REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 39 OF 2007

ANNA MARIE CASSIEDE

BRUNO CASSIEDE.....PLAINTIFFS

- VERSUS –

PETER KIMANI KAIRU P/A

KIMANI KAIRU & CO. ADVOCATES.....DEFENDANT

R U L I N G

The plaintiffs filed suit against the defendant seeking a refund of certain sums of money which the plaintiffs claimed was deposited with the defendant for the purposes of an intended purchase of a property at Kileleshwa, Nairobi. On 4th June, 2008 this court allowed the plaintiffs' application for summary judgment. Judgment was entered in favour of the plaintiffs and as against the defendant as prayed in their plaint. The defendant was aggrieved by the decision of this court and duly filed a notice of intention to appeal against the said decision to the Court of Appeal. The said notice of appeal was filed in court on 13th June, 2008. On 18th June, 2008 the defendant filed a notice of motion under the provisions of **Sections 3A** and **63(e)** of the **Civil Procedure Act** seeking the recall of the said judgment of this court. The defendant further sought the setting aside of the same judgment. He also sought an order of the court to declare the said judgment and the entire proceedings leading to the same to be a nullity. Pending the hearing and determination of the application, the defendant sought stay of proceedings.

The grounds in support of the application are on the face of the application. The defendant contends that the cause of action in the suit arose out of an advocate-client relationship that existed between the plaintiffs and the defendant. It was the defendant's contention that in the event of a dispute between an advocate and a client, the plaintiffs were required to invoke the jurisdiction of the court by filing an originating summons as provided for under the provisions of **Order LII Rule 4(2)** of the **Civil Procedure Rules** and not by filing a plaint. The defendant stated that since the plaintiffs filed the suit by way of plaint instead of by originating summons, this court lacked the requisite jurisdiction to deal with the matter. It was the defendant's further argument that the judgment and the subsequent decree were therefore nullities in law and therefore should be recalled and set aside. The defendant contended that since the judgment had not yet been perfected into a decree, this court had jurisdiction to recall the said judgment and set it aside. The application is supported by the annexed affidavit of Peter Kimani Kairu, the defendant.

The application is opposed. Aldrin Ojiambo, the advocate for the plaintiffs swore a replying affidavit in

opposition to the application. He deponed that the plaintiffs had properly invoked the jurisdiction of the court by filing a plaint instead of filing an originating motion as contemplated by the provisions of **Order LII** of the **Civil Procedure Rules**. He deponed that the fact that the plaintiffs had an option of approaching the court by filing an originating motion did not oust this court's jurisdiction to hear and determine the suit in the manner that it did. In any event, he swore that the defendant was not prejudiced by the manner in which the plaintiffs commenced the suit since the defendant had filed a detailed defence to the plaintiffs' claim. He was of the view that the application was filed as an afterthought since if the defendant had any claim regarding his fees, he should have filed a counterclaim in respect of the same. He deponed that this court had properly dealt with the matters in dispute and was therefore *functus officio*. He deponed that there were no sufficient reasons disclosed to warrant the recall of the judgment, its setting aside or the nullification of the proceedings herein.

At the hearing of the application, I heard the submission made by Mr. Kibet on behalf of the defendant and by Mr. Ojiambo on behalf of the plaintiffs. The two counsel basically reiterated the contents of the application and the affidavits filed in support of their respective clients' cases. The two counsel cited several decided cases in support of their respective opposing positions. There are two issues for determination by this court: the first issue is whether this court has power to recall its judgment and make an appropriate order setting the said judgment aside. The second issue is whether the defendant established a case to enable this court make an order of such a recall. It was conceded by the plaintiffs that this court has inherent jurisdiction to recall its judgment where it is established that there is just cause for such a determination. I accept the legal position which was set out in the case of ***Raichand Lakhamshi & Anor. vs Assanand & Sons [1957] EA 82***. Sir Newnham Worley, the then President of the Court of Appeal of East Africa stated at Page 85 as follows:

"*It is evident that the power to recall a judgment is one of the inherent powers of a court. In Kenya, as regards both the Supreme Court and the subordinate courts, inherent powers are saved by s. 97 of the Civil Procedure Code. We think, therefore that the courts in Kenya have the same inherent power as courts in England to recall a judgment before it is perfected by a formal decree or order. Such a power is beneficial because, as was pointed out in Harrisons's case (1), it avoids the absurdity and consequential expense of the court having to pass a decree which it knows to be wrong, but which could only be upset by means of an appeal, or in Kenya by the alternative procedure of an application for review. If the courts in Kenya exercise the discretion to recall judicially and ensure that all parties affected are given an opportunity to be heard, it is unlikely that any injustice or hardship will be caused."*

This legal position was accepted by Lenaola J. in ***Belgo Holdings Limited vs Akber Abdullah Kassam Esmail Nairobi HCCC No.244 of 2004*** *(unreported)* where at page 12 of his ruling he held as hereunder:

"*If the actions taken all along in this suit were a nullity for reasons I have laboured to explain above, and where there is as is apparent contempt of court, the earlier orders can be recalled even if no party so applies. To my mind, this court has the inherent power on its own motion to put right what is wrong, more so where a party has benefited from the commission of an offence which was not disclosed to court."*

It is therefore clear that where it is established that the order or the decree issued by the court was granted by mistake or by the court misapprehending its jurisdiction or when a party procures the said order or decree by concealing from the court material facts which would have affected the determination of the matters in dispute, then this court has inherent jurisdiction to recall its order or decree for the purposes of its setting aside and for the greater purpose of upholding the rule of law and doing justice to the parties to the particular suit.

In the present application, it is the defendant's contention that this court proceeded without jurisdiction when it heard and determined the suit in favour of the plaintiffs by allowing their application for summary judgment. It was the defendant's argument that since the dispute between the plaintiff and the defendant was a dispute involving an advocate and a client, the procedure that ought to have been invoked by the plaintiffs in seeking an appropriate relief from court was by filing an originating summons as contemplated by **Order LII Rule 4(2)** of the **Civil Procedure Rules**. The defendant argued that the

failure by the plaintiffs to abide by this procedural requirement went to the jurisdiction of this court and therefore the proceedings and the judgment were a nullity and should consequently be set aside upon this court applying its inherent jurisdiction. On their part, the plaintiffs are opposed to the application. They submitted that the fact that there was a procedure where the plaintiffs could have filed suit by originating motion did not preclude the plaintiffs from filing suit by way of plaint. They further argued that the defendant had not been prejudiced by the fact that the plaintiffs had filed suit by way of plaint since the defendant filed an elaborate and detailed defence to the suit. The plaintiffs were of the view that the application was an afterthought and meant to delay the plaintiffs from enjoying the fruits of their judgment.

Has the defendant established a case to entitle this court recall its judgment? I do not think so. I have carefully read the provisions of **Order LII** of the **Civil Procedure Act**. The said Order sets out the procedure in respect of certain actions contemplated to be taken under the **Advocates Act (Cap 16 Laws of Kenya).** For instance, **Rule 2** gives the procedure to be adopted when the Registrar refuses or neglects to issue a practicing certificate to an advocate. (See **Section 26(2)** of the **Advocates Act**). **Rule 3** deals with an application made under **Section 45** of the **Act**. This section is in regard to a situation where an advocate and a client have entered into an agreement for the settlement of legal fees. **Rules 8 and 9** deal with the procedure to the adopted when a party appeals from the decision of the disciplinary committee appointed under **Section 57** of the **Advocates Act**. It is therefore clear that the procedure provided under **Order LII** of the **Civil Procedure Act** essentially deals with matters relating to legal practice and the discipline of advocates. I accept the defendant's argument that one of the procedures that the plaintiffs can approach the court is by filing an originating summons as provided under **Order LII Rule 4(2)** of the **Civil Procedure Rules**. I am however not persuaded by the defendant's submission that that is the only procedure which the plaintiffs are allowed by the law to approach the court. The plaintiffs had the option of filing a suit by way of plaint or by filing an originating motion. The fact that the plaintiffs chose to file suit by way of plaint is not fatal or prejudicial to their case nor does it raise an issue regarding the jurisdiction of this court.

With the greatest respect to the defendant, I think his application is based on a false premise. The relationship between an advocate and his client is an ordinary contractual relationship that is subject to the ordinary law of contract. An Advocate-Client relationship is not a special relationship that confers upon the parties a responsibility to approach this court in a particular manner when either party is aggrieved by the conduct of the other. This is more so when it is alleged that there was breach of contract. In respect of the advocate's fees, the enforcement of professional undertakings and the rendering of accounts, the procedure to be adopted is provided for by the **Advocates Act** and the **Rules** made under **Order LII** of the **Civil Procedure Rules**. Where a client considers that there was breach of contract in the course of the giving effect of his instructions by the advocate, he may file suit by way of plaint, like any other litigant who alleges that the other party breached the contract.

This court noted in its earlier ruling allowing the plaintiffs' application for summary judgment that the defendant acted contrary to the specific instructions of the plaintiffs when he purported to pay the vendors the amounts deposited with him without due authorization by the plaintiffs. I find no merit with the application by the defendant. This court had jurisdiction when it heard and determined the application for summary judgment. The plaintiffs did not breach any rules of procedure when they filed their suit against the defendant by way of plaint instead of filing an originating motion as provided by **Order LII Rule 4(2)** of the **Civil Procedure Rules**. The plaintiffs were not filing suit for the defendant to render accounts of the sums received on their behalf. They were seeking the refund of monies that was deposited with the defendant pending further instructions. The application lacks merit and is consequently dismissed with costs.

DATED at NAIROBI this 9th day of July, 2008.

L. KIMARU

JUDGE