learned Counsel submitted that consequently, there was Client-Advocates relationship clearly established by evidence. The fact that, it was not officially documented, it never absolved the Advocates from his canonical obligation. The Learned Counsel averred that from the contents of the replying affidavit, Counsel attempted to absolve himself by making allegations of not practicing in the name and style of Kalonzo Aziz rather Aziz and Associates, which never conferred any corporate and separate entity as in the case of "*Solomon v Solomon*". The applicant obviously dealt with the respondent whom he identified by name.
 13. The Learned Counsel further submitted that the *Advocates Act*, cap 16 defines an Advocates to mean any person whose name is duly in the Role of Advocates. The provision of the Act dealt with qualified to act as an Advocate unless:-
 - He has been admitted as an Advocates.
 - His name is for the time being in the Roll and
 - He has in full a practicing certificate.

Consequently, a firm of Advocates has no capacity to qualify as such persons only and not a firm or firms of Advocates. That, in event, the Advocate was aggrieved by the description and that, the firm would be meaning by the name of Kilonzo, then in the circumstances Order I Rule 15 was handy and would apply to join his partner or partners as third parties accordingly. He has shied away, and is estopped from raising the issue at this juncture.
 14. The respondent went into graphic details knocking out monies paid by way of acknowledgement and agreement dated December 21, 2016, through mobile Phone remittances and leaving a balance of a sum of Kenya Shilling Two Million One Eighty Thousand Four Thirty Five Hundred (Kshs. 2,180,435.00/=), which was due and owing. All these events explained situation of Advocates/client relationship.



15. On whether or not the respondent owed the applicant a sum of Kenya Shillings Four Million Eight Hundred Thousand (Kshs. 4,800,00/-). The Learned Counsel submitted that there was no doubt that the applicant was a victim of the circumstances. He tendered a title to the respondent. He was paid part of the money and went to wine and dine. From the total sum paid, there remained an outstanding balance being a sum of Kenya Shillings Four Million Eight Hundred (Kshs. 4,800,000/=). The respondent went on to explain in fine details bits that were paid spread over a period of more than 7 years and scaled it to a sum of Kenya Shillings Two Million One Eighty Thousand Four Thirty Five Hundred (Kshs. 2,180,435/-).
16. According to the Counsel, the applicant was accepting to receive the scaled down amount on condition that it was to be paid at once. He cited the case of “John Nyambu and another -Versus - Mu and Associates Justice Joyce Khaminwa in HCC 463 OF 2007 in e KLR, stated as follows:- “an advocates has no right in Law to withhold monies which come to him for onward transmission to his client as alien”.

The strict Application of the provision of Orders 52 Rule 4 (1) (a), (b) and (c) of the Civil Procedure Rules, 2010 and the court would consequently make the order without blinking an eye.
17. On whether the Advocate received a sum of Kenya Shillings Four Million Eight Hundred Thousand (Kshs. 4,800,000/=) or not. the Learned Counsel for the Plaintiff submitted that, from the averments made out in the Replying Affidavit by the Counsel for the respondent, he conceded the point but knocked down money paid for almost a decade and arrived at a figure of a sum of Kenya Shillings Two Million One Hundred and Eighty Thousand (Kshs. 2,180,000/=). Hence, the answer to this query was in an emphatic yes. The amount due and payable now was a sum of Kenya Shillings Two Million One Hundred and Eighty Thousand (Kshs. 2,180,000/=).
18. In conclusion, the Learned Counsel submitted that the event was the success of failure of an action. This was provided for under the provision of section 27 of the Civil Procedure Act, cap. 21. These costs were warranted in the instant case because the amount in question had been outstanding since the year 2016. The mode of payment was by pittance. If the applicant was given to drinking alcoholic substances, then almost all of it would be wasted in that fashion leaving nothing for investment. The respondent should bear the costs of the suit.

V. Analysis and Determination

19. I have carefully read and considered the pleadings herein, the written submissions and the cited authorities by the applicant, and the relevant provisions of the Constitution of Kenya, 2010 and statutes.
20. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has framed three (3) following issues for determination.
 - a. Whether the application under the Originating summons dated May 3, 2021 has any merit.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who will bear the Costs of the application under Originating summons dated May 3, 2021.

Issue No. a). Whether Originating summons dated May 3, 2021 are merited.

21. Under this sub heading, the substratum of the suit is straight forward – settlement of debt owing from the sale of land. Sufficient evidence by affidavit has been placed before the court to show that, on the face of the record, the two parties had the intention to enter into a legal relationship as evidenced by



- the sale agreement, terms and conditions stipulated thereof. It has not been disputed that there was a transaction in which the respondent represented the applicant and acted on their behalf.
22. According to the applicant, he sold - part of his land belonging to his relative at a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000/=). The Title thereof was hypothecated in the Bank to secure payment. The Advocate promised to pay instantly, however, the Advocate alluded to a misfortune which hindered him to pay. But, entered into a memorandum of understanding. The Advocates were thus obligated to hold the money until authorized and/or up to completion of the sale transaction, or as they would be authorized to do.
23. I have relied on the case of “*George Muriani Muboro t/a A.M Muboro Advocate v Ndungu Kamiti*, Civil Appeal No. 233 of 2003” the Court of Appeal held that:
- “ ... A stakeholder is a person with whom money is deposited pending the decision of a bet or a wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest.”
24. The court went further to render a decision that:-
- “ ... a stakeholder has a duty to deliver the money or property to the owner or owners once the right to legal possession or ownership has been established....”
25. The respondent on the other hand has argued that on 21st day of December, 2016, parties herein expressly ratified any agreements they previously had setting out fresh terms, whose contents the applicant has cleverly not brought this court with a view to misrepresent and mislead the Honourable Court. Pursuant to the agreement of December 21, 2016, the respondent has, on diverse dates remitted several installments towards settlement of the agreed debt to the tune of a sum of Kenya Shillings Two Million Six Nineteen Thousand Five Ninety Five Hundred (Kshs. 2,619,565/-). Further to the foregoing, the correct balance from the said mutually agreed amount, less amount paid now stands at a sum of Kenya Shillings Two Million One Eighty Thousand Four Thirty Five Hundred (Kshs. 2,180,435/-). Since the advent of the global insurgency of the Covid 19 pandemic, the respondent has been experiencing a serious financial issues and has, at all material times been in touch with the applicant making frantic attempts to liquidate the said payments. Parties having entered into a contract then the applicant’s action if any should be vide a suit from recovery of the balance and not through an Originating Summons.

Issue No. b). Whether the parties are entitled to the reliefs sought

26. Under this sub heading the issues have already been well crystallized above. According to the plaintiff, after he sold his land for a sum of Kenya Shilling Thirteen Million Five Hundred Thousand (Kshs. 13,500,000/-) in the year 2012, the Advocate promised to pay instantly. However, the Advocate alluded to an unexplained and mysterious misfortune which hindered him to pay. But, instead he entered into a Memorandum of Understanding. On December 21, 2016, he paid a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) being a debt he owed to the Bank to wit Equity Bank. Before on November 20, 2013, he painstakingly paid a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=). According to the applicant, the outstanding balance was a sum of Kenya Shillings Four Million and Eighty-Eight Thousand (Kshs. 4, 088, 000/-) as evidenced by the Demand letters and the replies thereof.



27. In order to make some progress on the matter, this court wishes make reference to the case of “[John Nyambu](#) (*supra*) where the court held that:

“an advocates has no right in Law to withhold monies which come to him for onward transmission to his client as alien.”

28. The Advocates ought to have maintained the same in its client’s account. The court was not informed that instructions for placing the money in an interest earning account were given. However, it is prudent that the advocates placed it as such. It is now seven years down the line. Without hesitation, the respondent is under an obligation to remit the proceeds of the land transaction to the applicant with interests at court rates from when the originating summons were filed which is May 3, 2021. Based on the surrounding facts and inferences of the matter herein, bordering on Advocates integrity and professional misconduct and misbehaviour, I strong feel that this is such a serious issue whereby the applicant may consider formally lodging a complaint with the Law Society Advocates Disciplinary Commission and the Honorable Attorney General Advocates Complaints Commission for their appropriate action. It should act as deterrent to such cases occurring again in future. The suit by the applicant must succeeds.

Issue No. c). Who will bear the Costs of Originating Summons application May 3, 2021.

29. It is now well established that the issue of Costs is a discretion of the court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of section 27 (1) of the [Civil Procedure Act](#), cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “[Jasbir Rai Singh v Tarchalan Singh eKLR](#) (2014)” and “[Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited](#), eKLR (2014)”.

30. In this case, as Court finds that the applicant is entitled to the costs of this application to be paid by the respondent.

VI. Conclusion & Disposition

31. In long analysis, the honorable court has carefully considered and weighed the conflicting parties’ interest as regards to the preponderance of probabilities and the balance of convenience. Clearly, the applicant has established and proved is case against the respondent. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

a. That Judgement be and is hereby entered in favour of the applicant to wit that the Originating Summons dated May 3, 2021 be and is hereby found to have merit and hence allowed entirely.

b. That an order made that a sum of Kenya Shillings Two Million One Eighty Thousand Four Thirty-Five Hundred (Kshs. 2,180,435/-) to be paid to the applicant by the respondent with interests at the Court rates of 14% from the time the Originating summons were filed which is May 3, 2021 to the date of the delivery of this Judgement hereof.

c. That the applicant may consider lodging a Complaint with the Law Society of Kenya, Advocates Disciplinary Committee and the Honorable Attorney General - Advocates Complaints Commission for stern disciplinary action taken against the impugned Advocate for the Vendor of the suit property.

d. That is the closure of the matter

e. That the costs of these proceedings shall be paid by the respondent.



It Is So Ordered Accordingly.

**JUDGEMENT DATED, SIGNED AND DELIVERED AT MOMBASA VIA MICROSOFT TEAMS
VIRTUALLY THIS 16TH DAY OF OCTOBER 2023.**

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**HON. JUSTICE L. L. NAIKUNI (MR.)
ENVIRONMENT AND LAND COURT
MOMBASA**

Judgement in the presence of:

- a. M/s. Yumna, Court Assistant;**
- b. Mr. Gichana Advocate for the Plaintiff.**
- c. No appearance for the Defendant.**

