

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 159 OF 2007

JAMES MUKIRI KARIUKI.....PLAINTIFF

VS

JOSEPH NGUCHU NJERU.....DEFENDANT

RULING

1. Hearing of the above suit commenced on 19th March 2012 with the plaintiff giving his evidence in chief in support of his case against the defendant. At the close of the plaintiff's evidence in chief, Mr. Ngugi counsel for the defendant told the court that before he commenced cross-examination of the plaintiff, he wished to raise an objection with regard to production of an agreement dated 20th March 2005 entered into between the plaintiff and the defendant and in which the defendant admits having borrowed a sum of Kshs. 5,950,000/- from the plaintiff and which sum, under the agreement, was payable within 30 days of receipt of a written demand notice from the plaintiff.

2. The grounds upon which counsel for the defendant raised the objection are, firstly, that the document was not stamped and, secondly, the document did not meet the requirements of Section 35(1) of the Advocates Act. Mr. Ngugi submitted that the document was filed on 2nd December 2011 and counsel for the plaintiff was well aware of Section 19 of the Stamp Duty Act. He argued that the section was no longer available to the plaintiff as he had had ample time to comply. He submitted further that the document fell under Section 35 as read together with Section 34 of the Advocates Act hence the drawer of the document should have been indicated. He submitted that the document was an agreement and not merely an acknowledgement of debt hence was not excluded under Section 34(4) of the Advocates Act.

3. In response, Mr. Kiragu Kimani, for the plaintiff submitted that Section 19 of the Stamp Duty Act allows stamping of documents in the course of proceedings. He therefore undertook to cause the document to be stamped before the next hearing date. With regard to compliance with Section 35(1) of the Advocates Act, Mr. Kiragu submitted that the said section only applied to documents drawn by an advocate. An acknowledgement of debt was not a document that must be drawn by an advocate. He told the court that the documents that must be drawn by an advocate were set out in section 34(1)(a) to (f) of the Advocates Act. The document presently objected to did not fall under any of the categories specified in the said section.

4. I have considered the rival arguments by counsel for the parties with regard to the objection raised against production of the agreement dated 20th March 2005 aforesaid.

5. With regard to the objection based on Section 19 of the Stamp Duty Act cap 480, my take is that Section 19(1) of the Stamp Duty Act which precludes admissibility in evidence of unstamped instruments which are otherwise chargeable with stamp duty is applies subject to subsection (3) thereof as well as Sections 20 and 21 of the Act. These provisions give room for stamping of documents out of time subject to the penalties stipulated therein. None of the said provisions completely close out the window or opportunity to stamp a document and stamping can be done at any stage of legal proceedings. This is understandable because the main object of the Stamp Duty Act is, as stated in the preamble to the Act, to make provision for the levying and management of stamp duties. It is therefore be contra the purpose of the Act for any limitations to be imposed on when a document can be stamped. In the present case

therefore, I make the finding that the agreement dated 20th March 2005 is still amenable to stamping and the plaintiff should forthwith proceed with stamping of the document before resumption of further hearing in this matter.

6. With regard to the objection that the agreement of 25th March 2005 does not comply with Section 35 as read together with Section 34 of the Advocates Act in that the drawer of the document is not indicated in the agreement, my understanding of Section 34(1) of the Advocates Act is that only the documents or instruments stipulated therein are mandated to be exclusively prepared by a qualified advocate. The instruments whose preparation is made the preserve of a qualified advocate under the said section are given as documents relating to conveyance of property, documents or instruments relating to formation of any limited liability company, an agreement of partnership or the dissolution thereof; documents used for the purpose of filing or opposing grant of probate or letters of administration; documents for which a fee is prescribed under Section 44 of the Act and documents or instruments relating to any other legal proceedings. Juxtaposed with the list of documents or instruments stipulated under Section 34(1) of the Act, I do not think that the Act contemplates that every kind of agreement between two parties must be prepared by a qualified person. The Act is cognizant of the impracticability of rendering every possible agreement to be prepared by an advocate and does therefore only isolate very specific instruments which, in its wisdom, parliament felt that only a qualified person should be permitted to prepare given the special nature of such documents. In that regard, I take the view that an agreement between two parties in which one party acknowledges owing the other a certain sum of money is not of the nature contemplated by Section 34(1) of the Advocates Act and may therefore be prepared by the parties without the necessity of involving an advocate. Any such an agreement consequently need not indicate the drawer as Section 35 of the Advocates Act imposes such a requirement only in respect of documents and instruments stipulated under Section 34(1) of the Act.

7. The upshot of the foregoing is that the objection fails and is hereby dismissed with costs. The parties may fix a fresh hearing date at the registry.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2012.

J. M. MUTAVA

JUDGE