REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL SUIT NO. 610 OF 2012(OS)

THE STATUTORY MANAGER

UNITED INSURANCE COMPANY LIMITED…….....…..APPLICANT

VERSUS

EDWARD MURIU KAMAU, NJOROGE NANI MUNGAI &

PETER MUNGE MURAGE P/A MURIU MUNGAI & CO.ADVOCATES……..... DEFENDANT

J U D G M E N T

1. On 19th September, 2012, the applicant took out Originating Summons under Order 52 of the Civil Procedure Rules seeking various orders of accounts against the Respondents. Principal amongst them was an Order compelling the Respondents to pay to it the sums of Kshs.68,568,664/= being part of the proceeds of the purchase price from the sale of LR. No. 25196 (Original Number 209/7594) (hereinafter "the suit property") together with accrued interest. The Applicant also sought an order for the Respondents to furnish a full and detailed itemized Statement of Account of the outstanding balances and or any kind of payments received and or made in respect of the said sale.
2. The background to this matter is that on 15th July, 2005, the Applicant was appointed the Statutory Manager of United Insurance Company Ltd (hereinafter "UIC"). Pursuant thereto, the Applicant and the Respondents entered into an Advocate-Client relationship, whereby the Respondent acted for the Applicant in various matters including the sale of the Suit property which was sold to Zep-Re (P.T.A Reinsurance Company) for a sum of Kshs.242,000,000/-. In that transaction, the Respondents acted for the applicants as Vendors and received a sum of Kshs.193,380,489/-. The Applicants contended that out of the said sum, the Respondents had irregularly continued to withhold a sum of Kshs.68,568,664/-.
3. In support of its case, the Applicant filed two Affidavits of Mumut Ole Sialo sworn on 19th September, 2012 and 21st January, 2013, respectively. The Applicant contended that on several occasions, it had requested the Respondent to supply a statement of account in respect of the subject sale but the account submitted vide a letter dated 21st February, 2007 was not satisfactory. The Applicant took issue with the said statement and contended that from an examination of the same, it was clear that part of the sale proceeds had been retained and utilized by the Respondents without its Authority.

4. It was the Applicant's case that although it had instructed the Respondents on various matters, such instructions were unconnected the sale of the suit properly and the proceeds therefrom. That the money held by the Respondents was so held in trust for the Applicant as a client and should not be diverted for other purposes. In the premises, the Applicant opinioned that it was improper for the Respondents to retain and utilize the sale proceeds on matters related to different instructions. The Applicant also contended that most of the items in the statement provided by the Respondent were unsupported by any documentary evidence and fee notes relied on by the Respondents could not stand as the same were contested and had not been verified.
5. In Defence, the Respondents filed a Replying and a Further Affidavit by Edward Muriu Kamau sworn on 16th November, 2012 and 25th February, 2013, respectively. The Respondents denied the entire claim and contended that on various dates the Applicant had instructed them to act on its behalf in various matters including the sale of the suit property. That they had given a full account of the monies received from the sale proceeds which they had applied in a manner sanctioned by the Applicant. That a sum of Kshs.43,800,180/- had been applied towards settlement of their fees. The Respondents therefore contended that the sum of Kshs.8,349,318/16 was now being held as a lien for outstanding legal fees and disbursements. The Respondents therefore contended that they had acted within the law. In conclusion the Respondents denied the Applicant's accusation that they had frustrated the verification and reconciliation exercise of the disputed fee notes.
6. I have carefully considered the affidavits on record, Counsels written submissions, oral hi-lights thereon and authorities relied on. There is no dispute that the Respondents received instructions from and actually acted for the Applicant on various matters including the sale of the suit property. It is also not disputed that the Respondents did receive for the Applicant Kshs.193,389,596/86 as part of the sale proceeds. What is in dispute is whether the sale proceeds received by the Respondents was properly disbursed by the Respondents, whether the Respondents are holding a sum of Kshs.68,568,664/- belonging to the Applicant, and if so whether the same should be paid over to the Applicant. These three issues then are the ones for determination in this matter.
7. On the first issue, there is no dispute that the Respondents received a sum of Kshs.193,389,596/86 from the sale of the suit property. They received the said sum as Advocates for the Applicant and therefore, for and on behalf of the Applicant. That being the case, the general rule is that the Respondents were under both statutory and fiduciary duty to account to the Applicants for the said total sum without any deduction whatsoever.
8. The Applicant's position as set out in paragraphs 5 and 6 of the Affidavit in support is that, it was a fundamental term of the Advocate-Client agency relationship that the sale proceeds of the transaction would be forwarded to the Applicant and that the Respondent had breached this fundamental term by failing to release the entire sale proceeds to the Applicant. The Respondent's answer to this was that the entire sum of Kshs.193,389,596/86 had been expended and utilized as directed by or on behalf of the Applicant and that there was no monies left to pay to the Applicant. In the Replying Affidavit of Edward Muriu Kamau, the Respondents produced correspondence to show that the payments they had made from the sale proceeds had been approved by the Applicant or was for the benefit of the latter.
9. On being served with the Replying Affidavit, the Applicant filed a Further Affidavit wherein it noted in paragraph 8 thereof that having studied the correspondence that had been produced by the Respondent, it was clear that payments amounting to Kshs.128,373,719/70 were supported by documents. In that paragraph, Mr. Mumut Ole Sialo itemized a total of 8 payments totalling Kshs.128,373,719/70 that were paid to 3rd parties and not the Applicant. To that extent, the Applicant approved the Respondents actions of paying out and or disbursing the said total sum of Kshs.128,373,719/70 to 3rd parties and not the Applicant. This in my view was in direct contradiction with Mr. Sialo's averments in paragraphs 5 and 6 of his Affidavit in Support wherein he had insisted that the entire sale proceeds was supposed to be released to the Applicant.
10. Further, this also contradicts the otherwise able and brilliant submissions of Mr. Millimo that since the Respondents had received the sale proceeds for a particular purpose, they could not purport to use and/or apply the same for any other purpose other than that for which it was received. In this regard, I am of the view and so hold that whilst the Respondents received the sum of Kshs.193,389,596/86 for onward transmission to the Applicant, the dealings between the Applicant and Respondents subsequent to such receipt was to the effect that the Respondent was

allowed to hold such funds for other purposes authorized by the Applicant other than the initial purpose instructed. In this regard, the holding in the case of **Albert Oduor Mumma –vs- Peter Opondo Kaluma & 2 others (2011) eKLR** relied on by the Applicant does not apply. This is so because, in the instant case, it is clear that on receipt of the sale proceeds from the purchaser, the Respondents were allowed either expressly or otherwise by the Applicant to apply those proceeds to other purposes than to release the same to the Applicant. In this regard, I answer issue No. 1 in the affirmative that the Respondents were entitled to disburse the sale proceeds as they did.

11. This leads me to the second and 3rd issues. These are, whether the Respondents are holding a sum of Kshs.68,569,664/- belonging to the Applicant and if so, whether they should pay the same over to the Applicant. From the Originating Summons, the amount claimed by the Applicant was Kshs.68,568,664/- together with interest. After being served with the Replying Affidavit, the Applicant deponed in paragraph 10 of the Further Affidavit that the amount due was Kshs.70,165,868/20. When the Respondents filed a Further Affidavit producing more documents, Mr. Millimo, learned Counsel for the Applicant submitted at page 11 of the Applicants written submissions that the amount due was Kshs.69,811,283/60. In this regard, there are three different figures which the court is called upon to determine and decree in favour of the Applicant.
12. For the purposes of this Judgment, I will deal with the claim as submitted by Mr. Millimo. The Applicants position is that the sum due to it is Kshs.69,811,283/60 which the Respondent has admittedly utilized as follows:-

a. Agency fee - Kshs.7,260,000/-
b. Nyachae & Co. Advocates - Kshs.1,200,000/-
c. Zep-RE (PTA Insurance) - Kshs.3,381,540/-
d. Muriu Mungai & Co. - Kshs.43,800,180/-
e. Muriu Mungai & Co. - Kshs.14,149,500
f. Undisclosed expenditure - Kshs.20,063/60

TOTAL - **Kshs.69,811,283/60**

The Applicants position was that the said payments or expenditure was unauthorized and that therefore the Respondents should pay the same to the Applicant. On their part, the Respondents contended that the expenditure was authorized and that they acted on the instructions of and/or for the benefit of the Applicant. In this regard, I propose to consider each expenditure separately to ascertain the veracity of each party's contention.

13. The first expenditure is a sum of Kshs.1,200,000/= paid to Nyachae & Co. Advocates. This emanated from an out of court settlement in respect of costs arising from **HCCC No. 437 of 2006 NYACHAE & Co. ADVOCATES –vs- MURIU MUNGAI & Co. ADVOCATES.** It was the Respondent's case that the payment was in connection with the sale of the suit property. The Respondents had given a professional undertaking to the Law firm of Nyachae & Co. Advocates, who were representing the Chargee of the suit property. That upon that undertaking, the Chargee discharged the suit property and released the completion documents to the Respondents to effect the sale of the suit property on behalf of the Applicant. The Respondents contended that the transaction however delayed out of no fault of their own, consequent whereof the firm of Nyachae & Co. instituted the above suit against the Respondents to enforce the undertaking. A Caveat and Restriction were also lodged on the suit property in connection with this breach. A compromise was however negotiated and the suit was withdrawn on payment of Kshs.98,753,984/70. and a further sum of Kshs.1,200,000/= as costs of the suit. The Respondents contended that the payment of Kshs. 1,200,000/= was made in the best interest of the Applicant as a condition precedent for the withdrawal of the suit. That further, the Undertaking to the firm of Nyachae & Co. was made by the Respondents on the express instructions of the Applicant and was therefore for the Applicant's benefit. In rejoinder, the Applicant contended that the payment made to Nyachae & Co. was irregular as the Respondents had not sought the consent and authorization to make such deductions from the sale proceeds, and that in any event, the Applicant was not a party to the said suit.
14. I have perused the evidence before the court and in particular the annextures marked as *"EMK C"*

attached to the Respondents Further Affidavit. I have noted that the above suit that was instituted by Nyachae & Co. against the Respondents was for enforcement of a professional undertaking given by the latter. I have also noted that a consent was entered between the two parties settling the suit on 31st July, 2006. One thing that is clear is that the Applicant was not a party to that suit. It is also contended that the Applicant did not give any consent or approval to the settlement or payment of the said Kshs.1.2million as costs. Where does that leave the Respondents? This Court takes note that the liability of the Respondents arose out of a professional undertaking given by them to Nyachae and Company. That undertaking was in respect of the suit property. Of course such professional undertaking it but a natural consequence of a client's instructions to an Advocate to act as Vendors Advocates in a sale transaction. The undertaking was therefore for the benefit of the Applicant as a vendor to be able to complete the sale of the suit property. There was no evidence to show that the Respondents were to blame for the delay in the completion of the transaction to have led to the suit against them. In my understanding of the law of agency, where an agent incurs liability whilst in the course of undertaking the authorized instructions of the principal, the agent is entitled to pass on such liability to the principal. I am aware that if the agent pledges personal liability, then the same is upon him but in the instant case, in matters of conveyance, no party will deal with any advocate who does not give an undertaking as to complete a transaction for his Client. Indeed the Advocates professional undertaking is the cardinal and most important component in all conveyance transactions. Without it, transactions might be difficult to complete. In this regard, since it has not been shown that the Respondents were responsible for the delay or that the sum of Kshs.1.2million agreed to as costs were excessive, I am of the view that the compromise of the suit and subsequent payment of the said sum of Kshs.1.2million to Nyachae and Company was for the benefit of the Applicant. Such sum was therefore properly incurred from the sale proceeds and reject the Applicant's claim on it.

15. I now turn to the issue of the Agency Fee of Kshs. 7,260,000/=. This amount was paid by the Respondents allegedly as a agency Commission for the sale of the suit property. The Applicant contended that this payment was irregular, that the Respondents had the knowledge that the sale of the suit property did not involve a broker or any agent. That in view thereof, the instructions relied on by the Respondents did not disclose that the payment was properly made. The Applicant further contended that there was no proof that such monies were paid or released to the purported agent. Refuting this claim, the Respondents contended that the payment of Kshs. 7,260,000/= was made on the instructions of the Applicant vide a letter dated 26th January, 2006. That prior to that, one John Githaka, had visited the Respondents office and informed one of the Respondents that he was responsible for identifying the purchasers of the suit property and was therefore entitled to a commission of the same. That in the premises, the payment was properly made. The Respondents also contended that the issue of Kshs.7,260,000/= was a subject of other suits which were currently pending before other courts of competent jurisdiction.

16. From the record, I have noted the existence of **Anti-Corruption Case No. 6 of 2009, Republic – v-Edward Muriithi and Johnson J Githaka.** In that case, one of the Respondents had been charged jointly with Mr. Githaka for fraudulently obtaining public property, to wit, Kshs.7,260,000/=. Those charges were later dropped but the case against Mr. Githaka is still pending It is clear that the issue of the payment of Kshs.7,260,000/- by the Respondents as commission is a subject of the pending criminal proceedings. Without making any firm findings that can prejudice the said case, I take the following view on the matter.

17. There is on record a letter dated 26th January, 2006 from Mr. J. J. Githaka asking the Respondents to release a commission of 3% on the sale of the suit property. The said Mr. Githaka was the former Managing Director of the Applicant and he wrote and signed the letter as Statutory Manager. The question that arises is, can the Respondents be faulted for following written instructions of their client? Is it plausible that an Advocate can be held liable for acting on express instructions of a client just because the management of a client subsequently changes? I entertain some doubt. In my view, that would be catastrophic to the legal practice. If that were the case Advocates would carry out their work with a lot of uncertainty. Conclusiveness of instructions by corporations would be dependent on the continuing in management of persons in favour of such instructions! To my mind, unless it is shown to be an outright illegal or fraudulent act which an Advocate has engaged with full knowledge of that fact, Advocates should be left to conduct the affairs of their profession in an atmosphere of certainty. Accordingly, I reject the Applicant's

claim under this head. The Applicant is bound by the acts of its former Managing Director and cannot purport to transfer liability incurred under his instructions to the Respondents.

18. With regard to the rental payments made to Zep Re amounting to Kshs.3,381,540/=, the Respondents contend that it was under instructions from the Applicant that they made payment to Okwach & Company, Advocates. They produced a cheque and a copy of their Bank Account Statement to confirm this payment. The Applicant however contended that that payment was not made to Zep Re and that the Bank statements produced did not disclose the person to whom the money was paid. I have seen the letter dated 22nd November, 2006 from the Applicant to the Respondent. In that letter, the Applicant directed the Respondents to pay Kshs.3,381,540/- to Zep Re. A cheque dated 29th November, 2006 payable to Okwach & Company was produced and a bank statement of the Respondent shows that the said cheque was subsequently paid. The Respondents asserted that Okwach & Company were Zep Re's Advocates. In the circumstances of this case, can it be said that the payment was irregular? To my mind, the express instructions of the Applicant as is contained in its letter dated 22nd November, 2006 is an admission that there was rent due. There is no evidence that was tendered to show that Zep Re, have subsequent to the issuance of the cheque to Okwach and Company, demanded the said sum. It is now seven (7) years since the cheque is shown to have been paid and no demand has been made on that rent. That to me is evidence that the rent had been settled. On my part therefore, I am satisfied that the said sum was properly paid by the Respondents notwithstanding that it was paid to the Advocates for the Claimant. The important thing is that, there has been no demand by Zep Re for the same. In view thereof, I find that the demand by the Applicant in respect of the said Kshs.3,381,540/- is unfounded and is without merit.

19. The next item is that of the Legal Fees of the Respondents. The figures by the parties seem to be at variance. On the one hand, the Applicant contends that the Legal fees that the Respondents paid themselves and/or retained amount to Kshs.57,949,680/=, that is, Kshs.43,800,180/- and Kshs.14,149,500/-. On the other hand, the Respondents have sought to justify the payment to themselves of Kshs.44,420,180/= and have contended that, they are entitled to withhold a sum of Kshs.8,349,318/16 making the total amount to be Kshs.52,769,498/16.

20. The Court has agonized over this issue. Firstly, it should be noted that in all the documents produced in evidence, it is not disputed that the amount received by the Respondent as sale proceeds from Zep Re was Kshs.193,380,489/-. This is what Mumut Ole Sialo told the Court at paragraph 7 of the Affidavit in support to the Originating Summons. That is the sum which the Respondents sought to explain in their Replying Affidavits. The sum however, seems to have been increased to Kshs.198,539,587/90 by the Applicant allegedly to include a claim for "sale of shares". That was first introduced by Mumut Ole Sialo in his Further Affidavit of 21st January, 2013 at paragraph 9 (vii).

21. On my part, I will deal with the issue of legal fees from two angles. Firstly, the alleged approved payments and secondly, the balance being held by the Respondents which they claim to be a lien. On the first limb, there is evidence that a sum of Kshs.43,800,180/- is contended to have been approved as legal fees payable to the Respondents. I have seen a letter dated 5th December, 2006 by the Respondents to the Applicant. In that letter, the Respondents sought the Applicant's approval for retention of a total sum of Kshs.43,800,180/- as their fees for various matters. Vide a letter dated 13th December, 2006, the Applicant approved the retention of the said sum to the Respondents. To my mind, those two letters were unequivocal as to the intention of the parties. The Respondents had sought the Applicants approval of Kshs.43,800,180/- as payment for the Respondents' fees. Can the Applicant now turn around and claim that such retention was irregular? In my opinion, it would appear that the Applicant is challenging its own instructions. Nothing was produced in evidence to show that the letters relied upon by the Respondents were falsified. All that is claimed is that the legal fee is subject to verification and clarifications and that the same is in respect of different transactions and not from the sale of the suit property.

22. That may be so, but what is abundantly clear is that the payments of Kshs.43,800,180/= were duly approved for the matters which the Respondents had communicated to the Applicant. I will agree with the Respondents that the Applicant cannot approve such payments and thereafter dispute the same after the lapse of several years. A party cannot approbate and reprobate at the same time. The verification exercise of the fee notes relied on by the Respondents should have been carried

out prior to the said approval. The contention that the fees sought was in respect of different matters other than the sale of the suit property is in my view misconceived, as the Applicant has readily admitted that part of the proceeds had also been applied for other varied expenditure other than matters incidental to the sale transaction. To this end, I find that the claim by the Applicant for the release of Kshs. 43,800,180/- by the Respondents unwarranted and is without merit. That sum is already spent on items expressly approved by the Applicant and cannot be re-opened.

23. This now leads me to the final issue. The same is with regard to monies now held by the Respondents on account of unpaid fees due and owing by the Applicant. As stated earlier, it is not in dispute that the Respondents acted for the Applicants in numerous matters. The same have been tabulated in both the Replying and Further Affidavits of the Respondents. Indeed, the Respondents produced pleadings running to over 2800 pages. The Applicant contended that the Respondents were withholding Kshs.14,149,500/= and demanded that the same be released to it. The Respondents on their part contended that they are only holding Kshs.8,349,318.16/=. So which is the correct amount being held? From paragraphs 9 and 10 of Mumut Ole Sialo's Further Affidavit, it would seem that the Applicant's contention includes a sum of sale of shares. From page 12 of the Respondent's submissions, the Respondents seem not to have included this item in their calculations. Were the Respondents to include this item which is not the case, the amount that the Respondents would be holding would almost be at par with the amount claimed by the Applicant with some little variance. Whatever the amount due, this court is only called upon to decide whether the Respondents can continue holding the same as a lien or they are to pay the same to the Applicant. Before ascertaining the sum held, I propose to consider the issue of whether the same is being properly held as a lien.

24. It is the Respondents' contention that they have the right to hold the amount in their possession until legal fees owed to them by the Applicant is paid in full. They produced voluminous documents in terms of fee notes and pleadings for cases they have handled on behalf of the Applicant. They contended that they are owed unpaid fees in excess of Kshs.100Million. They therefore asserted that in the circumstances, they had a right of lien on the sum in their possession. Mr. Munge, appearing for the Respondents referred to the case of **Prekookeanska Plavidba –vs- Int. Lines Srl, (1988) All ER** wherein it was held that:-

> ***" A solicitor's lien entitles him in common law "to retain property already in his possession until he is paid the costs due to him in his professional capacity, property in this context including, inter alia, money held in a client account....." (Emphasis provided)***

The same conclusion was arrived at in the case of **Withers LLP v Langbar International Ltd [2011] EWCA Civ 1419, [2011] All ER** where the English Court of Appeal held that

> ***"Money in a client account may be subject of a retaining lien, even where it is otherwise held by the Solicitor on trust for the Client"***

25. On the other hand, the Applicant has not contested that it owes the Respondents fees. What it has contested is the amount of legal fees claimed. The Applicant contends that the Respondents have inflated their fees and that in some instances fee notes, were duplicated and exaggerated. To my mind, this Court has no jurisdiction to ascertain the correct fees payable to the Respondents. That is the jurisdiction of the taxing master. The issue before me is whether there is legal fees due and if so, whether the same can be retained as a lien. There is no dispute that there is some fees due to the Respondents. However, the Applicant contends that it was not proper for the Respondents to retain and utilize the sale proceeds on matters that related to different instructions. In its view therefore, no right of lien attaches on the withheld monies. I have already found that the sale proceeds in this case were not entrusted to the Respondents for a specific purpose. From the various instructions given to them by the Applicant, it is clear that payments were made to third parties unconnected with the sale of the suit property. Some of the monies were expended towards the payment of utility bills, management fees of the Applicant among many others. From the evidence tendered, it would seem that the monies were held by the Respondents on behalf of the Applicant for general purposes. I so hold because, once the Applicant started giving instructions to

the Respondents to apply the funds for other purposes, the sale proceeds lost their character of a specific purpose and were now held for general purposes. In the case of **Loescher –vs- Dean (1950) Ch. 491** the Court held that:-

"The money was not entrusted to the Solicitor for any specific purposes, but was paid in the ordinary course of business as the solicitor of the client. .....on receipt of the money, the solicitor has a lien over it for his unpaid costs....."

To this end, I am of the view and so hold that once the sale proceeds of the hands or possession of the Respondents became held for general purposes, the Respondents acquired every right to withhold any sums thereon as a lien for unpaid and outstanding legal fees. This is essential given the state of the Applicant who is a Statutory Manager of a company that has been placed under statutory management. I think Section 52 of the Advocates Act is clear that an Advocate's accrued fee is to be protected at all costs including holding the property of a client as a lien.

26. However, I note that there is a dispute as to the exact amount of legal fees that is in question. I also note that there has been a verification exercise initiated by the parties and the same has been stalled for one reason or the other. Given this position, it would be prudent for the Respondents to file their respective Bills of Costs for taxation since the verification is yet to bear any decisive results. In the result however, I will direct that the Respondents do file their bills for taxation in the usual manner but within a reasonable time. I find that the Originating Summons is without merit and the same is hereby dismissed with costs.

DATED and **DELIVERED** at Nairobi this 14th day of June, 2013.

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MABEY

JUDGE