REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 434 of 2005

SIMON PETER NJERU GICHUKI……..…… ……PLAINTIFF

VERSUS

P. WAMBUGU KARIUKI t/a WAMBUGU KARIUKI

& ASSOCIATES ADVOCATES.……...…DEFENDANT

R U L I N G

The Plaintiff in this suit, by a plaint filed on 5th August, 2005 sued his Advocate for damages for breach of contract, special damages for losses and expenses incurred and for a refund of money received by him and not accounted for in an Agreement of Sale. After being served with the summons and the plaint, the Defendant/Advocate filed a statement of defence dated 29th September, 2006.

Subsequently, on 8th February, 2006, the Defendant/Advocate filed a Chamber Summons application under **Order VI Rule 13(1) (a)** and **2** of the **Civil Procedure Rules** seeking to have the Plaintiff's suit struck out with costs.

The Defendant cited nine grounds on the face of the Chamber Summons as the basis of the application. These nine grounds are set out in full here below.

1. The Plaintiff in paragraphs 3 and 4 of the plaint avers/alleges that the Defendant acted for him sale of L.R. No. 209/3143 as the vendor to Tom Onchiri and Robin Arani Buruchara and as a purchaser from Telposta Pension Scheme.

2. In the said paragraph 3 and 4 of the plaint the plaintiff avers/alleges that the defendant received a total of Khss.10,292,000/- to hold on behalf of the plaintiff.

3. In paragraph 5 of the plaint the plaintiff avers/alleges that the defendant after receiving Kshs.10,292,000/- only paid out Kshs.6,840,000/- leaving unaccounted for kshs.3,452,000/- in breach of the agreement stated in the said paragraphs 3 and 4 of the plaint.

4. The plaintiff in paragraph 6 of the plaint avers/alleges that the defendant despite having been instructed by the plaintiff failed to transmit Kshs.3,452,000/- which amount the defendant todate has not accounted for or refunded to the plaintiff.

5. As captured in paragraph 8 of the plaint the plaintiff's claim is for Kshs. 3,452,000/- being the allegedly unaccounted for money todate together with another claim of kshs.130,000/- being loss of entitlement to house allowance due to the defendant's alleged delays in failing to comply with the Plaintiff 's ALLEGED instructions as his client.

6. The plaintiff's claim against the defendant is for a total of Kshs. (3,452,000 + 130,000) = 3,582,000/- though the

plaint reflects liquidated prayers of Kshs.130,000/-.

7. As can be noted in paragraph 20 of the defendant's counterclaim dated and filed in court on 29/9/05 and the plaintiff's defence to counterclaim at paragraph 12 the defendant acted for the plaintiff until 23/3/05 when the plaintiff terminated the defendant's services.

8. In the light of the foregoing it is clear that the defendant as an advocate had been retained by the plaintiff. THE RELATIONSHIP OF ADVOCATE AND CLIENT HAD EXISTED. The plaintiff's cause of action therefore ought to be seeking the defendant to account/explain how he dealt with the money received on behalf of the plaintiff IF AT ALL ALLEGEDLY CONTRARY TO THE PLAINTIFF'S INSTRUCTIONS AS CONTENDED IN THE PLAINT. The Plaintiff's cause of action is therefore in the eyes of the law clearly INCOMPETENT, UNREASONABLE and DISCLOSES NO REASONABLE CAUSE OF ACTION because his cause of action in law IF AT ALL does not lie by filing of the plaint as captured by the defendant's defence dated and filed in court on 29/9/05 in its paragraph 17. The cause of action is therefore INCOMPETENT and FATALLY DEFECTIVE. The plaintiff IF AT ALL GRIEVED ought to have moved the court as provided for under Order LII Rule 4 of the Civil Procedure Rules.

9. The Plaintiff's cause of action is therefore incompetent as its contrary to the mandatory provisions of the law. It is a cause of action which is therefore unsustainable in law, it is unreasonable, cannot lie and ought to be struck out with costs.

10. That the costs of this application be provided for.

The application is opposed. The Plaintiff has filed grounds of opposition to the application dated 14th April, 2008 in which the following grounds are cited.

1. With the determination of instructions by the Plaintiff, the advocate-client relationship ceased to exist and reasons therefore the rules governing client-advocate ceased to exist.

2. The suit is competent in court and mere technicalities if any should not be employed to scuttle the legal process of recovery.

3. The defendant having filed a counterclaim to the plaintiff's claim, he is precluded/estopped from challenging the competence of the suit.

4. The grounds set out in support of the application are not legal grounds but factual matters which cannot be dealt with in an application.

5. The plaintiff shall be prejudiced if the proceedings are struck out.

6. The application has been brought in bad faith and has malafides.

7. The application has not been brought in good time within reasonable time and thereby intended to forestall the quick disposal.

I have considered this application together with the submissions by the Advocates for both parties.

In regard to the first issue whether the Respondent should come to court by way of an originating summons under **Order LII** of the **Civil Procedure Rule**, **Mr. Onkoba** for the Respondent was of the view that the Respondent could only file a suit against the Applicant/Advocate because the Advocate/Client relationship had ceased. Ms. Waweru's submission that since such a relationship existed at one time, **Order LII, rule** 4 applied.

Order LII rule 4(1) and (2) is very clear that an application under **Order LII** can be made where either an Advocate and Client relationship exists or where one existed at any one time. **Ms. Onkoba's** understanding of the order was therefore misleading.

The second issue is whether the Respondent's suit is incompetent. **Ms. Waweru's** submission was that the Respondent's claim should have been made by way of an originating summons under **Order LII** of the Civil Procedure Rules since all the Respondent wanted was accounts. **Ms. Onkoba** did not agree with him and submitted that the Respondent was claiming special and general damages and not merely accounts and that in the circumstances, the suit was sustainable, reasonable and competent.

Ms. Onkoba relied on the cases of **D.T. Dobie vs. Muchina [1982] KLR** and **Nitin Properties Limited vs. Kalsi and Another [1995-98] 2 EA** 257 for the preposition that court should not strike out the whole suit if an amendment may breath some life into suit.

Ms. Waweru on her part relied on **Halsbury's Law of England 1999 Vol. 2 Sections 1-21** on the jurisdiction to enforce undertakings given by solicitors; for the preposition that such an application can only be made through originating summons by the party to whom the undertaking was made. I do agree with the prepositions in the above texts.

The case of **Kenya Commercial Bank (KCB) Limited vs. Osebe [1982] KLR 297** is perhaps the most applicable to the instant matter. **Law, Potter, JJA & Hancox Ag. JA** held:

"***1. The Procedure of originating summons is intended for simple matter, and enables the court to settle them without the expense of brining an action. The procedure is not intended for determination of matters that involve a serious question. The procedure should not be used for the purpose of determining disputed questions of fact.***

5. There is no power conferred on a judge to award damages on an originating summons."

The Plaintiff/Respondent herein seeks not only a refund of monies he paid to the Defendant/Applicant, who was at the time of payment his Advocate, but in addition he seeks special and general damages for other expenses he incurred due to the Defendant's negligence and or breach. Cleary the Plaintiff's claim cannot be brought by way of Originating Summons, as the court would lack jurisdiction to award damages if he approached the court under **Order LII** of the **Civil Procedure rules**. The Plaintiff's suit is therefore not incompetent or bad in law as argued by the Applicant. An Advocate, like any other party is capable of being sued in a suit. A suit in which an Advocate is a Defendant cannot be termed incompetent just because an Advocate has been sued by his client and the client seeks redress by way of an award of damages.

Order LII rule 4 is meant to be used in simple matters involving *inter alia* Advocate/Client accounts. It would not be suitable in cases where damages are sought like in this case. I do find that the Plaintiff's suit is sustainable competent and should therefore not be struck out on grounds urged in this application.

Having come to the conclusion I have of this matter, the application dated 8th February, 2006 lacks in merit and is accordingly dismissed with costs to the Respondent.

Dated at Nairobi this 23rd day of June, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Onkoba for the Applicant

Ms. Waweru for the Respondent

LESIIT, J.

JUDGE

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