

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 71 of 2008

ALARAKHIA KHAMISA ALOO :::::::::::::::::::: 1ST APPLICANT

FATMABAI ALARAKHIA ALOO :::::::::::::::::::: 2ND APPLICANT

VERSUS

L.J. MANGHNANI

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

RULING

This is the Defendant/Respondent application dated 4.9.2008 seeking that the Plaintiff/Respondent suit be struck out with costs. Mr. Omollo for the Defendant/Respondent argues that the Plaintiff claim was settled in full by a payment of £19,500 to his lawyers. This sum he argues was received and accepted by the lawyers in ***full and final settlement*** of the Plaintiff claim and as such the present suit ought to be dismissed as having since accepted this sum the Plaintiff is estopped from making any further claim against the Defendant. The initial demand was for a sum of £100,000. A sum of £40,500.00 was paid out to the Plaintiff leaving the balance of £59,500.00 which forms the subject of this present suit. Mr. Omollo for the Defendant argues that the Plaintiff lawyers on record at the time did accept £19,500 in full and final settlement for a claim of £59,500.00. This is indeed strange. Did the Plaintiff instruct his lawyers to accept this reduced amount in full and final settlement of his claim. Clearly not. The Plaintiff did on 13th March 2008 write to his advocates Mutisya Bosire & Company and declared himself “***shocked***” by their actions (letter marked LJM”7”). Clearly if the Plaintiff lawyers chose to accept a reduced sum it was not upon the instructions of the Plaintiff himself. Mr. Omollo for Defendant argues that the Plaintiff is bound by the actions of his lawyers and therefore is bound to forgo his claim for the full £59,500. The court cannot see how this can be. It is the client who instructs the lawyer and not the other way round. A lawyer who acts contrary to the wishes and/or instructions of his client cannot be deemed to have bound his client by such actions. Who was this lawyer acting for? From the annexed correspondence it is clear that the Plaintiff demand was at all times for £59,500 and at no time did he indicate in writing or instruct his lawyer to accept £19,500.00 in full settlement. The Plaintiff claim in his Originating Summons filed in court on 28th March 2008 was £59,500. As such his claim remains outstanding.

Furthermore court notes from the correspondence annexed to the replying affidavit specifically vide a letter dated 23rd November 2007 from the Plaintiff advocates written to the Defendant the Plaintiff had an additional claim of Kshs.4,178,000 which claim has not been addressed by Mr. Omollo in his submissions to this court. All in all this court observes that the Plaintiff deserves his day in court and an opportunity to ventilate his case. To dismiss the suit at this point would be to prejudice the Plaintiff pursuit of justice. The court rules that this application is not convincing and lacks merit. It is dismissed in its entirety with costs to the Plaintiff/Respondent.

Dated and delivered at Mombasa this 27th day of May 2009.

M. ODERO

JUDGE

Read in open court

Mr. Mokaya for Plaintiff/Respondent

No appearance by Defendant/Applicant