



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 724 OF 2012 (O.S.)

**JOSEPH NJOGU
MUITA..... APPLICANT**

VERSUS

MUREITHI PATRICK KIMITI T/A

**P.K MUREITHI & CO ADVOCATES.....
.....RESPONDENT**

RULING

INTRODUCTION

1. The Applicant's Originating Summons dated 1st October 2012 and filed on 20th November 2012 was brought under the provisions of Order 52 Rule 4 (1) (a), 4 (1) (b), 4 (2) and 4 (3) of the Civil Procedure Rules. It sought the following Orders:-
 - a. **THAT Mureithi Patrick Kimiti Advocate do deliver to the applicant herein a detailed cash account in respect of monies received on the Applicant's behalf in respect of the sale of LR No 9508/3 ("the property") to Joseph M Muchiri.**
 - b. **THAT Mureithi Patrick Kimiti Advocate do pay the Applicant herein within 7 days from the courts order, the full sum received on behalf of the Applicant in the said sale of Kshs 1,050,000/= with interest accruing at the rate of 20% per annum from 6th December 2010 until payment in full.**
 - c. **THAT Mureithi Patrick Kimiti Advocate do bear the costs of this application.**
2. The grounds under which the said summons was premised were as follows:-
 - a. **The Respondent acted for the Applicant in (sic) of L R No 9508/3 ("the property") to Joseph M Muchiri at a purchase price of Kshs 16,000,000/=.**
 - b. **That it was agreed between the parties herein that out of the entire purchase price, Kshs 12,000,000/= would be paid to the Applicant and the balance of Kshs 4,000,000/= was to be used to cater for legal fees and Estate Agents.**
 - c. **However, (sic) Respondent in a clear breach of the duty he owed to the Applicant, forwarded Kshs 10,950,000/= and not Kshs 12,000,000/= leaving a balance of Kshs 1,050,000/=.**
 - d. **The Respondent was indebted to the Applicant in the sum of Kshs 1,050,000/=.**

AFFIDAVIT EVIDENCE

3. The said summons was supported by the Applicant's affidavit sworn on 1st October 2012. It set out in *extenso* the grounds on the face of his application. He annexed copies of the Agreement for Sale dated 6th October 2010 between him and the Purchaser namely Joseph M Muchiri, a letter dated 23rd June 2011 by John W Muiya confirming receipt of part payment of Kshs 1,000,000/= leaving a balance of Kshs 3,400,000/= as commission and a demand letter dated 17th August 2011 by M/S Sichangi & Co Advocates to the Respondent exhibits marked "JNM 1", "JNM 2" and "JNM 3" respectively.
4. The Respondent filed a Replying Affidavit through Bernard Mureithi who was the advocate practicing in the name and style of M/S P K Mureithi & Co Advocates. He was acting for both the Applicant and Joseph Macharia Muchiri in the transaction in respect of L.R No 9505/3 (hereinafter referred to as "**the subject property**").
5. He gave a breakdown of the sum of Kshs 1,050,000/= as follows:-

- | | | |
|---------------------------|------|-----------|
| a. Unpaid stamp duty | Kshs | 340,000/= |
| b. Obtaining Court orders | Kshs | 200,000/= |

to lift caveat

- | | | |
|-------------------|------|----------|
| c. Rates Payments | Kshs | 45,000/= |
|-------------------|------|----------|

- | | | |
|--------------------------|------|----------|
| d. Obtaining 6 Clearance | Kshs | 45,000/= |
|--------------------------|------|----------|

Certificate

- | | | |
|----------------------------------|------|----------|
| e. Plane ticket for the vendor | Kshs | 300,000= |
| e. including Car rental paid for | | |

by the purchaser

- | | | |
|-----------------------|-------------|------------------|
| f. Further Legal fees | <u>Kshs</u> | <u>120,000/=</u> |
|-----------------------|-------------|------------------|

TOTAL	<u>Kshs 1,050,000/=</u>
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6. In addition, the Respondent contended that further legal fees accrued as a result of more work required in obtaining completion documents and facilitation of the Applicant's travel from the United States of America to Kenya for purposes of proceeding with the transaction. It was its further averment that based on the aforesaid calculation, the amount received in the client account for onward transmission to the Applicant was in the sum of Kshs 5,070,000/= and as a result, it did not owe the Applicant any monies.
7. The Respondent annexed copies of the Stamp Duty Declaration, Assessment and pay – in – slip, Transaction Voucher of Stamp Duty in the sum of Kshs 340,000/=, an order issued by Okwengu J on 24th February 2011, Payment Requests for Rates in the sum of Kshs 48,906/= exhibits marked as "BM 1", "BM 2" and "BM 3" respectively.

LEGAL SUBMISSIONS BY THE APPLICANT

8. In his written submissions dated 3rd May 2013 and filed on 16th May 2013, the Applicant stated that the court could order the delivery by the advocate of a cash account and the payment or delivery by the advocate of money or security as the Respondent was withholding the sum of Kshs 1,050,000/= without justification.
9. He referred the court to Order 54 Rule 4 (1) (a) and Rule (1) (a) of the Civil Procedure Rules,

2010 which provides as follows:-

“Where the relationship of advocate and client 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 by the advocate of a cash account**
- b. **the payment or delivery up by the advocate of money or security”.**

10. The Applicant discounted the Respondent’s assertions that it paid a sum of Kshs 340,000/= arguing that clause 7.1 of the Agreement for Sale was clear that the stamp duty was to be paid by the Purchaser. The said clause stipulated as follows:-

“The Stamp Duty on the transfer and the registration fees and other charges payable with respect to the registration of the Transfer shall be payable by the Purchaser”.

11. It was his contention that the Respondent’s payment of the Stamp Duty, contrary to the Agreement for Sale, could not be visited upon him.
12. As regards the sum of Kshs 200,000/= which the Respondent stated was its fees to obtain the aforesaid court order by Okwengu J, the Applicant submitted that the Respondent had not given a breakdown of the task or itemised the steps taken as was required by the Advocates Remuneration Order.
13. He pointed out that the production of the Rates payment was no proof that the amount demanded therein was paid by the Respondent and that it was erroneous for the Respondent to have alleged that it obtained six (6) Rates Clearance Certificates when it had only annexed one (1) Rates payment for Kshs 43,906/=.
14. He put the Respondent to task for having failed to submit any evidence to prove that it had paid plane ticket and car rentals for him and dismissed the sum of Kshs 120,000/= being further legal fees as baseless.
15. He referred the court to Order 52 Rule 4(3) of Civil Procedure Rules, 2010 which states as follows:-

“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 advocate’s lien, if any, as the court deems fit”.

16. He said that Kshs 600,000/= was set aside to cater legal fees and other costs. It was his argument that the Respondent had not claimed that he was exercising his right of lien over the said sum of Kshs 1,050,000/= and that it had not filed any taxation with regard to this matter.
17. He therefore urged the court to allow the said Originating Summons.

LEGAL SUBMISSIONS BY THE RESPONDENT

18. In its written submissions dated 15th June 2013 and filed on 17th June 2013, the Respondent pointed out that the stamp duty of Kshs 340,000/= was paid by the said Joseph Macharia Muchiri, the purchaser of the subject property. It denied that the said sum of Kshs 340,000/= as well as the sum of Kshs 45,000/= for Rates, air ticket and car rentals passed through it.
19. It relied on Section 5 of the Advocate Remuneration Order to justify its charging further legal fees when it obtained further orders to facilitate the sale transaction. It said that the said section provided for special fee for exceptional importance and complexity. The said section stipulates as follows:-

1. **In business of exceptional importance of unusual complexity an advocate shall be entitled to receive and shall be allowed as against his client a special fee in addition to the remuneration provided in this Order.**
2. **In assessing such special fee regard may be had to –**

- a. **the place at or the circumstances in which the business or part thereof is transacted;**
- b. **the nature and extent of the pecuniary or other interest involved;**
- c. **the labour and responsibility entailed; and**
- d. **the number, complexity and importance of the documents prepared or examined.**

20. It argued that the expenses therein were outgoings within the meaning of Clause 2.2 of the Law Society Conditions of Sale (1989) and that since the monies were made directly by the Purchaser who deducted the same, it could not be held liable for monies that it never received.

21. It was also its contention that the Applicant never showed how he travelled to the United States and that consequently, he was entitled to the fees that it had charged as was envisaged in Section 19 of the Advocates Remuneration Order.

22. It concluded by saying that the Applicant was fully aware that the said Joseph Macharia Muchiri deducted the sum of Kshs 1,050,000/= from the final purchase price which it said it never received and therefore urged this court to dismiss the originating summons with costs to it.

LEGAL ANALYSIS

23. From the Respondent's Replying Affidavit, it is evident that it was acting for both the Applicant and the Purchaser, Joseph Macharia Muchiri in the sale and purchase of the said subject property.

24. It does appear from the Respondent's affidavit evidence that save for the sum of Kshs 320,000/= which the Respondent stated was for fees to obtain court orders to lift the caveat and further legal fees, it did not receive the sum of Kshs 730,000/= which it stated was deducted by the said Joseph Macharia Muchiri before he remitted to it the balance of the purchase price.

25. There were demands and counter – demands by the Applicant and the Respondent as regards what each was entitled to. The question of payment of the rates was a pertinent issue and a receipt ought to have been provided to support the same. Perusal of Exhibits "BM 3" and "BM 4" are not proof of payments and the court agrees with the Applicant's submissions in this regard. The court notes, as the Applicant pointed out, that a copy of the Rates Demand was duplicated. It is, however, evident from the Respondent's submissions that the said Joseph Macharia Muchiri paid a sum of Kshs 45,000/= for rates.

26. The question of airfare and car rentals was not adequately addressed. It is not clear who paid the same or why the same needed to be paid for the Applicant. The court is of the view that there was no full disclosure of this fact by both parties making it difficult for it to make a conclusive finding.

27. From the affidavit evidence, it is not possible for this court to tell exactly what transpired as the Respondent was acting for the Applicant and the said Joseph Macharia Muchiri. It would be important therefore that the Respondent deliver to the Applicant a detailed cash account in respect of monies received on the Applicant's behalf as regards the sale of the subject property supported by evidence in view of the fact that he was under a duty to protect the respective parties' interest in the said transaction.

28. As the issue of the fees charged by the Respondent were hotly contested the Applicant, it would be fair and just that the Respondent lodge a Bill of Costs for taxation. This is because the Respondent did not furnish the Applicant with an itemised Bill of Costs and there does not appear to have been an Agreement of the fees payable by the Applicant as provided for in Section 45 of the Advocates Act Cap 16 (laws of Kenya).

29. The power to order such taxation is stipulated in Order 52 Rule 3 of Civil Procedure Rules, 2010 set out in paragraph 15 hereinabove.

DISPOSITION

30. As prayer No (1) and (2) of the Applicant's Originating Summons cannot be granted simultaneously, at least not until the issue of the Respondent's costs is resolved or delivery of cash account is delivered to the Plaintiff by the Respondent, the court hereby grants prayer No (1) and hereby reserves determination of prayer No 2.

31. The Respondent is hereby directed to comply with Prayer (1) within thirty (30) days from the date of this ruling.

- 32.The upshot of this court’s decision is that it will render a ruling at this juncture in respect of prayer No (1) and defer the final judgment until after the Respondent’s Bill of Costs is determined.
- 33.The Respondent is hereby directed to file its Bill of Costs within thirty (30) days from the date of this ruling.
- 34.Either party will be at liberty to apply to court for further orders. Costs in the cause.
- 35.It is so ordered.

DATED SIGNED and DELIVERED at NAIROBI this 31st day of March 2014

J. KAMAU

JUDGE