REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1719 OF 2001

UNITED INSURANCE CO LTD.....……. APPLICANT

VERSUS

WARUINGE & 2 OTHERS……. RESPONDENT

RULING

By notice of motion dated 16th May and filed in court on 19th May 2003, the plaintiff applicant seeks that judgment be entered in favour of the plaintiff against the first and second defendants in the sum of Kshs 2,634,133.70 together with interest on admission. In the alternative, the applicant prays for summary judgment against the 1st and 2nd defendants for the same amount together with interest. The applicant also prays that costs of the application be provided for.

The application is brought under o XII r 6 and o XXXV rules 1 and 5 of the Civil Procedure Rules. It is based on the ground that the 1st and 2nd defendants have in their defence expressly admitted the plaintiff's claim to the extent of Kshs 2,634,133.70, and that both defendants have no defence to the plaintiff's claim to the extent of Kshs 2,634,133.70 and the filed defence and set off are a sham. The application is further supported by the annexed affidavit of Mohammed Wanyoike, the plaintiff's Assistant General Manager Finance and Administration. He avers that the plaintiff instructed the defendants, a firm of advocates, to sell properties known as LR No Dagoretti/Riruta 2971 and 2972. Whereas the sale of the first mentioned property fell through, the second property was successfully sold and a sum of Kshs 3,200,000.00 paid to the defendants as the purchase price on behalf of the plaintiffs. The only dispute is the amount expended in respect of legal fees, agency commission and other incidental disbursement; hence, the defendants admit holding a net sum of Kshs 2,634,133.70 which they received on behalf of the plaintiff but never remitted.

The application is strenuously opposed. In a 29 paragraph replying affidavit, the 1st defendant and senior partner in the firm of Waruinge and Waruinge advocates, sets out the chronology of the relationship between themselves and the plaintiffs.

It all began in 1996 when the defendants were placed on the panel of legal service providers by the plaintiff and thereby started receiving legal briefs. The practice in the defendant's firm was to supply the plaintiffs with a schedule of outstanding fees for settlement and which they used to settle by instalments. Owing to poor payments from the plaintiff, the outstanding fees came to a figure of Kshs 3,525,309.00 as at 15th September, 1999. The defendants wrote to the Managing Director of the plaintiff formally advising them of the indebtedness by a letter dated 22nd September, 1999. In response, the plaintiffs wrote back on 27th September, 1999 in which the plaintiffs said:-

"We confirm that we are aware of our indebtedness to your firm and further that we are making arrangements to pay. Kindly bear with us but in the meantime we attach our cheque for Kshs 148,799.00"

By another letter dated 18th September, 1999, the plaintiffs wrote in response to a letter from the defendant and said:-

"We confirm that we will be paying an amount of Kshs 150,000/= fortnightly until the whole outstanding amount is paid. Further, we confirm that our cheque for the stated amount will be forwarded on 22/10/99. Kindly bear with us and thank you for understanding."

According to the defendants, by May 2000 the plaintiff had defaulted in payments of the agreed instalments. The defendants thereupon wrote exhibit No RWW 4 in which they said, *inter alia*;

"Enclosed herein please find the schedule of outstanding fee notes giving a break down of what is owing, but note that this does not cover the current briefs since restructuring of your company.

_ Interim fee notes - Kshs 3,249,979.00

_ Final fee notes - Kshs 386,920.00

Total Kshs 3,636,899.00

Please note that payments received on account have been applied towards affecting the interim fee notes."

In a subsequent letter dated 29th May, 2000 and addressed by the plaintiff to the defendant, the former wrote –

"Dear Madam,

Re: Outstanding Legal Fees

Your letter dated 24th May, 2000 on the above subject refers. As you are aware, the economic conditions seem to move from bad to worse with recent doomsday to scenario announced by the Government…As a result, our cash flow projections have experienced a lot of difficulties and subsequently we have had to revise our benchmark payments. This is therefore to confirm that the current benchmark payment to your firm is Kshs 150,000/= per month which will be reviewed when the economic situation gets better and our cash flow improves.

Please indulge us in this matter and continue with your support, since we trust this is only temporary feature."

After a lull of about a month, the plaintiff wrote on 26th June, 2000 and their letter was in the following terms:-

Dear Mrs Waruinge,

Re: Outstanding Legal Fees

Runda Plots Nos 7785/755 & 7785/707

We write to you to offer to pay part of your outstanding legal fees with the above two plots in Runda each valued at Kshs 1.6 million.

Kindly indicate your agreement to enable us begin the transfer process.

We look forward to hearing from you soon."

The defendants wrote back on 17th July, 2000, and their letter (exhibit

RWW 7) read as follows:-

"We refer to your letter dated 26th June, 2000. We appreciate your offer of the two plots, each valued at

Kshs 1,600,000/=. We are not able though to accept a direct swap of the said plots as an offset against our legal fees which currently stands at Kshs 3,541,568.00 as at 30th June, 2000 on all finalized matters. (This is excluding interim fee notes and the new briefs).

Our suggestion is that you hold the titles and what we shall endeavor to do is solicit for buyers who will then have the transfers signed directly to them… At this stage we are not in a position to incur costs on stamp duty which we shall immediately have to do if you transfer the said plots directly to us."

It would appear that some more letters were exchanged between the parties as the plaintiff wrote to the defendants on 3rd November, 2000 (RWW 8) in the following words:-

"Dear Madam,

Re: Outstanding Legal Fees and Runda Plots No 7785/ 755 & 7785/707

We refer to the above matter resting with your letter dated 17th July, 2000. We wish to have this matter concluded. Please advice whether you wish to have these plots transferred against your legal fees. If so, send us a list of legal fees for completed work totaling Kshs 3.2 million. Otherwise we shall offer them to other advocates who missed out earlier."

It appears that the defendants wrote to the plaintiff on 7th August, 2000, as in their response dated 11th August, 2000, (RWW 9) the plaintiffs wrote back and said:-

"Dear Madam

Re: LR Dagoretti/Riruta/2971 & 2972

We refer to your letter dated 7th August, 2000 and apologise for the delay in responding.

You may now proceed to sell the two houses at Khs 3,200,000/= minimum…"

Up to this point, there is no doubting that the plaintiff owed the defendants some money by way of legal fees. If there were any dispute, it would not relate to the issue of liability to pay the fees, but only as to the quantum such fees.

The sale of the Dagoretti houses brought to the surface that dark aspect of the relationship between the parties, which seems to have been simmering unnoticed. After the sale of one of the properties, the defendants did not remit the purchase price as they contended that they were owed fees by the plaintiff. The long train of correspondence exchanged between the parties from 1996 to 2000 leaves little doubt, if any, that the plaintiff owed the defendants some legal fees. The question is how much. By a letter dated 3rd July 2001 (exhibit RWW 21), the defendants wrote to the plaintiffs in the following terms-

"Re: Sale of LR Dagoretti/Riruta/2971 & 2972 and other Litigation Briefs

Further to our letter dated 29th June, 2001 we forward to you a file containing 112 costed bills up to 30th June 2001 amounting to Kshs 4,432,700.80 together with the amended schedule. We also give you a schedule of cases set down for hearing after 31st July, 2001, so that you may make arrangements for your own representation.

We shall be obliged to receive your cheque for Kshs 4,814,343.15 covering the herewith 112 files and the

balance that was carried forward from concluded matters of Kshs 381,642.55."

In canvassing this application before the Court, Mr Gichuru for the applicant argued that under o 8 r 2 of the Civil Procedure Rules, a set off is designated an independent suit. And owing to the advocate/client relationship between the parties, any issue of fees ought to be adjudicated upon under s 48 of the Advocates Act, which is couched in mandatory terms. S 49 provides the procedure where the quantum of costs is challenged, and indicates clearly that where the reasonableness of the quantum is disputed, no judgment would be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer. In this matter there has not been any taxation. The defendant's only remedy lies in s 52 which gives an advocate a right to move the

Court and get charging orders to retain any money received on behalf of the client. But no such application has been made. In those circumstances, he contended that the defendants received Kshs 3.2 million upon the sale of one of the properties at Riruta. After deducting their dues, they were left with a balance of Kshs 2,634,133.70 on their own admission, and that judgment should be entered against them for that sum.

In opposing the application, Mr Maina for the respondent argued that the history of this matter is such that the defendants are demanding from the plaintiff only that which is rightfully due to them. Even though the plaintiffs authorized the defendants to deduct their legal fees out of the sale price of the Dagoretti property, the plaintiffs stood indebted to the defendants to the extent of more than Kshs 4 million.

As the defendants are partners, there was no need for both of them to swear different replying affidavits. The affidavit of one suffices to cover both defendants. Even though there is no charging order under s 52 of the

Advocates Act, he submitted that the defendants have a lien over the money received on behalf of a client.

The Advocates Act is not exhaustive in this regard, he said. He concluded by contending that there are weighty issues, such as that of a lien which cannot allow for a summary judgment, and that therefore the defendants should be allowed to defend unconditionally.

I think that the dispute between the parties is clearly delineated. The defendants received some money on behalf of their clients after the sale of their client's property, and it cannot be denied that the clients are legally entitled to payment. However, even though the defendants were authorized to deduct their costs from the purchase price, their contention is that the plaintiffs owed them a lot more money than the proceeds of the sale, and that therefore by the process of a set off, the defendants need not pay the proceeds of the sale to the plaintiffs. The defendants have been very candid and forthright. They admit receiving the money on behalf of the plaintiff, but maintain that the plaintiffs owe them money on account of unpaid fees and that therefore they are entitled to a set off.

Is this an appropriate case for entering judgment on admission or, in the alternative, for entering summary judgment? Granting judgment on admission of facts is a discretionary power. This power must be exercised sparingly in only plain cases where the admission is clear and unequivocal.

However, as observed in *Cassam v Sachania* [1982] KLR 191, judgment on admission cannot be granted where points of law have been raised, and where one has to resort to interpretation of documents to reach a decision. It seems to me that quite a few points of law have been raised in this suit. Some such points are, for instance:-

1. must an advocate meticulously comply with the requirements of ss 48, 49 and 52 of the Advocates Act before he can set off against a client?

2. Is an advocate entitled to a lien over clients property/moneys if his fees has not been paid?

These are serious points of law which go deep into the circumstances of this case, and which may not be conducive to the entering of a summary judgment.

In *Gohil v Wamai* [1983] KLR 489, Chesoni Ag JA (as he then was) said at p 496-

"The basis of an application for summary judgment under o XXXV is that the defendant has no defence to the claim (*Zola & Anor v Ralli Bros Ltd & Anor* [1969] EA 691) rule 2 (1) of o XXXV requires the defendant to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.

The onus is on the defendant to satisfy the Court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must to further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the claim…If the defendant establishes what he is required to do under rule 2(1) of order 35 the Court should grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is not dismissed."

In *Kirat Singh & Co v P Mughji* (1952) 19 EACA 33, it was held that in order to decide whether or not there is an arguable defence, the Court must look at the whole of the respondent's replying affidavit and defence.

And looking at the first defendant's very comprehensive affidavit, and the 1st and 2nd defendant's defence, one is left in no doubt that one of the issues that will call for trial is whether the plaintiff itself owes any money to the defendants as alleged. If it does, how much. These are triable issues, which would entitle the defendant to set off and as long ago as 1938 in *Hasmani v Bangque Du Congo Belge* (1938) 5 EACA, Sir Joseph Sheridan, CJ said,

"If there is one triable issue contained in the affidavit supporting the application for leave to appear and defend, then the appellant is entitled to have leave to appear and defend unconditionally."

In my view, there are in this case more than one triable issues, and being of that inclination, I think that the defendants are entitled to leave to defend unconditionally. It is so ordered. Costs in the cause.

Dated and delivered at Nairobi this 14th day of October, 2003

L. NJAGI

……..

JUDGE