



**Malonza t/a Malonza & Company Advocates v Mwanja & 3 others (Sued as trustees of Mulolongo Brothers Association) (Environment & Land Case 241 of 2017) [2022] KEELC 3433 (KLR) (4 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3433 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 241 OF 2017**

**A NYUKURI, J**

**JULY 4, 2022**

**BETWEEN**

**PETER MWENDWA MALONZA T/A MALONZA & COMPANY  
ADVOCATES ..... PLAINTIFF**

**AND**

**STEPHEN NZUKI MWANIA ..... 1<sup>ST</sup> DEFENDANT**

**JAMES NJOROGE MURIGI ..... 2<sup>ND</sup> DEFENDANT**

**JOHN MUTUKU MUINDE ..... 3<sup>RD</sup> DEFENDANT**

**AGNES NJERI GICHUKI ..... 4<sup>TH</sup> DEFENDANT**

**SUED AS TRUSTEES OF MULOLONGO BROTHERS ASSOCIATION**

**JUDGMENT**

**Introduction**

1. The plaintiff, who is an advocate of the High Court of Kenya, practising as such within Nairobi City, filed a plaint dated May 24, 2017 against the four defendants herein. Thereafter, he amended the plaint on July 26, 2018. He averred that the defendants were trustees of Mulolongo Brothers Association, (hereinafter referred to as the Association), which Association owned a parcel of land formerly known as L.R. No. 21141 situated at Syokimau in Machakos County, (hereinafter referred to as the suit property). It was his case that the members of the Association, which included the defendants, resolved to subdivide the suit property with intention to allocate the resultant subdivided plots or titles to each of the 739 members of the Association.
2. It was further the plaintiff's assertion that the defendants instructed the plaintiff in his capacity as an Advocate, to render legal services to the Association to ensure that subdivision of the suit property is



done, deed plans prepared and 739 titles issued so that each of the 739 members of the Association is issued with their respective title.

3. The plaintiff further stated that legal fees for the work to be done was agreed upon between himself and the Defendants and a further agreement by both parties was that the Defendants were to collect the agreed amount of legal fees from each of the 739 members for onward transmission to the plaintiff. It was the plaintiff's case that he executed the instructions of the Defendants accordingly whereof the 739 titles were processed, registered and issued. He further stated that the titles were to be collected by the plaintiff herein from the Machakos Lands Registry, who was to subsequently issue to the 739 members upon payment of the agreed legal fees.
4. The plaintiff alleged that in a twist of events, with intention to shortchange him and avoid payment of his legal fees as agreed, the defendants visited Machakos Lands registry and collected the 739 titles and subsequently refused to pay the plaintiff's the same, despite collecting the same from the members of the Association.
5. Therefore, the plaintiff sought the following orders:
  - a. An order directing the defendants to pay all outstanding legal fees to the plaintiff forthwith as shall be agreed and in default same to be taxed.
  - b. Costs of the suit.
  - c. Such other reliefs the Honourable Court shall deem fit to grant.
6. By a defence and counterclaim dated November 1, 2017, the defendants denied the plaintiff's claim. They averred that as trustees of the Association, they did not enter into any contract with the plaintiff but as the plaintiff was a member of the Association, having purchased five plots from the Association, some members engaged him for purposes of obtaining their titles, and that the engagement was in their individual capacities.
7. It was further the defendants' case that the number of plots that resulted in the subdivision of the suit property was 839 and not 739. The defendants also denied agreeing to collect any monies on behalf of the plaintiff. They stated that in July 2012, the plaintiff promised to acquire titles for 839 members upon payment of legal fees of Kshs. 54,300/- per title, promising to deliver the titles within three to five months. Further that the plaintiff received a sum of Kshs. 5,430,000/- being legal fees from one hundred members of the association, but by the year 2015, he had not processed their titles as expected. That this forced the defendants to engage a private surveyor in 2016 who assisted them in obtaining titles.
8. The defendants asserted that due to the delay occasioned by the plaintiff, the 839 members were forced to incur extra expenses in terms of land rent and land rates for the years 2013, 2014, 2015 and 2016 before the titles could be issued by the Chief Land Registrar. They also lamented that due to the plaintiff's unprofessionalism and incompetence, they incurred an additional expense of Kshs. 4,195,000/-. They further averred that they hold 39 titles as lien for expenses incurred including the plaintiff's five titles. They maintained that the 839 plots were issued by the Machakos Lands registry due to their efforts as the plaintiff had failed to deliver the 100 titles in respect of which he had been paid.
9. The defendants further averred that the plaintiff was aware of their intervention to obtain the 839 titles as the plaintiff refunded part of the money paid earlier in the sum of Kshs. 1,258,500/-, which was part of the titling fees. They alleged that the plaintiff filed High Court Miscellaneous Application No. 139 of 2017, which touches on the same issues.



10. Consequently, the defendants made a counterclaim for the following orders;
  - a. That the plaintiff be compelled to refund to the defendants a sum of Kshs. 10,446,200/- due and owing from the defendants.
  - b. That the plaintiff's suit against the defendants be dismissed with costs to the defendants at court rates until payment in full.
  - c. That the defendants be awarded the costs of the counterclaim together with interests thereon at court rates until payment in full.
  - d. Any other relief as this Honourable Court may deem appropriate to make.
11. The plaintiff filed a reply to defence and defence to counterclaim dated November 8, 2017. He averred that he did not know individual members of the Association but in the Annual General meeting of the Association held in mid 2012, it was resolved that each member was to pay to the plaintiff a sum of Kshs. 54,300/- to cover legal fees and disbursements in relation to the processing of title deeds.
12. It was the plaintiff's averment that the delay was occasioned by the defendants who failed to pay the private surveyor they had engaged, who only released the deed plans to the plaintiff in 2015 and therefore payment of land rates and land rent was occasioned by the Defendant's delay. The plaintiff further stated that he prepared transfer documents for all the members of the Association and denied occasioning the extra expense of Kshs. 4,195,000/- by the defendants. He averred that the defendants had no locus standi to claim for the sums paid by individual members and challenged the defendants to avail particulars of individual members who paid the sum of Kshs. 54,300/- to the plaintiff. The plaintiff denied receiving a sum of Kshs. 5,430,000/- or refunding Kshs. 1,258,500/-. He further denied the defendants counterclaim of Kshs. 10,074,700/-. He alleged that Miscellaneous Application No. 139 of 2017 was not a suit but a taxation of costs relating to unpaid legal fees of the transaction herein.

### **The plaintiff's Case**

13. This matter came up for hearing on September 17, 2019, when PW1, Peter Mwendwa Malonza, the plaintiff herein, testified. He adopted his witness statement filed on May 24, 2017 as well as his supplementary statement dated May 14, 2019 as his evidence in chief. He restated the averments contained in the amended plaint as restated earlier in this judgment. He testified further that he was instructed by the defendants to subdivide and transfer the suit property to 739 members at a cost of Kshs. 20,000/- for each title making it a sum of Kshs. 14,780,000/-. He testified that he did the work as instructed but that the defendants collected the titles without his knowledge and refused to pay his legal fees.
14. It was further his testimony that although he executed instructions by the defendants to obtain the 839 titles, some of the plot owners only paid Kshs. 2.8 million which he accounted for. That he spent part thereof as survey fees and also paid Kshs. 167,800/- for checking fees. He insisted that he has never acted for individual members of the Association, as he received instructions and acted for the Association. Further, he averred that he is also a member of the Association and that the defendants had declined to give him his title deeds. He denied occasioning the delay in the issuance of the titles and blamed the defendants for the delay, claiming that the defendants failed to pay the surveyor in time, leading the latter to withhold the deed plans. He emphasised that he prepared all the transfers and followed up on the titling process. It was his position that the counterclaim of Kshs. 10,074,700/- had no basis. He conceded that he owes the defendants Kshs. 271,500/- for his five titles. He confirmed that he filed a bill of costs which was taxed but the same was set aside by consent so as to determine the issue of instructions first.



15. The plaintiff produced documents in the list of documents dated May 24, 2017 as well as the supplementary list of documents dated 14<sup>th</sup> May 2019. He produced a demand letter dated May 2, 2017 drawn by himself as P-Exhibit 1, a letter to the Registrar of Lands Machakos dated February 8, 2017 as P-Exhibit 2, an email correspondence he sent to James Njoroge dated 15<sup>th</sup> May 2017 as P-Exhibit 3, a letter from the Survey of Kenya dated April 5, 2016 as P-Exhibit 4, his letter addressed to Chief Land Registrar dated May 5, 2016 as P-Exhibit 5, undated deed of surrender by the defendants as P-Exhibit 6, a letter from the National Titling Centre dated 23<sup>rd</sup> July 2015 as P-Exhibit 7, his letter to the National Titling Centre dated July 27, 2015 as P-Exhibit 8.
16. Further, he produced his letter to the Commissioner of Lands dated August 17, 2015 as P-Exhibit 9, his letter dated 22<sup>nd</sup> September 2015 addressed to the National Titling Centre as P-Exhibit 10, his letter of November 17, 2015 addressed to the National Titling Centre as P-Exhibit 11, a letter from the National Titling Centre addressed to the Association dated 19<sup>th</sup> November 2015 as P-Exhibit 12, his letter dated November 19, 2015 addressed to the National Titling Centre as P-Exhibit 13, the list of members of Mulolongo Brothers Association as P-Exhibit 14, Land Rent Demand Notices as P-Exhibit 15, a duly executed transfer in favour of one Willinam Monari Maosa as P-Exhibit 16 and acknowledgements by one Benjamin Kimanzi Mengo of receipt of monies from the plaintiff payable to Director of Survey as P-Exhibit 17. That marked the close of the plaintiff's evidence.
17. As the defendants and their counsel on record were not present on the hearing date of September 17, 2019; the court marked the defence case as closed, dismissed the counterclaim and directed parties to file submissions. However, on the same date later at 10.35 a.m, counsel for the Defendant appeared in court and informed court that he had been involved in a motor vehicle accident which caused his delay, and that he intended to file a formal application.
18. By an application dated 30<sup>th</sup> October 2019, the defendants sought for setting aside of the proceedings of 17<sup>th</sup> September 2019 which closed the defendants' case and dismissed his counterclaim. They also sought for leave to prosecute their defence and counterclaim as well as leave to cross examine the plaintiff on the evidence he adduced before court.
19. By a ruling made on 23<sup>rd</sup> October 2020, this court allowed the defendants' application dated 20<sup>th</sup> October 2019 as prayed, hence paving the way for cross examination of the plaintiff and prosecution of the defence and counterclaim.
20. Consequently, on 18<sup>th</sup> March 2021, the plaintiff was subjected to cross-examination. He testified that he was a member of Mulolongo Brothers Association as he owned five plots. He also stated that although he could not remember when the suit property was purchased by the Association, he is the one who acted for them in the transaction of purchase. He conceded that although he sought for legal fees in the amended plaint, the amount was not specified.
21. The plaintiff further stated that he had filed an Advocate/Client Bill of Costs but he same was never taxed as the issue of whether or not he had been instructed was to be determined first and the bill is still pending before this court. He stated that the taxing master directed that the issue of instructions be determined first, which prompted him to file this suit. It was his position that the subject matter of this suit is land and that Machakos High Court Miscellaneous No. 139 of 2017 is a taxation and not a suit.
22. On the question as to why he was demanding for legal fees, the plaintiff testified that he rendered legal services by processing titles for 839 plots. He also stated that he did apportionment of land rent, prepared all the transfers that were signed, went through valuation, titles were prepared and forwarded to Machakos Land Registrar for preparation of green cards.



23. On the question as to the form of instructions given, he stated that they were verbal instructions as there was no letter of instructions. He stated further that by the time he bought the five plots around 2012 and 2013, the suit property had already been subdivided. According to the plaintiff, the documents signed by the defendants was the evidence of instructions to him. He stated that he only produced a sample of the transfer forms he prepared for the 839 plots. He denied that the deed of surrender was prepared before he came on board. He denied having been instructed by members individually as he only dealt with the defendants who are the officials of the Association.
24. It was the plaintiff's testimony that the defendants were obligated to pay him Kshs. 20,000/- for every title while the balance of Kshs. 34,300/- was to be applied for duty, hence the total amount chargeable per a title was Kshs. 54,300/-. The plaintiff further stated that a few members paid him the Kshs. 54,300/- directly. He stated that according to their agreement, the members of the Association were to pay the money to the Association and subsequently, the Association through the defendants were to pay him the money. He emphasized that his client was the Association and not the members.
25. The plaintiff stated that about 70 members of the Association paid him Kshs. 2,900,000/-. His position was that the said members were sent to him by the defendants. The plaintiff maintained that he paid all the dues to the government for processing of the 839 titles. He referred to the receipts for Kshs. 1,258,500/- and Kshs 167,800/- paid to the government. He conceded that the receipts of Kshs. 1,258,500/- was issued to Mulolongo Brothers and stated that the defendants took the money from his office in cash. The plaintiff stated that he did not trust his clerk with the sum of Kshs. 1,258,500/- that is why he gave the defendants the amount to pay as they were his clients.
26. It was the plaintiff's position that the delay in issuance of titles was caused by the members who were unable to pay the surveyor. He denied that the amount he paid to the defendants was a refund. He stated that he was not paid money by the defendants but a few members of the Association paid him. He denied having been paid Kshs. 5,430,000/- and denied the Defendant's claim in the counterclaim.
27. In re-examination, the plaintiff stated that he began acting for the defendants when they bought the suit property, although the advocate/client relationship was verbal. He insisted that Exhibit 13 of the defendants, enclosed minutes of the meeting he had with the defendants where his legal fees was discussed. He stated that he filed the bill of costs in July 2017 and that the same was stayed pending determination of the issue as to whether he had been instructed by the defendants. He also stated that in the defence, the defendants had admitted the jurisdiction of the court and even filed a counterclaim. With that, the plaintiff's case was marked as closed.

### **Defence Case**

28. On 7<sup>th</sup> February 2022, DW1 James Njoroge Muriigi, the 2<sup>nd</sup> Defendant herein gave his testimony on his own behalf and on behalf of his co-defendants. He relied on and adopted his witness statement filed in court on 5<sup>th</sup> December 2018 as his evidence in chief. He testified that in 2002, the defendants formed an Association with intention of running a land buying and selling business which culminated in the registration of Mulolongo Brothers Association as a society on 23<sup>rd</sup> September 2002.
29. He further stated that in 2002 the Association purchased the suit property. That subsequently, the Association obtained approvals from Mavoko Municipal Council for subdivision of the suit property. It was the defence evidence that the Association then engaged Ndichu & Associates Physical Planning Consultants on 27<sup>th</sup> December 2005 to undertake subdivision of the suit property leading to 839 plots. Further that upon subdivision, the said plots were advertised for sale and all plots were purchased by individuals including the plaintiff who purchased five plots.



30. DW1 further stated that in mid 2012 members of the Association who had purchased plots in respect of the suit property agreed that anyone interested in engaging an advocate for purposes of obtaining title for their plots, would engage the services of the plaintiff who was also a member of the Association. He stated that later he learnt that about 100 members of the association had sought the plaintiff's services, and being trustees of the association they forwarded the original title deed for the suit property to the plaintiff to enable him obtain individual titles for members who had already paid him. It was his testimony that he also learnt that the plaintiff had sought from the 100 members an additional sum of Kshs. 15,000/- making it a total of Kshs. 54,300/- per member.
31. DW1 also stated that as trustees, the defendants demanded from the plaintiff, the completion of the process of obtaining titles for the 100 members of the association. He further claimed that in 2013 and 2014, he realized that the plaintiff had failed to discharge his duty to the 100 members despite having received a total sum of Kshs. 5,430,000/- from the said members. That this prompted the defendants to pay land rent and land rates arrears and obtained the respective clearance certificates. It was his position that the plaintiff's conduct led them to lose confidence in him, and due to the pressure from members and desire to save face, they decided to engage the Survey of Kenya directly.
32. It was DW1's testimony that they received demand from government to pay titling fee of Kshs. 1,258,500/- and Kshs. 167,800/- as survey checking fees. That they therefore demanded from the plaintiff the said amount which was duly refunded and subsequently paid. He further stated that the Director of Survey of Kenya forwarded to the Chief Lands Registrar the Registry Index Map (R.I.M). He also stated that the defendants surrendered the original title of the suit property to the Chief Lands Registrar and thereafter collected the title deeds for the members of the Association from the Lands Registrar, Machakos.
33. The witness denied there being any contract between the plaintiff and the defendants. He also denied instructing the members of the association to attend the plaintiff's office. He maintained that individual members sought the plaintiff's services individually due to the fact that he was an advocate and also a member of the Association. He insisted that only 100 members of the Association instructed the plaintiff, while 739 members did not instruct the plaintiff having lost confidence in him due to his failure to avail titles to the 100 members. DW1 stated that the plaintiff was paid Kshs. 5,430,000/- by 100 members of the Association, but only refunded a sum of Kshs. 1,426,300/- leaving a balance of Kshs. 4,003,700/- which sum is counterclaimed by the defendants. It was his position that the defendants had already dispatched all the title deeds, save the five belonging to the plaintiff and the same were held as lien for non payment of Kshs. 271,500/- and a further sum of Kshs. 10,174,700/- due and owing from the plaintiff.
34. DW1's position was that the defendants surrendered their interest in the suit property vide the deed of surrender to the Government of Kenya for purposes of individual titles to the new plot owners. His view was that instructions connotes payment of legal fees and that the fact that the only payments made were from individual members and not the Association, there is no proof of instructions from the defendants to the plaintiff. He stated that the 839 actual owners of the suit property were not party to this suit and any judgment entered against them would be a miscarriage of justice.
35. DW1 produced several documents in support of the defence case, and the counterclaim. He produced Grant I.R. 95107 for L.R., 21141 as D-exhibit 1, the Associations final beneficiary list as D-exhibit 2, commitment Agreement to Ndichu & Associates dated 31<sup>st</sup> October 2007 as D-exhibit 3, receipt dated 27<sup>th</sup> December 2005 issued by Ndichu and Associates to the Association as D-exhibit 4, a letter by the plaintiff to the Association dated 19<sup>th</sup> May 2008 as D-exhibit 5, letter from the plaintiff dated 8<sup>th</sup> August 2012 as D-exhibit 6, receipt of Kshs. 1,100,000/- from the Municipal Council of Mavoko as D-



- exhibit 7, land rates clearance certificate dated 24<sup>th</sup> October 2012 as D-exhibit 8, payment voucher from the Association dated 27<sup>th</sup> February 2013 as D-exhibit 9, Bankers Cheque dated 27<sup>th</sup> February 2013 as D-exhibit 10, receipt dated 1<sup>st</sup> March 2013 as D-exhibit 11, letter dated 16<sup>th</sup> July, 2013 as D-exhibit 12, letter from the Association to the plaintiff dated 16<sup>th</sup> February 2013 as D-exhibit 13, advertisement in the “Standard” Newspaper dated 26<sup>th</sup> February 2013 as D-exhibit 14.
36. DW1 also produced a letter from the Association dated 25<sup>th</sup> July 2013 as D-exhibit 15, receipt dated 25<sup>th</sup> July 2013 as D-exhibit 16, plaintiff’s letter to the Association dated 26<sup>th</sup> March 2014 as D-exhibit 17, receipt no. 66834 as D-exhibit 18, receipt no. 66835 as D-exhibit 19, Rates Clearance Certificate dated 8<sup>th</sup> July 2014 as D-exhibit 20, Rates Clearance Certificate dated 4<sup>th</sup> April 2015 as D-exhibit 21, letter dated 19<sup>th</sup> November 2015 from Survey of Kenya as D-exhibit 22, Receipt Number 7130354 from Government of Kenya as D-exhibit 23, Receipt from Government of Kenya dated 20<sup>th</sup> November 2015 as D-exhibit 24, letter from Survey of Kenya dated 21<sup>st</sup> March 2016 to the Chief Lands Registrar as D-exhibit 25, deed of surrender dated 4<sup>th</sup> October 2016 as D-exhibit 26 and letter from Survey of Kenya dated 5<sup>th</sup> April 2016 as D-exhibit 27.
37. On cross-examination, DW1 stated that he was the secretary of the Association and therefore knew all the operations of the Association. He confirmed that the transaction in respect of the purchase and registration of the suit property was done by the plaintiff, where of the plaintiff was the vendor’s advocate. He insisted that the defendants did not instruct the plaintiff to act on the Association’s behalf in respect of the 839 plots. He maintained that he was not aware that transfer documents were prepared by the plaintiff. His position was that no transfer documents were prepared as he only gave a list of the Association members to the Surveyor.
38. DW1 stated that the plaintiff had initiated issuance of the leasehold titles which the defendants abandoned and initiated freehold titles. They denied stopping the plaintiff from proceeding with the work on grounds that they had not instructed him in the first place. On being referred to D-exhibit 13, which was undated letter from the Association addressed to the plaintiff forwarding the minutes of 16<sup>th</sup> February 2013, the witness stated that the letter referred to the 100 members who had not paid what was due. He maintained that the defendants released the mother title for L.R. 21141 to the plaintiff to enable him get titles for 100 members. He conceded that some money was paid to the plaintiff by members of the association but that he had no evidence of who paid what and when the same was paid. He conceded that he had not produced the receipts for moneys paid by the 100 members. His position was that he was claiming the amount paid by the 100 members on behalf of the said members although the said members were not parties to this suit.
39. DW1 testified further that he was claiming for the moneys paid as land rents and rates paid to the lands office and the amount paid for deed plans and paid to the surveyor. He also sought for the sum of Kshs. 200,000/- paid to Ndichu & Associates for survey work done.
40. On re-examination, DW1 stated that at the time the 100 members of the Association paid the plaintiff, there was no participation by the leaders of the Association who are the defendants. He maintained that the defendants released the mother title to the plaintiff due to pressure from the 100 members who had paid the plaintiff. It was his evidence that the advertisement made by the defendant was to ensure the money was paid to them and that the plaintiff did not play any role in the survey process. He emphasized that the reason they counterclaimed for Kshs. 5,430,000/- from the plaintiff was because the plaintiff received the said amount yet the same members who paid the money got their titles through the defendants although the latter did not receive any money from them. He complained that although they paid for the process, the plaintiff was still holding some of the deed plans. That marked the close of the defence case.



41. Thereafter the court directed parties to file and exchange their written submissions. The plaintiff filed their submissions on February 22, 2022, while the defendants filed their submissions on April 12, 2022.

### Submissions

42. Counsel for the plaintiff submitted that DW1 admitted in his evidence that the plaintiff attended meetings organized by the plaintiff and that he was instructed by the defendants to process titles for 839 members. According to counsel, the evidence of such instructions include the defendants' release of the mother title to the plaintiff, release of all the 839 deed plans to the plaintiff, the defendants' letters to the plaintiff and the defendants' signing of all the 839 transfers prepared by the plaintiff. Counsel pointed out that the defendants' allegation that the plaintiff was only instructed by 100 members was not true as all correspondence referred to 839 plots.
43. Counsel maintained that instructions by a party to their advocate needed not be in writing, and that the same could be verbal. Counsel relied on the case of *J. G. Singh t/a Singh Gitau Advocates vs. National Bank of Kenya Ltd*, Nairobi Misc. Civil Suit No. 178 of 2008, where the court held that verbal instructions are recognized by the court especially where the same is supported by correspondence and conduct of the parties. Counsel argued that documents produced by the plaintiff demonstrated that the defendants signed all the 839 transfer documents and collected money from the plaintiff to pay to the National Titling Centre for all the 839 plots which upon payment brought the receipt to the plaintiff. Counsel also stated that all the letters by the plaintiff to the land's office referred to all the 839 plots.
44. On whether the plaintiff carried out the instructions given to him by the defendants, counsel submitted that the plaintiff received the mother title from the defendants, prepared a surrender document which was signed by the defendants and the same surrendered to the Chief Land Registrar. Counsel pointed out that a sample transfer showed that all the defendants signed the transfer documents. Counsel argued that the plaintiff submitted all the transfer documents to the lands office together with the requisite payments and that the plaintiff's letters to the lands office confirm that the plaintiff handled the transaction on behalf of all the 839 members to completion. Counsel argued that it is the plaintiff's letter dated February 8, 2017 that prompted the defendants to pick the titles from the lands office at Machakos. Counsel maintained that the plaintiff executed the instructions given to him by the defendants to process titles for its 839 members at a legal fee of Kshs. 20,000/- per plot adding up to Kshs. 14,780,000/-, which amount the plaintiff is entitled to.
45. On whether the counterclaim was merited, counsel submitted that the defendants were not entitled to the claim they made in the counterclaim. Counsel submitted that the defendants did not give the names or details of the individual 100 members they claim as having instructed the plaintiff in their individual capacity. Counsel argued that the individual 100 members are not party to this suit and that the defendants had no authority to claim on their behalf the sum of Kshs. 5,430,000/-.
46. It was also contended for the plaintiff that the sum of Kshs. 1,177,000/- paid in respect of land rent and rates, was not paid to the plaintiff and therefore the same could not be claimed from the plaintiff. Counsel argued that this claim was misplaced. In regard to the sum of Kshs. 4,195,000/- and Kshs. 200,000/- paid by the defendants to their surveyors to survey and prepare 839 deed plans, counsel contended that the same was paid to the surveyor and not to the plaintiff and therefore the same cannot be claimed from the plaintiff. Counsel concluded that the plaintiff was entitled to the prayers made in his claim as he was duly instructed by the defendants to undertake registration and transfer of 839 plots in favour of the Association members; a task he executed and is therefore entitled to payment



- of legal fees. Counsel was of the view that the counterclaim lacked merit and that the same ought to be dismissed.
47. Counsel for the defendants submitted that the following facts were not controverted;
- a. That the plaintiff was a member of Mulolongo Brothers Association and was present at the association meeting by virtue of his membership.
  - b. That the defendants were the Association trustees and that 839 titles in favour of the Associations 839 members were procured.
48. Counsel argued that what was in contention was whether the defendants instructed the plaintiff to sub-divide and transfer the suit property, whether the plaintiff was entitled to the prayers sought in the amended plaint and whether the defendants' counterclaim was merited. Counsel pointed out that in paragraph 4 of the plaintiff's statement of 14<sup>th</sup> May 2019, the later conceded that he attended the Association's meeting as a member. Counsel argued that the burden of proof lied with the plaintiff to prove that he received instructions while attending the Association's meeting. Counsel buttressed this argument by relying on section 107 of the *evidence Act* for the proposition that he/she who alleges must prove. Counsel argued that the plaintiff failed to produce proceedings, minutes or resolutions of the meeting where he was allegedly instructed to act for the defendants, and therefore failed to prove his case.
49. Counsel was of the view that article 35(1) of *the Constitution* protects the plaintiff's right to access to information which includes the right to seek for such information from any person holding the same if it was necessary for purposes of seeking protection of his fundamental right. It was counsel's position that at no time did the plaintiff seek for the minutes, if at all they existed from the defendants' evidence of him being instructed as alleged.
50. While relying on the case of *Obaga v Akiba Bank Limited* [2008] 1EA 300, where it was held that the burden to prove a retainer always rests on the advocate and where there is no evidence of a retainer save the oral statement of the advocate which is denied by the client, the court will deem the advocates action as having been done without authority from the client. It was counsel's contention that the plaintiff gave contradictory testimony as he stated on due hand that he was instructed to carry out the subdivision and on the other hand averred in cross examination that he was instructed when subdivisions had been done already.
51. Counsel argued that in the absence of evidence of being instructed on the part of the plaintiff, he is not entitled to the orders sought in the amended plaint. Counsel also contended that the authority relied upon by the plaintiff was distinguishable from the facts in this case as the conduct of parties and correspondence exchanged between the parties in the case of *J. G. Singh T/A Singh Gitau Advocates vs National Bank of Kenya Limited* (Supra) clearly pointed to a presumption of a retainer, unlike in the instant case.
52. It was argued for the defendants that the plaintiff was instructed by individual members of the association and was to be paid Kshs. 54,300/- to cover legal fees and disbursements, but due to his failure to deliver as agreed, the defendants took up the issue and delivered the titles to their members. Counsel observed that paragraph 4 of the plaintiff's supplementary statement dated May 14, 2019 is a concession on the part of the plaintiff that he received money on behalf of 100 members. It was counsel's position that to save face, the defendants obtained titles for all the 839 members which included the 100 members who had already paid their money to the plaintiff. It was counsel's assertion that the mother title was given to the plaintiff out of good faith as it is obvious that the original title must be presented for purposes of subdivision. Counsel stated that the defendants sought for a refund



from the plaintiff in their capacity as trustees of the association. Counsel submitted that due to the plaintiff's failure and inability to procure individual titles for the 100 plots as instructed by the 100 members the defendants were inconvenienced and occasioned on extra burden with respect to deed plan processing for the individual plots and a fresh survey as claimed in the counterclaim.

53. Counsel also submitted that High Court Miscellaneous Application No. 139 of 2017 was filed by the plaintiff in bad faith to pre-empt payment in respect of the entire 839 parcels. Counsel concluded that costs of this suit should be borne by the plaintiff.

### **Analysis and Determination**

54. Having considered the pleadings, evidence and submissions made by the parties in this case, it is my considered view that the following issues arise for determination;
- a. Whether a retainer existed between the plaintiff and the defendants acting on behalf of Mulolongo Brothers Association in respect of subdivision, transfer and registration of 739 titles in favour of the members of Mulolongo Brothers Association.
  - b. Whether the plaintiff is entitled to the orders sought in the amended plaint.
  - c. Whether the defendants are entitled to the orders sought in the counterclaim.
  - d. Who should pay costs of the suit.
55. The *Black's Law Dictionary*, 9<sup>th</sup> Edition defines a retainer as;
- (1) A client's authorization for a lawyer to act in a case.
  - (2) A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period on a specified matter.
  - (3) A lump sum fee paid by the client to engage a lawyer at the outset of a matter also termed engagement fee.
  - (4) An advance payment of fees for work that the lawyer will perform in the future also termed retaining fee.
56. The *Halsbury's Laws of England*, 5<sup>th</sup> Edition, 2009 Volume 66 Page 13 Paragraph 763 define a retainer as;
- “The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment .....”.
57. In essence therefore, a retainer is a client's authorization for an advocate/lawyer to act on his behalf or fees paid to a lawyer to act for a client in a specific matter. A retainer creates an agency relationship between the client and the lawyer.
58. In the case of *Njeru Nyaga & Co. Advocates vs. George Ngure Kairuki* (Nairobi Commercial & Admiralty Division) Case No. 723 of 2012, the court stated as follows;
- “This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the *Advocates Act*, probably because of the special position the word occupies in the Advocate – client relationship. Although the present case does not fall under section 512, of the *Advocates Act*, the innumerable previous



counts' rendition on the phraseology ...where the retainer is not disputed .....provide the content of the term "retainer." "Retainer" in the wider sense entails the instructions by a client or a client's authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or for specified matter, or a fee paid in advance for work to be performed by the lawyer in the future."

59. Similarly, in the case of *Abmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd* [2007] eKLR, the court adopted the definition adopted by Halsbury's Laws of England 4<sup>th</sup> Edition and the court stated as follows:

"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus the giving of a retainer is equivalent to the making of a contract for the solicitor's employment. Njagi J. pointed out that in the same work, it is further explained that a retainer need not be in writing, unless, under the general law of contract, the terms of the retainer or the disability of a party, to it make writing requisite. It is then further stated, the judge added at Paragraph 103 even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case.

60. Also, in the case of *Omulele & Tollo Advocates vs Mount Holdings Limited* [2016] eKLR, the Court of Appeal held that a retainer need not be written, it may be oral. Further the court held as follows;

"Where a client disowns an oral retainer or even the existence of a retainer relationship; it is for the advocate who claims under that retainer to prove to court that such a relationship indeed existed, otherwise the court will deem that he acted without instructions".

61. It is therefore clear from case law that an advocate may receive instructions to act for the client orally. However, where the client disputes the existence of an advocate-client relationship, it is up to the advocate to demonstrate that despite there being no written document to show that the advocate was employed to act on behalf of the client, the circumstances of the case and the conduct of the advocate and the client, unequivocally demonstrate the existence of an agent/principal relationship, hence the relationship is implied.
62. In the present case, the plaintiff argued that although the retainer was not reduced into writing, the same is implied by the fact that the defendants released the mother title of the suit property to the plaintiff, the defendants released all the 839 deed plans to the plaintiff, the defendant's letters to the plaintiff and that the defendants signed all the 839 transfers prepared by the plaintiff.
63. On the question of whether the defendant's release of the mother title to the plaintiff amounted to conduct implying the existence of advocate-client relationship, the defendants contended that the plaintiff had been instructed by 100 members and therefore subdivision would, as a matter of fact, require the surrender of the mother title to the lands office. As observed earlier in this judgment, a retainer need not be in writing. It may be implied where the parties conduct explicitly demonstrate that such a relationship exists. In my view, even where a retainer is implied, the nature, scope and extend of what the advocate was employed to do must be discernible from the circumstances and the parties conduct. It must not be left to conjecture.
64. Unlike in instances where an advocate appears in court for the client or files pleadings for the client with the latter's knowledge and with no objection from the client, the circumstances obtaining in the instant suit required 839 members to obtain titles from the suit property. This means that several matters were to be undertaken; including survey, subdivision, preparation of deed plans, payment of



land rates and rent, procurement of clearance certificates from the relevant Municipality Council and ensuring payment or waiver of stamp duty.

65. While the plaintiff contended that he was instructed by the defendants in their capacity as the trustees of the Association, the defendants maintained that the plaintiff was acting on instructions of 100 members in their individual capacities. The onus of proof that there existed an implied retainer rests with the plaintiff. While it is not in contention that the defendants released the mother title of the suit property to the plaintiff, what is in contention is whether the same was for purposes of processing 100 titles or 739 titles as pleaded in the amended pleadings or 839 titles as alleged by the plaintiff in his evidence.
66. I note that while the plaintiff pleaded in his amended pleadings that he received instructions to procure titles in respect of 739 members of the Association, which he restated in his witness statement filed on 24<sup>th</sup> May 2017, he averred in his supplementary witness statement dated 14<sup>th</sup> May 2019 that the instructions he received were in respect of 839 titles. It is trite law that a party is bound by their pleadings. I have also considered the documents produced by the plaintiff. P-Exhibit 1 refers to 739 titles, which formed the basis for the plaintiff's demand in the demand notice being a sum of Kshs. 14,780,000/-. However, the plaintiff exhibits number 5, 10 and 13 which are his letters dated May 5, 2016, 22<sup>nd</sup> September 2015 and November 19, 2015 respectively, refer to 839 titles. The question as to the number of titles the plaintiff was instructed to procure is at the centre of this dispute as the plaintiff in his amended pleadings refers to 739 titles, in his supplementary statement and evidence in court, he refers to 839 titles, while the Defendant states that the plaintiff was instructed only in respect of 100 titles. Having considered the amended pleadings as well as the witness statements and or evidence given in court by the plaintiff, I find that the plaintiff's case as regards the number of titles he was allegedly instructed to procure by the defendants, as being inconsistent.
67. As regards release of the mother title to the plaintiff, I agree with the defendants that, that alone cannot be sufficient conduct to imply a retainer as subdivision of the suit property whether to result in 100 titles or 839 titles would require surrender of the mother title.
68. The plaintiff also argued that release of all the 839 deed plans to him by the plaintiff meant that he had instructions to procure 839 titles, and that this was fortified by the fact that the defendants signed all the 839 transfers prepared by the plaintiff. While the defendants contested these allegations, the plaintiff did not give evidence to show that 839 transfer forms were executed by him, on instructions of the defendants. However, most importantly, and a position which both parties appear to hold is that once a title was processed, the person who was responsible for payment of legal fees of that title was the title holder. The plaintiff did concede that the payments he had received in the sum of Kshs. 2.9 Million was paid by individual title holders, and that no money was paid by the Association or the defendants as trustees of the associations in respect of legal fees. In view of the above analysis, I find and hold that the plaintiff has failed to satisfy the court that there existed an implied retainer between himself and the defendants, as the legal fees was to be paid by individual members, and not the defendants, or the association.
69. As regards the counterclaim, the plaintiff denied the same and averred that he was paid Kshs. 2.9 Million shillings only. The defendant did not produce any evidence to prove payment of Kshs. 5,430,000/- by the 100 members. They did not even have their names or any other particulars. But most importantly they have not exhibited any authority to make a claim on behalf of the alleged 100 members.
70. The defendants also sought for Kshs. 1,177,000/- paid for land rent and rates. The plaintiff has disputed this claim on ground that the money was not paid to him but to the Municipal Council of Mavoko. The plaintiff stated that the delay was occasioned by the defendants who delayed to pay their



surveyors. From the payment request produced by the defendant dated October 8, 2012, the rates due were Kshs. 1,100,000/-. On the other hand, payment to Geoder (K) Limited was made on February 27, 2013 for the sum of Kshs. 450,000/- and 2 July 6, 2013 for the sum of Kshs. 600,000/- for purposes of survey and rent apportionment. As the new titles would not have been issued without survey and that the money having been paid to the surveyor and not to the plaintiff, the said claim must fail. The same position applies to the land rates and land rent, which claim must also fail.

71. The Defendant also sought for Kshs. 4,195,000/- being deed plan processing for individual plots title deeds. There is no reason given by the defendants as to why the plaintiff should be liable to pay the same. Just like subdivisions would need survey, the same would also require deed plans for each new title, whether the plaintiff did the work or not. I therefore do not find any basis why the plaintiff should pay the defendants the sum paid for deed plans.
72. Another claim made by the Defendant is for survey work by Ndichu and Associates for the sum of Kshs. 200,000/-. The defendant produced a document christened commitment agreement for the sum of Kshs. 200,000/- wherein the Defendant was said to have paid Kshs. 100,000/- while the balance of Kshs. 100,000/- was to be paid in three months. The document is dated 31<sup>st</sup> October 2007. In addition, there is a receipt from Ndichu & Associates dated December 27, 2005 for Kshs. 100,000/-. It is strange that the first instalment was paid on 31<sup>st</sup> October 2007 while the last instalment was paid on 27<sup>th</sup> December 2005, that is two years before the commitment and even before the Defendant was registered as proprietor of the suit property. In any event that payment was made before the plaintiff came on board, and therefore he cannot be liable to pay the same.
73. In the premises therefore, I am not satisfied that the defendants' counterclaim against the plaintiff is merited.
74. In the end, I dismiss the plaintiff's suit for lack of merit. I also find that the counterclaim lacks merit and I dismiss the same. As each party has lost their case, I make no order as to costs.
75. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Maithya holding brief for Mr. Malonza for the plaintiff

Ms Kwamboka holding brief for Mr. Nzei for the defendants

Ms Josephine Misigo – Court Assistant

