



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC APPLI 41OF 2007

IN THE MATTER OF: ORDER LII RULE 4(1) (a) AND (b) (POWER
TO ORDER ADVOCATE TO DELIVER CASH)

FRANCIS WAIGANJO KIMANGA..... APPLICANT

- Versus -

J. W. KAGWE T/A

J.W. KAGWE & CO. ADVOCATES.....RESPONDENT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

RULING

Two applications are considered in this ruling. The first one is by an originating summons dated 26th January, 2007 and made pursuant to O. LIII rule 4(1) (a) and (b) of the Civil Procedure Rules, Rules 4 and 12 of the Advocates (Accounts) Rules, the Advocates Act, Cap 16 laws of Kenya and section 3A of the Civil Procedure Act. The applicant thereby seeks orders-

1. THAT the Honourable court be pleased to order Ms. J. W. Kagwe & Company, Advocates, to deliver up Kshs. 6,462,000.00 plus interest to the Applicant and or forthwith deposit the sum in court.
2. THAT the respondent do pay the costs of this application.

The application is supported by the annexed affidavit of Francis Waiganjo Kimanga, the applicant, sworn on 26th January, 2007.

The second application is by a chamber summons dated 5th April, 2007, and made under O. XXXIX rules 1(a), rule 7(1) (a) and rules 8 and 9 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, and all the enabling provisions of the law. The application prays for orders, inter alia, that-

- (a) The Respondent Advocate be ordered to forthwith remit Kshs. 694,291.54 to one Martha Wangui Mureithi (hereinafter referred to as “the vendor”) if not yet
- (b) The Respondent Advocate be ordered to forthwith deposit Kshs. 5,037,140.46 in court

for preservation pending hearing and determination of the main summons (read, the originating summons referred to herein above).

(c) Costs of the application be awarded to the applicant.

The application is supported by the annexed affidavit of the applicant, Francis W. Kimanga, sworn on 4th April, 2007.

Arising from the two supporting affidavits, the common ground is that there existed an advocate/client relationship between the Respondent and the Applicant initially in the purchase by the applicant of plot No. Kwale/Galu/Kinondo/49 from one Martha W. Mureithi, the vendor, and subsequently in the sale of the same plot to one Rita de Nicolo Lugogo. In the originating summons, the applicant claims Kshs. 6,462,000.00 received on his behalf in the sale of the plot to Rita de Nicolo Lugogo. And in the application by chamber summons, the applicant seeks an order for payment of interest to the vendor at 10% per annum on Kshs. 8,770,000.00 from 14th February, 2006 which was the completion date, to 28th November, 2006 when the sale price was finally paid to the vendor. It is the applicant's case that the said amount should be paid as soon as it continues to attract interest, yet the Respondent is holding the Applicant's funds.

To the application by originating summons, the Respondent

filed a statement of defence dated 14th February 2007. In paragraph 4 thereof, the Respondent denies that an amount of Kshs. 6,462,000.00 is owing to the applicant as the latter has not paid interest for late payment in relation to the same plot which is the subject matter of this application. He further states that the applicant has not paid the legal fees due to the Respondent in respect of the plot and other transactions which are set out in the replying affidavit, all of which are required to be paid out of the funds that the Respondent is holding. He finally states that what is truly necessary in this matter is an order that accounts between the Applicant and the Respondent be taken and filed in court subsequent to which the court may give directions. This sentiment is echoed in paragraph 13 of his replying affidavit sworn on an undisclosed date but filed in court on 15th February, 2007. It is also repeated in paragraph 13 of his replying affidavit sworn on 12th April, 2007, in response to the 2nd Application by chamber summons dated 5th April, 2007.

At the hearing of the applications, Mr. Ndegwa appeared for the

applicant while Mr. Were appeared for the Respondent. Both counsel made submissions which, in my view, did little more than highlight what was already on record. Mr. Were, however, conceded that although the sum claimed is Kshs. 6,462,000/=, the sum has since been reduced to shs. 4,906,500/=. He submitted that the court should examine the documents and find that this is a matter for taking accounts, and that the Respondent is ready for an order to pay the said sum of Kshs. 4.9 million to the court or to the applicant. He finally said that the two applications before the court were interwoven, and they were brought to court prematurely before the accounts were taken, and therefore the Applicant should meet the costs.

Mr. Ndegwa replied that the application was not filed

prematurely because it was the Respondent who had undertaken to pay the purchase price which subsequently attracted interest, and should have paid the interest because they are still holding the money. He also submitted that the issue of taking accounts does not arise as the Respondent has already done the accounts and attached them to his replying affidavit. He therefore submitted that the money admitted in the sum of Kshs. 5,731,432.00 should be paid to the Applicant forthwith.

After considering the applications and the arguments of

counsel, I find that the only issue for determination is whether the Respondent owes the Applicant and, if

so, how much money. Although the Respondent contends that this is a matter for taking of accounts, I agree with Mr. Ndegwa that the Respondent has already taken accounts as evidenced in Exhibit 2 which is annexed to the Applicant's affidavit sworn on 4th April, 2007. The exhibit contains a fee note made up to 15th January, 2007. It shows that after all the deductions inclusive of the Respondent's fees, the total sum due and payable to the Applicant as of 15th January, 2007, was Kshs. 5,731,432.00. Although Mr. Were stated that the sum claimed had since been reduced to Kshs. 4,906,500/= that was no more than a statement from the bar. No evidence was adduced in substantiation.

In the circumstances, I agree with Mr. Ndegwa that the amount

of money admitted in the fee note is due and payable to the Applicant, subject to the payment of the sum of Kshs. 694,291/= to the vendor on account of outstanding interest. I therefore direct that-

1. The Respondent's Advocate do forthwith remit the sum of Kshs. 694,291/50 to one Martha Wangui Mureithi, the vendor.
2. That the Respondent's Advocate do forthwith pay to the Applicant the sum of Kshs. 5,037,140/50
3. The Respondent to pay to the Applicant the costs of the application by chamber summons dated 5th April, 2007, as the two applications are interwoven and were heard as one application.

It is so ordered.

Dated and delivered at Mombasa this 11th day of December 2007

L. NJAGI

JUDGE