



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 279 OF 2004(O.S)

LEISURE LODGES LTD.....PLAINTIFF

VERSUS

JAPHETH S. ASIGE

S.O. ANYANZWA t/a

ASIGE, KEVERENGE &

ANYANZWA CO. ADVOCATES.....DEFENDANTS

J U D G M E N T

Background

1. On 15/2/2001, H.W. Gichohi and G.M. Kimeu as interim liquidators of the plaintiff LEISURE LODGES LTD, wrote to the defendant, as its advocate and said:

“15th February 2001

Asige Kiberenge and Anyanzwa Adv

Wakiande House, 2nd Floor

Meru Road

MOMBASA

Dear Sirs,

RE: DEPOSIT FOR VARIOUS LEGAL MATTERS, ETC.

We have instructed the company, Leisure Lodges Ltd (In

Interim Liquidation) to pay directly to you a sum of

Kshs.5,000,000.00 which is part of our outstanding fees. It is

in essence payment of our fees on account.

In accordance with our discussions with you this amount will be applied in accordance with our instructions to you on matters directly relating to both of us and it should be placed under our joint names viz. H.W. Gichohi and G.M. Kimeu. Please place the same into an interest earning account pending our instructions on various legal matters that you are handling on our behalf.

Yours faithfully

H.W. GICHOHI G.M. KIMEU.”

2. It is contended by the plaintiff and not controverted by the defendant, that the next day after the letter was written and cheque delivered, the said two interim liquidators, who were appointees of the court, had their appointment revoked by the court and therefore ceased to hold the office and mandate by which they controlled and managed the affairs of the plaintiff.

3. On 2.8.2004, the plaintiff did write to the defendant and demanded the refund of the sum of Kshs.5,000,000 as aforesaid. Upon receipt of the demand, the defendant's response was short and terse. The defendant said in the letter dated 20/8/2014:-

“Sorry we do not owe your client a single cent. You have completely got the facts wrong.

Please ascertain and verify your instructions and leave us alone”.

4. That letter seems to have closed every opening for any further discussion because on the 24/12/2004 a decision was made to sue and the originating summons was thus filed. The originating summons was amended on the 10/2/2016 but it would appear that the purpose for the amendment was merely to delete the word Company from the defendant's business name (firm).

5. When served the defendant did file grounds of opposition which termed the originating summons as frivolous vexatious and abusive of the court process deserving dismissal; that the originating summons was inviting the court to engage in internal client/advocate affairs without mandate and that there was no question for determination by the court because the exhibits shown give full explanation of the alleged questions.

6. On 10/12/2015, the court having observed that the **‘only issue is whether the money was fees to the liquidators**, granted to the defendant leave to file further affidavit or accounts evidencing disbursement to the liquidator.

7. A Replying Affidavit sworn by Mr. Japhet Asige on the 01/3/2012 after directions had been given. In that affidavit, the defendant contend and maintain that the letter by which the sum of Kshs.5,000,000 was paid to them gave full instructions on how the money was to be applied. That the money was intended and meant for the fees due to the interim liquidators and that the defendant at no time bore any duty to apply the money by opening an interest bearing account as contended by the plaintiff. It was then contended that the suit does not take into account the letter written by the interim liquidator on the purpose of the money.

8. In answer to the plaintiff's assertion that the interim liquidators having been removed on the 16/4/2001, there is not a record on any instructions given to the defendant on how the money was to be used, the defendant contend that such belief is erroneous and that there was no fiduciary relationship between the plaintiff and the defendant's firm.

9. There is yet another Affidavit in reply sworn on 12/8/2016 and filed the same day pursuant to the direction by the court given on 10/12/2015. In it the defendant after denying that the money was intended for opening an interest balancing account, the defendant avers and asserts that the money was

paid by a banker's draft and not by a cheque from the plaintiff, was part of the interim liquidators fees and was to be applied in accordance with the instructions of the joint interim liquidators in whose name the interest bearing account was to be opened and maintained. The defendant then admit that the letter of 15/4/2001 had specific instructions on how to apply the monetary but avers that the instructions were complied with but asserts being a stranger to the allegations that the interim liquidators were acting for the plaintiff. In reality and truth this latter affidavit does not serve the purpose for which the court granted leave for it to be filed and served. It does no more than reiterate what the earlier affidavit had asserted and therefore leave the only question to be whether the money was fees to the interim liquidators, whether or not if it was, how was it disbursed and if not disbursed whether the plaintiff is entitled to accounts.

10. Twice the court granted to the parties liberty to file and serve written submissions but come the 6/6/2017 when the matter was called and ordered to proceed none had been filed. It was then ordered that the matter proceeds by oral submissions at 11.30. By the time it was called out for hearing Ms. Kibe Advocate, had filed for the submissions but the court directed that the same would not be taken into account because it was filed late and outside the time set by the court and further that Mr. Asige was yet to be served. The matter therefore proceeded with each side tendering oral submissions.

Submissions by the Plaintiff

11. Mrs Kibe, advocate for the plaintiff made fairly brief and straight forward oral submissions. She said that the originating summons simply sought orders for accounts. To her the purpose of the deposit of the suit sum was that the same be deposited into a joint interest being account in the names of the two interim liquidators in their capacity as such interim liquidators and that the money was obtained from the plaintiffs accounts operated by the said interim liquidators. The letter accompanying the cheque, she pointed out, directed that the money be kept in the account '*pending instructions on various legal matters*' the firm handled on their behalf.

12. It was therefore submitted that the cheque having been dated the 15/2/2001, was presented for clearance on the 16/2/2001 the same day the tenure of the two interim liquidators was terminated by a court order. As at the date of the termination, no instructions had been given and therefore the plaintiff deemed the money to have remained seated with the defendant. To the plaintiff therefore it was the company, the plaintiff which instructed the defendants and therefore it mattered not whether it had been removed from the hands of the joint interim liquidators.

13. The counsel cited the provisions of Order 52 Rule 4(1) to cloth the court with jurisdiction to order accounts and delivery of documents held by an advocate on behalf of a client. It was additionally submitted that no loss or prejudice would be occasioned to the advocate if the accounts are ordered so that there is disclosed a justification whether or not the advocate is entitled to continue withholding the funds. Reliance was then placed on the decision in *John Nyamu & Another vs Mum & Associates Advocates, HCC No. 463 of 2007 (OS) [2008] eKLR Joyce Khamimwa J*, for the proposition that an advocate has no right in law to withhold monies that come to him for onward transmission to his client as a hen. With those submissions the plaintiff/client prayed that the suit be allowed as prayed.

Submissions by the Defendant

14. For the defendant, Mr. Asige, reiterated the facts deponed in the two affidavits sworn by him in opposition to the Originating summons. I have hereto before set out the facts in these affidavits. They are that there was no instructions to keep the money in a fixed deposit interest bearing account and that the money belonged to the two interim liquidators and not the plaintiff. It was further said that the plaintiff ought to have sought explanation from the two individuals rather than filling this suit.

15. Mr. Asige then took the objection that the summons was made under the wrong provisions of the law and therefore the orders sought could not be granted as sections 6, 7 & 19 of the Advocates Act did not support the orders sought. He further pointed out that Order XXVI Rule 2(b) 3, Civil Procedure Rules does not exist and therefore the application was incompetent and incapable of being granted as prayed.

16. On the merits, the defendants faulted the summons as not properly founded on the basis that the court cannot delve into the issues as framed which to him were issues between an advocate and his client. For those reasons Mr. Asige described the summons as lacking legs to stand on and prayed that it be dismissed with costs.

17. In reply to the Defendants response to the plaintiff submissions, Ms.Kibe implored the court to appreciate that the law places a special duty on an advocate as an officer of the court both under the Advocates Act and Order 52 and that the originating summons was properly taken and deserved being allowed as prayed.

Analysis and determination

18. Having read the pleadings filed and heard the parties on their submissions and having read the entire record of the file; I have formed the opinion and view that whether to order accounts will be wholly dependent upon the purpose for which the sum of Kshs.5,000,000/= was paid to the defendant in this matter.

19. However, before I venture into that endeavor, Mr. Asige had raised an objection to the summons on the basis that it is brought, under wrong provisions of the law. In court I drew Mr. Asige's attention to the provisions of Order 51 Rule 10 and he responded that, the provision notwithstanding, it was still incumbent upon the plaintiff to cite with precision under what provision of the law the originating summons was brought.

20. I entertain no doubt that failure to cite a provision of the law and the citing the wrong provision should not by itself *disentitle* a party to deserved legal remedies if the facts provided when applied to the law as appreciated by the court support the litigants prayers. I equally hold the view that while it is desirable to cite the provisions of the law pursuant to which a matter is brought to court, that is not to say that the court abdicates its duty to know and appreciate the law by letting it to be a duty placed upon the shoulders of the parties to direct the court where the law is. Never. A court of law is deemed to know the law and even where none is cited to it is duty bound to ascertain for itself the law applicable and to determine a matter before it based on that very law even not cited or hidden from it by the parties.

21. This position has been repeatedly stated by our courts and one only needs to cite the decision in ***KWANZA ESTATES LTD VS DUBAI BANK OF KENYA LTD & KENYA DEPOSIT INSURANCE CORPORATION [2016] eKLR*** where the Court of Appeal said:-

“A judge in determining a dispute is not restricted only to provisions of the law cited by the party.”

22. Being guided and bound by the decision I am unable to agree with Mr. Asige that this matter is bound to fail and be dismissed for being grounded on wrong or no proper provisions of the law cited.

23. In RE: PRIDEINN HOTELS LTD the Winding Up Cause No. 2 of 2016 the court had this to say:-

“I would add that even without the saving provisions a court reserves inherent jurisdiction to meet is core mandate of dispute resolution and that even if there was to be no saving provisions and even without the need to cite which provision of the law a petition to liquidate a Company is brought, the court has the right to receive and consider a petition and is duty bound to hear the parties on the dispute and deliver itself upon the facts when applied to the law. This must be the true meaning of Article 159(2) d of the Constitution”.

24. The foregoing have led me to find and I now hold that the objection to the matter on those technical grounds cannot be sustained but must be dismissed. Even without Order 51 Rule 10 this court is bound to observe the dictates of Article 159(2)d of the constitution.

What was the purpose of the deposit?

25. It is evident on the plain and natural words and meaning of the letter dated 15/2/2001 that the sum was being sent to the defendant in order that they keep the same in a joint interest being account in the names of the two interim liquidators pending their ***“instruction on various legal matters that you are handling on our behalf,”***

26. Whether that money was to be applied towards the fees of the two interim liquidators or to take care of the various matter the advocate handled for them, matters not. What matter is that the money was sent to Mr. Asige’s firm by the two in their capacities as interim liquidators of the plaintiff. The assertion by the plaintiff that the money was obtained from the plaintiff account which was then being controlled by the two has not been contested and I think is incontestible.

27. I say it matters not for what reason the money was sent to the advocate because either way it was so sent as clients’ money, not fees due to the advocate and the advocate was at all times under an obligation and professional duty to render an account as and when called upon to do so. A keen reading of the same letter reveals that the subject matter was expressed in upper case as **DEPOSIT FOR VARIOUS LEGAL MATTERS, E.T.C.**

28. It is not in dispute that the cheque made in favour of the advocate was so made on the 15/2/2001 and was apparently presented for clearance at the STANBIC BANK KENYA LTD, NAIROBI on the 16/2/2001. That is the same day the mandate of the two gentlemen to continue in control of the plaintiffs affairs was terminated by the appointing authority, the court. It is also not contested or alleged that after the cheque was so presented and cleared, the defendant ever received any instructions from the plaintiff or indeed either both of the two interim liquidators. Without such instructions it is instructive if not irresistibly inferable that it is kept as so instructed.

29. To this court, that money having been placed as a deposit pending instructions could only be applied with and pursuant to such instructions and not otherwise. I have said and observed that the money was given to the defendants in their capacity as advocates for the plaintiff, whether under liquidation or otherwise. That is the reason the letter of instruction bore the letterheads of the plaintiff. I refused to be persuaded that the money was given otherwise.

30. On 10/12/2015, when the matter came before court for an application to set aside a dismissal order on the basis that there had been no service and after Mr. Njenga declined to take any firm position whether or not a notice was ever served the court reinstated the suit and gave directions that:-

“As to only issue for determination appears to me to be Whether or not the payment of Kshs.5,000,000/= was for fees to the interim liquidators, I direct that Mr. Asige files a further affidavit or accounts detailing and evidencing disbursement to the liquidators”.

31. That is the order or direction that yielded to the defendant the right to file the affidavit sworn by Mr. Asige Advocate on 12th August 2016 before SAMUEL ODHIAMBO, Commissioner for Oath.

32. In the entire affidavit no attempt was made to discharge the duty for which the affidavit was ordered to be filed. That state of affairs can only lead one to conclude that no disbursement was ever made by the defendants and it is therefore both a legal and professional duty upon the advocate to avail the details of how such sum was ever used or treated if the provisions of Rule 13 of Advocate Accounts Rules were to be complied with by them.

33. Those Rules define what a clients money under Rule 2 and places obligations on an advocate on how to handle such money. The rules define clients money to mean money received or held by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money in several capacities. The only exempts money to which the advocate is the sole person entitled and money for the advocates fees. With this definition, whether the money was received as fees to the interim liquidators or on account of other pending legal matters, it was indeed clients’ money and the defendant is obligated to account. It therefore cannot be argued as Mr. Asige did before me that he was not a trustee for the plaintiff. I hold that so long as he held that money waiting instructions he stood in the position of a

trustee over the money and a trustee only act for the benefit of the persons entitled and upon instruction.

34. When the three questions framed in the originating sums are put in perspective, all amount to one question, whose money was it and for what reason was it deposited with the defendant.

35. If one finds, as I have found that the money belonged to the plaintiff as a client, then it follows that when the said client therefore asks for accounts, such accounts are due and must be rendered.

36. I have said enough to underscore the ultimate decision that the plaintiff is entitled to cash accounts and for payment of any sum that such accounts shall reveal to be due to the client from the advocate.

Rendition

37. The money deposited and paid to the defendant by cheque no. 031469 dated 15/2/2001 and drawn on ABN-AMRO BANK pursuant to the instructions by the plaintiff belong to the plaintiff. The said money was deposited with the defendant as advocates for the plaintiff.

38. The Defendant as such an advocates are bound in law to render an account on how the money has been applied or employed from the date of deposit to date. The advocate as defendant herein shall render such accounts within 30 days from today and any sum, if at all, found to be due be paid to the plaintiff within 30 days thereafter.

39. This matter shall be mentioned on 20/7/2017 to confirm compliance.

40. The costs of the originating summons are awarded to the plaintiff.

Dated and delivered at Mombasa this 23rd day of June 2017.

HON. P.J.O. OTIENO

JUDGE