



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Suit 71 of 2008

IN THE MATTER OF THE ADVOCATES ACT

CHAPTER 16 LAWS OF KENYA

ALARAKHIA KHAMISA ALOO

FATMABAI ALARAKHIA ALOO.....APPLICANTS

VERSUS

L.J MANGHNANI

T/A SACHDEVA & COMPANY ADVOCATES.....RESPONDENT

JUDGEMENT

The Plaintiffs' claim against the Defendant was set out in the Originating Summons dated 28th March 2008 praying interalia that:

- a) The Respondent L.J Manghnani be ordered to account for and pay up the Applicants sums of Sterling Pounds 59,500 and Kshs. 4,178,000.**
- b) That the aforestated monies be paid by the Respondent with the interest at commercial rates.**
- c) That the Honourable Court be pleased to make such other or further orders as it may deem just to grant.**
- d) That the costs of this application be borne by the Respondent.**

The Originating Summons was supported by an affidavit sworn by Alarakhia Khamisa Aloo. The thrust of his case is that sometime back they advanced sterling pounds 100,000/= to one NazirMohamed Hussein Noormohamed. That in the year 2003 the said NazirMohamed Hussein Noormohamed having not paid the advanced amounts they lodged a caution against his title number Mombasa/Block XXVI/586 as security for repayment of the aforesaid monies. That on 26th October 2004 the said Nazir Mohamed Hussein Noormohamed requested them to remove the said caution against his title on the undertaking of one Ismail Gulamali that he would repay the advanced amount within 90 days and they executed an agreement thereto. That it was a term of Clause 5 of the said agreement that the applicants would execute the caution withdrawal forms and leave with the firm of Sachdeva & Company Advocates on clear undertaking that the caution was not going to be registered until they confirm in writing receipt of the

sum of sterling pounds 100,000. That Nazirmohamed never honoured the payment plan. Instead he gave a new proposal to pay 60,000 sterling pounds within ten days. The agreement was captured in letter dated June 7, 2005 from the respondent and countersigned by the Applicants and Salim Haji Essak as guarantor to Nazirmohamed. That in a letter dated 23rd June 2005 the respondent further confirmed that he will not register the withdrawal of caution until the applicants had been paid the sum of sterling pounds 60,000. That without confirmation from the applicants, the respondent registered the withdrawal of caution on 8th June 2004. That a search on the property revealed that various leases had been registered against the title. The applicants have only received the sum of sterling pounds 40,500 from the said Nazirmohamed and that a sum of 59,500 was outstanding. It is this sum that they sought to recover not from Nazirmohamed but from the respondent based on breach of professional undertaking.

When served the respondent filed a replying affidavit sworn by himself. His primary contention is that what was due from him was sterling pounds 60,000/= and that Nazirmohamed paid sterling pounds 40,500/= and that he paid the equivalent of sterling pounds £19,500/= in Kenya shillings at the exchange rate of Kshs. 128 to the pound. That counsel for the applicants agreed to receive the sum of Kshs. 2,496,000/= in full and final settlement of the sum of sterling pounds £19,500/= that was due. He annexed letters dated 24th January 2008, and 4th February 2008 and the reply from Messrs. Mutisya Bosire & Company dated 6th February 2008. That it is not true that he received the sum of sterling pounds 100,000/= and Kshs. 4,178,000/= on account of the applicants but that he only received sterling pounds 60,000/= and that his undertaking was limited to this sum. He urged the suit to be dismissed. An application was made to strike out the suit as frivolous but through a ruling dated 27th May 2009 by Justice Maureen Odero the application was dismissed. An application was made by the applicants for the matter to proceed by way of *viva voce* evidence. It was allowed on 31st July 2009. The hearing of the summons commenced on 4th March 2010. Alarackia Khamisa Aloo gave evidence as PW1. Apart from the evidence in his affidavit what emerged of concern is that as early as 8th June 2004 the withdrawal of caution had been registered by the respondent. This was done without his knowledge. He discovered this fact on 13.03.2008. The respondent kept on telling him that caution had not been removed. He instructed Mr. Mutisya Advocate to demand the money. Only equivalent of Kshs. 19,500 sterling pounds was received. The instructions were to demand sterling pounds £61,500 and Kshs.4,178,000/=. The ten day period within which the sum of sterling pounds £60,000 was to be paid passed without payment. The waiver was thus vacated and the whole amount was due. PW2 was Stephen Mutua Mutisya Advocate who acted for the applicant in the debt recovery. He confirmed that he received the equivalent of sterling pounds £19,500 from the respondent and paid over the same to the applicants after deducting his charges. After the applicant had received the money he asked the advocate to sue the respondent for some balances. He refused and the applicant withdrew instructions. He had verbal instructions to receive sterling pounds 19,500 in full and final settlement of the claim. On cross-examination he stated that the applicant did not wish to pursue Nazirmohamed because he was broke. It would be a waste of time. The defendant closed its case without adducing oral evidence. Written submissions were filed by both parties.

The Plaintiff's/Applicants stated that on the 25th October, 2004, the Defendant/Respondent wrote a letter to them in which he undertook to hold an application to withdraw a caution in trust until he confirmed in writing a sum of £100,000 or equivalent amount in US Currency had been paid to him. It was also submitted that the said letter was followed by another letter written by the Defendant/Respondent on the 7th June 2005, which reiterated discussions held between the Plaintiff and Nazir Mohamed Hussein Noor Mohamed. It was submitted that the above two letters were written by the Defendants/Respondent in his capacity as an Advocate for the Plaintiffs and the same were addressed to the Plaintiffs/Applicants who were his clients at the time to whom he owed a duty to act in good faith and in accordance with the dictates and terms of the said letters.

It was further submitted that in breach of the said trust and in breach of the Plaintiffs' express instructions the Defendant proceeded and registered the said withdrawal of caution without any instructions or otherwise from the Plaintiffs. The Defendant it was submitted received two letters from Messrs Mutisya Bosire and Company Advocates dated 21st January 2008 and 4th February, 2008 and the amounts demanded were £61,500 and Kshs.4,178,000 respectively. It was further submitted in evidence

that the Defendant had before the said payment to Messrs Mutisya Bosire & Company Advocates tried to pay the Plaintiffs part of the owed monies by issuing a cheque of Kshs.500,000/= which was rejected as it was below the amount demanded.

The Plaintiffs' submitted that the Defendant embarked on a collusion mission with Messrs Mutisya Bosire & Company in which the Defendant issued cheques for Kshs. 2,496,000/- in the name of the firm of his Advocates firm. It was stated by the Plaintiffs that the Defendant had not exhibited nor tendered any discharge from the Plaintiffs of his undertakings to the Plaintiffs in his letters of 25/10/2004 and June 2005.

In response, the Respondents stated in their submissions that the Originating Summons dated 28.3.2008 erroneously assumed that the undertaking given was for Pound Sterling 100,000 and Kshs. 4,178,000.00, while the undertaking was of the sum of Pound Sterling 60,000/= modified through letter of 7th June 2005. The respondent only received the sum of 60,000 sterling pounds of which he accounted for. He gave a cheque of Kshs. 6 million to Salim who was to organize conversion into sterling pounds and forward to Applicant. The Respondents submitted that since it is admitted that the Plaintiff appointed Mutisya Bosire & Co. Advocates to demand for payment and since Mutisya Bosire & Co. wrote to the Respondents on the 6.2.2008 stating that:-

“Further to yours dated 4/2/2008 we confirm that you can forward the cheques in full and final settlement on account of Mr. Maghanani “ the debt was fully discharged.

I have considered the rival submissions and the pleadings in the matter. The issue in dispute is whether the respondent received a sum of sterling pounds of which he has not accounted to the Applicants. The Applicants have moved the court invoking Order LII Rule 4. The said rule provides that:

“Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal representative, make an order for—

- a) **The delivery by the advocate of a cash account.**
- b) **The payment or delivery up by the advocate of money or securities.**
- c) **The delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant.**
- d) **The payment into or lodging in court of any such money or securities.**
- e) **The delivery up of papers and documents to which the applicant is entitled.”**

The Applicant would seem to contemplate paragraph (b) of the said rule 4. According to PW1 that since the respondent undertook not to register the withdrawal of caution before receiving the sum of sterling pounds 100,000 but he nevertheless did so it must be taken that he received the sum. This is a presumption which was rebutted by the replying affidavit of the respondent. At paragraph 10 of his replying affidavit the respondent deposes that it is not true that he was to receive the full claim of sterling pounds 100,000. His responsibility was to receive sterling pounds 60,000/= and then proceed and lodge the withdrawal of caution. There was nothing fraudulent in that.

May be the fraud may be inferred from the testimony of PW1 when he stated that the application for withdrawal of caution was registered on 8th March 2004 while in the year 2005 by letter of 7th June 2005 the respondent was representing that the withdrawal of caution had not been registered and that he was not going to do so until the sum of sterling pounds 60,000 had been paid. The agreement of 7th June 2005 was therefore entered into on the basis that caution had not been withdrawn. Upon hindsight the applicant agonizes that had he known he would have insisted on the full amount of sterling pounds 100,000 because the respondent was clearly in breach of his undertaking. Exhibit “AKO-3” shows that the application for withdrawal of caution was not dated when it was given. The letter of October 25, 2004 (exhibit AKO-4)

from the respondent is relevant. It states:

“We confirm you have handed over to us Application to Withdraw Caution duly signed by you.

We undertake to hold the same in trust to your order and not to register and/or make use of the said document until you confirm in writing that you have been paid the sum of Sterling Pounds 100,000 or equivalent of the said amount in US currency.”

The letter of June 7, 2005 modified the obligations on the first letter. It states:

“1. Out of the sum of Sterling pounds 100,000.00 Mr. Nazir Mohamed Hussein Noor Mohamed and/or nominees will pay you the sum of sterling pounds 60,000.00 within ten days from the date hereof to your account in U.K. details of which have already been given to Mr. Nazir Mohamed Hussein Noor Mohamed and/or nominees.

2. On receipt of the sum of Sterling Pounds 60,000.00 we are at liberty to remove the caution lodged by you against the above property.

3. The balance still outstanding and payable by Mr. Nazir Mohamed Hussein Noor Mohamed and/or nominees to you would be Sterling Pounds 40,000.00 and Kshs. 4,178,000.00. It has been agreed between yourselves and Mr. Nazir Mohamed Hussein Noor Mohamed and/or nominees that if Mr. Nazir Mohamed Hussein Noor Mohamed and/or nominees pays to you the sum of Sterling Pounds 40,000.00 and Kshs.1,000,000 within eighteen months from the date thereof, you will accept the said amount in full and final settlement.”

From this letter the contention by the respondent that their obligation was to receive Sterling Pounds 60,000.00 has basis. It is clear that the balance of 40,000.00 and the Kshs. 4,178,000 was to be paid by Mr. Nazir Mohamed Hussein Noor Mohamed and/or nominees. I am satisfied by the evidence on record that the sum of Sterling Pounds 60,000.00 received by the respondent was handed over to the applicant. The extra sum of Kshs. 40,000.00 was not received by the respondent and there is no basis for an action of accounts and an order to handover. If the applicant is concerned about the breach of obligations under the undertaking then his legal advisers know what to do. But this claim has not been presented for purposes of enforcing a professional undertaking or seeking damages for breach of such undertaking. The upshot is that the Originating Summons dated 28th March 2008 lacks merit and is hereby dismissed with costs.

Dated AND Signed At Nairobi ON This 23RD Day Of AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND Delivered at Mombasa on this 25TH day of September 2012.

J.W. MWERA

JUDGE

Delivered in the presence of: Odera for Mokaya for Plaintiff