

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 224 of 2009

DOMINIC WAIGI NDUNG’U.....PLAINTIFF

VERSUS

G. H. M. KAMONDE T/A G. KAMONDE ADVOCATE....DEFENDANT

RULING

The plaintiff filed suit by originating summons purportedly under the provisions of Order LII Rule 4 of the Civil Procedure Rules and Section 47(1) of the Advocates Act seeking this court’s orders to compel the defendant to deliver a cash account to him and thereafter the defendant be ordered to reimburse the plaintiff the sum of KShs.209,200/= which the plaintiff alleges is being unlawfully withheld by the defendant. The plaintiff further prayed for an order of the court to compel the defendant to deliver his bill of costs in court for taxation to determine the legal fees due to the advocate. The motion is supported by the grounds on the face of the application and the annexed affidavit of the plaintiff. The motion is opposed. The defendant Geoffrey Kamonde swore a replying affidavit in opposition to the motion. The plaintiff swore an affidavit in further support of the motion.

The parties to this suit agreed to dispose off this suit by making submissions. Counsel for the parties herein agreed by consent to file written submissions in support of their respective clients’ opposing cases. They duly complied. The said written submissions were duly filed. I have carefully read the pleadings filed by the parties in support of their respective positions. I have also read the written submissions filed by the respective counsel for the plaintiff and the defendant. From the pleadings filed, the following are the undisputed facts of this case. The plaintiff and the defendant had an advocate-client relationship. The plaintiff was at the material time resident in the United States of America. The plaintiff instructed the defendant by phone to act on his behalf in the purchase of a parcel of land referred to as LR. No. 209/388/8285. The purchase consideration for the said parcel of land was KShs.6.5 million.

According to the plaintiff, he deposited with the defendant the sum of KShs.650,000/= being the 10% deposit of the purchase consideration. This fact was not denied by the defendant. The sale transaction fell through. According to the defendant, the plaintiff gave him further instructions to act on his behalf in the purchase of another parcel of land identified as LR. No. 8285/654. The purchase consideration for this parcel of land was KShs.5.5 million. The plaintiff disputes giving instructions to the defendant to act on his behalf in the subsequent sale agreement. It is the plaintiff’s case that the defendant did not have instructions to undertake any legal work in respect of the conveyance of the second property. It appears that there was a disagreement between the plaintiff and the defendant before the second sale agreement was executed. The plaintiff withdrew instructions from the defendant and proceeded to instruct the firm of Muchiri Munga & Kibanga Advocates to undertake the conveyancing work on his behalf. The plaintiff requested the defendant to refund the said sum of KShs. 650,000/= that was deposited with him. Instead of refunding the entire amount, the defendant deducted the sum of KShs.209,200/= . He claimed the sum constituted his legal fees for the work done. The plaintiff disputes that the defendant is entitled to be paid the said sum of KShs.209,200/=. It was for that reason that the plaintiff filed the present suit.

Upon evaluating the facts of this case, it was clear to the court that the issue in dispute between the plaintiff and the defendant in actual fact is the quantification of the work that was done on behalf of the plaintiff by the defendant acting in his professional capacity as an advocate. As stated earlier in this ruling, there is no doubt that there existed an advocate-client relationship between the plaintiff and the

defendant. The plaintiff retained the defendant to act on his behalf in the purchase of certain properties which transactions appear not to have been completed. This court cannot assess the quantum of the work done by the defendant to determine the legal fees that he is entitled to be paid. The court cannot at this stage of proceedings order the defendant to refund to the plaintiff the said sum of KShs.209,200/=. It was evident that the defendant is entitled to hold part of the amount that was deposited with him as lien pending settlement of his legal fees. I was not persuaded by the thrust of the plaintiff's submission which was to the effect that the defendant was holding the said sum of money as his trustee: the true position is that the plaintiff deposited the said sum of money with the defendant in his capacity as his advocate.

In the premises therefore, the order that commends itself to this court is an order that will lead to the determination of defendant's entitlement as legal fees. I direct the defendant to file and serve his advocate-client bill of costs in court within fourteen (14) days of today's date. After assessment of the defendant's said bill of costs, the taxing officer shall make appropriate orders in regard to the amount now held by the defendant. Since no party was wholly successful in present suit, I direct that each party bears his own costs.

DATED in NAIROBI this 28TH day of OCTOBER 2009.

L. KIMARU

JUDGE