



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.293 OF 2013

RAFIQUE EBRAHIM PLAINTIFF/APPLICANT

VERSUS

WILLIAM OCHANDA T/A

OCHANDA & CO. ADVOCATES DEFENDANT/RESPONDENT

R U L I N G

1. Before the Court is an application by the Plaintiff dated 5th July, 2013 brought under the provisions of **Order 51 Rule 1** of the *Civil Procedure Rules*, **Section 3 & 3A** of the *Civil Procedure Act* and all other enabling provisions of the law. The applicant seeks the following prayers from this Court;

“1. THAT this matter be certified as urgent, its service be dispensed with and it be heard ex-parte in the first instance;

2. THAT this Honourable Court be please to grant a mandatory injunction compelling the Defendant/Respondent herein to provide the Applicant with full and true accounts of all the monies the Defendant received from the Plaintiff in the year 2010 pending the hearing and determination of this Application.

3. THAT this Honourable Court be pleased to grant a mandatory injunction compelling the Defendant/ Respondent herein, to provide the Applicant with full and true accounts of all the monies the Defendant received from the Plaintiff in the year 2010/2011, pending the hearing and determination of this suit;

4. THAT this Honourable Court be pleased to grant a mandatory injunction compelling the Defendant/Respondent herein, to surrender to the Plaintiff, all the title deeds he holds on behalf of the Plaintiff pending the hearing and determination of this application;

5. THAT this Honourable Court be pleased to grant a mandatory injunction compelling the Defendant/Respondent herein, to refund plus interest, all the funds to the Plaintiff.

6. THAT costs of this application be provided.

2. The application is predicated upon the grounds that the Applicant had engaged the professional services of the Respondent as an advocate, who acted for him in several land conveyance and purchase transactions in the year 2010. It is also contended that the Respondent received monies for and on behalf of the Applicant, which monies have never been accounted for, despite demands for the Respondent to do so by the Applicant. The application is further supported by the affidavit of the Applicant, **Rafique Ebrahim**, sworn on even date. It is deponed, as has been reiterated in the grounds of the application, that the Respondent had received monies from the Applicant, which he has not accounted for despite various demands. It is also deponed that the Respondent holds various titles to land purchased, which have never been transferred to the Applicant.
3. The application is opposed. In the Grounds of Opposition dated 10th October, 2013, the Respondent contends that the application is incompetent, frivolous, fatally defective, an abuse of the process of the Court and has not satisfied the threshold of granting the prayers sought. In further opposing the application, in the Replying Affidavit of **William Ochanda Onguru** sworn on even date, it is deponed that in as much as the Applicant engaged the Respondent's services as an advocate, the engagement was limited to paper work and formalization of land purchasing transactions. It is contended that the Applicant himself dealt directly with the vendors, agents and other third parties and that at no time did his firm receive the Kshs. 133,000,000/- as alleged by the Applicant. I found this reference puzzling as there is no mention of such amount being paid to the Respondent in the Applicant's Affidavit in support of his Application. Further, it is deponed that the Applicant owes the Respondent unpaid fees for other professional services, real reason for the present application and suit aimed at avoiding payment of the outstanding fees.
4. In his oral submissions of Dr. Khaminwa, counsel for the Plaintiff, submitted that the client-advocate relationship had broken down and the application for accounts was to determine the issues as set out in the Amended Complaint dated 1st August, 2013. Counsel submitted that the Respondent had admitted to the existence of the advocate-client relationship and that indeed that the firm had received monies for and on behalf of the Applicant. It is the Applicant's submission that the application for accounts was in order to ascertain how much money was received, how much was disbursed and how much still remains in the Applicant's account with the Respondent firm.
5. In reiterating and further submitting on his opposition to the application, Mr. Onyantha, appearing for the Respondent, submitted that the Applicant had neither made a claim for a liquidated amount in the Complaint nor in the Application so as to warrant an Order of the Court for the prayers sought. Counsel also submitted that a mandatory injunction on an interlocutory application is not usually granted, unless there exist very clear and special circumstances. Further, counsel submitted that the Applicant had not established any special circumstances or clear case from which the Orders sought should be granted by the Court.
6. The determination of the instant application is predicated upon the issuance by this Court of mandatory orders at an interlocutory stage. The principles of granting a mandatory injunction are propounded in Halisbury's Laws of England, Volume 24, paragraph 948 which reads;

“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”

The threshold for granting mandatory injunction orders is well set out in the case of **Locabail International Finance Ltd v Agroexport & Others (1986) All ER 901** wherein the court stated;

“A mandatory injunction ought not to be granted on an interlocutory application in

the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.”

This finding was echoed in the Court of Appeal case of **Trinity Prime Investment Ltd v Savings & Loan & Another Civil Appeal No. 90 of 1998**, referred to in the ruling of Waithaka, J in **Shedrach Kiruki M’Laari v Samuel Kiptanui Korir & 2 Others Civil Case No. 262 of 2012; (2013) eKLR**, where it was held *inter alia*;

“...where the Court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end.”

Similar sentiments were reiterated by the Court of Appeal in **Africa Safari Club Ltd v Commissioner of Police & 6 Others Civil Application No. 248 of 2011; (2013) eKLR**, where the Court reiterated the ruling of Gicheru, JA (as he then was) in **East African Fine Spinners Ltd (In Receivership) & 3 Others v Bedi Investments Ltd Civil Application NAI. 72 of 1994 (UR)**, who cited Megarry, J (as he then was) in **Shepherd Homes Ltd v Sandahm (1971) 1 Ch. 34** where the learned Judge stated:

“...it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.(emphasis added). If, of course, the defendant has rushed on with his work in order to defeat the plaintiff’s attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff’s promptitude is a badge of the seriousness of his complaint.”

7. From the foregoing, it is evident that the Applicant has to establish and indeed prove to the Court that he has a strong case for the issuance of mandatory orders at the interlocutory stage, and as such, the issuance of such orders will be depend upon a clear case being made out before Court. As reiterated in the above authorities, the Court would be reluctant to grant mandatory orders at an interlocutory stage when it would seem that it would determine and bring litigation to an end. It is evident that the prayers in the Application are similar to the relief sought by the Applicant in his Amended Plaint dated 1st August, 2013. However, I do not consider that for the Court to issue mandatory orders as prayed for at this stage, that it would be determining the entire suit at an interlocutory stage, without the benefit of full hearing.
8. In his said Application dated 5th July 2013 the Applicant in prayers 2 and 3 thereof, has asked the Respondent to account to him for moneys had and received. There is also a further prayer seeking the delivery up to him of any Title Deeds held by the Respondent on his behalf. The prayers in the Plaint also ask for an account to be provided and the delivery up of any Title Deeds held. It also asks for a refund of all the remaining monies held by the Respondent to the credit of the Applicant, as well as costs and interest. The Respondent has intimated that he is owed fees and the Applicant’s counsel has stated from the bar that if this is so, the Respondent should raise fee notes as appropriate. For my part, I would consider that if the Respondent is holding on to any title deeds for property belonging to the Applicant, then he would be entitled to a lien for any unpaid fees.
9. As a result, I do not consider that the Respondent should have any difficulty in providing a full

and true account of the monies had and received as well as paid out, for and on behalf of the Applicant. This is more so as the Respondent admits that he had acted for the Applicant and there developed a fiduciary relationship of a client/advocate nature. In my opinion, such an accounting will clarify the issues as between the parties in order that they can be completely canvassed before Court at the hearing of the suit in due course. Accordingly, I grant prayer 3 of the Applicant's Notice of Motion dated 5th July 2013. At this stage, I am not prepared, for the reasons given above, to grant prayer 4 of the same. The Applicant will have the costs of his Application.

DATED and delivered at Nairobi this 30th day of October, 2013.

J. B. HAVELOCK

JUDGE