



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 182 OF 20102 (O.S)

SERAH DAMA MWANZIA.....APPLICANT

-VERSUS-

MTANA R. MWAHUNGA T/A

MWAHUNGA MTANA & CO. ADVOCATES.....RESPONDENT

JUDGMENT

Introduction

1. By an Originating Summons Application (“the application”) dated 27th September 2012 and filed on the same date, the Applicant seeks a determination, as against the Respondent, of the following questions:
 - a. **A cash account for the sale proceeds as Vendor's Advocates in respect of Plot MN/III/3861;**
 - b. **A cash account of the decretal sum from MSA HC Misc Appln. No. 22 of 2012;**
 - c. **Payment and delivery of both sale proceeds and decretal amounts to Messrs. Mogaka Omwenga & Mabeya Advocates for the Plaintiff Applicant;**
 - d. **Delivery of the court file and report on the status of execution process in Msa. HC Misc. Appln. No. 22 of 2012.**
 - e. **A set off of the Respondent's Advocates/Clients costs for the sale transaction in respect of Plot MN/III/3861 and for MSA HC Misc. Appln. No. 22 of 2012 with the Applicant's costs for the present proceedings.**

The Applicant's Case

2. The application is supported by the Applicant's affidavit sworn on 27th September 2012.
3. The Applicant's case is that she had instructed the Respondent to act for her in a transaction involving the sale of her property known as Plot No. MN/III/3861 at a price of Kshs. 14,000,000.00. That the Respondent has received a substantial amount of the purchase price but has failed to remit the same to the Applicant or to give an account of the same.
4. The Applicant contends that a case, being HC Misc. Application No. 22 of 2012, was filed on her behalf by the Respondent to enforce a professional undertaking by A.A. Said & Company Advocates who were the advocates of the Purchaser of the Applicant's said property. That as a result of the said suit, the Respondent was paid a further Kshs. 2,400,000.00 which he has not

remitted to the Applicant or accounted for.

5. It is the Applicant's case that to date, the Respondent has received a sum of over Kshs. 10,000,000.00 on her behalf.

The Respondent's Response

6. The Respondent filed a Replying Affidavit sworn on 7th November 2012. His response is that the reason why the Applicant has not received her monies in time and in full is because the Purchaser delayed in paying for the transaction and to date the Purchaser is yet to pay almost Kshs. 4 Million.
7. The Respondent states that part of the monies received was paid out to squatters on the property as well as the Applicant's brother.
8. The Respondent further states that as far as payments regarding Mombasa High Court Miscellaneous Application Number 22 of 2012 are concerned, the same have not been remitted to the Applicant because the matter is still pending in court; execution process is still underway and the Respondent is yet to tax his fees.
9. The Respondent finally states that he has made some payments to the Applicant and therefore the allegation that he has violated the Applicant's right by holding her monies is not true.

The Issue for Determination

10. In my view, the main issue for the court's determination is whether this is a case that warrants the Respondent (who was the Applicant's advocate) to be ordered to give an account for all the monies received by himself on behalf of the client and whether all the prayers in the Originating Summons application should be granted.

Analysis and Determination

11. It is not in dispute that the Respondent was the Applicant's advocate in respect of sale of the Applicant's property known as Plot No. MN/III/3861 which was sold at a price of Kshs. 14,000,000.00 to a company known as Shella Properties Limited (“**the Purchaser**”). It is also not in dispute that the Purchaser paid some monies towards the purchase price, but delayed in making such payments which delay resulted in a court case (Mombasa High Court Miscellaneous Application Number 22 of 2012) for the enforcement of the professional undertaking by the Purchaser's advocate, A.A. Said & Company Advocates.
12. What, however, is in dispute is how much monies have been paid by the Purchaser to the Respondent and whether the same have been remitted to the Applicant by the Respondent.
13. The Applicant contends that the Respondent has received a sum of over Kshs. 10,000,000.00 on her behalf but has only paid her Kshs. 2,400,000.00. This is largely supported by Respondent's letter of 18th September 2012 which is in the following terms-

“18th September 2012

Our Ref: MM/cv/47/010'S'

Your Ref: S/213/1/2012/WM-ea

MOGAKA OMWENGA & MABEYA

ADVOCATES

MOMBASA

Dear Sir,

RE: PLOT NO. MN/III/3861 – SERAH KALUME KITSAUMBI

We refer to the above matter and to our discussion to meet yourself in your chambers on Friday the 14th September 2012. I tried to call you but we think you were busy.

We are writing to you to put things into perspective in this matter. This matter has really dragged and has taken too long. This has been occasioned by so many issues. The Agreement was signed way back on the 16th of December 2010. The transfer was executed by our mutual clients on the 27th of May 2011. We vigorously have been pushing for Mr. Said to pay the consideration but it pains to say that the way he has been paying this money is not only wrong for a professional but really sad. We have indulged him several times. We were forced to file an OS in Court and a Consent was recorded, Misc. Application No. 22 of 2012. After the consent, we filed warrants on the 17th of April 2012 and pushed Auctioneers to seek for the payment. The decretal sum was Kshs. 6,638,020/-. So far out of the decretal sum, the amount paid to us vide cheque No. [particulars withheld] each for Kshs. 850,000/- and another one No. [particulars withheld] on the 4/5/2012 amounting to Kshs. 2 Million and further Kshs. 700,000/- which was paid through Makini Auctioneers. The other cheques were stopped information which is well within your knowledge.

As we are writing there is still pending a balance of Kshs. 3,938,020/- excluding the interest that has so far accrued. For ease of clarity and openness, I do enclose for you the filed copies of warrants. You will agree with us therefore the purchaser is yet to pay Kshs. 4 Million.

By dint of this letter, we do authorize the firm of A. A. Said and Company to pay the remaining balance directly to our mutual client upon which then we shall sit down and pay the balance thereof as already agreed between ourselves.

Thank you for your indulgence.

Yours faithfully,

MWAHUNGA MTANA & COMPANY

MTANA R. M.

Cc. A. A. Said & Co. Advocates

Cc. Client.”

14. At paragraph 11 of his Replying Affidavit, the Respondent states that “to date the Purchaser is yet to pay almost Kshs. 4 million”. This implies that out of the total purchase price of Kshs. 14 million, the Respondent has received about Kshs. 10 million because only Kshs 4 million is remaining. The Applicant contends that she has only received Kshs. 2,400,000.00. The Respondent does not state with specificity the amount of money he has paid to the Applicant out of the Kshs. 10 million he admits to have received. Going by these facts, it is apparent that there are some monies that the Respondent is yet to remit to the Applicant. I believe the letter reproduced above probably more represents the truth of the amount received.

15. This is a matter in which the Applicant accuses the Respondent of receiving monies on her behalf

but failing to remit the same to her. The best way to rebut such claims is for the Respondent to render an account of the exact amount of monies he has received on behalf of the Applicant and how the monies have been applied.

16. The Respondent avers that there was delay on the part of the purchaser to make payments but at the same time he admits having received about Kshs. 10 million. As far as Mombasa High Court Miscellaneous Application Number 22 of 2012 is concerned, the Respondent claims that the same is still pending. However, since he admits that judgment was entered and a decree passed on 6th March 2012 for Kshs. 6,337,000.00 yet the execution is for Kshs. 3,938,020.00, it is clear that the Respondent has been paid about Kshs. 2,398,980.00 which he should account for. In deed, in his written submissions filed on 21st August 2013, the Respondent admits having received Kshs. 2,700,000.00 in partial satisfaction of the decree.

17. The fact that the Respondent avers that he made certain payments to squatters and the Applicant's brother only supports the need to render an account so that it is clear how much he paid in respect of these persons and the basis upon which such payments were made.

18. In my view, this is a case that warrants the court to order a delivery of a cash account by the Respondent of the monies received on behalf of the Applicant in respect of the sale transaction of Plot MN/III/3861 and the decretal sum from Mombasa High Court Miscellaneous Application Number 22 of 2012 as per prayers 1 and 2 of the application.

19. The Respondent has failed even in this action to adequately respond to the Applicant's claim.

20. It is for that reason that I make the following orders-

- a. **The Respondent shall within 21 days from today's date render to the Applicant a cash account of the sale proceeds of Plot MN/III/3861.**
- b. **The Respondent shall within 21 days from today's date render an account of the decretal sum recovered in Mombasa HC. Misc. Application No. 22 of 2012.**
- c. **The Respondent shall deposit within 21 days the sale proceeds of the Plot No. MN/III/3861 with the firm of MOGAKA OMWENGA & MABEYA ADVOCATES who shall receive the said proceed on behalf of the Applicant.**
- d. **The Respondent shall within seven (7) days from this date hereof deliver the file held by him on behalf of the Applicant in respect of Mombasa H.C. Misc. Application No. 22 of 2012 to Mogaka Omwenga & Mabeya Advocates.**
- e. **The Costs are awarded to the Applicant.**

DATED and DELIVERED at MOMBASA this 26TH day of JUNE, 2014.

MARY KASANGO

JUDGE