



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 538 of 1999 (O.S)**

**DR. VIJAY KUMAR SAIDHA .....1<sup>ST</sup> PLAINTIFF**

**DR. UMA SAIDHA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**T.G. BAKRANIA.....1<sup>ST</sup> DEFENDANT**

**M. RANA .....2<sup>ND</sup> DEFENDANT**

**ALNASHIR VISRAM ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff seeks orders under O 52 rule 4(1) (b) of the Civil Procedure Rules that::

Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative make an order for:

b) The payment or delivery up by the advocate of money or securities.

The application is supported by the affidavit of the 1<sup>st</sup> Plaintiff. It is his case that the Defendants carried on a practice as advocates in the name of Veljee Devshi & Bakrania ( the firm ) and that he and his wife, the Second Plaintiff paid to the firm a sum of Shs.18 million on completion of the sale of their property at Sotik.

After deducting their fees a cheque of Shs.16, 167,080/= was given to the Plaintiff which was returned marked “Refer to Drawer”.

That on the 10.11.1998 Mr. Bakrania in his own handwriting wrote to the 1<sup>st</sup> Plaintiff stating that “we will pay to you” the purchase price plus interest at 20% on the sale proceeds. A part payment of Sterling Pound 20,000/= was made on the 8.12.1998.

Annexed to the affidavit is the agreement for sale drawn by the firm which states in clause 6 the firm was acting for the Plaintiffs as vendors.

It is also stated that the sum of Shs.18 million is held by the firm as a stakeholder to be released on

the condition set out in Special Condition 1.

Also annexed is a Bill of Costs dated the 30.10.1998 and a cheque for Shs.16, 167,080/= drawn on the Bank of India. There are two signatures on the cheque one being that of Mr. Bakrania and a stamp with the firm's name and address on it. As well as a note from the Bank stating the cheque was unpaid is a letter from Mr. Bakrania on the headed paper of the firm dated the 10.11.98 which agreed to pay the sum of Shs.16,167,080/= plus further interest from the 7.10.1998 to the actual date of payment on the 13.11.1998 with interest for 37 days at 20%.

Mr. Bakrania admitted his personal liability for the sum of Shs.16, 167,080/= and judgment was given against him herein. The Plaintiffs, however, seek an order against the other two Defendants as they contend that these Defendants were partners in the firm at the material times and as such were liable to repay the money to the Plaintiff.

The Second Defendant, Mohammed Rana swore an affidavit in reply on the 18.2.2005. The purport of the affidavit is that the first Plaintiff was a personal friend of Mr. Bakrania and as he did not trust the firm's bank, he asked that the money be placed with the Bank of India. He then arranged for the cheque of Kshs 18 million the sale proceeds, to be sent to Mr. Bakrania, the payee being the Bank of India as Mr. Bakrania had a personal account at that bank. It is alleged that Bank applied the sum of Kshs 18 million to the personal indebtedness of Mr. Bakrania at the bank and as a result the cheque issued by Mr. Bakrania was dishonoured. The other signatory to the cheque was a Ms. Audrey Dorado, Mr. Bakrania's accountant.

He further alleges that he had no knowledge of the Transaction and as the funds were not received by the firm and were not recorded in the firm's books of accounts he had no knowledge of the deposit of the money with the Bank of India. He does not know the 1<sup>st</sup> Plaintiff who is a stranger to him.

The 3<sup>rd</sup> Defendant now Mr. Justice Visram swore an affidavit in reply on the 18.2.2005. His affidavit was in most material facts the same as that sworn by the 2<sup>nd</sup> Defendant. The main difference is that the 3<sup>rd</sup> Defendant wrote a note dated the 3.7.1998 in which he resigned as a partner in the firm from the 1.8.1998.

Notice of change dated the 10.11.1998 was filed with the Registrar of Business Names. The Notice is altered in that the date of resignation is amended from the 1.11.1998 to 1.8.1998. I accept that this was the correct date of resignation.

The 1<sup>st</sup> Defendant swore the affidavits filed in court on the 17.3.2000 and 24.9.2000 respectively.

The affidavit sworn on the 24.3.2000 was sworn after both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had resigned from the partnership. In this affidavit he depones that the sale went through in October but that the 1<sup>st</sup> Plaintiff did not want us (sic) to deposit the sale proceedings in the firm's account and so the same were released and deposited in his personal account.

In other respects he confirms what is contained in the affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The 1<sup>st</sup> Plaintiff did reply to the affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He does not, however, deny the allegation that it was at his request that the sale proceeds were not paid into the firm's account but into Mr. Bakrania's personal account.

He also queries the date the 3<sup>rd</sup> Defendant resigned and states that he had met him on many occasions in the firm office. He also states that he was always present in the firm's office even after 1999. He denied any special relationship with Mr. Bakrania.

The Plaintiffs relied on the provisions of the **Partnership Act** (the Act).

It is their case that the firm was engaged in the conveyance matters and that under **Section 7 of the Act** the actions of Mr. Bakrania bound the other two partners and the acts done by Mr. Bakrania were acts of conveyance in the usual way business of the kind carried on by the firm.

Further that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were liable under **Section 14 of The Act** as Mr. Bakrania was acting in the ordinary course of business the firm was liable for his actions. And under **Section 15 of The Act** the firm is liable to make good the loss of money misapplied by Mr. Bakrania.

In respect of the 3<sup>rd</sup> Defendant it was submitted that under **Section 40 of the Act** the Plaintiffs were entitled to treat all apparent members of the old firm as still being members of the firm until they had notice of change.

The Plaintiff relied on this case of **NDERITU V WAWERU (1975) EA 308** where persons who were registered as carrying on business together were held to be partners as they were registered as such under the Registration of Business Names Act and the presumption that they were partners had not been rebutted.

The Plaintiffs also relies on the case of **RAMBHAI & Co. (UGANDA) LTD v LALJI RATNA AND ANOTHER (1970) EA 106**. It was held in that case that a person introduced as a partner in the firm was an apparent member of the firm and express notice of his withdrawal was necessary and as this was never given, he was liable for the debts of the firm.

The facts as I find them are these: That Mr. Bakrania carried out the practice of advocates with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In the course of the business of the practice, the Plaintiffs engaged the service of the firm to carry out the sale of the Plaintiffs' property.

The instructions for the transaction were given to Mr. Bakrania on or about the 15<sup>th</sup> September 1998 when an agreement for sale was drawn by the firm in which the firm was to act for the Plaintiffs. Somewhat unusually there was no deposit provided for as consideration for the agreement but the full purchase price was payable on the signing of the agreement. The completion date was stipulated to be on the 30.9.1998. The purchase price was to be paid to the firm as stakeholders to be released after the transaction was completed.

As I have already stated the 1<sup>st</sup> Plaintiff did not deny that the sum of Shs.18 million was paid to Mr. Bakrania's personal account at his request.

This was a variation of the terms of the agreement for sale which required the proceeds of sale to be paid into the firm's account. This was not done. Although the stamp of the firm appears on the cheque given to the Plaintiff by Mr. Bakrania in my view and I hold the account was not the firm's but Mr. Bakrania's personal account. The letter of 10.11.98 was written personally by Mr. Bakrania it agreed to pay the Plaintiff interest at 20% on the outstanding sum. This appears to have been a personal agreement by Mr. Bakrania in which he was agreeing to pay this interest personally to the Plaintiff.

By varying the agreement the Plaintiffs were no longer looking to the firm to pay them the money. This is not a case where a partner has misapplied funds it is a case where parties have agreed to variation of an agreement so that the receipt of the money and payment thereof was no longer a matter for the firm but a personal agreement between the Plaintiff and Mr. Bakrania. It appears that the Plaintiff trusted Mr. Bakrania in preference to the money being paid to the firm.

In the result this was not a transaction which was in the ordinary course of business of the firm and as such I find that neither the 2<sup>nd</sup> nor 3<sup>rd</sup> Defendants have any liability in the matter to repay the sums claimed by the Plaintiffs. The personal nature of the transaction is reinforced by the fact that Mr. Bakrania personally repaid to the Plaintiffs a sum of \$20,000. The fact that Mr. Bakrania deducted the firm's fees from the proceeds of sale does not alter the essential nature of the transaction which was personal, between the Plaintiffs and Mr. Bakrania.

So far as the 3<sup>rd</sup> Defendant is concerned, I find that he in fact resigned on the 1.8.1998 and was not a partner at the time of the transaction.

In the result I dismiss this suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and order the costs of the Plaintiffs and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to be paid by the 1<sup>st</sup> Defendant.

Dated and Delivered at Nairobi this 6<sup>th</sup> day of October, 2005.

**P.J RANSLEY**

**JUDGE**