



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NUMBER 529 OF 2010 (OS)

UFANISI CAPITAL AND CREDIT LIMITED. PLAINTIFF

VERSUS

STEPHEN KIPKENDA KIPLAGAT.....DEFENDANT

PAUL LILAN AND.....DEFENDANT

PHILEMON KOECH T/A KIPKENDA, LILAN & KOECH ADVOCATES.....DEFENDANT

R U L I N G

The plaintiff filed an Originating Summons on the 8th November, 2010 against the defendant. It was filed under certificate of urgency. The Originating Summons seeks, among other orders, that the defendant be directed to pay the plaintiff Ksh.31,350,000/- together with interest at commercial rate from 16th September, 2010. Simultaneously, the plaintiff filed a Chamber Summons for Interim Orders. It is this Chamber Summons that is for my ruling today.

The Chamber Summons dated 8th November, 2010 was filed by Ms Havi & Company Advocates for the plaintiff. It was filed under section 1A, 1B, 3, 3A and 63(b) (e) of the Civil Procedure Act (Cap 21 Laws of Kenya). It was also filed under Order 39 rule 1 and 2 and Order 52 rule 4 of the Civil Procedure Rules.

The prayers in the application are as follows:-

- (1) *This application be certified as urgent.***
- (2) *The defendant be directed to deliver to the plaintiff a true and correct cash account of the sum of Ksh.94,500,000/- held to the plaintiff's credit as at 16th September, 2010 pending the hearing of this application inter parties.***
- (3) *The defendant be directed to pay the sum of Ksh.31,350,000/- into court, or in a joint interest earning account in the names of the defendant's and plaintiff's Advocates pending the hearing of the application inter parties.***

(4) The defendant be directed to deliver to the plaintiff a true and correct cash account of the sum of Ksh.94,500,000/- held to the plaintiff's credit as at 16th September 2010 pending the hearing of this suit.

(5) The defendant be directed to deposit the sum of Ksh.31,350,000/- into court, or in a joint interest earning account in the names of the defendant's and plaintiff's advocates pending the hearing of this suit.

(6) The costs of the application be provided for.

I will straight away say that prayers 1, 2 and 3 of the Chamber summons application have already been spent. They do not call for any decision after the application was heard. They are therefore not for consideration in this ruling.

The application has grounds on the face of the Chamber Summons. The grounds are that there was an advocate client, relationship between the defendant and the plaintiff in which the defendant acted for the plaintiff in the sale of property L.R No. 209/2582 to Superior Phone Limited for Ksh.145,000,000/-; that under the agreement for sale dated 27th January, 2010 the balance of the purchase price of Ksh.115,000,000/- was payable to the defendant on behalf of the plaintiff; that on completion of the sale and registration of the transfer the said balance of the purchase price was paid to the defendant; that as at 16th September, 2010 the defendant held to the plaintiff's credit the sum of Ksh.94,500,000/- which the plaintiff instructed the defendant to disburse by, among others, paying Ksh.42,500,000/- to the plaintiff and to retain Ksh.5,000,000/- to the plaintiff's credit; that the defendant paid to the plaintiff only Ksh. 16,150,000/- and claims to have paid 35,000,000 to the Dasahe Ltd on account of claimed agency fees despite the fact that the said Dasahe Limited did not procure the purchase of the property and also express instructions from the plaintiff on 26th August, 2010 canceling the agency agreement and directed the defendant not to make any payments to the said Dasahe Limited; that the defendant still held to the plaintiff's credit the sum of Ksh.31,350,000/- which the defendant had refused to pay to the plaintiff; that the plaintiff was apprehensive that unless the defendant was ordered by the court to deposit the sum of Ksh.31,350,000/- into court or in a joint interest earning account in the names of the defendant's and plaintiff's advocates, the defendant will convert the said sum in collusion with the said Dasahe Limited; that the plaintiff will thereby suffer irreparable injury; and that the plaintiff was ready, able and willing to furnish a suitable undertaking as to damages if any as a condition for the grant of the orders sought.

The application was filed with an affidavit sworn by Wilson Kipkoti described as a Director of the Plaintiff on 8th November 2010.

It was deponed in the said affidavit, *inter alia*, that on 23rd October, 2009, Superior Phone Limited offered to purchase the property L.R. 209/2582 from the plaintiff for Ksh.150,000,000/- which price was after acceptance on 25th October 2009 revised on 22nd January, 2010 Ksh.145,000,000/-; that the defendant acted for the plaintiff in the sale and in terms of the agreement for sale dated 27th January, 2010 the balance of the purchase price of Ksh.115,000,000/- was payable to the defendant on behalf of the plaintiff; that the agreement and transfer were completed and registration effected and the said amount paid; that as at 16th September, 2010 the defendant held to the plaintiff's credit the sum of Ksh.94,500,000/- which the plaintiff instructed the defendant to disburse – to Kimotho & Some Ksh.30,000,000/- to Mugambi Imanyara & Company Advocates Ksh. 14,000,000/-, fees due to the defendant ksh.3,000,000/- to be retained on behalf of the plaintiff Ksh.5,000,000/-, and to Ufanisi Capital & Credit Limited Ksh.42,500,000/-. It was further deponed that the defendant paid Ksh.14,000,000/- to Mugambi Imanyara & Company Advocates and also paid themselves ksh.3,000,000/- but never paid Ksh.42,500,000 to the plaintiff as instructed; that after the refusal to pay the plaintiff lodged a complaint with the police for theft by servant against Stephen Kipkenda Kiplagat, a senior partner of the defendant;

that the defendant only paid a sum of Ksh.16,150,000/- to the plaintiff on 27th September, 2010 after Mr. Kiplagat was arrested and questioned by the police but thereafter filed Miscellaneous Application No. 543 of 2010 in an attempt to avoid arrest; that the defendant claims to have paid Ksh.35,000,000/- to Dasahe Limited on account of agency fees despite express instructions from the plaintiff given on 26th August, 2010 canceling the Agency Agreement and directing the defendant not to pay the said Dasahe Limited. It was deponed that in those circumstances the defendant still held Ksh.31,350,000/- which they had refused to pay. The said amount, comprised of Ksh.5,000,000/- which was to be retained to the plaintiff's credit and Ksh.26,350,000/- (being the balance of Ksh. 42,500,000/- which the defendant was instructed to pay to the plaintiff and Ksh.16,150,000/- actually paid). It was deponed also that this affidavit was sworn in support of both the Originating Summons and Chamber Summons.

The said Wilson Kipkoti swore a Supplementary Affidavit on behalf of the plaintiff on 29th November 2010 which was filed on the same date. This Supplementary Affidavit was in response to the Replying Affidavit filed on 25th November, 2010. It was deponed, inter alia, that Dasahe Limited did not procure the purchase and that the Agency Agreement was not acted upon; that Rahab Mwihi Karoki a Director of Superior Phone Limited was introduced to the deponent by one Jackson Mwangi, in relation to the sale of the plot; that the formal offer for purchase of the property for Ksh.150,000,000/- was made to Mugambi Imanyara & Company Advocates, on 23rd October 2009 by the advocates of Superior Phone Limited, Kimandu Gichohi & Company Advocates which offer was accepted on 26th October, 2009.

It was further deponed that on 21st January, 2010 Stephen Kipkenda Kiplagat from the defendant legal firm introduced the deponent to David Some and drew up an Agency Agreement upon the promise by the two of them that they would get the plaintiff another purchaser for the property as Superior Phone Limited was taking too long to accept the terms of the Agreement for Sale. Stephen Kipkenda Kiplagat demanded that he acts for the plaintiff in the purchase in order to secure the agency fees that could be due. It was deponed that on 22nd January 2010 Superior Phone Limited revised the offer to purchase the property downwards to Ksh.145,000,000/-; that thereafter, on 22nd January 2010 Stephen Kipkenda Kiplagat called the deponent to review and execute an agreement for sale claiming that the Agent had found a purchaser. It was then that the deponent noticed that the purchaser was the very same person that had been introduced to him by Jackson Mwangi.

It was deponed that, at that time, the deponent made it clear to Stephen Kipkenda Kiplagat that the agreement for sale should not contain any agency price and the agency price was removed from the Agreement for Sale. It was deponed that Dasahe Limited did not procure a purchaser and that was the reason why the agency price was removed from the mode of payment in the agreement for sale. It was deponed that Stephen Kipkenda Kiplagat and David Some volunteered to pay Stamp Duty and Penalties towards the transfer of the property from Standard Assurance Kenya Limited with the knowledge that the sums or costs incurred in that regard would be paid to David Some upon the plaintiff's receipt of the balance of the purchase price. This was the basis of the payment of the amount of Ksh.14,850,000/- referred to paragraph 4(d) of the defendant's affidavit.

It was deponed that only an amount of Ksh.2,800,000/- was deposited in the client's account of Mugambi Imanyara & Company Advocate by Samuel Kimotho and the deponent had received a true and correct account from the said advocates. It was reiterated that the plaintiff had not instructed or authorized the defendant or Dasahe Limited to make any payments to any advocate directly other than through the account of Mugambi Imanyara & Company Advocates.

It was denied that Dasahe Limited paid any fees to any advocate on behalf of the plaintiff. It was deponed that no commission fees of Ksh.35,000,000/- or any amount was due to Dasahe Limited. It was deponed that the plaintiff specifically forbade the defendant from paying any commission fee to Dasahe Limited by letter of 26th August 2010 which the defendant received on 16th September, 2010; and that the defendant decided to act against those instructions to the plaintiff's detriment. The contents of the letter and instructions of the plaintiff to the defendant dated 16th September, 2010 on the payment of Ksh.94,500,000/- were reiterated. It was deponed also that the sum of Ksh.35,000,000/- which would have been paid to Dasahe Limited was made up of Ksh.14,850,000/- for Stamp Duty and penalties, of

Ksh.2,800,000/- for legal fees deposit to Mugambi Imanyara & Company Advocate (plus interest of Ksh.200,000), Ksh.1,500,000 for disbursement and Ksh.10,650,000/- being consideration for the advance of money incurred on the plaintiff's behalf.

It was also deponed that by a letter dated 17th September 2010 from the defendant to his banker the defendant transferred Ksh.61,350,000/- to Dasahe Limited despite assurance by Stephen Kipkenda Kiplagat to Milton Mugambi and the deponent on 16th September 2010, that he would not pay the commission fee claimed. It was deponed that the claim that the defendant received the deponent's letter of 26th August 2010 after payment to Dasahe Limited was false as the defendant had clearly admitted in paragraph 12 to 15 of the affidavit in Miscellaneous Application No. 543 of 2010 that he saw no justification in acting upon the instructions of the deponent.

It was further deponed that the defendant transferred the amount of Kshs. 16,150,000/- to the plaintiff on 27th September 2010 only after the arrest of Stephen Kipkenda Kiplagat. It was also contended that the charge sheet dated 13th October 2010 was in respect of the sum of Ksh.31,350,000/- and that there was no discrepancy at all. It was further deponed that any contract between Dasahe Limited and the plaintiff would be subject to the Estate Agents Act (Chapter 533 of the Laws of Kenya). It was also deponed that there was no guarantee that the defendant and its partners Stephen Kipkenda Kiplagat, Paul Lilan and Philemon Koech would be there when and if judgment is delivered on the sum claimed. It was deponed that the said partners had not demonstrated what property they had which might be at the disposal of the court to secure the judgment. Therefore, the sum claimed ought to be secured to prevent defeat to the ends of justice.

The plaintiff/applicant through their advocate also filed written submissions on 29th November, 2010. A summary of the circumstances of the matter was given. It was contended that Order 52 rule 4 of the Civil Procedure Rules empowered the court to order an advocate to deliver a cash account and payment into court of any money claimed by a client. Similar powers were granted under Order 19 rule 1 & 2 of the Civil Procedure Rules. In addition, section 63 (b) of the Civil Procedure Act (Cap 21) empowered the court to direct a defendant to provide security in order to prevent defeat to the ends of justice. Therefore, the request by the plaintiff for accounts and deposit of the sum claimed was well founded.

It was contended that clients' money was defined in the Advocates Accounts Rules (Cap 16 Laws of Kenya). Reliance was placed on Rule 1 thereof which sets out how clients' money should be dealt with. Reliance was also placed on rule 12 which prohibited an advocate from dealing with clients money in a manner other than that authorized by law. It was emphasized that the plaintiff/applicant had given specific instructions to the defendant in writing. However, the defendant ignored those instructions and on 8th November, 2010 paid Dasahe Limited Ksh.61,350,000/-.

The plaintiff's counsel relied on a publication **Bowsted & Reynolds on Agency 8th Edition page 111** wherein the learned author stated as follows: -

“Unless otherwise agreed, authority to act as Agent included only authority to act for the benefit of the principal.”

It was contended that the defendant, not having acted for the benefit of the plaintiff, acted beyond the scope of his authority. Therefore, he was liable to pay the sum in question.

Reliance was placed again on the same publication wherein the author stated: -

“If the agent has received money on his principals' behalf or receives it for a particular purpose which he does not carry out, the principal can sue the agent for restitution. Further, if the principal entrusted

money to his agent for a particular purpose which the agent has not carried out, the principal can recover that money on the same basis.”

The case of **Ger Versus Marmanet Forest Co-operative Society Ltd (2002) KLR 1** was relied upon wherein the Court of Appeal stated, *inter alia*, that

“The advocate has made a half hearted attempt to show that he paid over the money to a third party but for the alleged payment to constitute a valid discharge from his duty to account to his client he would have to prove such payment was made with the authority of the respondent.”

Reliance was also placed on the case of **Anna Marie Cassiede Versus Peter Kimani Kairu Hccc No. 39 of 2007 (UR)** where the court found an advocate liable for payment made to a third party without authorization of the client.

It was also contended that the defendant herein was fraudulent by attempting to take upon himself to commit a client on liabilities which had not been agreed to. Reliance was placed on the case of **Republic Versus District Land Registrar – Ex-parte Kiprono Tegerei (2005) eKLR**.

It was emphasized, that on the authority of decided cases, the defendant was obliged to account for and pay to the plaintiff the sums claimed.

It was the contention that Dasahe Limited was not entitled for agency fee or legal fees. This was because the said company did not procure a purchaser for the sale of the property. That position has not been contravened at all. Reliance was placed on the case of **Rajdip House Development Limited Versus Wachira Wambugu (1996) eKLR** where the Court of Appeal rejected an advocate’s claim for payment of commission not provided for in the agreement for sale. It was contended that since the plaintiff expressly forbade the defendant from paying any claimed commission to Dasahe Limited, the defendant could not have paid without seeking confirmation from the plaintiff. In any case Dasahe Limited could not contract to procure a purchaser for the property and get agency fees as it was not a registered Estate Agent. No payment would therefore have been due to Dasahe Limited. Reliance was placed on section 18 of the Estate Agents Act (Cap 533 Laws of Kenya) which forbade Dasahe Limited from acting as such agent. Reliance was also placed on the case of **Mapis Investments (K) Limited Versus Kenya Railways Corporation (2006) eKLR** wherein the Court of Appeal stated as follows: -

“This was in our view tantamount to an admission to the facts giving rise to the illegality. That being the case, it was then a matter of law as to whether the non-registration resulted in the illegality of the conduct; it is clear that a contract to perform Estate Agency Services can only be legal if entered into with a registered Estate Agent.”

Reliance was also placed on the case of **National Bank of Kenya Ltd Versus Wilson Ndolo Ayah (2009) eKLR** where the Court of Appeal reiterated that no one could claim to act in a profession field where he was not qualified and registered.

In conclusion, it was submitted that the defendant was a firm of advocates whose partners were divided on the sum claimed as evidenced in a letter dated 2nd November, 2010 written on behalf of all Lilan and Philemon Koech. There was no guarantee that the defendant and its partners would be there when judgment was delivered for the sum claimed. Therefore the sum claimed ought to be secured to prevent defeat to the ends of justice.

The application was opposed. A replying affidavit sworn on 25th November, 2010 by Stephen Kipkenda Kiplagat was filed on the same date. It was deponed, *inter alia*, that Wilson Kipkoti had approached Mr. Kipkenda to look for an agent to procure a buyer and that Dasahe Limited was introduced to Mr. Kipkoti for that purpose. That Mr. Kipkoti agreed with Dasahe Limited that he would pay Dasahe Limited if it

procured a buyer for the plaintiff. Consequently, a commission agreement dated 21st January, 2010 was signed between the plaintiff and Dasahe Limited. The deposit for the sale amounting to Ksh.30,000,000/- was paid directly to the plaintiff company by the purchaser. Stamp Duty of Ksh.2,200,000/- and penalty for failure to pay Stamp duty on time of Ksh.12,650,000 was paid by Dasahe Limited for and on behalf of the plaintiff on the understanding and agreement that the plaintiff would refund Ksh.14,850,000/- to the agent Dasahe Limited.

It was deponed further that the transfer was registered on 23rd February 2010 and that on 25th March 2010 the High Court at Milimani Civil Case No. 806 of 2003 cancelled the transfer of LR 209/25/82 to the buyer Super Phone Communication Limited. That ruling of Mr. Justice Kimaru was thought to be appealable against. As a result, and with the consent and approval of Mr. Kipkoti for and on behalf of the plaintiff, a team of lawyers led by Mr. Mugambi Imanyara was instructed. The said Mr. Mugambi Advocate informed Mr. Kipkoti in the presence of the deponent that in order to act in the application for stay and intended appeal, a sum of Ksh.10,000,000/- would be required as fees. The plaintiff did not have money and approached the agent Dasahe Limited to pay on its behalf and the agent paid in line with the agreement dated 26th March 2010. Civil Application No. Nai 231 of 2008 and Civil Application No. 79 of 2010 were therefore prosecuted for and on behalf of the plaintiff. The two applications were consolidated.

It was also deponed that the transfer of the subject plot was not as simple as Mr. Kipkoti would like the court to believe. The history had been explained in a letter dated 2nd November 2010 to Mr. Havi Advocate. Further, in order for Standard Assurance Ltd to pass title to the plaintiff, it demanded payment of Ksh.20.5 million which was paid to them. It was further deponed that several payments were made in the transaction for and on behalf of the plaintiff. These were Ksh.30,000,000/ paid to the plaintiff directly, Ksh.20.5 million which paid on account of the plaintiff to Standard Assurance Company Limited, Ksh.14,850,000/- refunded to Dasahe Limited for and on account of Stamp Duty and penalty, Ksh.10 Million refunded to Dasahe Limited on account of legal fees, Ksh.1,500,000/- refunded to Dasahe Limited on account of miscellaneous expenses, Ksh.3 Million paid to the defendant/respondent for agreed fees, Ksh.14 Million paid to Mugambi Imanyara Advocates on account of further fees, Ksh.35 Million paid to the agent Dasahe Limited on account of their commission as per clause 2 of the commission agreement dated 21st January, 2010, and Ksh.16, 150,000/- paid to the plaintiff company.

It was deponed that the payments were based on the express instructions of the plaintiff company and the agreement between the parties. Therefore, a total of Ksh.125,000,000/- had been paid out directly or for and on behalf of the plaintiff company. The defendant who was also the respondent did not owe or hold any money for or on behalf of the plaintiff company and that Dasahe Limited was paid Ksh.35 Million as its commission.

It was deponed that there was a discrepancy in what the plaintiff was demanding. It was not clear whether it was Ksh.26,350,000 made up of Ksh.42,500,000 less Ksh.16,150,000/-, or Ksh.31,350,000/- as stated in the charge sheet in the criminal case No. 1771 of 2010. It was deponed that the relationship between the plaintiff and Dasahe Limited was contractual, and therefore the plaintiff had come to this court with dirty hands by not disclosing material facts and also concealing facts. That the plaintiff was abusing court process by using intimidation, blackmail and making the police debt collectors in order to enrich himself by obtaining favourable orders. It was deponed also that the issue of liability of a firm of advocates in an action for giving accounts under Order 52 (4) of the Civil Procedure Rules, was a question which could only be determined at the trial and not in a interlocutory application. It was also deponed that the plaintiff would not suffer any irreparable loss or damage if the prayers were not granted. The defendant also filed a supplementary replying affidavit sworn by Stephen Kipkenda Kiplagat on 16th December, 2010. In the said affidavit it was deponed, *inter alia*, that the alleged draft agreement mentioned in paragraph 5 of Mr. Kipkoti's supplementary affidavit was not exhibited. Further that the deponent (Kiplagat) relied on the contents of the affidavit of David Some (which was annexed). It was deponed also that the appointment of Dasahe Company Limited was done through an agency agreement dated 21st January and 23rd March 2010 respectively. The affidavit of David Some sworn on 6th December, 2010 was annexed to this affidavit as "SKK 1" and same was sworn in support of the

respondent's position.

It was deponed further that Mr. Wilson Kipkoti had requested Mr. David Some to pay Stamp Duty and penalties for and on behalf of the plaintiff company. It was denied that the deponent into hiding. It was also deponed that David Some of Dasahe Company Limited personally applied for registration of the subject transfer and also personally paid Ksh.14,850,000/- to Kenya Revenue Authority for Stamp Duty and penalties. It was deponed that Wilson Kipkoti had admitted to the police that he had instructed the respondent to draw up the Agency Agreement on 20th January, 2010. It was also deponed that David Some of Dasahe Company Limited had procured the sale.

The defendant through their counsel Guram & Company filed written submission on 10th December, 2010. It was contended that they were relying on the two affidavits sworn by Stephen Kipkenda Kiplagat and filed on 25th November and 6th December 2010 respectively.

It was contended that the defendant had accounted for the Ksh.94,500,000/- .That the defendant had accounted for the monies received fully. That the defendant was not holding any monies for or on behalf of the plaintiff/applicant. It was contended that Dasahe Limited as agent had sworn an affidavit in support of the defendants' supplementary replying affidavit, and that the said Dasahe Limited received Ksh.35 Million as their agency commission as agreed. It was contended that Dasahe Limited was not an Estate Agent nor had they described themselves as such. They therefore, were not subject to Estate Agents Act (Cap 533) Therefore the decision by the Court of Appeal in the case of **Mapis (K) Versus Kenya Railways Corporation** (supra) was not applicable. It was contended that the allegation that the partners of defendant's firm were divided was a false allegation. It was contended that the court cases cited by the plaintiff were distinguishable and were not applicable to the present case and the present application.

The respondent relied on several cases, among them, the case of **Charles Ngari Kibuchi Versus T M Ongalo t/a Tom Ongalo & Company Advocates-Nairobi C. A No. 16 of 1998**. The case of **Oraro & Rachier Advocates Versus Co-operative Bank of Kenya Ltd Nairobi C.A No. 358 of 1999**, as well as the case of **Rajdip Housing Development Ltd Versus Wambugu (1999) 2EA 279 (CAK)**, among others were relied upon. It was contended that the Originating Summons herein was not the right procedure to bring these proceedings, as facts were disputed and. most of the allegations made by the plaintiff were denied. Therefore, there was need for tendering a parole evidence, which could not be satisfactory addressed through the procedure of bringing an Originating Summons.

It was contended that since all accounts for the purchase had already been tendered to the plaintiff by the defendant as at 23rd September 2010, and, based on the decisions such as the case of **Oraro & Rachier Versus Co-operative Bank of Kenya Ltd** (supra), the prayers in the application should be dismissed with costs.

On the hearing date Mr. Havi for the plaintiff/applicant made oral submissions in support of the application. Mr. Billing for the defendant/respondent made oral submissions in opposition to the application.

I have considered the application documents filed, the submissions both written and oral, the authorities cited and the law. Some of the documents filed appear to refer to both the main motion in this case which are the Originating Summons, and the Chamber Summons. As far as the record goes no directions have been given for the hearing of the Originating Summons. Therefore, I will only here today to deal with the interlocutory application which was filed by a way of Chamber Summons. I have already highlighted the prayers which are still alive in the Chamber Summons application. In short they are prayers 4, 5, and 6 therein.

This application appears to revolve around an issue of an advocate accounting to a client for monies received by such advocate on account of the client. Order 53 rule 4 of the Civil Procedure Rules allows this court to order an advocate to give a cash account where an advocate receives money for or on behalf of a client. It provides as follows: -

“4(1) where the relationship of an advocate and a client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for; -

- (a) the delivery by the advocate of a cash account;***
- (b) the payment or deliver 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 into court of any such money or securities;***
- (e) the delivery up of papers and documents to the client of which he is entitled.***

(2) Applications under this rule shall be by Originating Summons supported by affidavit and shall be served on the advocate.

(3) if the advocate alleges that he has a claim for costs the court may make such order for the taxation and payments for securing the payments thereof and the protection of the Advocates Lien if any as the court thinks fit.”

It is not in dispute that there has been an advocate, client relationship between the plaintiff/applicant and the defendant/respondent. A number of arguments have however, been put on both sides. Those arguments relate to whether there has been a full account or not. Those in my view, go to the determination of the Originating Summons. At this preliminary stage the court cannot determine substantively the issues raised in the Originating Summons until after the same is heard substantively, and both parties have presented their positions in accordance with the law.

I observe that the prayers in the Originating Summons relate to a request for payment to the plaintiff of a sum of Ksh.31,350,000/- together with interest (prayer 1) as well as a prayer for delivery of a cash account for Ksh.94,500,000/- (prayer 2), as well as a prayer that in the mean time and pending delivery of the cash account for Ksh.94,500,000/-, the defendant be directed to deposit Kshs.31,350,000/- either into court or in an interest earning account (prayer 3).

I have already highlighted the prayers in the Chamber Summons at the beginning of this ruling. I will not repeat them here. I have also stated that only prayers 4, 5 and 6 are alive. It will be noted straight away that prayer 4 of the Chamber Summons is a substantive order requested in the Originating Summons as prayers. In my view, it cannot be granted at this interlocutory stage, as it will have the effect of determining a substantive prayer before the Originating Summons is heard on merit. Therefore, without more, prayer 4 of the Chamber Summons cannot be considered by this court. I dismiss the same as far as this Chamber Summons application is concerned. It will be addressed in the determination of the Originating Summons.

Prayer 5 of the Chamber Summons, is in my view, an interlocutory prayer. It was anticipated under prayer 3 of the Originating Summons as an interim measure. I will therefore have to consider this prayer.

The prayer relates to the request for deposit of Ksh.31,350,000/- into court or in a joint interest earning account in the names of the advocates for the parties. There are a lot of disputes as to whether the amount should have been paid to Dasahe Limited. The plaintiff/applicant claims that as a client they did not give instructions for the money to be paid to a third party. They admit that, at one time, there was an agency arrangement between them and Dasahe Limited. This agency arrangement was for procurement of a

purchaser for their plot the subject of these proceedings. They state that that agreement did not work and they specifically instructed the defendant not to pay any commission to Dasaha Limited. In spite of these express instructions the defendants paid out the money breaching the advocate client obligations.

The defendants on the other hand state that they paid that money in pursuance of the agency arrangement. That their action was lawful. That they do not currently hold any money on account or on behalf of the plaintiff. They definitely object to the payment of the monies by them, either to court or to an interest earning account. Firstly, they claim that do not have the money. Secondly, they lawfully paid the money in accordance with instructions from their client who is the plaintiff.

The relationship between an advocate and a client is special relationship. It is based on trust, confidentiality as well as professional standards. An advocate or firm of advocates takes instructions from their clients. They are bound to act according with those instructions. If those instructions are unlawful, or impossible they are required to inform their client on the same. They are not to act against specific instructions without the information or concurrence of the client. In this particular case there is a dispute as to what instructions were given. But obviously, there is no dispute that the subject money was received by the advocates (defendant) on behalf of the client (plaintiff). The amount appears to have been paid to a third party who is not a party in these proceedings. The advocate obviously is required to account to his or their clients.

Prima facie, with the facts placed before me, I find and hold that the plaintiff/applicant has provide sufficient evidence to show that he has a prima facie case with the probability of success. They have also demonstrated that they will suffer substantial loss if no orders are granted to secure the amount of Ksh.31,350,000/-. They have shown that indeed, money was received by the defendants on their behalf. The defendant, on the other hand, appears to rely on technicalities, whose merits can only be determined after the hearing and determination of the Originating Summons. It cannot also be said that it is unusual for a firm of advocates to split. In my view, this is a matter where the balance of convenience would require the money in question to be secured. In my view the principles in the case of **Geilla-vs-Cassman Brown & Co. Ltd (1973) EA 358** are applicable. After all when the matter is finally be determined, if either any of the parties is entitled to the amount secured, appropriate orders will be given.

The authorities cited in my view were not relevant to the issue of deposit of funds. They will be relevant to the determination of the main Originating Summons regarding the obligations of an advocate to a client. The case of **Rajdip Housing Development Ltd versus Wambugu (supra)** did not relate to the obligations of an advocate to a client. That case related to the interpretation of an agreement between parties.

In conclusion, I find merits in the request by the applicant who is the plaintiff for deposit of the amount of Ksh.31,350,000/- into court pending the hearing of the suit. I will grant prayer 5 of the Chamber Summons. As for costs, they will await the decision of the main Originating Summons.

For the above reasons, I allow the application with regard to prayer 5 and order that the defendant do deposit within 30 days from today the amount of Ksh.31,350,000/- into court. This matter will be mentioned on 10th May, 2011. Costs in the cause.

Dated and delivered at Nairobi this 8th April, 2011.

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GEORGE DULU

JUDGE

In the Presence of

Mr. Anzala for the plaintiff/applicant
Mr. Billing for the defendant/respondent
Catherine Muendo Court clerk