REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1113 of 2003

GALSHEET (K) LTD……..…. PLAINTIFF
VERSUS
GIKUNDA MIRITI T/A GIKUNDA MIRITI & CO. ADVOCATES……..… DEFENDANT

JUDGMENT

The facts of this case made this judgment a painful one to write. As I pondered whether to state this fact in my record I considered the definition of a judgment in Osborne's Consise Law Dictionary, 5th Edition which is,

> "**The decision or sentence of a Court in legal proceeding. Also the reasoning of the judge which leads him to his decision, which may be reported and cited as an authority, if the matter is of importance, or can be treated as a precedent."**

I shall revert to this later in my concluding remarks.

The hearing of this Originating Summons, filed on 23rd October 2003, took strange twists when parties appeared before me. On the 21st of July 2005, Mr. Mailani appearing for the Defendant sought an adjournment on the grounds that Mr. Gikunda, "who has the conduct of this case" was in Meru. The Plaintiff's advocate did not object to the adjournment provided an early hearing date was taken in Court. He urged the Court to consider that

> "**The matter involves K.Shs.1,500,000 being benefits of a deceased employee and his children are orphans and desperately in need."**

An adjournment was granted and matter stood over to 13th October 2005 when unfortunately the same could not be reached. Mr. Gikunda the Defendant appeared without representation. The record shows that Gikunda Miriti, Trading as Gikunda Miriti & Company Advocates appointed M/S Mohamed & Lethome to act on the law firm's behalf in this matter by a Notice filed on 2nd June 2004. The record suggests that the Respondent was so represented on 2nd June 2004 before the Hon. Mr. Justice Nyamu by

the same Mr. Mailani who on the 21st July 2005 told this Court that the Defendant had the conduct of the suit. When on 25th October 2005 parties appeared before me the matter was adjourned by consent on the grounds that amicable settlement was being discussed and that a consent judgment would be recorded on the 11th of November 2005. Unfortunately the matter was not listed for mention as ordered by me and the Plaintiffs had to take another mention date at the Registry. When parties next appeared before me, Counsel for the Applicant submitted that:

> "**Mr. Gikunda the Defendant has neither**
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> **paid the sums due nor made any proposal**
>
> **towards a settlement. He has been outside**
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> **Court and has gone to Justice Angawa's**
>
> **Court. We ask for a hearing date for the**
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> **Originating Summons."**

The matter was thus fixed for hearing on 20th February 2006. Again Mr. Gikunda appeared without his advocate and attempted to apply for an adjournment to give the advocate time to attend, which was refused. The advocate, who Mr. Gikunda had indicated was on his way never showed up. I have considered the pleadings and submissions by Counsel for the Plaintiff in relation to the Originating Summons. I have also considered the affidavit filed by the Defendant on 17th June 2004 pursuant to leave granted by the Court on 2nd June 2004.

As is seen from the documents submitted as annextures to the Plaintiffs Supporting Affidavit this matter started well, with the Plaintiff Company, in utmost good faith and in accordance with the law, promptly computing and arranging to pay the terminal benefits of their deceased employee, Joey Amollo Oneya under its existing Retirement Benefits and Group Life Insurance Scheme. The Plaintiff appointed the Defendant as the agent to disburse the dues to the estate of the deceased. Initially, the Defendant acted well in the interests of the estate and at one time refused to pay out the money to a relation of the deceased not named as a beneficiary. As it seen from annexture "GMP 1" the Defendant appears to have studied the relevant documents and discovered that the deceased had appointed his wife and two sons as his sole beneficiaries of his retirement and insurance benefits. Evidence shows that his widow later died leaving the two sons Isaac Omondi Oneya and Mallan Odhiambo Oneya orphaned and as sole beneficiaries. The second son had not become of age at the time the benefits became payable. Apparently the nomination form signed by the deceased stipulated that in such an event the public trustee would hold the minor's benefits in trust. At a meeting held at the Plaintiff's offices on 6th November 2001 in the presence of, and presumably with the benefit of the Plaintiff's Counsel, the Plaintiff decided to leave out the Pubic Trustee having considered that

> "……**depositing the money with the Public**
>
> **Trustee may be punitive to the orphans**
>
> **putting (sic) into consideration the**
>
> **characteristic agony we all encounter when**
>
> **dealing with public offices."**

It was decided at that meeting that the Plaintiff Company makes out two cheques of equal amounts as follows:

"(a) 1st cheque in the name of MARTIN OMONDI ONEYA…. to be handed over through our lawyer (the Defendant) who will get himself and Galsheet (Plaintiff) discharged.

(b) 2nd cheque in the name of GIKUNDA MIRITI & CO. ADVOCATES with instructions to open an Investment Account for the minor MASTER MALLAN ODHIAMBO ONEYA. Mr. Gikunda will write to Ms Okwach & Co. Advocates (for the Estate) inviting them to act as co-trustees of the said account. The account will be closed once the minor attains the age of 18 and whatever is in the account given to him."

The above appears as minute 1.3 of the minutes of 6th November 2001 appearing in the bundle of documents marked annexture "GMP 1". Thus on 9th November 2001 two cheques were drawn as agreed each for Kshs.1,473,482.50 and handed to the Defendant. The correspondence shown to the Court indicates that the Defendant deposited the minor's cheque in his clients' account on 12th November 2001 but instead of inviting M/S Okwach & Company to open a joint investment account on the minor's behalf as instructed by the Plaintiff, he entered discussions with the minor's brother and uncle for the purpose. No reasonable explanation appears to have been given for this change of course. Six months after the cheques were handed to the Defendant the Plaintiff asked for a refund by a letter dated 4th May 2002 after which there ensued a cat and mouse chase between the two, leading to the Plaintiffs reporting the matter to the police as well as the Advocates Complaints Commission. Sensing the heat, the Defendant owned up and stated that the money intended for the minor's investment had been "taken by his bank in settlement of an outstanding account he had with them in respect of a certain plot of land"! The Defendant promised to refund the money and by a handwritten undertaking dated 26th June 2002 he bound himself to repay the full amount of Kshs.1,473,420.50 within 45 days and not "charge the Defendant any professional fees or charges at all". Perhaps it was on the strength of this undertaking that no action was taken by the police and the Advocates Complaints Commission. We do not know. The promise did not materialize nor did others made thereafter leading the Plaintiffs to file these proceedings. The evidence against the Defendant is so weighty that it is surprising he would have sworn and filed the Replying Affidavit of 17th June 2004 in which he perjures himself in paragraphs 4 and 6. The said paragraphs read as follows:

"4. THAT the amount in relation to this case was not exclusively payment for a trust account as the same included Advocates fees.

6. THAT liability was never acknowledged but negotiations were going on between the parties.

His contention in paragraph 8 to the effect that the Plaintiffs, by seeking the orders herein intend to unjustly enrich themselves boomerangs right into the Defendant's face.

Taking all the evidence adduced by the Plaintiff to which the Defendant has no reasonable defence I have no hesitation whatsoever to find that on the balance of probabilities the Plaintiff has proved its case against the Defendant and that the answers to all the questions raised in paragraphs (a) to (d) of the Originating Summons dated 23rd October 2003 are in the positive. Accordingly I find that the Defendant is liable to pay the Plaintiff the entire sum of Kshs.1,473,482.50 with interest at the prevailing bank rates through the period 9th November 2001 to the time the amount is fully repaid. This means that any

increases in bank interest rates must be taken into account to the benefit of the beneficiary. Where however there may have been a fluctuation below today's prevailing rate, the Court's rate shall apply.

The Court has not been told whether or not the affected beneficiary, MALLAN ODHIAMBO ONEYA is now of age. If he is then he is entitled to a direct payment of the sums due since the Plaintiff has clearly demonstrated that it has no personal interest in the same and has been pursuing the same on behalf of the beneficiary. The Plaintiff's demonstration of goodwill in this matter is highly commendable. Therefore, I find it appropriate to state in this judgment that the judgment debt herein ordered is payable to the Plaintiff on behalf of the intended beneficiary MALLAN ODHIAMBO ONEYA and not to the Plaintiff's use. Accordingly, judgment is hereby entered.

Going back to my opening remarks, I will be quick to find that the deprivation of benefits due to an orphaned child by an advocate is no small matter and the Court, as a custodian of justice cannot but consider it with great indignation. Much as a judge sits to administer justice according to law, the facts and circumstances of a particular case are capable of rendering the writing of judgment painful as is the case herein. Moreover, if, as observed by Fry L.J. and Lord Esher M.R. in WILSON –vs- GLOSSOP (1888) 20 Q.B.D at page 354, the Court, in administering justice ought to consider what is morally and socially wrong, it follows that the Court, albeit in its impersonal conscience, cannot be expected to be totally devoid of feeling. I believe the promulgation of the Rules of Natural Justice revolve around such conscience on the part of administrators of justice. That considered, I am of the view that it is appropriate and noble to state what I have concerning this case.

Being fully aware of the facts of the case, the Defendant has for over four years deprived an orphaned minor of his only means of a meaningful survival. Without blinking his eyelids he has gone ahead to perjure himself before the Court by swearing a false affidavit as regards his conduct and the facts of the case. The Defendant has perhaps forgotten that perjury is a grave offence relating to the administration of justice which, though a misdemeanour, attracts a custodial sentence of seven years. Given the nature of this case, which is closely akin to the case of REPUBLIC –vs- KAMAU JOHN KINYANJUI H.C. CRIMINAL REVISION NO. 13 of 1999 as consolidated with CRIMINAL APPEAL NO. 544 OF 1999, KAMAU JOHN KINYANJUI –vs- REPUBLIC, I highly recommend to the Attorney General to take appropriate action against the Defendant in that regard, but without prejudice to his obligation to satisfy the judgment entered against him herein. The Advocates Complaints Commission should also deal appropriately with the complaint lodged in relation to this matter in view of its gravity.

Dated and delivered at Nairobi this 28th day of April, 2006.

M.G. Mugo

Judge

In the presence of:

Janja h/b for Omollo for the Plaintiff

Defendant in person