



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 17 OF 2015

RENOM AGENCY LIMITEDPLAINTIFF

VERSUS

MUTHOGA GATURU & COMPANY ADVOCATES.....DEFENDANT

AND

1. JOSEPH RASHIDI MASENGO

2. PAULINE NDITO MASENGO

3. LUC RASHID MASENGO.....INTERESTED PARTIES

RULING

1.This ruling determines the preliminary objection dated 22nd September 2015; the notice of motion dated 22nd September 2015 and another notice of motion application dated 9th July 2015.

2.In the application dated 9th July 2015, the interested parties seek for orders striking out the plaintiffs' suit (Originating Summons) as against the defendants and that the defendant advocate be ordered to release and pay the interested parties the balance of the purchase price.

3.The grounds upon which that application is predicated are that:

a)The defendant acted for the interested parties in the sale of their property LR NO. 1338/89 Athi River for the consideration of shs 128,250,000 where the plaintiff purported to act as agents;

b)The defendant has paid the interested parties a sum of shs 45,939,570 from the purchase price leaving a balance of shs 82,310,430 now wrongly held:

c)The plaintiff and the defendant colluded not to disclose the true price and deceived the interested parties that the property had fetched only shs 97,500,000

d)The undertaking relied upon by the plaintiff and given by the defendant giving rise to the present claim by the plaintiff was issued without instruction, illegal and no court ought to enforce an illegal contract.

e)The plaintiff has brought this claim seeking kshs 35,125,000 being undisclosed portion of the

purchase price allegedly in addition to commission earned as an Estate Agent;

f)The commission is chargeable under Estate Agents Remuneration Rules;

g)It has come to the fore that the plaintiff is not a registered Estate Agent and therefore not authorized to offer such services or levy a commission.

h)The plaintiff has contravened Section 2 and 18 of the Estate Agents Act and paragraph 7 of the Estate Agents Remuneration Rules.

i)The orders sought are necessary to restore money to the proper owner.

4.The application is supported by the affidavit sworn by Joseph Rashidi Masengo sworn on 9th July 2015 wherein it is deposed that in 2013 the interested party placed LR No. 1338/89 Athi River on sale and appointed defendant advocates to facilitate the sale and conveyance, whereas the plaintiff presented himself as an Estate Agency and was allowed to market the property.

5. That the plaintiff found a buyer and informed the interested parties that the buyer had offered the price of shs 97,500,000.00 which was accepted and Sarah Hillman was authorized to sign the sale agreement on behalf of the interested parties at the defendant's office.

6.That the interested parties executed a memorandum of understanding dated 29th March 2014 agreeing to pay the plaintiff a commission of sh 4,875,000 pursuant to the representation made by the plaintiff that was an Estate Agent.

7.That unknown to the interested parties, the purchaser had paid shs 128,250,000 and the plaintiff and defendant reached a secret deal to share shs 30,750 over and above the disclosed sum of shs 97,500,000.

8.That when the interested parties learnt of the deal, they wrote to the defendant advocate informing them that they were aware of the scheme to defraud the interested parties and insisted that the entire purchase price be released to the interested parties. That owing to the conduct of the plaintiff, the interested parties conducted a search to establish whether it was licensed to carry out business as an Estate Agent.

9.That by letter dated 20th March 2015 the Registrar of Estate Agents Registration Board wrote stating that Mumo Mweu was not a registered Estate Agent and the plaintiff Renom Agency Limited is not eligible for Registration to practice as an Estate Agent as only individuals are registrable under Cap 533 of the Estate Agents Act. That that being the case, the plaintiff and its directors are barred by law from providing the services of Estate Agency and cannot enforce the present claim; and that it has expressly contravened Section 2 and 18 of the Estate Agent Act and cannot seek the aid of this court.

10.Further, that this suit was brought through collusion of the plaintiff and defendant to have the court to sanctify their illegal actions. That therefore the suit should be struck out to keep the streams of justice pure and effectual.

11.The plaintiff opposed the interested parties' application for striking out the suit. They filed grounds of opposition dated 22nd July 2015 and a replying affidavit sworn by Mumo Mweu on 22nd September 2015.

12.In the replying affidavit, the plaintiff denies ever representing itself as an Estate Agent and that the defendant and interested parties were aware that it was a general agent. Further, that it is the interested parties who approached the plaintiff to procure a buyer and not vice versa, which the plaintiff did and found a buyer who was willing to pay sh 8,550,000 per acre as opposed to the shs 6,500,000 given by the interested parties agent Sarah Hillman. That no transaction was concluded and a memorandum of understanding was reached and the defendant advocates executed a professional undertaking.

13. The plaintiff also denied any knowledge of a sum of shs 128,250,000 alleged to be the purchase price and even denies the sale agreement for that sum and blames the defendant for colluding with the interested parties to deny if it's just dues as per the professional undertaking given by the defendant advocate which cannot be vitiated as it is a distinct and independent contract hence it cannot be questioned.

14. Further, that as the notice of motion raises serious issues of integrity of the defendant, those issues cannot be determined in an application because fraud cannot be proved by affidavits and that interested parties have to commence fresh proceedings against their advocate.

15. That in any case, the Estate Agents Act does not provide that a non-registered Estate agent is not entitled to its commission hence the allegations by the interested parties have no legal basis.

16. Further, that the interested parties have no locus standi in these proceedings which are brought under Order 52 Rule 7(1) (b) and (10) (I) of the Civil Procedure Rules purely to enforce a professional undertaking between the defendant advocate and the plaintiff.

17. By another dated 22nd September 2015, the plaintiff filed a Notice of Motion seeking orders:

1. That pending hearing and determination of this application, the defendant be restrained from paying out to any party in this dispute the sum of shs 81,810,420 it is holding on account of sale of LR 1338/89 Athi River between Joseph Rashidi Masengo & 3 Others as named, acting through their Attorney Sarah Hilda Nyiva Hillman and Kabansora Millers Limited;

2. that within 14 days of making of the orders, the defendant do pay to the plaintiff a sum of kshs 4,875,000; that the balance of shs 76,935,430 be deposited in court or in a joint interest earning Bank Account in the joint names of the plaintiff's advocates, the defendant and the advocates for the interested parties.

18. That application is supported by the affidavits of Mumo Mweu and grounds, among others that Patrick Rugo Githinji advocate do attend court to confirm the contents of his affidavit sworn on 5th February 2015; that the defendant firm of advocates represented the interested parties in the sale of LR No. 1338/89 Athi River for a sum of shs 128,250,430 deposited with the defendant advocated by the purchasers.

19. That the advocate undertook to honour a professional undertaking on 16th August 2015 in the sum of shs 35,625,000 but that to date only shs 500,000 has been paid; that shs 4,875,000 is due to the plaintiff which is not a contested issue. That the balance of shs 76,935,430 should be deposited in court or in a joint interest earning account.

20. In the supporting affidavit of Mr Mumo Mweu dated sworn on 22nd September, 2015, it is deposed that in 2013 he was engaged to procure a purchase of LR No. 1338/89 Athi River measuring 15 acres at a reserve price of shs 6,500,000 per acre and it was agreed that he would be entitled to a commission of 5% of the reserve price. That the property was registered in the names of the interested parties. That the interested parties aforesaid engaged Sarah Hillman as their law Attorney and agent to act on their behalf. That the plaintiff procured Kabansora Millers Ltd who agreed to purchase the property at 8,550,000 per acre, which was sh 2,050,000 above the reserve price which came to shs 128,250,000. That there was an agreement between the plaintiff and interested parties that any amount over and above the reserve price would be for the plaintiff for their marketing efforts hence, the interested parties would be paid shs 97,500,000, and the plaintiff shs 30,750,000 as consideration for aggressive marketing, and that agreement was made on 16th August 2013 in the presence of Patrick Rugo Githinji advocate who confirmed the same vide letter dated 16th August 2013 as per annexure MM3. That on the same date the defendant facilitated conclusion of the sale transaction by giving a professional undertaking, with instructions of the interested parties upon which the sale was concluded and shs 128,250,000 made of shs 8,500,000 per acre paid to the defendant.

21. That the professional undertaking was clear that the plaintiff would get 5% commission on the reserve price of shs 6,500,000 per acre and shs 30,750,000 being consideration for aggressive marketing of the said property.

22. That on 19th March 2014 the plaintiff and interested parties entered into a memorandum of understanding over the reserve price of shs 6.5 million per acre whereby he interested party would be entitled to shs 97,500,000 and the plaintiff shs 4,875,000. That to date, only shs 500,000 was paid to the plaintiff by the defendant despite reminders, the defendant is unwilling to honour the professional undertaking therefore necessitating the suit.

23. The plaintiff also deposes that the interested parties has admitted that that the plaintiff is entitled to the 4,875,000 by their affidavits sworn on 9th July 2015 and 24th June 2015; that since the payment of that money to the plaintiff is not disputed it should be paid forthwith.

24. The plaintiff also seeks orders that the defendant advocate Mr Rugo Githinji should attend d court to shed light on the issues at hand.

25. Simultaneous with the filing of the Notice of Motion dated 22nd September 2016 the plaintiff also filed Notice of preliminary objection dated the same day. The preliminary objection is said to be on a point of law against the interested parties application dated 9th July 2015 on the ground that:

i. The issues raised by the interested parties in the said notice of motion touches on advocate /client relationship which is a sole preserve of the disciplinary tribunal established under the Advocates Act Cap 16 Laws of Kenya; and

ii. The interested parties have no locus standi to institute this suit having donated a general power of attorney to Sarah Hilman which is valid up to date.

26. In response to the plaintiff's notice of motion dated 22nd September 2015, the interested parties swore a replying affidavit sworn by Joseph Rashidi Masengo on 4th October 2015 contending that the whole transaction giving rise to the claim by the interested parties is riddled with illegalities and fraud committed by the plaintiff; That the interested parties' complaint concerns the concealment of the true purchase price to the interested parties being kshs 128,250,000 and that instead the plaintiff and defendant advocate misrepresented to the interested parties that the best price obtained was shs 6.500,000.00 per acre hence a total of shs 97,500,000 and that it was a result of the misrepresentation that the memorandum of understanding was reached; that the handsome reward for the marketing efforts was the 5% commission, of the purchase price and no other.

27. The deponent also denied ever attending a meeting on 15th August 2013 at the defendant's offices where the plaintiff was to be rewarded with all the amount in excess of the reserve price, noting that the letter of 16th August 2013 was not even copied to the interested parties, a sign of concealment of the time purchase price. That shs 30,750,000 is not based on any contract between the plaintiff and the interested parties.

28. Further, it was deposed that the professional undertaking was entered into on 6th March 2013, a clear manifestation that the professional undertaking was entered into to perpetuate the fraud upon the interested parties by the defendant and the plaintiff.

29. The interested party also deposed that neither the plaintiff nor the defendant disclosed to him the subsequent purchase price or the purported professional undertaking by the defendant firm and further, that the defendant had no instructions to give the said undertaking which was fraudulent and therefore unenforceable in law.

30. That in the memorandum of understanding of 19th March 2014 the plaintiff at clause C only disclosed the purchase price of shs 97,500,00 and not shs 128,250,000.

31. Further, that in the said memorandum of understanding the plaintiff agreed that it had no claim or right to any money over and above shs 97,500 disclosed in the memorandum of understanding.

32. The interested parties also contend that shs 4,875,000 being balance of the 5% commission is not due or payable since the plaintiff contravened the Estate Agents Act as it was not registered or even registrable under that Act hence it cannot benefit from its own crime or transgression of the law and further, that the suit herein is brought to enforce proceeds of crime and in collusion with the defendant advocate.

33. It is also contended that there is no legitimate question to be tried and that on the issue of power of Attorney to Sarah Hilman, it was revoked upon discovery that she was part of the conspiracy perpetuated by the plaintiff and the defendant.

34. All parties' advocates filed written submissions which they also argued orally, substantially covering all the issues raised in the applications, and preliminary objection. They also filed authorities for this court to consider.

35. The interested parties counsel, Mr Ojiambo submitted that the interested parties were misled by the plaintiffs the defendant /advocate into signing an memorandum of understanding and an agreement for sale of their land on the understanding that the purchase price paid was 97.5 million only for them to learn later that the purchase price was shs 128 million.

36. Further, that from the documentation exchanged between the plaintiff and the defendant, the two of them agreed to share the excess purchase price between themselves and that they colluded not to account to the interested parties without the latter's consent.

37. The interested parties also submitted that they sought to be enjoined to this suit after learning of being defrauded and that when they inquired from the Estate Agents Board, they were informed that the plaintiff was not a registered estate agent hence not authorized to practice as an estate agent and therefore his practice offends Section 2 and 18 of the Estate Agents Act, Cap 533 Laws of Kenya. In that regard, the Interested parties argued that the plaintiff had no capacity to transact on behalf of the interested party and is therefore not entitled to the commission since the 'Act' criminalizes practicing as an estate agent without a license of the Estate Agents Board. Accordingly, it was also argued that the plaintiff had no locus to bring this suit against the defendant to recover the purported commission.

38. Reliance was placed on the case of Maps Investment (K) Ltd V Kenya Railways Corporation [2006] e KLR where the Court of Appeal declined to enforce the claim for commission noting that Maps was not an Estate Agent, and that the court was concerned with the situation where a party contravened an Act of Parliament but sought a remedy on an agreement to enforce it.

39. The Interested Parties maintained that the letter of undertaking by the defendant not to account to the Interested Parties shs 30,750,00 and to pay the same being the excess purchase price to the plaintiff was illegal and therefore the plaintiff would not be entitled to the said money and not even the commission. They urged the court not to enforce the illegal undertakings and or transactions but strike out the suit and order the defendant to release all the money it is holding to the Interested Parties.

40. On the plaintiff's application dated 7th September 2015 it was argued that there is no way the court can order for release of shs 76,935,40 to the plaintiff as held by the defendant, when the originating Summons filed by the plaintiff seeks for shs 35,000,000 being the undertaking and shs 4,875,000 the commission.

41. On the preliminary objection filed by the plaintiff urging the court to dismiss the Interested Parties application and that the Interested parties have no right to participate in these proceedings, it was submitted that the preliminary objection has no legal basis since the plaintiff should have enjoined the Interested Parties as defendants and that the Interested Parties could not have gone to the Advocates Disciplinary Tribunal to complain against the defendant until after the court had thrashed out the

issues. Reliance was placed on *Ann Marie Cassiede & Another V Peter Kimani Kairu*[2009] e KLR where Kimaru J held that the relationship between client and advocate is not a special relationship.

42. It was also submitted that the preliminary Objection is incompetent since there is no reason why the plaintiff who was claiming that the defendant advocate had refused to honour an undertaking, could not complain to the Advocates Disciplinary Tribunal but expected the Interested Parties to complain to the said tribunal. Counsel maintained that their clients had interest in the money held by the defendant hence they were proper parties as interested parties, relying on Supreme Court Petition No. 20 of 2013.

43. In response, Mr Thuku for the plaintiff submitted that the Originating Summons concerns failure by the defendant to honour a professional undertaking to pay shs 35,000,000 to the plaintiff and not for enforcement of the memorandum of understanding between the plaintiff and the interested parties. He denied that the plaintiff ever represented itself as an Estate Agent hence the Estate Agents Act is inapplicable. It was submitted that the interested party is a spoiler, since it had a retainer relationship with the defendant yet the plaintiff is only seeking for enforcement of a professional undertaking which is a contract. Further, that there was no application for joinder of parties hence, the Interested Parties are wrongly joined to these proceedings and therefore the Supreme Court Petition No. 20/2013 is irrelevant and that the Interested Parties are therefore strangers and they should be struck out and that they have no mandate to ask the court to strike out the plaintiff's suit. Counsel maintained that the Interested Parties should have complained against the defendant to the Advocates Disciplinary Tribunal for breach of trust, professional negligence or misconduct.

44. Further, that there are no substantive pleadings for alleging fraud against the advocate and that fraud cannot be decided on affidavit evidence. Reliance was further placed on the case of *Patel V Kairu & Mangat V Wesley Chepkoinet* where the court held that the Interested Party is not strictly a plaintiff or defendant and therefore it cannot be allowed to ask for substantive prayers.

45. On vitiating contracts, reliance was placed on *National Bank of Kenya Vs Anaj Warehousing Ltd* SC Pt 36/2016 where the court held that it cannot invalidate all documents filed by an unqualified advocate who had no practicing certificate and that what was important was the intention of the parties hence no law can invalidate a professional undertaking. He urged the court to dismiss the Interested Parties' application dated 22nd September 2015.

46. On behalf of the defendant, Mr Khaseke counsel submitted that they did not file any replying affidavit because they left the matter for the court to determine who should be paid the money that the defendant admits holding, after the interested party raised the issue with the money being paid to the plaintiff. He also submitted that the defendant is willing to deposit the shs 35 million into court.

47. Mr Khaseke also submitted that the issue of fraud cannot be determined summarily and that the Interested Party cannot be the recipient of the alleged fraud and collusion which are issues that can only be determined by hearing the main originating summons.

48. Further, that the interested party has not lodged any counterclaim or a claim hence the court cannot summarily order for the money to be paid to them.

49. On the prayer for injunction by the plaintiff, it was submitted that what was in issue as per the Originating Summons was 35 million yet the injunction seeks to restrain payment of over 81 million without a basis. Further, that there should be no apprehension that the money will be paid to third parties as the defendant was waiting for a determination by the court for them to comply.

50. Further, that a mandatory injunction cannot issue before all the issues of the legality or otherwise of the memorandum of understanding are determined hence the matter should be dealt with in the Originating Summons. Reliance was placed on *Nakuru Veterinary Centre Ltd V Mary W. Kariuki* [2003] e KLR and *Papindea Kaur Atwal V Harbans Singh Amrit & Another* [2015] e KLR.

51. In a rejoinder, Mr Ojiambo counsel for the interested parties submitted that on 23rd March 2015 the interested party was enjoined to this suit by consent of all the parties. He maintained that his client's claim is for the balance of the purchase price which the plaintiff and the defendant undertook between themselves not to disclose to the interested parties. Further, that if the court does not strike out the suit then the extra purchase price should be paid to the interested parties which is not disputed. Further, that the Interested Parties never agreed to give to the plaintiff amount in excess of 97 million reserve price. Further, that the so called letter of undertaking was never copied to the interested parties hence it is fraudulent and cannot be enforced being an illegal contract.

DETERMINATION

52. This court has carefully considered the two applications on record and a preliminary objection filed by the interested party. As a cardinal rule, a preliminary objection raised should be considered first before any other proceeding since if found to be validly raised, is likely to dispose of the whole matter.

53. The big question therefore is whether the preliminary objection filed on 23rd September 2015 and dated 22nd September 2015 should be allowed. To answer that question, the court must determine what a preliminary objection is, in law. The legal delimitations for a preliminary objection were set out in the *Mukisa Biscuit Manufacturing Company Ltd V West End Distributors Ltd* [1969] EA that :

“ so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit per Sir Law J.A.”

54. Sir Charles Newbold P. in the same case stated that:

“ A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.”

55. Ojwang J.B. J (as he then was) made it more simpler when he stated in *Oraro V Mbaja* [2005] e KRL that:

“ I think the principle is abundantly clear. A “ preliminary objection” correctly understood I now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested in any event, to be proved through the processes of evidence.

Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, it is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement.....that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

56. Applying the above tests to the Preliminary Objection raised by the plaintiff, the Preliminary Objection dated 22nd September 2015 is two pronged namely:

i. That the issues raised by the interested parties in the Notice of Motion touches on advocate/client relationship which is a sole preserve of the Disciplinary Tribunal established under the Advocate Act Cap 16 Laws of Kenya; and

ii. That the interested parties have no locus standi to institute this suit having donated a general power of Attorney to Sarah Hillman which is still valid up-to-date.

57. For this court to strike out the interested parties' application dated 10th July 2015 on the ground that the issues raised therein touch on advocate/client relationship which is the sole preserve of the Disciplinary Tribunal as established under the Advocates Act Cap 16 of Laws of Kenya, it must investigate the facts surrounding the circumstances under which the claim for payment of balance of the purchase price was made.

58. From the submissions of parties and the affidavit evidence, there are factual details which require determination by the court only after proof and authentication, and not just a matter of legal principle.

59. Consequently, I find that the first ground of the Preliminary Objection fails for not being a true preliminary objection in the sense of the law as spelt out in the above cited cases.

60. As to whether the second ground that the interested parties have no locus standi because they had donated a power of Attorney to Sarah Hillman which power of attorney was still subsisting to date, in order for this court to determine that issue, it has to hear evidence as to whether or not the power of attorney granted by the Interested Party to Sarah Hillman respecting the transaction for sale of property is subsisting or was revoked and if so, at what point in time since the Interested Parties were enjoined to these proceedings not through their representatives but on their own behalf.

61. Furthermore, the cases of Joseph Leboo V Director, Kenya Forest Service & Others (Eldoret ELC 273/2013 and Mangat Group Ranch & 3 Others V Wesly Chepkoimet & 19 Others [2014] e KLR are only applicable in so far as there was a pending application by persons who wished to be enjoined as interested parties. In this case, the interested parties are already enjoined by consent and that notwithstanding, nothing bars them to apply to be enjoined as either plaintiffs or as defendants to these proceedings upon which they can adequately articulate their claim in the matter. Justice shall be administered without undue regard to procedural technicalities as such technicalities would only go to ousting a genuine litigant from the seat of justice.

62. Accordingly, the second limb of the preliminary point fails to meet the threshold set out in the Mukisa Biscuit case and others as cited.

63. In the end, I find that the two preliminary points of law raised by the plaintiff are incapable of disposing of the interested parties' application dated 7th September 2015. The Preliminary Objection rose, in my view, does nothing but confuses the issues. I therefore dismiss the preliminary points of law raised by the plaintiff dated 22nd September 2015 for want of merit.

64. On the merits of the application dated 7th September 2015, the interested parties are seeking to have the suit herein filed against the defendant advocates struck out and that the balance of the purchase price to be paid to the Interested Parties.

65. I will commence with the issue raised by the plaintiff that the Interested Parties are strangers to this suit and therefore they cannot ask to be paid any money or to have the suit struck out.

66. On 23rd March 2015, the record clearly shows that all the parties herein were ably represented in court by their advocates and on that date, all the parties advocates consented to the interested herein being enjoined as such to this suit and the court made an order to that effect, with leave of 14 days to the interested parties to file a replying affidavit in the dispute. A Mr Orina advocate held brief for Mr Gitonga for the applicant whereas Mr Mwiti was for the defendant and Mr Ojiambo appeared for the interested parties.

67. For the above reason, that the matter of joinder of the interested parties to these proceedings was by consent, and as that order of 23rd March 2015 has not been challenged or sought to be varied, discharged or set aside, I find the objection by the plaintiff ill motivated and unwarranted. I would not even go into the merits of whether or not the interested parties should have been enjoined to these proceedings since the merits thereof was spent by the consent of the parties as recorded by the court on 23rd March 2015. Similarly, it would be a waste of judicial time to discuss whether or not the

interested parties should have come to court on their own or through their agent Sarah Hillman. This is so because the affidavit evidence on record is clear that Sarah Hillman had the Power of Attorney to represent the interested parties in the transaction for sale of the interested parties' land and which she did act. No facts or law was cited before this court to the effect that the donor cannot sue on his own or in his own name and behalf where there is a Power of Attorney donated to a donee. In any case, parties ought to know that a donee of the Power of Attorney can only sue and conduct proceedings in the name of a doner. This is what the courts have held in Grovindji Malhirada V N.M. Patel HCC No. 94/1994; Jones V Gurney [1913] W.N. 72, Daleys Agency Law in EA [1966]; Abdalla Wilji Hirji V Dhanji Buwji & Company [1921] 8 EALR 206; Turri Sidpra & Another Vs Uganda Rehabilitation Development Foundation Kampala HCC 199/93, Republic V Public procurement AdministrativeBoard Exparte Sympony Technologies Limited (K) & 2 Others [2016] e KLR.

68. Further, in Francis Kamande V Vanguard Eletrical Services Ltd CA 152/1996, it was held that a donee of Power of Attorney cannot sue in his own name unless the debt is assigned to him/her.

69. For the above reasons, I find that the objections rose relating to the capacity or locus standi of the interested parties to this suit are misconceived and the same are dismissed.

70. On the issue of whether the application dated 9th July 2015 is incompetent because it touches on advocate/client relationship governed by the Advocates Act and therefore in the preserve of Advocates Disciplinary Tribunal, I have considered the submissions by the parties for and against the objection. Whereas I agree that the affidavit evidence on record is clear that there was advocate/client relationship between the defendant and interested party, nonetheless, the interested party cannot be compelled, and no law compels them to file their complaint to the Advocates Disciplinary Tribunal to claim for the balance of the purchase price allegedly withheld by their advocate.

71. Order 52 of the Civil Procedures Rules under which the plaintiff herein has filed the Originating Summons seeking to enforce a professional undertaking too permits the Interested Party herein, who is claiming for balance of purchase price received by his advocate to be released to him in view of the trust bestowed on the advocate to apply for an order of accounts. More Specifically, Order 52 Rule 4 of the Civil Procedure Act pursuant to the Advocates Act provides:

1)“ where the relationship of advocate and clients exists or has existed the court may, on the application of the client or his legal personal representative, make an order for:

- a) The delivery of an advocate of a cash account;
- b) The payment or delivery up by the advocate of money by securities
- c) The delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;
- d) The payment into or lodging in court of any such money or securities;
- e) The delivery up of papers and documents to which the client is entitled.

2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.

3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocates lieu, if any, as the court deems fit.”

72. From the above provision, it is clear that the jurisdiction of this court to hear any claim by a client against an advocate is clearly conferred by statute and not ousted or at all. In the case of Velji

Shah mad Vs Shany, Bros & Popatlal Karman & Company CA7/1956[1957]EA438, the then Supreme Court of Kenya, applying the examples given in Maxwell on the interpretation statutes 9th Edition pages 246-249 and 250 stated that:

“.....whether there is anything that makes it the duty on which the power is conferred to exercise that power”..... “ where a statute confers an authority to do a judicial act, in a certain sense there would be here such a right in the public as to make it the duty of the justices to exercise that power: to put it in another way where the exercise of an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises.”

73.Furthermore, the provisions of Section 6) of the Advocates Act are couched in discretionary and not mandatory terms. It provides:

“ 60(1) A complaint against an advocate of professional misconduct which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate, may be made to the tribunal by way person.....”

74.The above Section, read together with Section 55 under Part X1 of the Advocates Act which provides that:

“ Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the court and shall be subject to the jurisdiction thereof and, subject to his Act, to the jurisdiction of the Disciplinary Committee.”

75.From the above provisions, it is clear to my mind that the interested party had the option of either filing a complaint with the Advocates Disciplinary Tribunal, concerning the defendant’s conduct or filing an Originating Summons under Order 52(4) of the Civil Procedure Rules.

76.In the instant case, noting that the plaintiff, who is not an advocate and therefore since the complaint being raised against the defendant touches on the plaintiff as well, I find that it was in order for the interested party to be enjoined to these proceedings as a party to ventilate their grievances against both the plaintiff and the defendant, who are alleged to have jointly conspired to defraud the interested parties of their extra amount raised on the sale of the interested parties’ land to some third parties.

77.Having exhausted the preliminary issues raised by the plaintiff against the interested parties application dated 7th September 2015, I shall proceed to examine the substance of that Notice of Motion. The Notice of Motion dated 7th September 2015 seeks for:

- a)Striking out of the suit herein filed by the plaintiff against the defendant and
- b)That the defendant be ordered to release and pay the interested party the balance of the purchase price for the sale of LR 1338/89 Athi River.

78.The application is brought under the provisions of Section 3A of the Civil procedure Act and Order 2 Rule 15(1) (b) and (d) of the Civil Procedure Rules. The grounds upon which the application is premised are as reproduced in this ruling which are also to be found on the face of the application and replicated in the deposition by the interested parties’ affidavit in support of the application.

79.The law regarding striking out of suits or pleadings and entry of judgment is now settled, as applied in the DT Dobie & Company (K) Ltd Vs Muchira [1982] KLR 1 that:

- a.That the court should not strike out if there is a cause of action with some chances of success.
- b.The power should only be used in plain and obvious cases and with extreme caution.

c. The power should only be used in cases which are clear and beyond all doubt.

d. The court should not engage in a minute and protracted examination of documents and facts.

e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.

80. Madan J in the above case succinctly stated, adopting Sellers J in *Wenlock v Maloney* [1965] 1 WLR 1238:

“ This summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chamber on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

81. Danckwerts LJ in the same case stated that:

“ The power to strike out any pleading or any part of a pleading under this rule is not mandatory: but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

82. On the other hand, Madan J in the *D. T Dobie* (supra) case stated that:

“ No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”

83. And Ringera J (as he then was) in the *Dr Murray Watson Vs Rent -a plane Ltd* HCC 2180/94, quoting from Halsbury's Laws of England 4th Edition Volume 36 paragraph 73 stated that:

“ In judging the sufficiency of a pleading for this purpose , the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that the absolute defence exists, the court will strike it out. Its pleading will not, however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases.....”

“ The Pith and Marrow of it is that where on a consideration of only the allegations in the plaint he court concludes that a cause of action with some chances of success is shown then that plaint discloses reasonable cause of action.”

84. Waki J on a similar issue of striking out a party's pleading in the *Bank of Credit & Commerce International (overseas) Ltd Vs Giogio Fabrise & Another* HCC 711 of 1985 stated that:

“ summary determinations of cases are draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious and otherwise an abuse of the court process, I must be satisfied that the suit has no substance, or is fanciful or the plaintiff is trifling with the court or the suit not capable of reasoned arguments, it has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious.”

85. Order 2 Rule 15(1)(b) and (d) of the Civil Procedure Rules provides that:

“ 15(1) at any stage of the proceedings the court may order to be struck out or amended any pleading as the ground that;

a)“....

b)It is scandalous, frivolous or

c)It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be,

d)So far as applicable this rule shall apply to an originating summons and a petition.”

86. The suit which is sought to be struck out is the Originating Summons dated 21st January 2015 wherein the plaintiff herein Reno Agency Limited sought for the following orders under Order 52 Rules 7(1)(b) and 10(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act:

1. That the defendant advocates do honour their professional undertaking can pay the plaintiff a sum of kshs 35,125,000 within fourteen (14) days from the date of service of an order of this Honourable court do issue an order in enforcement to compel the defendant firm to pay the sum of kshs 34,125,000 plus interest at commercial rates thereon immediately.

2. That the costs of this summons be awarded to the plaintiff.

87. In support of the Originating Summons is a detailed affidavit of Mumo Mweu, the plaintiff's Director, annexing documents in support of his depositions. Among those documents are an alleged professional undertaking, memorandum of understanding between the plaintiff and the interested parties through their appointed agent Sarah Hillman with power of attorney.

88. The purported undertaking is dated 16th August 2013, which is highly contested by the interested parties, who claim that the so called undertaking was a conspiracy to defraud them of the excess purchase price fetched from the sale of their land over and above the reserve price.

89. The interested parties also contend that they never agreed to give to the plaintiff any amount in excess of the reserve price. They accuse the plaintiff and the defendant of conspiring to withhold and or fail to disclose to the interested parties that the property was sold at kshs 128 million and not 97 million which latter was the disclosed amount.

90. The interested party has also deposed and annexed the agreement and memorandum of understanding which in their view, were the documents disclosed to them by the plaintiff and defendant advocate only for the interested parties to learn later that there were other agreements between the plaintiff and defendant to defraud the Interested parties of the extra purchase price negotiated over and above the reserve price.

91. To my mind, and without delving into the merits or demerits of the claims by the plaintiff against the defendant on the one hand and the interested parties claims against both the plaintiff and defendant, the plaintiff's suit, as against the defendant is not scandalous, frivolous or an otherwise an abuse of the process of the court. It is not obvious that this suit is of no substance or is fanciful or that the plaintiff is trifling with the court or that the suit is not capable of reasoned argument; has no foundation, or brought for annoyance or to gain fanciful advantage. An arguable suit is not necessarily one that must succeed but that there are triable issues of whether or not there is a valid professional undertaking between the plaintiff and defendant advocate to pay the plaintiff a sum of kshs 35,125,000.

92. The interested parties have nonetheless raised very serious issues of fraud against the plaintiff and

the defendant, jointly which issues, in my humble view, are triable after all the parties have agreed on the mode of proceeding with the Originating Summons, discovery made and the court giving directions in the matter.

93. Although the interested parties as enjoined to these proceedings, are neither plaintiffs nor defendants, they have an interest in the subject matter which is balance of the purchase price on excess of what was reserved price for the sale of their property. They must therefore properly lay their claim against both the defendant advocate and plaintiff in order for the court to give directions on how the matter shall proceed. They cannot be enjoined into the proceedings today and the next day, they are seeking to strike out the suit and judgment be entered in their favour where serious issues of fraud which are denied by the plaintiff and the defendant are raised. In *Uganda Commercial Bank Vs Mukoome Agencies* [1982] HCB 22, it was held that where fraud is alleged, the party alleging it must be given an opportunity to prove it. And that a substantial allegation of fraud raises a triable issue entitling a defendant leave to defend the suit.

94. In this case, the triable issues between the plaintiff and the defendant and as between the defendant, plaintiff jointly and the interested parties include:

- 1) Whether there was any valid professional undertaking by the defendant to the plaintiff;
- 2) Whether the 'professional undertaking' is legal or fraudulent for want of instructions from the interested parties;
- 3) Whether the plaintiff is entitled to any commission, not being a registered and or licensed Estate Agent under the Estate Agent Act;

95. A perusal of the memorandum of understanding dated 19th March 2014 does not reveal the fact of the plaintiff describing itself as 'Estate Agent'. It therefore follows that there is a triable issue as to whether a commission agent must be as a matter of law be a registered and licensed Estate Agent under the Estate Agents Act.

96. All those and many other issues raised in the parties' submissions are highly triable and therefore it would be a travesty of justice for this court to determine this suit on the basis of allegations raised in affidavits which evidence has not been tested in cross-examination. The issues raised are better canvassed at the full hearing of the merits of the suit and not by way of these interlocutory proceedings.

97. For those above reasons, I decline to grant the prayers sought in the Notice of Motion dated 7th September 2015 and proceeded to dismiss it.

98. On the merits of the application by the plaintiff dated 22nd September 2015, the application seeks for an injunction to restrain the defendant from paying a sum of shs 81,810,830 it is holding on account of sale of LR 1338/89 original 1338/4/58 Athi River between the interested parties herein through their Attorney Sarah Hilda Hillman and Kabansora Millers Limited; an order for payment to the plaintiff by the defendant; an order for payment to the plaintiff by the defendant a sum of kshs 4,875,000 within 14 days; the balance of amount held by the defendant upon grant of the prayer 2 and 3 i.e shs 76,935,430 be deposited in court or in a joint interest earning account in the joint names of the plaintiffs' defendant's and the interested parties advocates, and that Patrick Rugo Githinji advocate do personally attend court during the hearing of this application of the interested parties dated 9th July 2015 for cross examination of his affidavit sworn on 5th February 2015.

99. From the onset, the prayer for injunction on the amount of shs 81,810,430 must fail for reasons that there is no prima facie evidence explaining or justifying that claim since the Originating Summons seeks for enforcement of a professional undertaking in the sum of kshs 35,125,000/- and no more. secondly, the defendant admits that they are holding the sum of money shs 30.75 million which is the excess amount on the reserve price fetched following the sale of the interested parties' land to Kabansora Ltd. However, they contend that as the said sums of money is being claimed by

both the plaintiff and the interested parties, and that therefore they would not release it to any party except with the court's determination of the issues raised.

100. In my humble view, that is not an admission of a claim by the defendant especially where there is an intervention by interested parties laying claim to the said amount claimed by the plaintiff.

101. On the claim of 4,875,000 being commission on the 97.5 million, I decline to grant that prayer at this stage for reasons that the interested parties had laid claim to it, subject to proof, that the plaintiff not being an estate agent, registered or licensed by the Estate Agents Board under the Estate Agents Act, is not entitled to a commission or at all.

102. Therefore, in view of the highly contentious issues herein, it is only fair and just that any monies held by the defendant are preserved until the suit herein is heard and determined on merits.

103. On the prayer for cross examination of Mr Patrick Rugo Githinji advocate on his affidavit of 5th February 2015, I note that the plaintiff's counsel abandoned that prayer in his rejoinder submissions. Even if that were not to be the case, the court notes that the affidavit of Patrick Rugo Githinji advocate sworn on 5th February 2015 was in reply to the Originating Summons dated 21st January 2015 and not in reply to these interlocutory applications/proceedings. That being the case, the said affidavit being a defence to the Originating Summons can only be subject of cross examination at the hearing of the main Originating Summons. The prayer was therefore misplaced and I would have proceeded to dismiss it.

104. In the end, I make the following final orders:

1. The preliminary objection by the plaintiff dated 22nd September 2015 is hereby dismissed.
2. The application by the interested party dated 7th September 2015 is hereby dismissed.
3. The application dated 22nd September 2015 by the plaintiff is allowed only in part to the extent that:
 - a) All the sums of money held by the defendant as conceded, regarding the transaction between the interested parties herein and Kabansora Ltd respecting LR 1338/89 Athi River wherein the plaintiff acted as 'agent' for the interested party for purposes of procuring a buyer of the above stated land shall within 21 days from the date hereof be deposited in a fixed joint interest earning bank account to be opened and held jointly by the advocates for the plaintiff, the defendant and the interested parties until further orders of this court or until the suit herein is heard and determined.
4. The parties to this suit to expedite the hearing of this suit, which shall be given a hearing date on a priority bases.
5. Costs of the preliminary objection dated 22nd September, 2015, the applications dated 22nd September 2015 and 7th September 2015 shall be in the main suit and to the successful litigant(s).

Dated, signed and delivered at Nairobi this 19th day of August 2016.

R.E. ABURILI

JUDGE

In the presence of :

Mr Thuku for the plaintiff

Mr Mwiti holding brief for Mr Khaseke for the defendants

N/A for Interested Parties

C.A: Adline