



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 474 OF 2007 (O.S.)**

**IN THE MATTER OF SALE OF LAND REFENCES NUMBER 12502 KWALE DISTRICT**

**AND**

**IN THE MATTTTER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA) AND THE  
SUCCESSION ACT (CAP 160 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR PAYMENT OF MONEY IN THE HANDS OF  
AN ADVOCATE**

**BETWEEN**

**ORIENTAL COMMERCIAL BANK LIMITED**

**(FORMELY THE DELPHIS BANK LIMITED) :::::::::::PLAINTIFF**

**VERSUS**

**1. PRADEEP IAN MAKHECHA SUED AS THEADMINISTRATOR OF THE  
ESTATEOF**

**HASMUKH PRANJIVAN MAKHECHA TRADING**

**AS MAKHECHA & COMPANY ADVOCATES :::::::::::1<sup>ST</sup> DEFENDANT**

**2. MAKHECHA &COMPANY ADVOCATES :::::::::::2<sup>ND</sup> DEFENDANT**

**J U D G E M E N T**

1. The Originating Summons before the court is dated 12th September 2007 and filed in court on 14th September 2007 by the Plaintiff under Order XXXVI Rule 3 and 7, Order LII Rules 4 (1) and (2) of the Civil Procedure Rules, Section 47 and 50 of the Advocates Act (Cap 16 Laws of Kenya), Order LIII Rule 4 and 5 of the Civil Procedure Rules Section 3A of the civil Procedure Act, Section 56 of the Advocates Act and all other enabling provisions of the law.
2. The Originating Summons prayers and determination of issues as follows:-

Let Pradeep Ian Makhecha Of P.O Box 43935-00100 Nairobi And Who Is The Legal Administrator Of The Estate Of Hasmukh Pranjivan Makhecha (Deceased) Then Practicing Under The Name And Style Of Messrs Makhecha & Company Advocates And Makhecha & Company Advocates Of P.O. Box 43935-00100 Nairobi Within Ten (10) Days After Service Of This Summons Enter Appearance To This Summons Which Is Issued On The Application Of Oriental Commercial Bank Limited Who Was A Chargor Of The property known as Land Reference Number 12502 and who is entitled to payment of the sum of Kshs. 6,107,132.80/= which sum the 1<sup>st</sup> defendant who is vested with the management of affairs of Makhecha & Company Advocates the 2<sup>nd</sup> Defendant is liable to pay to the Plaintiff forthwith due to the deceased's and the 2<sup>nd</sup> Defendant's default to remit the said sum which was remitted to the deceased for onward transmission to the Plaintiff, for the determination of the following questions÷

1. Whether the Plaintiff is entitled to an order that the defendants do deliver into Honorable Court the sum of Kenya Shillings Six Million One Hundred and Seven Thousand, One Hundred and Thirty Two and Eighty Cents (Kshs. 6,107,132.80) which was at all material times hereto held by the firm of Makhecha & Company Advocates the 2<sup>nd</sup> defendant as stakeholders on behalf of the Plaintiffs.
  2. Whether the Plaintiff is entitled to an order that the defendants do tender cash account in respect of the sale and transfer of Land Reference Number 12520 Kwale District.
  3. Whether the Plaintiff is entitled to an order that the defendants do deliver the sum set out under prayer 1 above and tender the cash account prayed under order 2 above within seven (7) days from the date of such orders.
  4. Whether in default of compliance of orders 1 and 2 above judgment be entered for the Plaintiff and against the defendants for the sum of Kshs. 6,107,132.80/= together with interest at Court rates.
  5. Whether the Plaintiff is entitled to an order that the sum of Kshs. 6,107,132.80 due to the Plaintiff from the Defendants be set off against any sums found due to the defendants in High Court Miscellaneous Applications Numbers 73,74,75,77,79,273,392 and 393 all of 2007 between the Plaintiff and Makhecha & Company Advocates and/or any other sums of money which the Court and/or the taxing master may in any other cause find to be due from the Plaintiff to the defendants on account of costs due to Makhecha & Company Advocates.
  6. Whether the Plaintiff is entitled to an order of stay of execution in respect of the certificates of taxation that may be issued in High Court Miscellaneous Applications Number 73,74,75,77,79,273,392 and 393 all of 2007 being taxation proceedings between the 2<sup>nd</sup> defendants and the Plaintiff and/or any other sums of money which the Court may in any case find due from the Plaintiff to Makhecha & Company Advocates in any other cause.
  7. Whether an order may issue that the defendants do bear the costs of this summons and interest thereon till payments in full.
  8. Whether the Plaintiff is entitled to such further or other relief order as may be necessary to secure expeditious in full.
3. The Originating Summons is supported by the affidavit of **Atulkumar I. Dave** sworn on **12th September 2007**, and the Plaintiff's submissions filed in court on 28th October 2014.
  4. The Defendant has not filed any documents in opposition to the Originating Summons except the submissions filed on 2nd December 2014. Mr. Gitonga for the 2nd Defendant informed the court on 25th September 2014 that they would rely on the documents on record already, and that would appear to be Mr. Wambugu Gitonga's affidavit sworn on 22nd February 2014 on behalf of the 2nd Defendant.
  5. The Plaintiff's case is captured by the supporting affidavit of Atulkumar I. Dave, who depend that he is the General Manager of the Plaintiffs and have instructions of the Plaintiff's Board of Directors and is competent to swear the affidavit. Mr. Dave provided the history of the dispute, stating that by an agreement dated 14<sup>th</sup> September, 2000 the Plaintiff then known as Delphis Bank Limited sold a piece of land known as Land Reference Number 12502 situated in East of Mackinon Road in Kwale District to one Awadh Swaleh Said at a consideration of Kenya Shillings Fifteen Million (Kshs 15,000,000) only. (**A copy of a Sale Agreement was annexed as marked "AID"**). That Messrs Makhecha & Company Advocates the 2<sup>nd</sup> Defendant herein acted for the Plaintiff in the subject transaction while Messrs. Ghalia & Ghalia Advocates and Messrs A.

- Kassam Advocates acted for the Purchaser. Pursuant to the sale agreement aforesaid the Plaintiff executed a transfer in favour of the Purchaser's nominee known as Mombasa Cashew Nut Processors Kenya Limited. (***Annexed to the affidavit and marked "AID2" is a true copy of the said transfer instrument***).
6. That out of the purchase price of Kenya Shillings Fifteen Million (Kshs 15,000,000) the Purchaser initially remitted a sum of Kenya Shillings Eight Million (Kshs 8,000,000) directly to the Plaintiff. (***Annexed to the affidavit and marked "AID 3" are true copies of the correspondence confirming the said position***).
  7. Vide a letter dated 7<sup>th</sup> November, 2002 addressed to the 2<sup>nd</sup> Defendant the purchase's lawyers sought the 2<sup>nd</sup> Defendant's authority to deduct a sum of Kenya Shillings Eight Hundred Ninety Two Thousand and Seventeen Shillings and Twenty Cents (Kshs 892,017.20) on account of outstanding rates and remit the balance of Kenya Shillings Six Million One Hundred and Seven Thousand, One Hundred Thirty Shillings and Eighty cents (Kshs 6,107,132.80). The 2<sup>nd</sup> Defendant sought the Plaintiff's confirmation to the proposal above vide a letter dated 8<sup>th</sup> November 2002 and the Plaintiff acceded to the Purchaser's Advocates request through a letter dated 8<sup>th</sup> November, 2002 addressed to the 2<sup>nd</sup> Defendant. (***See annexure "AID 4" and "AID 5"***). The Purchaser's Advocates duly remitted the balance of the purchase price amounting to Kshs 6,107,132.80 to the 2<sup>nd</sup> Defendant.
  8. Indeed the Purchaser's Advocates vide letters dated 14<sup>th</sup> November 2002 and 26<sup>th</sup> November 2002 respectively addressed to the 2<sup>nd</sup> Defendant confirmed the said balance of the purchase price were remitted to the 2<sup>nd</sup> Defendant (***See "AID 6"***).
  9. The Applicant now alleges that the 2<sup>nd</sup> Defendant has refused and/or neglected to remit to the Plaintiff the said sum of Kshs 6,107,132.80 and/or tender an account in respect of the same despite numerous demands and requests from the Plaintiff. (***See "AID 7"***). The 2<sup>nd</sup> Defendant admits holding the said sum of Kshs 6,107,132.80 but maintains that it is holding the same pending settlement of the alleged outstanding fees due from the Plaintiff. (***See "AID 8"***).
  10. Mr. Hasmukh Pranjivan Makhecha who was the sole proprietor of the 2<sup>nd</sup> Defendant died on 17<sup>th</sup> June, 2006. The Plaintiff has established that on or about 17<sup>th</sup> July, 2006 the High Court of Kenya granted to the 1<sup>st</sup> Defendant limited grant of letters of administration ad colligenda bona to enable the 1<sup>st</sup> Defendant to enter into and/or make such arrangement as are necessary for the proper and continued running for the affairs of the 2<sup>nd</sup> Defendant. On the strength of the said limited grant the Defendants have proceeded to file in the High Court Numerous bills of costs against the Plaintiff and are seeking to have the same taxed by the court. Annexed hereto and cumulatively ***"AID 10"*** are true copies of the said bill of costs. However, the Defendants have refused to remit the said sum of Kshs. 6,107,132.80 notwithstanding that they have to proceed to file their bills in court for taxation. The Plaintiff through its Advocates on record had proposed to the Defendants through their Advocates that the said sum withheld be set off against any sums that the Court may find due to the Defendant in the taxation proceedings before the court but the Defendants have not given their response to the said proposal. (***See "AID 12"***).
  11. The Applicant believes that the 1<sup>st</sup> Defendant is mandated as the Legal Administrator of the Estate of Hasmukh Pranjivan Makhecha to pay all the debts of the deceased including monies received by the deceased in trust for and/on behalf of the Plaintiff. The Applicant further believes that a certificate of a taxing master is deemed in law to be final as to the amounts of costs covered thereof unless set aside or altered by the court and that on order for Judgement and execution can issue thereof. The Plaintiff does not know of any assets belonging to the deceased and or the 2<sup>nd</sup> Defendant within which the Plaintiff may lay claim thereon in the event the Defendant's fail to obey the court's order to remit the said sum of Kshs 6,107,132.80. The Plaintiff also believes that it would be unconscionable and unjust for the Plaintiff to be ordered to pay the Defendants any fees due to the deceased while on the other hand the funds due to the Plaintiff and received and withheld by the Defendants are not addressed, hence this application. The Plaintiff also tendered in evidence as exhibit ***"AID 13"*** a true copy of certificate of change of name from the Delphis Bank Limited to Oriental Commercial. Bank Limited.
  12. The 2<sup>nd</sup> Defendants did not oppose the application except through the 2<sup>nd</sup> Defendant's

submissions. He submitted that Mr. Hasmukh Pranjivan Makhecha (deceased) died on 17<sup>th</sup> June, 2006. At the time of his death he was running Makhecha & Company advocates, the 2<sup>nd</sup> Defendant herein, as a sole proprietor. The transaction giving rise to this suit is as stated at paragraphs 6 to 9 of the Supporting Affidavit of AtulkumariI Dave dated 12<sup>th</sup> September 2007. The transaction is said to have been done in November of 2002 and there is no letter from the 2<sup>nd</sup> Defendant stating that the said amount was ever received by the firm. Further, there is no correspondence making specific reference to the firm holding that amount or having ever received the same. The Defendant stated that no documents have been produced to support the position that the money was actually paid to the 2<sup>nd</sup> Defendant. The letters alluding to that position have no evidence in support of the contention. In any event, a reading of the letter dated 26<sup>th</sup> November 2002 indicates that the sale transaction was nullified. In Mr. Kassam's letter, it is evident that there was more to the matter than is disclosed by the Applicant herein. The Defendant submitted that it is not clear from the evidence presented by the applicant whether the situation referred to in the letter was ever remedied (***See penultimate paragraph of the letter by Mr. Kassam dated 26<sup>th</sup> November 2002- Annexure AID 6***).

13. The Plaintiff's claim of the sum of Kshs. 6,107,132.80/= is also contradicted by the contents of Mr. Kassam's letter dated 14<sup>th</sup> November 2002. The said letter, demands for an amount of Kshs. 1,314,935.75/=, which was to come from the deposit purportedly paid to the 2<sup>nd</sup> Defendant. Was this amount deducted? If so, what would the applicant be entitled to? Without the input of Mr. H.P. Makhecha (deceased), on what the true conclusion in the matter was, and without seeing all other correspondence subsequent to these the Defendant submitted that it is not possible to tell what the final position was. The file in that relation is no longer available to the 2<sup>nd</sup> Defendant. The Plaintiff's application is opposed by the 2<sup>nd</sup> Defendant's affidavit sworn by Wambugu Gitonga on 22<sup>nd</sup> February 2013. It was submitted that Mr. Wambugu Gitonga joined the said firm in January 2005. This is evidence of his lack of personal knowledge of what had transpired between the parties in 2002. During this period Mr. Wambugu Gitonga, was not on board as an advocate employed by the deceased and he is therefore not privy to any transaction that might have been carried on between the Plaintiff and the deceased. The Defendant submitted that the letters from the firm that are annexed to the plaintiff's application [**AID 8**] clearly state that funds held by the firm were so held as lien against payment of fees owed. There is the letter from the plaintiff to the firm dated 29<sup>th</sup> June 2005 demanding a sum of K.Shs. 7 million relating to various High Court matters referred to in the letter. The firm responded on 30<sup>th</sup> June 2005 seeking details of the same. No response seems to have been given. This happened during the lifetime of Mr. H.P. Makhecha. He died on 17<sup>th</sup> June 2006. Letters of administration ad colligenda bona were granted to Pradeep Ian Makhecha on 17<sup>th</sup> July 2006, for the purpose of making such agreement or arrangement as are necessary for the proper and continued running of the affairs of the firm of Makhecha & Company advocates (the 2<sup>nd</sup> Defendant herein). It was submitted that the letters of administration therefore gave Pradeep Ian Makhecha the authority to appoint Mr. Wambugu Gitonga in 2007, to wind up the firm of Makhecha & Company Advocates, collect the outstanding dues thereof and take over the files of firm in accordance with the law. It was submitted that Mr. Wambugu Gitonga is currently running the affairs of the firm of Makhecha & Company Advocates only in relation to the files of the 2<sup>nd</sup> Defendant that the clients did not take away and not in relation to the bank accounts of the 2<sup>nd</sup> Defendant. Meaning that there is no money being held by Mr. Wambugu Gitonga as a stakeholder on behalf of the Plaintiff. It was further submitted for the Defendants that the proceedings herein are an afterthought and are brought improperly before this court, to resolve issues that are seemingly not before this court, without the plaintiff making full disclosure before this court, in regard to its current relationship, or lack thereof, with the 2<sup>nd</sup> defendant, and how the same was concluded. The firm of Makhecha and Gitonga Advocates entered appearance on behalf of the 2<sup>nd</sup> Defendant in order to clarify its involvement in this matter. The firm currently goes by the name Makhecha and Gitonga advocates. Therefore, the Plaintiff's claim against the 2<sup>nd</sup> Defendant is unfounded and simply because the firm goes by the name of the late Makhecha does not warrant the Plaintiff to claim anything from the 2<sup>nd</sup>

Defendant. The Defendant asked this court to find that the 2<sup>nd</sup> Defendant should be removed as a party to this suit and all claims against it by the Plaintiff should subsequently fall, and to dismiss the Originating Summons.

14. I have carefully considered the Originating Summons and submissions of the parties. The only issue is whether this court considers the claim proved.

15. It is important to note firstly, that the Originating Summons is not opposed, and therefore the sworn statements of fact made in the supporting affidavit of Mr. Atulkumar I. Dave have not been challenged. It is the law of affidavits that what is stated as a fact in an affidavit can only be challenged by another affidavit. Therefore, attempting to challenge the content of Mr. Atulkumar Dave's affidavit through submissions would not amount to much in law.

16. Secondly, I have seen and verified the documents annexed to affidavit of Atulkumar I. Dave and in particular,

- ***The agreement for sale - annexure AID 1***
- ***Letter from Plaintiff calling for Kshs.6,107,12.86 – (annexture AID 5)***
- ***Letter from 2nd Defendant admitting holding the funds - (annexture AID 8).***

17. Having so noted, the finding of this court is that:-

1. The Plaintiff instructed the 2nd Defendant to act for them in sale transaction of the property known as LR No. 125002 situated in Kwale District which property the Plaintiff had entered into an agreement to sale to one Awadh Swaleh at a considering of Kshs.15,000,000/=.
2. The purchaser directly remitted a sum of Kshs.8,000,000/= to the Plaintiff.
3. The 2nd Defendant received the balance of the purchase price from the purchaser's advocates but refused to remit the agreed net balance of Kshs.6,107,132.80 and or tender accounts in respect for the same despite numerous requests by the Plaintiff.
4. The 1st Defendant was granted letters of administration to run the affairs of the 2nd Defendant and has likewise refused to render accounts.
5. The 1st Defendant however proceeded to instruct his advocates to tax various bills against the Plaintiff with regard to the services rendered by the 2nd Defendant.

18. Pursuant to the foregoing I enter judgement as follows:-

1. ***Judgement is hereby entered against the Defendants jointly and severally for the questions raised by the Plaintiff in the Originating Summons.***
2. ***Costs herein shall be to the Plaintiff.***

That is the judgment of the court.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JUNE 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Bundotich for the Plaintiff

No appearance for the 1st Defendant.

Mr. Gitonga for the 2nd Defendant

Teresia – Court Clerk