



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 773 OF 2001

NATIONAL BANK OF KENYA LTD.PLAINTIFF

VERSUS

DAVID MUKII MEREKA

T/A MEREKA & COMPANY ADVOCATES.....DEFENDANT

JUDGMENT OF THE COURT

The Background

1. At all times herein, the Plaintiff and the Defendant were in the advocate-client relationship respectively. During the year 1999 or thereabout, the Plaintiff instructed the Defendant to act on its behalf in the realization of property/security L.R. No. 8272/68 held against loan advanced by the Plaintiff to **Messrs. Thika River Estate Limited**. The Plaintiff alleges that it was an express term of the instructions or that it was reasonably envisaged in the contract that the Defendant would procedurally and professionally transact on behalf of the Plaintiff and remit all proceeds thereof to the Plaintiff. The Defendant sold and realized the security at Kshs. 10,800,000/= all of which amount was meant for onward transmission to the Plaintiff. In alleged breach of the attendant terms of the contract, the Defendant remitted Kshs. 6,000,000/= and withheld Kshs. 4,800,000/= without good cause or justification. The Plaintiff demanded remittance of the Kshs. 4,800,000/= out of which the Defendant remitted only Kshs. 2,723,640/= withholding Kshs. 2,076,360/= which amount the Defendant has failed to remit despite several notices and demands from the Plaintiff. The Plaintiff's claim against the Defendant is for payment of the sum of Kshs. 2,076,360/= together with interest at 25% from 25th July, 1999 until payment in full and costs of the suit and interest, the same being part of the money received by the Defendant in the course of his duties as an advocate of the High Court of Kenya on behalf of the Plaintiff, its client.

2. The Defendant denies that he was given instructions during the year 1999 to act for Plaintiff in the realization of L.R. No. 8272/68 or at all. However, the Defendant admits that he acted for the Plaintiff in some transactions related herein and that it was express and or implied terms of instruction that the Plaintiff was to pay all disbursements and fees reasonably incurred in pursuance of the said transactions, and or that he was entitled to deduct such disbursements and or fees from recoveries made on Plaintiff's behalf, if any. The Defendant admits receiving instructions to conduct a sale by Private Treaty on behalf of the Plaintiff. Pursuant to the said sale by private treaty the purchaser paid a deposit on 17th November, 1998 of Kshs. 1,080,000/= and a further Kshs. 30,000/= on 19th November, 1998. The Defendant states that it was express and or implied instructions that the Defendant was to utilize the said

deposit in order to obtain clearance certificate and or other consents hence the Defendant proceeded to utilize the said deposit for the following payments:-

17/12/1998	Auctioneer's commission	Kshs. 270,000.00
21/1/1999	Valuation	Kshs. 2,250.00
21/1/1999	Commissioner of Lands Rates	Kshs. 62,212.50
21/1/1999	City Council Rates	Kshs. 153,428.80
4/2/1999	Clearance Certificate	Kshs. 6,600.00
15/2/1999	Disbursements	Kshs. 5,000.00
8/2/1999	Nairobi City Council	Kshs. 57,165.00
19/2/1999	Interest on rates 1999	Kshs. 550.00
		<u>Kshs. 557,206.30</u>

3. The Defendant's case is that he had authority express and implied to pay

and deduct the amount of Kshs. 557,206.30 from the said deposit, and further that he is entitled to counterclaim its fees for services rendered in the transactions the subject matter of the suit and as follows:-

Particulars of the counterclaim

(a) Fees for Misc. App. No. 891/1997 taxed at	Kshs. 518,014/=
(b) Fees for HCCC No. 424/1999 taxed at	Kshs. 305,221/=
(c) Fees for acting for the Defendant for the sale of Private treaty taxed at	Kshs. 872,631/=
(d) Fees for aborted sale of L.R. No. 10888 Thika taxed at	Kshs. 542,209/=
Taxed at Total	<u>Kshs. 2,238,075/=</u>

The Defendant's counterclaim is therefore for the total sum of Kshs. 2,530,335.10.

The Hearing

4. The Plaintiff called one witness PW1, while the Defendant appeared in person. PW1 testified that the Plaintiff had extended credit facilities to the customer, one **Thika River Estate Limited** who failed to service its loan. The Director of the said customer one Arthur Kabui Ngwiri had offered and charged as security, L.R. No. 8272/69 in favour of the Plaintiff.

5. In a bid to minimize its losses, the Plaintiff opted to realize its statutory power of sale and instructed the Defendant therein to realize the said security.

6. PW1 produced the letter of instruction dated 12th September, 1996 and 9th July, 1997 (*page 2-3, Plaintiff's bundle of documents*) as evidence. The Defendant admitted as much in his oral testimony in Court to the fact that he received the instruction to realize the security property by Private Treaty and that

he received the full purchase price.

7. The property was eventually sold by Private Treaty vide an agreement dated 19th November, 1998. The security was disposed off at a consideration of Kshs. 10,800,000= . The said consideration was paid through the Defendant's office. PW1 testified that out of the consideration of Kshs. 10,800,000/= remitted through the Defendant's office, the Defendant allegedly only remitted Kshs. 8,723,640/= to the Plaintiff thereby retaining an amount of Kshs. 2,076,360/= . PW1 testified that the Defendant has not justified or put forth valid reasons for withholding Kshs. 2,076,360/= .

8. The Defendant was his sole witness, and testified that the Plaintiff retained his firm to act in respect of above said sale and to recover Kshs 15,098,626/= owed to them by one of their customers, M/s Thika River Estate and in which Mr. A.K Ngwiri was a director as per their letter dated 15th April 1996. The said amount was secured with property LR No. 8272/69 Nairobi. The Defendant proceeded with the realization of the said security LR. No 8782/69 and instructed M/s Palomino Enterprises Auctioneers to proceed with the realization of the security. The witness testified that the Auctioneers were unable to access the property for the purpose of inspection by potential purchasers which prompted the Defendant to file suit on instructions of the Plaintiff (document No. 5, dated 4/12/97) that is **MA No 891 of 1997, National Bank of Kenya Vs. A.K. Ngwiri**. The said Mr. A.K. Ngwiri conceded to inspection of the property after service of summons in the said suit whereupon the auctioneers managed to obtain an offer of Kshs. 10.5 Million by way of private treaty. The Defendant was able to convince the proposed purchaser one G.B.M. Kariuki (now a judge of the Court of Appeal) to accept an increased figure of Kshs 10,800,000/= .

9. The agreement for Sale by Chargee by way of Private Treaty was executed between the Plaintiff and the said G.B.M. Kariuki dated 19th November 1998 (documents No. 7 in the Defendant's List of documents).

10. The said sale agreement provided among other things that a 10% deposit of Kshs. 1,080,000/= shall be paid upon execution of the sale agreement and the balance of Kshs. 9,720,000/= shall be paid within 90 days. The said G.B.M. Kariuki was unable to raise the said balance within 90 days whereupon the Defendant, with instructions of the Plaintiff filed **HCCC No. 424 of 1999, National Bank of Kenya Vs GBM Kariuki** in order to enforce his undertaking as an Advocate. The said G.B.M. Kariuki did eventually pay the balance of the purchase price by installments through the Defendant and which was accepted by the Plaintiff.

11. The Defence witness confirmed that the Plaintiff's claim is for the amount of Kshs. 2,076,360/= being the balance of the purchase price of Kshs. 10,800,000/- as having been retained by the Defendant.

12. The Defendant witness referred to his defence dated 21st June, 2001 and contended, among other things, that he was authorized to expend the deposit amount of Kshs. 1,080,000/= to pay off outgoings in order to have the transfer registered and more particularly paragraph 2(a) of the agreement which provided as follows:-

2 (a) A sum of Kshs 1,080,000 shall be paid to the vendor with full powers to utilize the same to pay outgoings of this agreement. There shall be no forfeiture in the unlikely event of the sale falling through"

13. The witness testified that pursuant to paragraph 17 of the amended defence and counterclaim the Defendant utilized part of the deposit as aforesaid by paying the amount of Kshs. 270,000/- to M/s Palomino Enterprises Auctioneers from the said deposit and pursuant to the Defendant's letter of authority dated 17th December, 1998. The Defendant further proceeded to pay the following amounts from the said deposit of Kshs 1,080,000/- as follows:-

i. Provisional valuation

<i>to Nairobi City County</i>	<i>Kshs 2,250.00</i>
ii. Land rent arrears	
<i>and rent to Commissioner</i>	
<i>of Lands</i>	<i>Kshs 62,212.00</i>
iii. Rates for 1996 to 199 to	
<i>Nairobi City County</i>	<i>Ksh153,428.80</i>
iv. Rates clearance	
<i>Certificate to Nairobi</i>	
<i>City County.</i>	<i>Kshs 1,600.00</i>
v. Water Bill and the Clearance	
<i>Certificate to Nairobi City</i>	
<i>County</i>	<i><u>Kshs 57,165.00</u></i>
Total	<u>Ksh276,655.80</u>

14. The witness testified that the above amount has been adjusted from the amount stated in the counterclaim of Kshs. 292,260.10/= and are in addition to the amount of Kshs. 270,000/- being payment to the Auctioneers as aforesaid and therefore making a total amount of **Kshs. 546,655.80/=** being the amount paid on behalf of the Plaintiff's as per paragraph 2(a) of the agreement as aforesaid. The Defendant contends that although the Plaintiff has denied that it gave authority to the Defendant to pay the said amount of Kshs. 276,655.80/=, it should be noted that the validity of the said payments and which are part of the Defendants List of Documents Nos. 10-14 has not been questioned by the Plaintiff as to their genuineness or otherwise. Further, the Defendant contends that as an advocate, he had ostensible authority to pay the said amounts and in any event the Plaintiff cannot demand money paid on its behalf and has therefore not lost any amount so as to enable it make a claim.

15. The Defendant testified that the Advocate/Client relationship had already broken down as at the time of the filing of the suit by the Plaintiff and by which time the Advocate's fees had not been determined. The Defendant therefore applied for stay of proceedings in order to have its Advocate/Client fees determined by the Court so as to confirm the net amount due to the Plaintiff, if any. The court did on 2nd June, 2004 order for a stay of proceedings pending the determination the taxations in. Nos. MA 34, 35, 36, and 37 already filed by the Defendant and which the Plaintiff had filed appeals and yet to be determined.

16. The Defendant witness testified that the results of the said Appeals at the present moment are as follows:-

i. M.A No 34 of 2002 the Honourable Justice S.C Odenyio struck out the Plaintiff's application to enlarge the file to serve Notice of Address of the suit on 7th May 2003.

ii. M.A No. 35 of 2002, the Justice Waki struck out the Chamber Summons for lack of costs for want of jurisdiction on 9th May 2002.

iii. M.A No 37 of 2002 the Honourable Judge Waki adopted the same reasoning in M.A No. 35

of 2002 and struck out the Chamber Summons on 9th May 2003.

17. The witness testified that in view of the above rulings, it is obvious that taxations Nos. 35, 36 and 37 are in place and valid as a counterclaims and totaling the amount of Kshs 1,695,893/- as hereunder:-

i. MA No.35 of 2002 and relating to the original instructions in HCCC No. 424 of 1999 for the recovery of the balance of the purchase price of Kshs 9,720,000/- by G.B.M Kariuki. - Kshs 872,631/- (518,041 this is the correct figure as corrected by court)

ii. MA No. 36 of 2002 related to MA No 891 of 1997 being an application to allow access to the L.R. No. 8272/69 the subject matter of the sale. - Ksh 518,041/- (305,221 this is the correct figure as corrected by court)

iii. MA NO. 37 of 2002 taxed for the amount of and relating to the instructions to sell the subject property by way of private treaty for a consideration of Ksh. 10,800,000/-

- Kshs 872,631/-

Total

Kshs 1,695,893/-

Submissions

18. In their submissions, the Plaintiff has dismissed the Defendant's attempt to explain how he spent the amount he withheld from the Plaintiff vide his letter dated 19th September, 2000. The Plaintiff submitted that the Defendant admitted that he received instructions from the debtor to act for him in respect of a different transaction of sale. In respect of this other transaction that the Plaintiff was not privy to, the Defendant allegedly advanced a sum of Kshs. 1,270,000/=. The Plaintiff submitted that its instructions to the Defendant were clear, unambiguous and candid. He was to receive the purchase price on behalf of the bank and remit the proceeds to the bank. He did not do that. The whole purpose of realizing the security was to reduce the debtor's indebtedness, not to increase it. The Plaintiff submitted that in advancing the debtor the aforesaid Kshs. 1,270,000/=, the Defendant was under no instructions from the Plaintiff to do so. He is liable to pay the said sum of money in its entirety. However, this issue is not forming the issues on controversy herein, and this court will allow it to rest here.

19. On the payment of outgoing by the Defendant, the Plaintiff submitted that it had not authorized any of those disbursements. The Plaintiff submitted that other than the sum of Kshs. 270,000/=, the Defendant was authorized to pay to the auctioneers, the rest of the outgoing totaling Kshs. 281,656/= were not authorized by the Plaintiff. In fact, it was submitted that the Defendant admitted in court he had no proof to show he was authorized to disburse the said sums he alleges. The Plaintiff was not satisfied with the Defendant's reasons for withholding the amount of Kshs. 2,076,360/= and vide its letters dated 9th September, 2000, 29th March, 2001, 4th April, 2001 and 21st May, 2001 the Plaintiff wrote to the Defendant demanding the balance of the purchase price.

20. In respect of his legal fees, the Plaintiff submitted that the fee payable in this matter is Kshs. 187,920= (VAT inclusive), calculated as per Schedule 1 of ***The Advocates' (Remuneration) (Amendment) Order of 11th December, 1997, Legislative Supplement No. 61 under Legal Notice No. 550.*** The fees of Kshs 187,920/= is to be subjected to a deduction of Kshs. 112,200/= being deposit paid in this matter. The fees to which the Defendant is entitled is therefore Kshs. 75,720/=.

21. The Plaintiff submitted that the express instructions of the Plaintiff were clearly communicated to the Defendant. Instead of abiding by them, the Defendant deviated and did not remit the amount of the purchase price. The reasons he has tendered as to why he did not remit the entire purchase price are mere excuses which cannot displace the express instructions of the Plaintiff. They do not hold any water at all.

22. The Plaintiff also submitted that its claim crystallized and was filed way before the Defendant filed the purported Taxations and in light of the conflict or contradiction between the letter dated 19th September, 2000 by the Defendant and the contents of the counter-claim, it is clear the counter-claim is an after-thought.

23. The Plaintiff submitted that the upshot is that the Defendant is fully liable to refund the Kshs. 2,076,360/= as sought by the Plaintiff less the auctioneer's fees of Kshs. 270,000/= authorized by the Plaintiff and his balance of the fees in respect of this transaction in the sum of Kshs. 75,720/=. The sum thus due from the Defendant in respect of the balance of the Purchase Price is Kshs. 1,730, 640/=.

24. The Plaintiff submitted that the Defendant had no authority to pay outgoings in the said transaction as he has purported in paragraphs 12 and 17 of his defence and Counter-claim has purported that he paid Kshs. 270,000/= as Auctioneer's fees, Kshs. 2,250/= as Valuation fees, Kshs. 62,212.20/= as Land rates, to Commissioner of Lands, Kshs. 153,428.80 as City Council Rates, Kshs 6,600= for Clearance Certificate, Kshs. 57,165.40/= for Water Bills and Kshs. 550/= as interest on rates all totaling Kshs. 551,656/=.

25. The Defendant has also purported that he deducted a sum of Kshs. 1,695,893/= as fees awarded to him and his firm in High Court Taxations Number 35, 36 and 37 of 2002. However, on cross-examination both PW1 and DW1 confirmed that paragraph 9(d) of Sale Agreement clearly stipulated that ***each party shall bear its own costs in respect of the preparations and completion of this Agreement and the Transfer of Forms but all Stamp Duty and other disbursements on registration on the same shall be paid by the Purchasers.***

26. The Plaintiff submitted that the disbursements paid out on Transfer by the Defendant totaling Kshs. 551,656.10/= were to be paid by the Purchaser as stipulated by Sale Agreement and not the Vendor (Bank) apart from a sum of Kshs. 270,000/= which the Defendant was expressly authorized by the Plaintiff to pay to the Auctioneer.

27. As is the norm is conveyancing practice, the Plaintiff submitted that the costs of the disbursements on registration such as the ones paid out by the Defendant are borne by the Purchaser who is ordinarily the beneficiary of the Title and the Vendor's (Bank's) duty in such cases is always limited to handing over the relevant registration documents to the Purchaser's Advocates to facilitate the Transfer of Title unless such disbursements are expressly stated in the Agreement to be borne by the Vendor which was not the case herein.

28. The Plaintiff submitted that in the circumstances, the Defendant having admitted that he disbursed the sums contained in paragraph 10 of his Witness Statement without instruction, approval or authority from the Plaintiff and contrary to the terms of the Sale Agreement, he is liable to pay the said monies totaling Kshs. 281,656= (*being the sum of Kshs. 551,656/= less the authorized Auctioneer's fees of Kshs. 270,000/=*).

29. The Defendant has also purported to claim a sum of Kshs. 1,695, 893/= as taxations for Taxation Numbers 35, 36 and 37. The Plaintiff submitted that apart from fees due in this matter, balance whereof is Kshs. 75,920/=, the sums claimed arose way before the alleged taxations and that the sum claimed in the Plaintiff was a distinct issue from the alleged taxation.

30. The Plaintiff cited the case of ***John Karungai Nyamu & anor vs Muu & Associates Advocates [2008] eKLR and Simon Njumwa Maghanga vs. Joyce Jeptarus Kagongo t/a Chesaro & Co. Advocates [2014] eKLR*** where the court held that an advocate has no right under any law to hold monies which have come to him for onward transmission to his client as lien and submitted that the Defendant herein by purporting to hold the sum of Kshs. 2,076,360/= on account of alleged legal costs which has not been ascertained nor fees notes on the same submitted to the client was irregular and unjustified. It was submitted that in any event, it is clear that at the time the sum claimed was received by the Defendant, no Bills of Costs or fees notes had been submitted by him or his firm of advocates to the Plaintiff and none of those Bills of Costs had been filed in court for taxations. Therefore the Defendant was acting in bad

faith by withholding the said money.

31. On his part, the Defendant submitted that the law with respect to an Advocate being in possession of monies or chattels on behalf of the Client is well established. In ***National Bank of Kenya Vs. Kang'ethe & Company Advocates HCMA No. 718 of 2014*** Justice Aburili held that an advocate has no right to fees before taxation hence there is no lien where there is no right and that a general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattels are satisfied.

32. The Defendant submitted that the only amount of fees which was paid by the Plaintiff was Kshs. 112,200/= and which amount was taken into account in taxation No. 37 of 2002 as per the ruling attached to the certificate of taxation dated 13th September, 2002 and being No. 17 in the List of Documents. In addition the Plaintiff referred to payments received by the Defendant from G.B.M. Kariuki of the amount of installments of Kshs. 10,000/= and which the Defendant confirmed that those were payments with respect to party and party costs against the suit filed against G.B.M. Kariuki with respect of his professional undertaking aforesaid. The Defendant submitted that the relationship between an Advocate/Client is recognized as a special relationship and an advocate has ostensible authority to do certain acts including payments of monies on behalf of a client without necessarily seeking authority unless it is proved that authority was tainted with fraud or illegality. Ostensible authority will arise where a Principle acts in such a way that leads a third party to believe that he has an agent acting on his behalf. Therefore, if a third party enters into transactions with an agent with the belief that he/she is acting on behalf of the Principle, the Principle will be liable for the Agent's acts even if the agent was acting out of his actual scope of authority. To that effect therefore it is not farfetched to state that the Defendant had ostensible authority to pay the amount of Ksh.276,655.80/= on behalf of the Plaintiff.

33. The Defendant cited the case of ***Flora N. Wasike Vs. Destimo Wamboko Civil Appeal No. 81 of 1984*** where the Court of Appeal, among other things stated that an advocate has ostensible authority to compromise a suit to judgment even without having obtained consent to do so. Although the said appeal specifically related to setting aside a consent order the principle therein is in all fours in this case since it is alleged that the Defendant paid the amount of Kshs. 276,655.80/= without authority from the Plaintiff and from the amounts it was holding but the Plaintiff has not stated that the said amount was excessive or otherwise. The Defendant further cited ***Misc. Application No. 240 of 2002 in the matter of registered land act chapter 300 laws of Kenya ex-parte Jonathan K. Rono*** where the court held that:

“Although an advocate has ostensible authority to compromise client's case, employment of such authority cannot be upheld where counsel consent to orders which are diametrically opposed to the express instructions which he has been given by client in a matter. It is not easy to prove that there was fraud or collusion in recording of any consent orders between advocates in the absence of their instructing clients but where such orders completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of orders, in the absence of any satisfactory explanation by counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued”.

34. The Defendant submitted that by expending the amount of Kshs. 276,655.80/= after having been authorized to pay the initial amount of Kshs. 270,000/= to the Auctioneer even in the absence of written instructions was advancing the Plaintiff's interest as required by the sale agreement in order to have the transfer by way of private treaty under the Plaintiff's power of sale finalized and that such actions were not diametrically opposed to the express instructions with respect to the auctioneers fees. No complaints were ever made to the Defendant before the filing of the suit with respect to the said payments. It is the Defendant's submission that he had ostensible authority to make the said payments and in any event the Plaintiff would still have paid them and has therefore not lost any money.

35. The Defendant also submitted that the Plaintiff's appeals on the above mentioned taxations have collapsed. The Plaintiff made no efforts in challenging those taxations during the hearings and made no

comment on the same despite its defence under paragraph 11 of the Reply to Amended Defence and Counterclaim. In addition it is in the court records pursuant to the Defendant's Chamber Summons dated 14th August, 2002 that the Plaintiff did indeed file a separate suit against Thika River Estate Limited and A.K. Ngwiri and another, that is **HCCC No. 124 of 2001** claiming the amount of Kshs. 44,828,280/= and as per paragraph 6 thereof took into amount Kshs. 10,800,000/= and as follows:-

“in pursuant of the same terms of the attention charge instruments the Plaintiff sometime during the year 1998 sold the Defendant's security LR No. 8272/69 Nairobi and realized Kshs. 10,800,000/= and the amount applied towards reduction of the loan account. The amount did not fully satisfy the outstanding loan amount and interest charged thereon”.

36. It is the Defendant's contention that the Plaintiff's claim be dismissed as being less than the Defendant's Counterclaim and the Defendant does not wish to pursue the balance of Kshs. 166,188/= from the Plaintiff plus interest thereon since the year 1998. The Defendant would prefer that the matter rests there and that each party bears its own costs.

The Determination

37. I have carefully considered the pleadings, evidence and submissions herein. I raise the following issues for determination.

(i) Whether the Defendant had authority to pay for the outgoings in the sale transaction.

(ii) Whether the Defendant's counter-claim is valid.

38. To address the first issue, this court refers to the general principle in conveyancing which is to the effect that the purchaser pays for stamp duty and transfer of the property charges, while the vendor pays for ground rents and other pending bill. This is the practice which can nonetheless be varied in writing. The other principle is that an advocate acting in conveyancing matters has the ostensible authority to make payment on behalf of his client, provided the said payments are those that his client would be obligated to make. This ostensible authority can be rebutted depending on particular circumstances. Where a counsel has acted for a client, like in the present case, for many years, the presumption of ostensible authority is difficult to rebut unless circumstances are such that on the face of the record, an advocate ought to have sought authority to pay for any outgoings. In the circumstance of this matter, there is nothing special to rebut the presumption of ostensible authority. The Defendant had acted for the Plaintiff in several matters and for several years, and is a household name in the Plaintiff bank. The outgoings which the Defendant paid for the bank are, to say the least, quite ordinary, and there is nothing to suggest that the Defendant required special clearance from the Plaintiff to make those payment. Again, in my view, the making of those payments are not in any way contradictory to the instructions by the Plaintiff that the Defendant was to realize the security and transmit the entire purchase price to the Plaintiff. Of course that was expected. However, when the deposit of Kshs. 1,080,000/= was paid to the Defendant the same is stated in the sale agreement to be for payments of disbursements. The person who pays for disbursements was the Defendant. He had all the authority to pay for all lawful disbursements. It is the finding of this court that the Defendant had the ostensible authority to pay for the disbursements on behalf of the Plaintiff, provided the said disbursements were those payable by the Plaintiff under the Sale Agreement. So the next issue to determine is whether the said disbursements were to be paid by the Plaintiff. Paragraph 2(a) of the Sale Agreement provided in part as follows:

“A sum of Kshs. 1,080,000/= shall be paid to the vendor with full powers to utilize the same to pay outgoings of this agreement...”

39. From the above what are those disbursements or outgoings which were payable by the Plaintiff as vendor under the agreement? In my view, these included auctioneer fees, valuation, Commissioner of Lands rates, City Council rates, clearance certificate disbursements, Nairobi City Council Water bill and interest on rates. All these were paid by the Defendant on behalf of the Plaintiff. In fact the Sale Agreement envisaged that the Plaintiff as vendor would at some stages before the title changed hands

make these payments. See paragraph 9(b):

“All outgoings shall be apportioned at the completion date.”

40. The Defendant made the above outgoing payments well before the completion date. The allegation that the Defendant did not have the authority to do that is a red herring aimed to annoy and vex the Defendant, and has no support in law.

41. The Plaintiff has sought support at paragraph 9 (d) of the Agreement which stipulates that:

“...each party shall bear its own costs in respect of the preparation and completion of this Agreement and the Transfer of Forms but all Stamp Duty and other disbursements on registration on the same shall be paid by the purchasers...”

42. My understanding of the above is that it did not put the liability for payment of land rates or existing water bills on the purchaser. There are certain outgoings which cannot be passed to the purchaser and this is indeed why paragraph 9(b) was put there. Paragraph 9(d) mainly took care of such things as advocates costs and other minor costs attendant to registration. It cannot be conceived for one minute that the purchasers were responsible for payment of outstanding bills of water, electricity or land rates. If that were to be, it would have been put in a very clear manner and there would have been no need for clause 9(b).

43. It is the finding of this court that all the payments of outgoings made by the Defendant were properly done, and with the attendant ostensible authority to bind the Plaintiff.

44. The second issue is whether the Defendant’s counter-claim is valid. The Plaintiff submitted that the counter-claim is an afterthought and that the taxations forming part of the same arose along time after this claim was filed, and that for that reason it should be dismissed.

45. To begin with, this court is of the view that whether an afterthought or not, a Defendant has the right to file a defence and counter-claim in a suit in which he can reasonably make such claim. In fact under sections 1A, 1B and 3A of the Civil Procedure Act one of the overriding objectives of this court is to deliver justice within a reasonable time. The submission by the Plaintiff that the Defendant should file separate suits for the counter-claims is therefore not very sound, and is counter to the said sections I have stated. The position of this court is that once satisfied that the counter-claim is legally anchored, this court will proceed to determine the same. Now, in the counter-claim the Plaintiff claims proved amounts of Kshs. 1,695,893/= pursuant to MA No. 35 of 2002 (Kshs. 518,041), MA No. 36 of 2002 (Kshs. 305,221), MA No. 37 of 2002 (Kshs. 872,631). These were taxed costs on matters which have been discussed in this Judgment. They were four taxation cases, but one was struck out to be filed afresh. The three remaining ones were challenged by the Plaintiff in the Court of Appeal but the challenge was struck out by the Court of Appeal. In other words, the three taxations have reached their end. There is no further process of appeal in relation thereto. Since the sums forming these taxations have not been paid by the Plaintiff, the Defendant has the right to counter-claim for them in this ongoing suit. It would be a waste of judicial time to tell the Defendant to file a separate sit for those taxed costs. It is the finding of this court that the amount of Kshs. 1,695,893/= due in the above taxations are now due to the Defendant and should be paid forthwith. In that regard, Judgment is hereby made for the Defendant against the Plaintiff in the sum of Kshs. 1,695,893/= due in the three taxation forming part of the counter-claim.

46. From the foregoing it is clear that the Plaintiff’s claim is less than the Defendant’s counter-claim, and is herewith dismissed. Since the Defendant has stated that he does not wish to pursue the balance of Kshs. 166,188/= plus interest thereto from the Plaintiff, this court accepts the Defendant’s submission to let the matter to rest.

47. In the upshot I make the following orders:

(a) A declaration that the Defendant had authority to make payment for outgoings on behalf

of the Plaintiff.

(b) The Plaintiff's suit is dismissed.

(c) Judgment is entered for the Defendant against the Plaintiff in terms of the counter-claim for Kshs. 1,695,893/=.

(d) The Defendant is not keen to pursue the balance of Kshs. 166,188/= plus interest and so the mater rests here.

(e) Each party shall bear own costs of the suit.

That is the Judgment of the court.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2017.

LADY JUSTICE G. NZIOKA

JUDGE

In the presence of: