



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO 313 OF 2010 (O.S.)**  
**IN THE MATTER OF THE ADVOCATES ACT, CAP 16**

**BETWEEN**

SLYVESTER HASUSA MAKHOKHA .....PLAINTIFF

**AND**

1. JAMES OKAO (t/a OKAO & COMPANY ADVOCATES)
2. NJOROGE WACHIRA (t/a NJOROGE WACHIRA & COMPANY ADVOCATES)
3. PLACID ROSTORN EGESA
4. FRANCIS PETER BARASA
5. FATUMA AMIN ABDULLAHI .....DEFENDANTS

**RULING**

1. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were struck off these proceedings by an order entered on 26<sup>th</sup> March 2012. So that left only the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the suit. The Plaintiff then filed **amended originating summons dated 24<sup>th</sup> April 2012.**
2. The originating summons is a client/advocate dispute brought under **Order 52, Rule 4** of the **Civil Procedure Rules** (the **Rules**). The summons essentially seeks as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants an order for an account of all the money held on behalf of the Plaintiff, and also an order for release to the Plaintiff of any money held on his behalf. There is also a prayer for an interim order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants “from releasing all funds allegedly due to Fatuma Amina Abdullahi pending determination” of the originating summons. A temporary order was granted on 29<sup>th</sup> March 2011 (Dulu, J) pending determination of the suit.
3. The Plaintiff’s case as stated in the grounds on the face of the originating summons is –
  - (i) That the Plaintiff instructed the 1<sup>st</sup> Defendant to act for him in a land sale transaction in which he was one of the vendors.
  - (ii) That the 1<sup>st</sup> Defendant was also acting for the Plaintiff’s brothers **Placid Rostorn Egesa** and **Francis Peter Barasa**, apparently the other vendors.

(iii) That the 1<sup>st</sup> Defendant received “sums of money” from various purchasers on behalf of the Plaintiff.

(iv) That the Defendants and the Plaintiff’s said brothers intend to hold KShs 8.2 million purportedly to be paid to one **Fatuma Amina Abdullahi** as damages whose cause and basis is unknown to the Plaintiff.

(v) That the said KShs 8.2 million is being held without the Plaintiff’s authority or consent.

(vi) That the Plaintiff is entitled to a proper and detailed statement of account, and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to be compelled to give that account.

4. In the supporting affidavit annexed to the summons the Plaintiff has deposed as follows, *inter alia* -

(i) That he is one of the administrators of the estate of the late **Clement Mzee Wakasa** (aka **Mzee Wakasa**).

(ii) That the Plaintiff was entitled to an equal share of the property Nairobi/36/170/VII together with his aforesaid brothers.

(iii) That they agreed to sell the said property to one **Hassan Shono Tulu** and one **Ibrahim Shunu** by sale agreement dated 9<sup>th</sup> March 2010 for KShs 26 million.

(iv) That the 2<sup>nd</sup> Defendant is “an advocate for the 5<sup>th</sup> Defendant”.

(v) That the “undertaking” was that after payment of legal fees and statutory payments the balance of the “funds realized would be shared out equally” between the Plaintiff and his two brothers.

(vi) That a deposit of KShs 2.5 million towards the purchase price was paid, and the Plaintiff was given his share.

(vii) That he has been waiting for his share of the balance of the purchase price (KShs 23.5 million).

(viii) That the 1<sup>st</sup> Defendant was to receive the purchase price.

(ix) That the Plaintiff is entitled to a proper statement of account of all money held by the 1<sup>st</sup> Defendant on his behalf.

(x) That he has now learnt that the Defendants “acting in cahoots with” his said brothers have agreed to pay to the said Fatuma Amina Abdullahi the sum of KShs 8.2 million.

(xi) That the Plaintiff is willing to pay the legal fees of the 1<sup>st</sup> Defendant.

A number of documents are annexed to the supporting affidavit.

5. I cannot find on the record any papers filed by the 1<sup>st</sup> or 2<sup>nd</sup> Defendant directly in response to the originating summons. But there is a statement of grounds of opposition dated 20<sup>th</sup> July 2010 filed on behalf of the 1<sup>st</sup> and 5<sup>th</sup> Defendants in response to an interlocutory application by chamber summons dated 15<sup>th</sup> June 2010 filed by the Plaintiff together with the originating summons. The only grounds of opposition therein that are relevant to the originating summons are -

- (i) That the originating summons is incurably defective and does not lie.
- (ii) That the Plaintiff has come to court with dirty hands.

6. It is not clear from the Plaintiff's pleadings why he sued the 2<sup>nd</sup> Defendant. But from a replying affidavit filed by the 5<sup>th</sup> Defendant in response to the Plaintiff's aforesaid chamber summons dated 15<sup>th</sup> June 2010, it appears that the KShs 8.2 million the Plaintiff mentions was banked in a joint account in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, both advocates. But it is also apparent that the 2<sup>nd</sup> Defendant was **not** the Plaintiff's advocate in the matter. Without existence of an advocate/client relationship between the 2<sup>nd</sup> Defendant and the Plaintiff, the Plaintiff cannot demand for an account from him. **See Order 52, Rule 4(1) of the Rules.**

7. The originating summons was canvassed by way of written submissions. The Plaintiff's submissions were filed on 25<sup>th</sup> April 2013 while the 2<sup>nd</sup> Defendant's submissions were filed on 12<sup>th</sup> June 2013. The 1<sup>st</sup> Defendant did not file any submissions. I have considered the submissions including the one case cited.

8. Both the Plaintiffs and the 2<sup>nd</sup> Defendant's submissions have mentioned a consent order recorded in a different case by which Fatuma Amina Abdullahi would be entitled to some KShs 8.2 million or thereabouts. The present proceedings cannot be a forum for challenging that order. The order can only be challenged in suit where it was made.

9. Likewise the present proceedings cannot be used to enforce the said order. The order can only be enforced in the proceedings where it was made.

10. As far as these present proceedings are concerned, there was an advocate/client relationship between the Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has not denied that he was holding some funds for the Plaintiff. In law and in equity the Plaintiff is certainly entitled to an account from the 1<sup>st</sup> Defendant.

11. As for the 2<sup>nd</sup> Defendant, as already seen, there was no advocate/client relationship between him and the Plaintiff. The Plaintiff cannot demand an account from him. The originating summons as against the 2<sup>nd</sup> Defendant must be refused. It is dismissed with costs.

12. I will allow the originating summons as against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has not made a claim for costs from the Plaintiff. I direct that the 1<sup>st</sup> Defendant do deliver to the Plaintiff a cash account of all the money he may have received on account of the Plaintiff in respect to the land sale transaction in question **within twenty-one (21) days of delivery of this ruling.** In default parties shall have liberty to apply. The temporary injunction granted on 29<sup>th</sup> March 2011 shall remain in place until further orders. The Plaintiff shall have costs of the originating summons as against the 1<sup>st</sup> Defendant. Those shall be the orders of the Court.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2013**