



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 50 OF 2015

BILALI HASSAN..... APPLICANT

VERSUS

MARANGA MAOSA T/A MARANGA MAOSA &

ASSOCIATES ADVOCATES.....RESPONDENT

RULING

1. The applicant filed an originating summons on 23rd February, 2015 under the provisions of Order 52 rules 4 (1) (a) and (b) of the Civil Procedure Rules, Rules 4 and 12 of the Advocates Accounts Rules under the Advocates Act and Section 3A of the Civil Procedure Act. It seeks the following orders:-

(i) That the Honourable Court orders Maranga Maosa t/a Maranga Maosa & Associates Advocates to be compelled to give a full detailed account in the manner in which he has so far received the monies related to the sale of Plot No. Mombasa/Block XVII/329 between 19th July, 2011 up to December, 2012;

(ii) That the respondent pays the costs of the application.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Bilali Hassan sworn on 16th January, 2015. The respondent filed a replying affidavit on 27th November, 2015 opposing the application.

3. In his oral submissions, Mr. Okanga, Counsel for the applicant stated that an amount of Kshs. 8 Million is in issue, out of which Ksh 2.5 Million had not been accounted for by the respondent. He further stated that in his written submissions he has outlined a list of the 16 beneficiaries out of which the respondent represented Ali Salim and Athman Salim while he represented 14 beneficiaries.

4. The court was informed of a consent entered into where the respondent got Kshs. 380,000/= as their costs in the Kadhi's Court, but he was not to receive Kshs. 300,000/= for Mombasa High Court Civil Appeal No. 106 of 2009 and Kshs. 350,000/= for conveyancing. In the applicant's Counsel's view, the said sum of Kshs. 650,000/= is in contention.

5. Mr. Okanga submitted further that out of the Kshs. 8 Million, his law firm received Kshs. 2,770,000/=. Kshs. 200,000/= was the commission fees for the respondent. He made reference to the Chief Kadhi's ruling which shows how the amount of Kshs. 8 Million was to be distributed. The respondent's clients

were to receive Kshs. 1,920,000/= but Kshs. 2.5 Million was still being held by the respondent. Counsel stated that the said law firm has refused to give audience to the applicant and no explanation was forthcoming as to why the said amount is still being held to date.

6. Counsel contended that the respondent has neither given a breakdown of how he expended the amount in issue nor has he disclosed that he is holding Kshs. 2.5 Million. The Court was urged to allow the application by granting the orders sought for the respondent to give an account of all the monies received by them. He relied on the case of **Florence Nyaguthie Murage vs Rumba Kinuthia & Company Advocates** [2015] eKLR, where the Court held that respondent had to give a cash account of monies received.

7. In response to the foregoing submissions, Mr. Mokaya made reference to the letter attached to the respondent's replying affidavit at page 62. Counsel submitted that the said annexure gives a detailed account of the monies received and how it was expended. He stated that through the said letter, they have answered to the request by Mr. Okanga on giving of a cash account of the monies received. The respondent further stated that the applicant is confused on the amount of money which he is claiming and that he did not indicate if he had been instructed by the other beneficiaries to act on their behalf. Counsel concluded his submissions by stating that the sums of money charged by the respondent as fees were raised and drawn to scale and that the estate of the deceased was to pay.

8. In his rejoinder, Mr. Okanga informed the court that the respondent had evaded stating if he has the Kshs. 2.5 Million or not. In his view, the beneficiaries have a right to complain if an amount of money is missing. Counsel further submitted that in the letter to the Advocates' Complaints Commission at page 65 of the respondent's annexures, the respondent did not give an account of the said money.

9. A perusal of the supporting affidavit dated 16th January, 2015 states that respondent has paid a sum of Kshs. 2,770,000/= to the applicant's Advocate leaving a balance of Kshs. 3,750,000/= which he is holding out of the sum of Kshs. 8 Million generated from the sale of plot No. Mombasa/Block/XVII/329. Annexure BH-1 attached to the said affidavit contains a consent letter that was filed in court on 9th June, 2011 in Mombasa HCCA No. 106 of 2009, Athman Salim vs Bilali Hassan. Arising from the said consent, the respondent was to be paid Kshs. 380,000/= as costs after the said Appeal was compromised on terms of the consent. The suit property Mombasa/BlockXVII/329 was to be sold and proceeds therefrom less the said sum of Kshs. 380,000 and agent's commission (if any) was to be distributed to the legal heirs of the estate of the deceased, Mwanaima Mohamed, in accordance with Islamic law. A further consent was to be executed after sale of the said property, to authorize the Land Registrar, Mombasa to convey and transfer the said property to the buyer.

10. In the supporting affidavit of 16th January, 2015, the applicant herein instructed the respondent together with M/s Okanga and Co. Advocates to act for him in a land sale transaction involving plot No. Mombasa/Block XVII/329 at a price of Kshs. 8 Million.

11. In his replying affidavit filed on 27th November, 2015, the respondent deposes that the consent adopted by the court was clear that proceeds from the sale were to be distributed to all beneficiaries of the estate after paying out Advocates fees, conveyance charges/fees and agents commission. The respondent states that he asked the applicant's Counsel vide a letter dated 5th October, 2011 to clarify an error in the contents of the applicant's letter dated 6th December, 2011, but has received no response to date.

12. In paragraph 19 of the said affidavit, the deponent states that after taking into account Advocate's fees, agent's commission and the disbursements he incurred, he came to the conclusion that the sale proceeds that were available for distribution amounted to Kshs. 6,400,000/= and that the applicant's counsel's clients were entitled to a sum of Kshs. 3,320,000/=.

13. The respondent's affidavit further states that the applicant has failed to account for the sum of Kshs. 2,770,000/= paid to him through his Advocate for distribution to himself and the other beneficiaries with whom he shared representation by M/s Okanga & Co. Advocates.

14. The said affidavit further states that the allegation that the respondent has refused to remit to the applicant a sum of Kshs. 3,750,000/= is misleading as the applicant's entitlement as a beneficiary was Kshs. 280,000/= which was part of Kshs. 2,770,000/= which was remitted to M/s Okanga & Co. Advocates.

15. Paragraph 6 of the order issued on 16th September, 2011 pursuant to a consent letter dated 14th September, 2011 reads as follows:-

“by consent of all beneficiaries thereto the appellant herein Athman Salim on one part and the Respondent herein Bilali Hassan be and are hereby appointed as administrators of the estate of Mwanaima Binti Mohamed – deceased thereby empowering them to dispose of title Mombasa/Block XVII/329 which is the only asset of the deceased to a willing buyer namely Ahmed Sharif Sheikh at a consideration of Kshs. 8,000,000/=.”

16. There is no doubt that through various correspondence received by the respondent which are attached to his affidavit, the applicant's Counsel has made concerted efforts to get the respondent to fully account for the sum of Kshs. 8 Million received from the sale of Mombasa/Block XVII/329. The letter attached to the respondent's affidavit at page 47 reads in part, ***“that on a rough estimate Kshs. 6,400,000/= is the amount due for distribution***. The said letter is addressed to the applicant's Counsel and is dated 23rd October, 2012. The use of the words ***“rough estimate”*** does not settle well with this court as the applicant's Advocate's legal fees is known, the respondent's fees is known and the residual estate was available for distribution to the beneficiaries in terms of the Kadhi's Judgment of 4th May, 2009. The use of the said words gives the impression that the respondent was being evasive in addressing the issues raised by the applicant's Counsel in his letter dated 17th August, 2012.

17. In the letter attached to the respondent's affidavit at page 65, he causes further mix up by stating as follows:-

“Since we paid to M/s Okanga & Company Advocates Kshs. 2,770,000/= in respect of the 12 beneficiaries the sum requested in the originating summons of Kshs. 3,750,000/= brings the figure to Kshs. 6,520,000.00 thus leaving out Kshs. 1,480,000.00 from the Kshs. 8,000,000/= purchase price which amount cannot be able to take care of the shares of the other beneficiaries whom M/s Okanga & Company Advocates does not represent amounting to Kshs. 2,480,000/=.”

18. The foregoing information leaves the court in doubt as to how the respondent could remit monies to the applicant's Counsel for the beneficiaries he was representing without him having calculated the residual estate of the deceased thus making provision for the rightful shares of all the beneficiaries.

19. Order 52 rule 4 of the Civil Procedure Rules provides that:-

“ 1. Where the relationship of an Advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for –

(a) the delivery by the advocate of a cash account;

(b) the payment or delivery up by the advocate of money or securities;

(c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;

(d) The payment into or lodging in court of any such money or securities;

(e) the delivery up of papers which the client is entitled.”

20. Counsel for the respondent in his written submissions states that the applicant is unsure of the amount

that he purports as not having been accounted for as being Ksh. 3,750,000/= or 2,170,000/= or Kshs. 2,500,000/=.

21. The applicant and a beneficiary to the deceased's estate by the name Athman Salim were by the consent letter dated 15th September, 2011 which was adopted by the court on the said date, appointed administrators of the estate of the deceased Mwanaima Binti Mohamed. For the said reason, the applicant herein has every right to follow up and seek information from the respondent on how the sum of Kshs. 8 Million arising from the sale of the deceased's asset Mombasa/BlockXVII/329 was expended.

22. In the case of **Florence Nyaguthie Murage vs Rumba Kinuthia & Company Advocates** [2015] eKLR, the court had the following to say:-

“ a reasonable thing to do is to say this is what you were awarded by the court, these are my costs as per the advocate's remuneration order and this is the balance due to you. Matters such as this one should not take the length of time it has taken. The issues are being prolonged for no good reason”

23. In the interest of justice, transparency and accountability and to settle the issue of account from the sale of the deceased's estate and distribution of the same to her heirs, I make the following orders:-

(i) The respondent herein, Maranga Maosa t/a Maranga Maosa & Associates Advocates is hereby ordered to give a full detailed account in regard to the monies he has so far received related to the sale of plot No. Mombasa/Block XVII/329 between July, 2011 up to December, 2012;

(ii) He is also ordered to give a further account of how he has distributed the said money to beneficiaries of the deceased's estate;

(iii) He is further ordered to give a full account of the money he has expended towards his professional fees;

(iv) The cash account on (i), (ii) and (iii) above shall be delivered to the applicant through his Counsel within 15 days from today's date;

(v) Costs of the application are awarded to the applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 21st day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mokaya for the respondent

No appearance for the applicant

Mr. Oliver Musundi - Court Assistant