



Mbora v Njagi; Victor L. Andande & Co. Advocates (Interested Party) (Environment and Land Appeal 9 of 2023) [2024] KEELC 5952 (KLR) (17 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 9 OF 2023
A KANIARU, J
SEPTEMBER 17, 2024**

BETWEEN

SAMWEL MWANIKI MBORA APPLICANT

AND

ZIPPORAH MUTHONI NJAGI RESPONDENT

AND

VICTOR L. ANDANDE & CO. ADVOCATES INTERESTED PARTY

RULING

1. The applicant - Samwel Mwaniki Mbora - filed a Notice of Motion dated 12.09.2023 anchored on sections 3, 3A and 63 (e) of the *Civil Procedure Act*. He is seeking an order against the respondent Zipporah Muthoni Njagi and her advocate Victor L. Andande asking that they be ordered to deposit Kshs. 360,000/= with the applicant's advocates within 7 days in default of which execution to issue against both of them. He is also seeking for costs of the application. The application targets both the respondent and her advocate, although the advocate is neither a party to the appeal before me nor the lower court proceedings.
2. The application is premised on the grounds that the applicant and the respondent entered into a mediation settlement agreement requiring that the applicant pays Kshs. 360,000 to him and in return, the respondent was to remove the caution she had registered against the applicant's parcel of land. That pursuant to the agreement, the applicant paid the respondent the said sum of money through her advocate. The said agreement was not adopted as an order of the court, instead it was ordered that the matter be heard in court. It was alleged that despite the said amount not being used to settle the respondent's claim, the respondent and her advocate have refused to return the money to the applicant or his advocate. The respondent, who is in the process of implementing the court's decree issued in her favour, has the applicants land and also the money, which is prejudicial to the applicant.



3. The application was opposed by the respondent via a replying affidavit where she denied that there was an order that the applicant pay her Kshs. 360,000/=. Neither was she aware of the circumstances under which the money was given to her advocate. She denied receiving the money either from the applicant or from her advocate. She deposed that the lower court in Embu ELC Case no. 83 of 2019 had ordered her advocate to refund the money to the applicant and as per the applicant's annexures, the money was deposited at her advocate's office and not given to her. That it is the said advocate who ought to refund the money, if at all, to the applicant as the respondent neither received the same nor did she instruct the advocate to collect the money on her behalf.
4. The respondent's advocate on his part responded to the application vide a preliminary objection dated 21.09.2023. The objection seems to be in regard to an application dated 15.09.2023 and it alleges that the application is fatally defective and an abuse of the court process as it offends clear provisions of law; that he cannot be properly joined to these proceedings as he was not a party to the proceedings in the lower court case leading to this appeal; and that an advocate cannot be sued for purportedly collecting money on behalf of his client.
5. The application was canvassed through written submissions. The applicant's submissions were filed on 16.11.2023 whereas the respondent's submissions were filed on 02.11.2023. It was submitted by the applicant that the respondent's advocate has not denied any of his claims as he did not file a replying affidavit to his application. That his preliminary objection is brought on grounds that the application offends clear provisions of law although none of the provisions of law have been cited. That failure to file a replying affidavit implies that the facts are admitted as was held in the case of Peter O. Nyakundi & 68 Others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning and another (2016) Eklr.
6. That further, the respondent's advocate has not denied being her advocate on record in the trial court proceedings leading to this appeal, which matter he conducted on the respondent's behalf until conclusion. That therefore he has no basis for objecting to his joinder in the present application. He also has not denied receiving the sum of money in dispute on behalf of his client. That he was holding the money as a stakeholder and since the mediation settlement agreement was not adopted, he had an obligation to refund the money to the applicant. In support of this sentiment, the case of Lucy Muthoni Muthumbi v Shamira Chepkemei Chelang'a & 2 others (2020) Eklr was cited.
7. The respondent on the other hand submitted that she did not receive any money from the applicant and that the same was paid to her advocate without her authorization or knowledge. That the applicant has averred in his application that the respondents advocate had been ordered by the trial magistrate to return the money to the applicant which order was not appealed against. That the advocate was rightly added to the application to help the court decide who should return the subject money to the applicant.
8. From my understanding of the application before me, the applicant is seeking to have a sum of Kshs. 360,000/= which he says he paid to the respondent through her advocate, refunded to him. He says that he paid the said money to the advocate as a result of an agreement they made with the respondent to settle some of the issues that were part of their case in the lower court. The respondent on the other hand denies that she instructed the advocate to receive the said money on her behalf. There is also mention of an order issued by the trial magistrate on 09.06.2022 directing the respondent's advocate to return the said money to the applicant's advocate.
9. From the onset, it is clear that this court is not the appropriate forum to resolve the dispute regarding the return of the money. This is because, the dispute arises from a separate transaction and involves matters not directly part of the appeal. The matter is further complicated by the fact that the respondents advocate was not a party to the proceedings leading to the appeal before this court and



neither was an application made nor leave sought for his joinder herein as a party. He is therefore a stranger to this court. In my considered view, the issue of whether the advocate should refund the money or who should refund the same should be resolved by the court that initially handled the matter or where the mediation settlement agreement was addressed. That court would better be placed to resolve the issue in the context of those proceedings.

10. For the foregoing reasons, this court finds no merit in the notice of motion application dated 12.09.2023 and hereby dismisses the same.
11. Costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF SEPTEMBER, 2024.

A. KANIARU

JUDGE – ELC, EMBU

In the presence of Respondent – present in person.

Court Assistant - Leadys

17. 9.2024

