



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mohammed & another v Salim Mwadumbo t/a Mwadumbo & Co. Advocates (Civil Case E667 of 2021) [2025] KEHC 1020 (KLR) (Commercial and Tax) (3 March 2025) (Ruling)

Neutral citation: [2025] KEHC 1020 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E667 OF 2021
JWW MONG'ARE, J
MARCH 3, 2025

BETWEEN

SHEHUNA MODHIHIRI MOHAMMED 1ST PLAINTIFF

NADHIA MODHIHIRI MOHAMMED 2ND PLAINTIFF

AND

SALIM MWADUMBO T/A MWADUMBO & CO. ADVOCATES DEFENDANT

RULING

1. By an Originating Summons application filed before this court by the Applicant and brought under Sections 3A and 63 of the *Civil Procedure Act*, Order 52 Rule 4 of the *Civil Procedure Rules* the Applicants seek the following orders:-
 1. Spent
 2. That this Honourable Court be pleased to issue an order compelling the Respondent to render/deliver a cash account of the exact amount of monies he received on behalf of the Applicants in relation to the transaction involving Land Parcel No. LR. 36/VII/456, and how the monies were applied.
 3. That the Respondent be and is hereby compelled to remit to the Applicants the money held by the Respondent on behalf of the Applicants, totaling Kshs.35,000,000/= being proceeds of sale of Land Parcel No. LR. 36/VII/456, together with the interest at court rates from 31/12/17 till payment in full.
 4. That this Honourable Court be pleased to grant any other order as it may deem fit, just and fair in the circumstances.



5. That costs of this application be borne by the Respondent.
2. The Application is supported by the grounds set out on its face and the supporting affidavit of Shehuna Modhihiri Mohammed sworn on 16th September 2022. The application is opposed and the Respondent has filed a replying affidavit sworn by Salim Ali Mwadumbo on 3rd February 2023. This matter was first referred to court annexed mediation with the consent of the parties on 10th March 2023 but parties failed to reach an out of court settlement and the matter was returned to this court for inter-partes hearing on 13th June 2023. Subsequently the parties have filed written submissions which I have carefully considered.

Analysis And Determination

3. The dispute that this court is called to determine arises from an Advocate– Client relationship where the Respondent was appointed by the Applicants to represent them in a land sale transaction involving their property registered as LR. No. 36/VII/465. It is the Applicant’s case that upon the successful conclusion of the sale of the said property, the Respondent was paid the full purchase price of Kshs.110,000,000/= but has only released to them the sum of Kshs.68,500,000/= and has refused and or failed to remit or account for the balance of the sum of Kshs.41,500,000/=. The Applicants have urged the court to order that the Respondent do account for the same and remit the balance of the funds received on their behalf by the Advocate.
4. Section 80 of the *Advocates Act* states as follows:-

“Any person being an Advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an Advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence...”
5. In addition, Order 52, Rule 4 of the *Civil Procedure Rules* provide as follows:-

“(1) Where the relationship of Advocate and Client exist or has existed the court may, on the application of the Client or his legal personal representative make an order for;-

 - (a) the delivery of a cash account;
 - (b) the payment or delivery up by the Advocate of money or securities;
 - (c)
 - (d) the payment into or lodging in court any such money or securities;
 - (e) the delivery up of papers and documents to which the Client is entitled.



6. The Court of Appeal in the case of *Kim Jong Kyu vs Housing Finance Company Limited & 2 others* (2015) eKLR in reinforcing the above provisions observed as follows:-

“.....Advocates in addition to being professionals , are officers of the court and play a vital role in the administration of justice. In our legal system, the Advocate/Client relationship has long been recognized as fiduciary relationship in which the Client places his or he confidence, faith, reliance and trust in the Advocate, whose aid, advice, opinion or protection is sought from time to time. The Client gives the Advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the Advocate..... the forgoing emphasizes that an Advocate must at all times act in the best interest of his Client... that failure to account for funds held by an Advocate on behalf of a Client is in fact a criminal offence.”

7. It is not in dispute that there existed an Advocate-Client relationship between the parties herein. Indeed, the Respondent in his replying affidavit, confirms that he was instructed to act for the Applicants in the sale transaction for LR. No. 36/VII/465 and that there was an initial transaction for Kshs.110,000,000/= which aborted but he later received the funds from the second sale transaction of LR. 36/VII/465 amounting to Kshs.115,000,000/= and proceeded to disburse the same in the following manner:-

- a. The sum of Kshs.83,000,000/= paid to the Applicants - The Applicants dispute this but acknowledge receipt of Kshs. 68,500,000 from the Respondents.
- b. Kshs.10,000,000/= paid towards Stamp duty for the two transactions – No receipts have been exhibited to substantiate these two payments.
- c. The sum of Kshs.9,000,000/= paid on behalf of one Fauz Ali Modhihiri, a brother to the Applicants as transfer costs for LR. 36/II/36 - The Applicants deny giving consent to the payments in respect of this payment.
- d. Kshs.5,000,000/= paid to the Respondent as agreed fees for the transaction - The Applicant deny that there was an agreement for such payment.
- e. Balance of Kshs.8,000,000/= held by the buyer’s Advocate pending the determination of the present application.

8. The Applicants admit payment of the initial Kshs.68,500,000/= and have annexed the copies of cheques received from the Respondent evincing the payment. On his part, the Respondent has not annexed any receipts to support his claim of having paid stamp duty twice for the same transaction. It is trite that Stamp Duty is a tax paid to the Government for a transfer. It is also trite that in any sale transaction, stamp duty is paid by the purchaser and all a seller is obligated to pay is Capital Gains Tax, if the property is sold for more value than that which it cost at acquisition.

9. Indeed, if the Applicant had made any payment towards this tax- that is Capital Gains Tax, nothing would have been easier than to attach the KRA acknowledgment and this being a tax obligation on the part of the Applicants, the same would have been paid against the Applicant’s KRA PIN as is the practice which means that the Applicants would be aware of this tax payment. I am therefore not persuaded that any of these funds were dispensed to pay Stamp Duty as alleged.

10. On the allegation of having paid transfer costs for and on behalf of relative of the Applicant, Fauz Modhihiri, the Respondent has not exhibited a consent authorizing him to utilize funds due to the Applicant on behalf of a third party. Neither has the Respondent exhibited receipts and



acknowledgement to support the payment either to the Advocates handling the sale on behalf of Fauz Modhihiri or the Stamp duty payment to the Government of Kenya. I am therefore not persuaded that the Respondent indeed made these payments as alleged.

11. For the claim of payment of his own legal fees to himself of Kshs.5,000,000/=, the Respondent has not attached to his affidavit a Client-Advocate fee agreement, confirming that the Client had consented to the payment of the same towards his fees nor has it been exhibited before this court a Certificate of Taxation for his Advocate - Client Bill of costs to support this payment.
12. As stated above, there is placed a duty of care upon the Advocate by the law and decisions emanating from the courts demonstrate that an advocate is called to act in the best interest of the Client, once that relationship has been created. Both parties have confirmed that this relationship existed and was created by the instructions of the Applicants to the Respondent to represent them in the sale transaction of LR No. 36/VII/465. The Advocate /Respondent has acknowledged that the funds emanating from the said transaction were received by him and has attempted to render an explanation as how the same were disbursed, albeit unsatisfactorily.
13. I have carefully perused the documents attached in support of the replying affidavit by the Respondent. I note that there are no receipts in support of payments for stamp duty or Capital Gains Tax to the Government as is alleged to have been paid. The Respondent has also failed to attach the Advocate-Client fee agreement for the sum of Kshs.5,000,000/= detained by him for the settlement of his fees and nor has he exhibited the authority to disburse the sum of Kshs.9,000,000/= for the Account of Fauz Modhihiri from his Clients the Applicants. There is also no explanation as to what is the relationship between the present suit and the sale agreement that has made the buyer's Advocates retain a portion of the sale proceeds amounting to Kshs.8,000,000/=.
14. In sum, I am persuaded that the Applicants Originating Summons application of 16/9/2022 has merit. I allow the same as prayed and grant the orders sought thereunder. Costs of this application are awarded to the Applicants. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MARCH 2025

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Oginga for the Applicants.

No appearance for the Respondent.

Amos - Court Assistant

