



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 165 OF 2012(O.S)

H S M PLAINTIFF

V E R S U S

1. TIMOTHY V. M. OKWARO

(PRACTISING AS TIM OKWARO

ASSOCIATES ADVOCATES)..... 1st Defendant

2. I Y D W 2ND DEFENDANT

RULING

1. The Notice of Motion dated 12th November 2013 is filed by **I Y D W** the 2nd Defendant. It is for an order that the 1st Defendant be directed to release the sum of Kshs. 4 million to the 2nd Defendant.

BACKGROUND

2. The Plaintiff **H S M** in filing this case alleged that he and 2nd Defendant were husband and wife. Their marriage had broken down and there were various suits between them seeking orders for division of property. That notwithstanding the Plaintiff and 2nd Defendant agreed in December 2011 to jointly sell the property **L.R. No. KWALE/[Particulars withheld]**, which property was registered in both their names. The property was sold for a consideration of Kshs. 10 million.
3. The Plaintiff filed this case against 1st and 2nd Defendants. The 2nd Defendant **TIMOTHY VITALIS MAKOKHA OKWARO** practicing as an Advocate under the name of **TIM OKWARO & CO. ADVOCATES** acted for both the Plaintiff and the 2nd Defendant in the sale transaction.
4. The Plaintiff by this Originating Summons seeks determination of various questions, amongst them being, whether the 1st Defendant acted in Plaintiff's best interest in the transaction; whether the 1st Defendant can hold the sale proceeds in trust for both Plaintiff and 2nd Defendant; whether Plaintiff had given unequivocal instructions to the 1st Defendant on the manner of sharing the sale proceeds; whether Plaintiff had withdrawn his instructions from 1st Defendant in respect of the sale transaction; and whether the 1st Defendant is liable towards the Plaintiff in damages for

professional misconduct.

5. Plaintiff filed an interlocutory application seeking to restrain 1st Defendant from releasing the balance of the purchase price of the property. It is accepted by all parties that money then that is the balance of the purchase price held by 1st Defendant in respect of that transaction is Kshs. 4 million. An interim injunction was issued which restrained the release of the purchase money by 1st Defendant to 2nd Defendant but to date the injunction application has not been heard inter partes.
6. It is in that background that the 2nd Defendant has filed Notice of Motion dated 12th November 2013. It is important to state that on 23rd June 2014 the Plaintiff's and 2nd Defendant's Counsels, in the absence of 1st Defendant, recorded a consent to the effect that-

“By consent the 1st Defendant do release the balance of the purchase price due from the sale of KWALE/[Particulars withheld] sold to Act fast Security Ltd within 21 days from today to the 2nd Defendant's Advocates.”

In essence, by that consent the Plaintiff and 2nd Defendant agreed that the Notice of Motion dated 12th November 2013 be granted as prayed.

7. The order of consent did not indicate the amount to be released by 1st Defendant to 2nd Defendant and as the Advocates for Plaintiff and 2nd Defendant sought further orders of the Court to clarify the amount to be released and because the 1st Defendant had written to this Court complaining that the consent was recorded in his absence the Court ordered the Notice of Motion of 12th November 2013 be argued before Court.

NOTICE OF MOTION DATED 12TH NOVEMBER 2013

8. The Notice of Motion is supported by an affidavit of Gikandi Ngibuini, the 2nd Defendant's Learned Counsel. He deponed as follows-
 - **THAT unfortunately the Plaintiff has finally agreed that the sum of Kshs. 4,000,000/- being balance of the purchase price of Plot No. KWALE/[Particulars withheld] which belongs to the Plaintiff and the 2nd Defendant and which was sold to a lady called Mary Peters for a sum of Kshs. 10 million should be released to the 2nd Defendant as the 1st Defendant has waived any claim thereon. I annex a copy of letter from the Plaintiff to that effect and mark it as annexure “GN-2”.**
 - **THAT in the circumstances it is fair and just that the orders prayed for should be granted as this will enable the Court achieve its overriding objectives of efficiently disposing off this matter without wastage of time and/or allowing the incurring of unnecessary costs.**

In submissions before Court 2nd Defendant's Counsel submitted that 1st Defendant cannot refuse to release the amount of Kshs. 4 million on the ground he is owed legal fees for work done by him on behalf of 2nd Defendant. That 1st Defendant for more than one year had failed to tax costs that he alleges he is owed by 2nd Defendant. That the Plaintiff having withdrawn his injunction application there was no basis for 1st Defendant to refuse to release the funds to the 2nd Defendant.

9. The 1st Defendant opposed the application. In opposing the 1st Defendant by his written submissions stated that the Plaintiff's act of withdrawing the injunction application cannot lead to the 1st Defendant releasing the money held by him to 2nd Defendant. The 1st Defendant submitted thus, amongst other submissions.

- **A dispute can only be declared between the First Defendant and the Second Defendant, if and/or when, upon the compromise herein by the Plaintiff (by withdrawal in this case) the Second Defendant asks for or demands Rendering of Account by the First Defendant and if she disagrees with the Account then the First Defendant will be obliged to file his Bill or Bill of Costs for Taxation by the Taxing Master. And this will be purely in the matter of the period of the Advocate/Client Relationship between the First Defendant. And such Bill or Bill of Costs cannot be in the matter of the present case but in a separate Miscellaneous case.**
- **This Honourable Court is not Taxing Master, therefore it is surprising that whereas we were awaiting the Written Submission from Counsel for the Applicant to enable us respond by Written Submissions, instead, on 20.02.2014 we have been served with a Further Affidavit sworn way back on 02.02.2014, which in our view is a purported response to a non-existent Bill of Costs.**

We submit that sound legal advice to the Second Defendant should be that she asks for demands for us to Render Account or to file Bill of Costs.”

10. The Plaintiff did not oppose the application.

11. I have considered the application, the affidavit evidence and the submissions. The Plaintiff through its Counsel had intimated by letter dated 25th October 2013, marked annexure “GN 2” that he wished to withdraw this suit. That being so the application for injunction will also stand as withdrawn. As stated before the 1st Defendant was restrained from releasing the balance of the purchase price by an interim injunction issued on 13th September 2013.

12. On the injunction application, together with this suit being withdrawn there is no basis for the 1st Defendant to continue holding the amount of Kshs. 4 million. After all the 1st Defendant by his letter dated 18th September 2011 to 2nd Defendant, who was then his client, did confirm he was restrained to release that money by the injunction order. 1st Defendant by that letter stated-

“On the 14th September 2012 lawyers for Mr. H S M served us with an Order of the High Court injuncting us from releasing any money to you pending the hearing of an application by H seeking Kshs. 4,000,000/-.”

13. The Court has an inherent jurisdiction over Advocates who are officers of the Court. And although the 1st Defendant has opposed the application I am of the view that since no specific claim has been made by him of fees owed by 2nd Defendant since 13th September 2011, when the injunction was granted, the interest of justice demand the Court do accede to the application.

14. To that end I grant the following orders-

- a. **This suit is hereby marked as ‘Withdrawn’. Parties will be at liberty to move the Court on the issue of costs of the suit.**
- b. **The 1st Defendant shall within 21 days from this date hereof release to the 2nd Defendant through her Advocate Kshs. 4,000,000/-.**
- c. **The 1st Defendant shall pay costs of Notice of Motion dated 12th November 2013 to the 2nd Defendant.**

DATED and DELIVERED at MOMBASA this 19TH day of MARCH, 2015.

MARY KASANGO

JUDGE