



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NO. 10 OF 2013 (O.S)

IN THE MATTER OF AN APPLICATION FOR AN ACCOUNT

BETWEEN

PINK PROPRIETORS LTD PLAINTIFF

VERSUS

JARED N. NYAKOE T/A NYAKOE MACHARIA ADVOCATESDEFENDANT

AND

1. STANSLAUS NGALA MWAGANDI.....THIRD PARTY

2. KENGA & CO. ADVOCATESTHIRD PARTY

JUDGEMENT

The originating summons dated 22nd March, 2013 seeks the following orders: -

1. An order directing the defendant to provide forthwith to the plaintiff an account for the expenditure of Kenya Shillings 600,000/= (Six Hundred Thousand) paid to him in his Malindi Offices for purposes of paying stamp duty on behalf of the plaintiff in respect of the transfer of that piece or parcel of land known as CHEMBE/KIBAMBASHE/272.
2. An order directing the defendant, to forthwith refund the sum of Kenya shillings 360,000/= (three Hundred and Sixty Thousand) to the plaintiff upon the issuance an order to that effect from this court, and to pay interest thereon from the date of commencement of these proceedings till payment in full at court rates, in default execution to issue.
3. An order directing the defendant, to settle costs of these proceedings, which costs are to be agreed on or taxed within 90 days of the determination of these proceedings.

The summons are supported by the affidavit of **Anna Catani** and **Paola Catani** sworn on 22nd March, 2013. The defendant filed a replying affidavit sworn by **Mr. Jared N. Nyakoe** on 24th September, 2014. The defendant filed an application dated 13th July, 2015 seeking leave to issue 3rd party notice and the same was granted. Only the 2nd third party, M/s Kenga & Co. Advocates responded to the 3rd party notice. The first 3rd party **Stanslaus Ngala Mwangandi** did not respond.

Parties herein agreed to determine the originating summons by way of written submissions. Counsel for

the defendant did not file any submissions. Counsel for the plaintiff maintain that the defendant was retained to act for the plaintiff in a land transaction involving Plot No. CHEMBE/KIBAMBASHE/272. The purchase price was Kshs.15 million. The defendant was paid Kshs.600,000/= being the 4% stamp duty and his legal fees of Kshs.225,000/= was paid separately. The defendant paid Kshs.240,000/= as stamp duty and indicated in the transfer documents that the sale price was Kshs.6,000,000/= only instead of Kshs.15 million. Counsel maintains that the defendant should account to the plaintiff and refund the balance of Kshs.360,000/=.

The 2nd third party contends that he never received any money from the defendant. He did not authorize the first 3rd party to collect money on his behalf. The valuation for stamp duty purposes is the duty of the advocate for the purchaser.

The main issue for determination is whether the defendant should refund a sum of Kshs.360,000/= to the plaintiff.

In his replying affidavit, Mr. Nyakoe concedes that indeed he was instructed to act for the plaintiffs in the land transaction. He further concedes that the purchase price was Kshs.15 million and that he was paid the sum of Kshs.600,000 as stamp duty. The only issue being raised in the affidavit is that the plaintiffs wanted to have the transfer registered within three days and he gave out the money to the seconde 3rd party who was acting for the vendor to facilitate the registration. Paragraph three (3) of the replying affidavit reads as follows: -

“THAT I did the agreement of sale and even drew the transfer and consent.”

The plaintiff annexed the transfer dated 6th June, 2011. It was drawn by the firm of Nyakoe Macharia and Co. Advocates. The title deed was also issued on 6th June, 2011. It is therefore clear that it is Mr. Nyakoe who indicated in the transfer document the purchase price as Kshs.6 million instead of Kshs.15 million. Mr. Nyakoe had a duty to his client to act professionally and not to blame third parties. The sale agreement was signed on 3rd June, 2011 and indicate the purchase price to be Kshs.15 million. There is no mention of the firm of Kenga and Co. Advocates in the sale agreement.

The originating summons herein were brought under Order 52 of the Civil Procedure Rules. The plaintiffs are seeking an order for the defendant to account and refund the unutilised amount of Kshs.360,000/=.

It is clear from the pleadings herein that the money for stamp duty was paid to Mr. Nyakoe. A receipt from his firm dated 3rd June, 2004 was issued. Mr. Nyakoe cannot escape the responsibility to account by stating that he gave the money to a 3rd party. Mr. Nyakoe has annexed an acknowledgement of receipt dated 6th June, 2011 whereby the first 3rd party received Kshs.360,000/= allegedly on behalf of the second 3rd party. What was paid to Mr. Nyakoe is Kshs.600,000/=. If the sum of Kshs.360,000/= was utilised to pay the stamp duty of Kshs.240,000/= it is clear that Mr. Nyakoe still retained Kshs.240,000/=. Further, it is Mr. Nyakoe who indicated the purchase price to be Kshs.6 million. Had the purchase price been properly indicated as Kshs.15 million, then Mr. Nyakoe would have handed over the whole sum of Kshs.600,000/= He is the one who undervalued the purchase price and should not blame other parties. Having been retained by the plaintiffs to finalize the transaction, he has a duty to account to the plaintiffs. The contention that the plaintiffs wanted the transaction to be finalized on the same day cannot hold. The defendant is a professional and is the one who was to guide the plaintiffs as to how long the transaction could have taken.

In the end, I do find that the plaintiffs are entitled to the orders being sought. Since the money was paid in 2011 and was not utilized for the purposes of settling the stamp duty, the only order this court can issue is for the refund of the entire unutilised amount of Kshs.360,000/=. The originating summons dated 22.3.2013 is granted as prayed. Costs to the plaintiffs.

Dated and delivered in Malindi this 21st day of April, 2016.

S. CHITEMBWE

JUDGE