



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 322 of 2007

BERNARD NJUE MBOGOPLAINTIFF

VERSUS

PETER NJERU MUGO

P. N. MUGO ADVOCATESDEFENDANTS

RULING

Coram: Mwera J.

Mrs Macharia for the Plaintiff

P. Mugo for Defendant

On 3/4/07 the applicant brought on originating summons (OS) under S. 3A Civil Procedure Act and 0525.4 Civil Procedure Rules seeking answers to the questions:

1. is a sum of Ksh. 668 423/= with interest held by the respondent/advocate by virtue of HCCC 1840/01 payable to the applicant?
2. is the applicant entitled to costs of the O.S.?

And further that the respondent do deliver cash account, a "list"? of money he has in his possession on behalf of the applicant and that he deliver that money to the applicant.

The grounds in the body of the summons stated that the respondent admitted having the money Sh. 668 423/= and yet he had refused to hand it over citing a lieu for costs while the applicant owed him no money. The applicant swore a supporting affidavit annexing some exhibits.

The respondent filed a replying affidavit with one annexure. Both sides filed skeleton submissions and alter on highlighted them.

In a concise manner Mrs Madahara told the court that the applicant and the respondent were a client and advocate in HCCC 1840/01. The applicant was the plaintiff in that cause, wherein judgement was entered for the applicant against the 2 defendants therein. Execution followed and ever since the respondent has not accounted for Sh. 668,423/= due to

the applicant. Having the money was not disputed.

Mr. Mugo's position that from the pleading in the plaint to the judgement and the decree, sh. 668 483/= (or is it sh. 668 423/=?) did not belong to the applicant. It was decreed that his sum be paid by the defendant to Kenya Commercial Bank (KCB). The court was informed that the basis of the suit CC 1840/01 was a gift of land the applicant made to the defendants which the defendants then charged to KCB. They defaulted in repayment and the suit was filed so that the defendants could be ordered to pay money to the bank. Judgement was obtained followed by a decree which was executed. The proceeds were paid to the bank and the balance passed to the 1st defendant. That in the circumstances the plaintiff applicant was not entitled to the money or explanation as to how that money was disbursed. There was no money due to the applicant. The respondent had not promised generally or by professional undertaking to pay any money to the applicant and so in the circumstances, the answers sought here are not warranted. In any event the costs between the two were taxed by consent at sh. 155,000/=. The applicant did not lay a claim by set-off over it if indeed the respondent owed him money.

In response Mrs Madahara stated that the gift of the said land to the 1st defendant was conditional even as none was disclosed in the plaint. The taxed costs still remain unpaid and with the applicant as the respondent's client, the latter is bound to give account of money given in the judgement.

Beginning with the undisputed fact, the applicant retained legal services of the respondent which included filing Notice 1890/01 against the 2 defendants. The facts of that case are not in issue here but quoting some parts of the plaint thereof may assist in determining this O.S:

“ 7. The plaintiff on request by the 1st Defendant without any consideration conditionally (?) transferred as a gift his land LR Ngandori/Kiriari/2855 to the 1st defendant to use in support of caltex Kenya Limited operations and their businesses, with mutual agreement that the 1st Defendant will without consideration re-transfer the said land to the plaintiff after stabilizing her late husband Samuel Rutere Amos Estate Business.”

With that the 1st defendant charged the subject land to KCB for a loan of sh. 500 000/=. The rest of the plaint spoke of the defendant on his part of the 1st defendant to service the loan and all that. Then in the prayers the applicant said:

“(a) Both Defendants be and are hereby jointly and severally declared liable and are compiled by order of this court to pay in full the said loan plus interest at Bank's rate and any other expenses to Kenya Commercial Bank for settlement of the said loan, failure of which the plaintiff be authorized to attach and sell the Defendant's and/or the late Samuel Rutere Amos Estate Properties to settle the sale liability in Kenya Commercial Bank Githunguri for the bank to discharge the said title.”

After due formal proof of the claim judgement was entered for the applicant as against the defendants in the

following order/decreed:

- “ 1. That judgement be and is hereby entered for the plaintiff against the Defendants as follows:-
2. That the Defendants do jointly and severally pay the bank loan of ksh. 900 945/= within 14 days thereof.
3. That in default of the above judgement be and is hereby entered against the legal representatives of the Estate of the late Samuel Rutere Enos in the sum of Ksh. 900 945/= plus interest”

Further orders were that the 1st defendant do sign all necessary documents to retransfer the subject land to the plaintiff. If she failed to do so the register of the High Court do execute those documents. The defendant failed to repay the loan, the subject land was sold and the proceeds paid to the bank. The applicant apparently sought to recover his land but not any sum of money.

In the view of this court, and it is not dealing with whether the land or money was recoverable or was a gift “conditionally” transferred. The court did not comprehend this phrase but clearly it read no condition in the plaint. All that notwithstanding the court ordered that the defendant jointly and severally pay the loan due to KCB. When the land transferred as a gift to the 1st defendant was sold, proceeds were applied to repay the KCB loan and Mr Mugo said here that the balance was given to the 1st defendant.

Fair enough. To answer the first question any sums the proceeds of sale of the subject land and sh. 668,423/= were to be paid to the bank. The land was gift to the 1st defendant when the defendant failed to pay up and that land was sold, it was in order that payment be made to the bank and it was. By that the estate of the late Samuel Rutere Enos was saved. The court heard that the balance after the bank was paid, was given to the 1st defendant. By Mr. Mugo’s admission the sale sum was recovered but it was disbursed as per the decree. The sum was never to go to the applicant at any time or ever.

However because the applicant and the respondent had a client – advocate relationships and the case that put them there came to an end, the latter should account to the former as by practice mandated. A client is entitled to know from his advocate the way things went on in the matters that they were engaged in. No wonder the respondents taxed costs remain unpaid. And the explanation or accounting for the proceeds of the sale of the subject land cannot be a difficult thing. The respondent has or must have the details of sale, the total sum realised, costs/expenses of the auctioneer, the balance, how part of it was paid to the bank and the residue passed on to the 1st defendant.

In sum that should be done in the next 28 days so that this matter is closed and costs are pursued by the respondent.

Orders accordingly.

Delivered on 16.4.10.

J. W. MWERA

JUDGE