



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 342 of 2005**

**DIXON OBEL OTONDO.....PLAINTIFF/APPLICANT**

**AND**

**ENOCK ALOO NYAGOL t/a ALOO & CO ADVOCATES.....DEFENDANT**

**J U D G M E N T**

The plaintiff/applicant's suit is by originating summons under Order LII Rule 4 of the Civil Procedure Rules.

The respondent did not file any papers in opposition and the court therefore accepts the evidence of the plaintiff as being a reflection of the facts in this matter.

The plaintiff retained the respondent advocate to act for him in a conveyancing transaction where the plaintiff was selling his property, known as Nairobi/Block 97/450 at Tassia Estate in Nairobi, to Josephine Wangechi Maina. The plaintiff exhibited a copy of the certificate of lease in his name. The purchase price was kshs 5 million of which was paid to the respondent. The registration formalities were completed early October 2004 but the plaintiff to date has not received the proceeds of that sale transaction.

When the plaintiff failed to obtain his funds as aforesaid he instructed the firm of Anjarwalla & Khanna advocates to act for him and to get his file from the respondent. The respondent, despite the plaintiff's instructions, refused to release his file to Anjarwalla & Khanna advocates.

In the meanwhile the plaintiff was informed by Mr Karim Anjarwalla that the firm of Iseme Kamau & Maema advocates, advocates who acted for the purchaser in the sale transaction, had paid the respondent kshs 500, 000 deposit and the balance of the purchase price being kshs 4, 5000, 000.

Further the plaintiff annexed a letter, which confirmed that the purchaser took possession of the property the subject of the sale transaction.

The plaintiff continued to demand for the purchase money but the demands did not receive the respondent's response.

The plaintiff complained to the complaint commission and to the law society of Kenya. There was exhibited by the plaintiff a letter written by the secretary of the law society of Kenya, which confirmed a telephone conversation with the respondent where he admitted having the purchase money. Part of that letter stated:

*“You informed me that you have not accounted for Mr Otondo’s money because of a dispute as to fees between you and him. You said you are in the process of filing your bill of costs for taxation. I asked you whether you had communicated this information to him and your answer was in the negative.*

*.....we agreed that, to obviate unpleasant consequence, you would account, within 7 days, for the money received on behalf of Mr Otondo by paying him the money received less your fees and any disbursement.”*

That letter is dated 26<sup>th</sup> November 2004.

The plaintiff did not, thereafter, receive his money from the respondent and accordingly the plaintiff reported the matter to the police and charges were preferred against the respondent at Kibera Magistrates Court.

The plaintiff in his supporting affidavit stated that he has not received his money from the respondent to date. He therefore averred that it is only just, in those circumstances, that the respondent do render a just and true account to the applicant.

On being served with the originating summons the respondent engaged in acts, which were just trying to postpone the day of reckoning. The respondent filed a notice of motion dated 20<sup>th</sup> September 2005 which when it was fixed for argument the respondent failed to prosecute the same. The court considered that application which sought declaration that the present action was in breach of the respondent’s constitutional rights. By this court’s ruling delivered on 2<sup>nd</sup> December 2005 the court dismissed that application. The court in that ruling made a finding in part as follows: -

**“To my mind the plaintiff’s right to have an account from the defendant of monies received on his behalf by the defendant is equally guaranteed by the constitution.”** Per Hon Justice Waweru.

Despite the dismissal of that application when this matter came before me on 13<sup>th</sup> March 2006 counsel who appeared for the respondent sought to prosecute another application filed by the respondent dated 16<sup>th</sup> January 2006 which sought the striking out of the originating summons on the basis that it is an abuse of the process of the court. The grounds that supported that application were similar to the grounds of the dismissed Notice of Motion.

When plaintiff’s counsel completed his submissions in support of the Originating Summons counsel for the respondent refused to respond to those submissions on the basis.

**“It will incriminate the defendant who faces a criminal charge.....”**

The respondent’s advocate refused to submit the respondent’s defence.

The court’s finding is that the plaintiffs application is merited and accordingly the court’s orders are

**(1) The defendant/respondent is hereby ordered to deliver a cash account of all the money held in clients account on the plaintiffs behalf within 14 days from the date of this judgment.**

**(2) In default the plaintiff may proceed to execute a decree against the respondent defendant for recovery of kshs 5, 000, 000 together with interest at court rate from 1<sup>st</sup> October 2004 until payment in full.**

**(3) The plaintiff is granted costs of this suit, which costs are assessed at kshs 20, 000/-.**

MARY KASANGO

**JUDGE**

Dated and delivered this 30<sup>th</sup> March 2006.

**MARY KASANGO**

JUDGE