



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 51 OF 2014

SHAFFIQUE ALLIBHAI.....PLAINTIFF

Versus

WILLIAM OCHANDA ONDURU T/AOCHANDA ONGURU &

COMPANY ADVOCATES.....1ST DEFENDANT

JOHNSTONE KIPLIMO ARAP CHEMOS.....2ND DEFENDANT

JUDGEMENT

1. Shaffique Allibhai (the Plaintiff) claims a sum of Kshs.17 million from William Ochanda t/a Ochanda Onguru & Company Advocates (the 1st Defendant) and Johnstone Kiplimo Arap Chemos (the 2nd Defendant).
2. In a Complaint presented to Court on 12th February 2014, the Plaintiff avers that being the owner of Land Reference No.209/11151, off Elgon Road Upperhill, the 2nd Defendant appointed the Plaintiff as an Agent to scout for a buyer thereof. The Plaintiff was successful and the property was sold at Kshs.60 million out of which some Kshs.15 million was paid by the 2nd Defendant to the Plaintiff as agreed Commission.
3. That happy ending did not last because the 2nd Defendant sought a refund of the Commission of Kshs.15 million on the pretext that there was an impending Criminal Prosecution (presumably involving the sale of the land) and institution of Civil suits against the 2nd Defendant for a rescission of the sale.
4. The Demand having been made, the Plaintiff retained the 1st Defendant as his Advocate. That other than advising the Plaintiff to deposit with him Kshs.15 million, the 1st Defendant asked for a further sum of Kshs.2 million to forestall any Criminal Prosecution against him. And the Plaintiff deposited the Kshs.17 million with the 1st Defendant.
5. It is the case of the Plaintiff that he issued written instructions to the 1st Defendant not to release the Kshs.17 million, wholly or partially, to the 2nd Defendant. But contrary to the said instruction the 1st Defendant purported to release some Kshs.7 million to the 2nd Defendant.
6. Thereafter, the 2nd Defendant proceeded to issue several written demands for the balance of Kshs. 8

million from the Plaintiff.

7. It is the averment of the Plaintiff that the 1st Defendant acted in breach of his fiduciary duties. Particulars are set out in the Plaint. The 1st Defendant is assailed for releasing part or the whole of Kshs.15million to the 2nd Defendant without authority of the Plaintiff, for refusing to account for the money deposited with him and for wrongly advising the Plaintiff to deposit with him the said money.

8. The Plaintiff also asserts that the 1st and 2nd Defendants acted fraudulently. That the 2nd Defendant, well knowing that there was no judgement rescinding the sale, proceeded to seek a refund of the Commission. Secondly, using the pretext of the threat of Criminal Prosecution he obtained Kshs.17 million from the Plaintiff through the 1st Defendant.

9. The 2nd Defendant neither entered nor filed Defence and there is an Exparte Judgment against him.

10. The 1st Defendant denies the Claim. In his statement of Defence filed on 26th March, 2014, the 1st Defendant avers that he was retained by the Plaintiff to negotiate an out of Court Settlement on money paid to the Plaintiff in a transaction which the Plaintiff said was fraudulent as the property sold was not owned by the Plaintiff. Further that his instructions were to resolve the matter as quickly as possible as the 2nd Defendant had involved the Police and the Plaintiff did not want to be deemed as part of the fraud. The scope of instructions being limited to negotiating with the 2nd Defendant and remitting money deposited with him by the Plaintiff.

11. The 1st Defendant acknowledges receipt of the money but denies that there were instructions to him not to release it to the 2nd Defendant. The 1st Defendant position is that the release of the money was pursuant to express instructions from the Plaintiff.

12. The 1st Defendant then avers that after payment of the funds to the 2nd Defendant, the Plaintiff again instructed him to demand the said payment from the 2nd Defendant on the basis that the 2nd Defendant was in the process of selling the Land to a Third Party. On those instructions, the 1st Defendant made the Demand.

13. The Plaintiff testified on his own behalf as did the 1st Defendant. Both rehashed the contents of their Pleadings but gave more detailed information of what transpired between them. These are discussed in the Court's analysis of the evidence.

14. As to issues for the Court's determination, the Plaintiff did not propose any. On his part, the 1st Defendant saw at least 14 issues. However, given the Pleadings herein, the evidence tendered, nature of dispute and failure of the 2nd Defendant to defend the matter, the issues proposed by the 1st Defendant are, with respect, a prolix. The Court suggests the following to be the issues:-

- i. Did the 1st Defendant have authority to release Kshs.15 million or any part thereof to the 2nd Defendant?
- ii. What did Kshs.2m paid to the 1st Defendant constitute and is the same refundable?
- iii. Order on costs.

15. It is common ground that some Kshs.17 million was paid by the Plaintiff to the 1st Defendant. The evidence of the Plaintiff is that, faced with the request of the refund of Commission by the 2nd Defendant and information from him that a Criminal prosecution was looming against the 2nd Defendant and himself, he sought Counsel of the 1st Defendant. That on advise of the 1st Defendant, the Plaintiff deposited Kshs.17 million with the 1st Defendant.

16. On his part the 1st Defendant testified that the Plaintiff called him from Dubai and informed him of a serious problem with the 2nd Defendant and requested for his assistance. The Plaintiff then sent the 2nd Defendant to the Office of the 1st Defendant.

17. That the 2nd Defendant was accompanied with some Policemen who were looking for the Plaintiff. These Police Officers were concerned that the Plaintiff was a party to a fraud. That the 1st Defendant informed the Plaintiff of this and sought his instructions. That the 1st Defendant persuaded the 2nd Defendant to accept refund of Kshs.15 million as a way of resolving the matter.

18. Thereafter the Plaintiff sent him the Kshs.15 million and an additional Kshs.2 million as fees to enable him address the two issues, namely, of refund to the 2nd Defendant and the threat of Criminal prosecution.

19. In my assessment, whether on his own volition or on the advise of the 1st Defendant, the Plaintiff deposited the Kshs.17 million with the 2nd Defendant. And the circumstances upon which, the money, at least for the Kshs.15 million, was deposited may not turn on much. What matters is the manner in which the 1st Defendant dealt with the money.

20. The evidence of the Plaintiff was that the money was to sit in the 1st Defendant's Clients account pending 'his investigations on various issues'. The Plaintiff produced various emails in which he communicated his instructions to the 1st Defendant on how the money was to be dealt with and in particular that he should not release the money to the 2nd Defendant.

21. In an email dated 6th November 2012 (P Exhibit page 12) the Plaintiff tells the 1st Defendant,

"Give me a day to sort my finances this is not a small amount of money. It seems Musa is stalling so we move with our plan however ensure Chemos DOES NOT GET THE MONEY IN THIS HAND. I also need a letter from you stating that this money is to be held in your Client Account pending the outcome of the case in question, as the banks will need to see why payment is being made, additionally I also need to be covered in this amount".(my emphasis)

22. This is reiterated in another email sent on the same day at 6.24pm (P Exhibit page 13)and an email of 9th November 2012. In this latter email, the Plaintiff tells the 1st Defendant,

"ok a further 5m will come on Monday or Tuesday into your account so you will sit on 15m as agreed".

23. On 22nd November 2012 the Plaintiff proposes that the Kshs.15m be moved into I and M Bank "since Chemos will take a long time to raisethe balance, I want to offset my costs of this borrowing which is very high". Chemos is the 2nd Defendant.

24. There is that strong evidence that the Plaintiff had given unequivocal instructions to the 1st Defendant not to release the money to Chemos.

25. There is now some evidence that either part or the whole of the 15 million was paid out. In an email of 12th February 2013 (P Exhibit page 23) the 2nd Defendant writes to the Plaintiff,

"Hi what happened again William has other tricks since he has refused to finalized (sic) with me then there is no deal and again what I signed he since refused so what documents shows me anything. I wanted also to take to Rawal a copy please I need the balance. Ask him to do the same."

William is the 1st Defendant. This email suggests that the 1st Defendant had paid some money to the 2nd Defendant hence the demand for the balance.

26. The 1st Defendant is himself unequivocal that he paid out all the Kshs.15 million to the 2nd Defendant. The 1st Defendant produced an acknowledgement of the receipt of the money by the 2nd Defendant. The acknowledgement is dated 16th November, 2012. (Defence Exhibit)

27. So, did the Plaintiff give instructions to the 1st Defendant to release the money to the 2nd Defendant? On this the 1st Defendant testified,

“Chemos came to my office and confirmed to me that he had paid his portion to Musa and on the strength of that I called my Client and told him this and that I will be releasing this money. Chemos came to my office around 13/14 of November 2012”.

The dates of 13th or 14th November 2012 as well as the acknowledgement of 16th November 2012 suggest that, at least by 16th November 2012, the 1st Defendant had released the entire sum of Kshs.15million to the 2nd Defendant.

28. When confronted with the following email of 22nd November 2012 (P Exhibit page 15),

“William I would like to move the 15m to I and M Bank, I have fixed a rate for call deposit and my office will give you the certificate copy. My office will get in touch, I sent you an earlier email to which you have not replied. Since Chemos will take a long time to raise the balance, I want to offset my costs of this borrowing which is very high,”

the 1st Defendant testified that he did not know why the Plaintiff would be asking about Chemos raising the balance.

29. There is yet something else of significance about this email. In it the Plaintiff is asking the 1st Defendant to move the Kshs.15million to I and M Bank. Why would the Plaintiff be doing so if indeed he had earlier on instructed the 1st Defendant to release the money to the 2nd Defendant? Would this not surprise the 1st Defendant? And if it did, how did he react to the email?

30. The 1st Defendant told Court that his response to that email was his email of 28th November 2016 (perhaps 26th November 2016)(P Exhibit page 16) in which he says,

“Mr. Alibhai let me handle this matter professionally, as indicated to you and Chemos I think its better holding the matter to its conclusion. Chemos Advocate has made a move which in my opinion would have the matter (sic) settled to your advantage. Will keep you posted in two days”.

It would be curious that the 1st Defendant would not be informing the Plaintiff that there was no money to move to I and M following his instructions to release it to Chemos (the 2nd Defendant)!

31. There is then the email of 15th December 2012 (P Exhibit page 20) from the Plaintiff to the 1st Defendant. It is a long email but for purposes of the issue at hand I reproduce this portion,

“please do the right thing and immediately update me as well as send all the copies of what Chemos has signed. You and I were both very clear that NO money was to be released. You even wrote to me vide email that you would wait before releasing any money. Contrary to this you released him 9million, you didn’t even bother to tell me, inspite of my clear instructions to you. I had to reach Chemos to update me, when you refused to answer any of my emails, that I sent both from my gmail and corporate email”.

32. To this and other emails, the 1st Defendant responded:-

“I have seen your various mails regarding the above matter. Had not had time to respond due to other court schedules but wish to remind you that when I took up this matter my opinion was which

I still hold that you handle the matter to the confines of Chemos and was categorical that the issues being raised therein ought not to be subject to you and accordingly we were not going to get involved with both Rawal advocate and Musa. I further advised that we need to have documentation executed by Chemos to that effect so that you are absolved both from criminal and civil liability. When you sent the money into my account you notified Chemos of the same and he came for the money. I made Chemos to execute the necessary documents which I shall send to you tomorrow when in the office. I believe I have dealt with this matter professionally and would like you to raise any issue not clear if any after you get the executed documents. Am however surprised at the way you have handled this matter involving people and issues not pertinent to my brief”.

This was on 16th December, 2012. Curiously, again, the 1st Defendant makes no reference to any instructions from the Plaintiff to release the money.

33. On a balance of probabilities, the Plaintiff has proved that his instructions to the 1st Defendant were not to release the money. On the other hand the 1st Defendant has not produced any evidence to the contrary or that the Plaintiff, on learning of the release, ratified it.

34. In my view the 1st Defendant was under an obligation not to release any money without the express sanction of the Plaintiff. In his own evidence the 1st Defendant says,

“my reading was that the 2nd Defendant was the actual Complainant. He wanted Police to help him recover what was paid to the Plaintiff (ie. 15 million)”.

As Advocate for the Plaintiff and with this intuition, the 1st Defendant was under a duty to ensure that the money deposited with him was paid out only in the interest of his Client and also on his Client’s express instructions as the Client had reserved that right.

35. What about the Kshs.2 million? The Plaintiff says it was to be used to

‘forestall any Criminal prosecution of the Plaintiff’ (paragraph 12 of Plaintiff).

On his part the 1st Defendant says it was legal fees.

36. In his evidence to Court, the Plaintiff does not explain how the Kshs.2 million would be used to ‘forestall’ the threatened Criminal investigations. And this Court would rather not speculate! But what is clear is that unlike the Kshs.15 million there were no instructions from the Plaintiff that this amount should not have been utilized. The Plaintiff does not say that he eventually faced any Criminal Prosecution and there may be no basis to seek a refund regardless of whether it was indeed Advocates fees on that brief.

37. Turning now to the 2nd Defendant, the allegation against him is that he sought refund of Ksh. 15 million he had paid the Plaintiff on the false pretext that the sale had been rescinded and that the sale was under Criminal Investigation. The 2nd Defendant did not file a Defence and the Plaintiff’s Claim is unanswered. Indeed, on 20th April 2015, an Interlocutory Judgement was entered against him. In addition, there is no evidence that the sale was rescinded. This Court finds that a case has been made out against him on a balance of probabilities.

38. In addition to the Principal sum, the Plaintiff prays for interest at commercial rates from 2nd October 2013 until payment in full. That is the date when the Plaintiff, through his Advocates Kilonzo & Co. Advocates, made a written demand to the 1st Defendant for refund of Kshs.17million.

39. Section 26(1) of The Civil Procedure Act, on interest, provides as follows;-

“(1) Where and in so far as a decree is for the payment of money, the court may, the decree, order

interest as such rate as the court deems reasonable to be paid on the principal sum adjudged from the dated of the suit to the date of the decree in addition to any interest adjudged on such principal sum of any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum”

40. In **Highway Furniture Mart Limited vs. Permanent Secretary Office of the President & another** [2006] eKLR, the Court of Appeal reiterated that an award of interest for a period prior to the filing of suit is a matter of substantive law. The Court of Appeal then observed as follows:-

“Section 34 (1) of the Indian Code of Civil Procedure is still intact and is in the same language as section 26(1) of the Civil Procedure Act, (see Mulla – The Code of Civil Procedure 16th Edition vol.1 page 505). At page 511 of Mulla (supra) the authors state:

‘Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (that is interest accrued prior to the institution of the suit).

.....It has been said the right to interest prior to the suit is a substantive one whereas Pendente Lite, it is one procedure with the discretion of the court’.

The authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between parties (see pages 511-514) of Mulla (supra)”

41. The dispute before me does not fit into any of the above categories. To award antecedent interest from the date of demand could encourage Plaintiffs to delay the bringing of an action, after making a demand, in the expectation of earning interest at Commercial rates.

42. And even if the Court was minded that antecedent interest at Commercial rates was deserved, no evidence was led as to what rate to apply. That prayer is underserved or at any rate unproved and is declined.

43. The result is that there shall be judgement for the Plaintiff against the 1st and 2nd Defendants jointly and severally for the sum of Kenya Shillings Fifteen Million (Kshs.15million) with interest at Court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 18th day of May,2017.

F. TUIYOTT

JUDGE

PRESENT;

Lwandi h/b Kilonzo for Plaintiff

Mugoi h/b Ochacha for 1st Respondent

Alex - Court Clerk