



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL, COMMERCIAL AND ADMIRALTY DIVISION**

**HC. MISC. CIVIL SUIT NO. 8 OF 2017 (OS)**

**IN THE MATTER OF: DELIVERY BY THE RESPONDENT/ ADVOCATE OF A CASH  
ACCOUNT OF THE APPLICANTS**

**IN THE MATTER OF: THE PAYMENT OR DELIVERY BY THE ADVOCATE/RESPONDENT OF  
MONEY HE RECEIVED ON BEHALF OF THE APPLICANTS FOR SALE OF LAND IN RESPECT  
OF PLOT NO. MGUMOPATSA/MAZERAS/187**

**IN THE MATTER OF: THE DELIVERY OF A LIST OF THE MONIES WHICH THE  
RESPONDENT HAS IN POSSESSION OR CONTROL ON BEHALF OF THE APPLICANTS**

**BETWEEN**

1. LATIFA

MOHAMED

2. MARIAM

MOHAMED

3. AKIDA

MOHAMED

(Administrators of the estate of MOHAMED OMAR  
SOHA

AND FATUMA MWINYI

(DECEASED)) .....PLAINTIFFS/APPLICANTS

**VERSUS**

CHARLES LUTTA KASAMANI T/A KASAMANI & CO  
ADVOCATES.....DEFENDANT/RESPONDENT

**RULING**

1. The Originating Summons before me is dated 25th January, 2017. It has been brought under the provisions of Order 37 rules 1, 1(a), 2 and 3 of the Civil Procedure rules. It seeks the following orders:-

(i) Spent;

(ii) That the defendant/respondent as the Advocate of the plaintiffs/applicants in respect of the purchase price he collected on behalf of the plaintiffs'/applicants' property which is plot No. MGUMOPATSA/MAZERAS/187 to deliver the cash account he received on behalf of the plaintiffs/applicants;

(iii) That the defendant/respondent to deliver to the applicants a list of monies amounting to Kshs.2,312,000/- (Kshs. Two Million Three Hundred and Twelve Thousand) which the respondent has in his possession or in control on behalf of the applicants which monies the respondent received on behalf of the applicants;

(iv) That the Honourable court do order the respondent to comply with the above within 14 days from the date of issuing of this order in default of which judgment be entered in favour of the plaintiffs as against the defendant;

(v) That the costs of the application be borne by the defendant/ respondent.

2. The application is premised on the grounds in support of the application and the affidavit of Mariam Mohamed sworn on 25th January, 2017. The respondent entered appearance on 3rd March, 2017 and filed a replying affidavit on 20th March, 2017.

3. Mr. Wachenje, Learned Counsel for the applicants submitted that Plot No. Mgumopatsa/ Mazerias/187 was sold pursuant to a sale agreement dated 27th July, 2010 which was attached to the applicant's supporting affidavit. He stated that the respondent herein acted for the purchaser, Unik Sunshine Environmental Services Ltd wherein Kshs.3.5 Million was realized from the sale. Counsel contended that the respondent failed to account for all the money for he only remitted Kshs.1,188,000/- to the applicants. As such, Kshs.2,312,000/- is outstanding and unaccounted for. He indicated that the applicants are the Administrators of the deceaseds' estate.

4. In making reference to the replying affidavit, Mr. Wachenje stated that the respondent in paragraph 9 states that he has neither refused nor failed to account for the outstanding amount and attached a schedule of payments made through Mpesa. Counsel's position was that in the absence of a statement from Safaricom, the said schedule cannot be verified for correctness and truthfulness. He prayed for their application to be allowed with costs to the applicants.

5. Mr. Ajigo, Learned Counsel for the respondent relied on the depositions in the respondent's replying affidavit and the annexures thereto whereby the respondent admits holding Kshs.2,312,000/-. He added that the person who gave instructions for the property to be sold was deceased but letters of administration were taken out. Counsel stated that the applicants are Administrators of the deceaseds' estate but all the beneficiaries have not given consent for the filing of the Originating Summons.

6. Counsel made reference to the annexure marked as CLX6 being the certificate of confirmation of grant and stated that the amount in issue is not listed as an asset. He indicated that the respondent had received instructions from Omari Mohamed not to release the money to the estate until beneficiaries agree on how to share the properties including the money. He informed the court that they are not opposed to the account being taken as long as the beneficiaries agree on how the proceeds are to be shared. He indicated that that Plot No. Mgumopatsa/ Mazerias/187 which was sold was listed (as an asset) in the certificates of confirmation of grant issued on 15th August, 2012.

7. In response to the respondent's submissions, Mr. Wachenje stated that the Administrators of the deceaseds' estate have properly brought the present suit and that they are the ones who can give instructions on anything to do with the deceaseds' estate. He prayed for an account to be taken and for

monies to be released for distribution.

**The issues for determination are if the respondent should be made to deliver the cash account he received on behalf of the applicants and to deliver to them a list of the monies outstanding to the account.**

8. The applicant's deponent, Mariam Mohamed attached to her affidavit two certificates of confirmation of grant dated 30th May, 2012 marked as MM1 and MM2. The Administrators of the deceaseds' estates are Latifa Mohamed, Mariam Mohamed and Akida Mohamed. The beneficiaries are six persons, including the said Administrators.

9. Contrary to the averments contained in paragraph 5 of the replying affidavit that the certificates of confirmation of grant do not specify what shares all the beneficiaries were to be paid out of the proceeds of the sale, the stark reality is that the said certificates indicate that the property was to be distributed equally among the beneficiaries. The certificates of confirmation of grant, leave no room for ambiguity. It thus follows that the proceeds from the sale of Plot No. Mgumopatsa/ Mazeras/187 were to be shared equally among the beneficiaries. The instructions that are said to have been received from Omari Mohamed are therefore misplaced in light of the clear mode of distribution contained in the certificates of confirmation of grant.

10. Section 82 of the Law of Succession Act (Cap 160) Laws of Kenya provides as follows:-

***“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:***

***(a) To enforce, by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate ....”***

11. The extent of the powers of an administrator to a deceased's estate were described by Musyoka J. in **Re The Estate of Thiong'o Nginyayu Muthiora** (Deceased) Succession Cause Number 2131 of 2011 as follows:-

***“ ..... he is the only person to be sued by third parties over the estate or to sue such third parties to protect the estate .....”*** (emphasis added).

12. The respondent does not deny having in his possession the outstanding amount of Kshs.2,312,000/- received from the proceeds of the sale of Plot No. Mgumopatsa/ Mazeras/187. He therefore has no legal authority to continue holding on to the said amount without proper basis, which he has failed to prove.

13. 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 .....”***

14. I have said enough to show that the application dated 25th January, 2017 is well merited. I hereby allow it and make the following orders:-

(i) That the defendant/respondent as the Advocate of the plaintiffs/applicants delivers the cash account he received in respect of the purchase price he collected on behalf of the plaintiffs/applicants' property, plot No. MGUMOPATSA/MAZERAS/187;

(ii) That the defendant/respondent delivers to the applicants a list of monies amounting to Kshs.2,312,000/- (Kshs. Two Million Three hundred and twelve Thousand) which the respondent

has in his possession or in control on behalf of the applicants which monies he received on behalf of the applicants;

(iii) The respondent shall comply with the above orders within 14 days from the date of issuing of this order in default of which judgment shall be entered in favour of the plaintiffs/applicants as against the defendant/respondent;

(iv) Costs are awarded to the plaintiffs/applicants.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28<sup>th</sup> day of JULY, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff/applicant

Mr. Oloo for the defendant/respondent

Ms Bancy Karimi - Court Assistant