



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 595 OF 2009 (OS)

DEWDROP ENTERPRISES LIMITED.....PLAINTIFF

- VERSUS -

**WAMBUGU WAMBUI ANGELINE T/A A.W. KINUTHIA & CO. ADVOCATES
DEFENDANT**

JUDGMENT

1. The amended originating summons seeks judgment against the defendant for Kshs 361,504 and costs. The defendant is an advocate of the High Court of Kenya. Edward Wachira, a director of the plaintiff, stated that the sums claimed were deposited with the advocate in the years 2006, 2007, 2008 and 2009 on account of legal and filing fees for 10 cases set out at paragraph 3 of his supplementary affidavit.
2. In October 2009, the plaintiff “discovered” that the advocate did not have a valid practicing certificate. On 30th October 2009, the plaintiff sought a refund of Kshs 424,054 consisting of the sums now claimed and an additional sum of Kshs 62,550 held on account of one Duncan Kireri Wachira, a director of the plaintiff. The plaintiff relied entirely on his depositions sworn on 9th February 2010 and 20th September 2012 in support of the amended originating summons.
3. The defendant contests the action. Her learned counsel placed full reliance on the affidavit sworn on 25th February 2010. The rebuttal tendered is that the sums claimed were paid to the exchequer as court filing fees for the cases I referred to.
4. I have considered the affidavit evidence and address by the parties. It is common ground that the defendant received the sums claimed by the plaintiff. The defendant’s learned counsel admitted as much. Doubt is also removed by the copies of receipts and cheques annexed to the supplementary affidavit showing payment to the defendant’s law firm on various dates between the years 2006 and 2008. I have also seen the annexure marked “ETW 4”, a letter from the Law Society of Kenya dated 23rd October 2009. The letter confirms that the defendant had not taken out a practicing certificate for the year 2009. There is no evidence before me that she had not done so between 2006 and 2009.
5. The cases the subject matter of this suit were all filed between 2003 and 2008. The payment receipts and cheques I referred to were made during the same period. The cases are particularized at paragraph 3 of the supplementary affidavit as follows:

i. The matter of Arbitration between Dewdrop Enterprises Limited and Harree Construction Limited.

ii. *CMCC 10203/2003 at Milimani Commercial Courts.*

iii. *CMCC 512/2008 at Milimani Commercial Courts.*

iv. *MISC 424/2008 at Milimani Commercial Courts.*

v. *MISC 684/2008 at Milimani Commercial Courts.*

vii. *SRMCC 13180/2006 at Milimani Commercial Courts.*

vii. *Misc 992/2008 at Milimani Commercial Courts.*

viii. *HCC 158/2007 Milimani Commercial Courts.*

ix. *SRMCC 12742/2006 at Milimani Commercial Courts.*

x. *Civil Appeal 276/2008 at Milimani Commercial Courts.*

6. In the absence of contrary evidence, I take judicial notice that cases are accepted at the court registries upon payment of filing fees. Secondly, all the cases were filed before 2009, the year when the defendant had not taken out a practicing certificate. Accordingly, the averment at paragraph 3 of the supplementary affidavit that “pleadings [were] drawn and filed by the defendant in contravention of sections 9, 31, 33 and 34 of the Advocates Act” is without evidential foundation. It is a cardinal precept of the law of evidence, codified at section 3 of the Evidence Act, that a fact is not proved if it is neither proved nor disproved. See *Gadhi Brothers Vs H.K. Njage T/a H K Enterprises* Nairobi, High Court case 1330 of 2001, *Kenya Anti-Corruption Commission Vs David Onsare Rogito and 3 others* [2012] e KLR.

7. The allegations by the plaintiff that the defendant was holding Kshs 62,550 belonging to Duncan Kireri Wachira, a director of the plaintiff and that she attempted to swindle the plaintiffs of Kshs 59,000 are devoid of evidence. First, Duncan Kireri is not a party to this suit. He might be a director of the plaintiff but the company remain a distinct legal *persona*. *Salomon Vs Salomon* [1897] A.C. 22. Secondly, the plaintiff has not tendered cogent evidence of the theft of Kshs 59,000.

8. I have then looked at the replying affidavit filed on 25th February 2010. The defendant depones that the sum of Kshs 361,504 “is inclusive of monies paid to third parties by the plaintiff on its own volition without consent or knowledge of the defendant”. She denies being entrusted with the sum “for safe custody or legal fees”. Her learned counsel, as stated, claimed that the sums were employed to payment of legal fees. The defendant has however not tendered an account or at all of the use of funds that she acknowledges she received. But in our adversarial system of justice, it is not really her case to disprove it: it is the plaintiff’s onus to prove it. In a synopsis, the plaintiff has not proved it and the defendant has not sufficiently disproved it. The fact is thus not proved. See *Gadhhi Brothers Vs H.K. Njage* (supra). As an officer of the court, she owed a duty to her client and the court for a better account. But within the confines of the prayers sought in the amended originating summons, and the evidence, there is no factual or evidential basis to order a refund of Kshs 361,504.

9. In the result, the amended originating summons dated 5th February 2010 is hereby dismissed. In the interests of justice, I shall make no order as to costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of March 2013.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr. E. Wachira (Director) for the Plaintiff.

No appearance for the Defendant

Mr. Collins Odhiambo Court Clerk.