



REPUBLIC OF KENYA



**KENYA LAW**  
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**Milinski v Mokaya & another (Civil Suit E029 of 2020)  
[2023] KEHC 8 (KLR) (3 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 8 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E029 OF 2020  
OA SEWE, J  
JANUARY 3, 2023  
IN THE MATTER OF SECTIONS 55 AND 56 OF THE  
ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA  
AND  
IN THE MATTER OF ORDER 52 RULES 4 AND 7 OF THE CIVIL  
PROCEDURE RULES**

**BETWEEN**

**KLAUS MILINSKI ..... APPLICANT**

**AND**

**KENNEDY OGERO MOKAYA ..... 1<sup>ST</sup> RESPONDENT**

**MOKAYA OGUTU & COMPANY ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

- [1] The brief background to this suit is that, sometime in 2014, the applicant instructed Kennedy Ogero Mokaya (the 1<sup>st</sup> respondent), practicing as Mokaya Ogutu & Company Advocates (the 2<sup>nd</sup> respondent) to act for him in a sale agreement. The applicant was desirous of selling his property known as Plot No. LR. 10014/I/MN and after negotiations, an Agreement for Sale was drawn by the 2<sup>nd</sup> respondent and duly signed on 11<sup>th</sup> April 2014 as between the applicant and one Mbaruk Ayub Ali (marked Annexure A to the Originating Summons).
- [2] It is not in dispute that the agreed purchase price was Kshs. 13,000,000/= of which a deposit of Kshs. 2,000,000/= was to be paid to the vendor's advocates (the 2<sup>nd</sup> respondent) upon the signing of the agreement. The balance was to be paid on or before 90 days of the signing of the agreement to the 2<sup>nd</sup> respondent. The parties are in agreement that the full purchase price was paid and the transaction completed as anticipated. The applicant was however perturbed that the respondents retained some



- Kshs. 5,000,000/= of the purchase price without any justification. After demanding for payment in vain, he resorted to filing the instant suit vide the Originating Summons dated 17 December 2020.
- [3] Thus, the Originating Summons was filed pursuant to Sections 55 and 56 of the *Advocates Act*, Chapter 16 of the Laws of Kenya and Order 52 Rules 4 and 7 of the *Civil Procedure Rules* for orders that:
- (a) The respondents do pay to the applicant the sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) with interest at court rates (12%) from 17 January 2021 to date, together with costs;
  - (b) The respondents engaged in professional misconduct in withholding monies due to their client, the applicant herein.
- [4] The Summons was premised on the grounds that there existed an Advocate/Client relationship between the applicant and the respondent; and that in the course of their relationship, the respondents received Kshs. 5,000,000/= as proceeds of the sale of the subject land, which they have to date withheld and neglected to pay to the applicant. It was further the contention of the applicant that, in spite of notice to sue and an existing decree passed in his favour, the respondents have failed to remit the said amount to him. The Originating Summons was supported by the affidavit of the applicant, sworn on 16<sup>th</sup> December 2020 and the documents annexed thereto.
- [5] In response to the suit, the 1<sup>st</sup> respondent filed his Replying Affidavit on 22<sup>nd</sup> March 2022, after leave to defend was given by the Court. He deposed that, sometime around the year 2011, the applicant was introduced to him by one John Dickson Oguta, an estate agent operating in the general coastal are of Kenya, to handle several issues touching on Plot No. LR 10014 (Original 306/5 Section I Mainland North). He confirmed that by an agreement dated 11<sup>th</sup> April 2014 the applicant agreed to sell the said property to one Mbaruk Ayub at an agreed purchase price of Kshs. 13,000,000/=; but that he only received Kshs. 12,600,000/= from the purchaser's Advocates, M/s Hassan Abdi & Company Advocates, leaving a balance of Kshs. 400,000/= in respect of which there was a pending suit.
- [6] At paragraph 6 of his Replying Affidavit, the 1<sup>st</sup> respondent explained how the sum of Kshs. 12,600,000/= was disbursed, contending that, Kshs. 1,000,000/= was paid out to the agent, John Dickson Oguta, and that Kshs. 3,600,000/= was retained by the respondents as lien for unpaid fees. Thus, the 1<sup>st</sup> respondent denied that he is indebted to the applicant in the sum of Kshs. 5,000,000/= as alleged or at all. He therefore prayed that the suit be dismissed with costs.
- [7] The respondents also relied on the affidavit of John Dickson Oguta, sworn on 21<sup>st</sup> March 2022. Mr. Oguta averred that sometimes in the year 2014, he entered into an agreement with the applicant, Klaus Milinski, in which the applicant agreed to pay him a commission of Kshs. 1,200,000/= for the sale of the property known as L.R. Subdivision No. 10014 Section I Mainland North. He annexed a copy of the said agreement to his affidavit as Annexure "JDO-1". He likewise confirmed that, pursuant to that agreement, he received a sum of Kshs. 1,000,000/= from the 1<sup>st</sup> respondent.
- [8] The Originating Summons was canvassed by way of written submissions in accordance with the directions dated 25<sup>th</sup> May 2022. Thus, Ms. Moolraj, counsel for the applicant, filed her written submissions on 2<sup>nd</sup> June 2022. She reiterated the applicant's stance that the agency fee was only Kshs. 140,000/= per the applicant's Annexure E; and added that the same was duly paid upon conclusion of the sale agreement. Counsel relied on Rules 9 and 11 of the Advocates (Accounts) Rules and the cases of *Samson Owino Ger v Marmanet Forest Co-operaative & Credit Society Ltd* [1988] eKLR and *Ufanisi Capital and Credit Ltd v Stephen Kipkenda Kiplagat & Another* [2011] eKLR to support her submission that no payment ought to be made from a client's account without the authority of the client.



- [9] In respect of the averment by the 1<sup>st</sup> respondent that Kshs. 3,600,000/= was retained as lien for unpaid fees, Ms. Moolraj submitted that an advocate has no authority to withhold client's monies as lien for fees. She made reference to *John Karungai Nyamu & Another v Muu Associates Advocates* [2008] eKLR; Milimani Misc. Application No. 388 of 2002: *Jack & Jill Supermarket Limited v Gitonga Kimani & Another* and *Warubiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] eKLR, among other authorities, in support of that proposition. Ms. Moolraj added that, in this matter, the applicant paid all the professional fees due in advance and exhibited some of the receipts as Annexure H to his Supporting Affidavit (at page 21 of the Originating Summons); and yet the respondents have withheld the applicant's funds since 2014. She consequently urged the Court to protect the applicant by allowing the Originating Summons in its entirety and as prayed.
- [10] On his part, Mr. Omollo for the respondents opposed the Originating Summons and relied on the two affidavits filed in that regard. He submitted that the suit is based on the false premise that the purchaser paid Kshs. 13,000,000= . He urged the Court to find that the respondents received only Kshs. 12,600,000/= and that there is an existing suit in respect of the balance, being Mombasa HCCC No. 268 of 2014 (OS): *Klaus Milinski v Hassan Abdi T/A Hassan Abdi & Company Advocates*, per Annexure "KM-2" to Mr. Mokaya's Replying Affidavit. Mr. Omollo further urged the Court to find that the respondents were entitled to withhold Kshs. 3,600,000/= as lien for fees in respect of services rendered to the applicant in various suits as set out in paragraph 6 of the 1<sup>st</sup> respondent's Replying Affidavit; which suits are still pending. He explained that there are several Advocate/Client Bills of Costs filed by the respondents against the applicant for recovery of professional fees, some of which have stalled due to numerous objections by the applicant.
- [11] Lastly, Mr. Omollo submitted that, on the instructions of the applicant to the respondents, a sum of Kshs. 1,000,000/= was paid out to the applicant's agent, one John Dickson Oguta, per Annexure "JDO-1" to the Replying Affidavit sworn by John Dickson Oguta. He pointed out that the averments in the respondents' affidavits were uncontroverted and therefore ought to be relied on as the true version of the facts surrounding the claim. He therefore posited that this dispute can only be resolved once all the pending Bills of Costs have been fully taxed by the Deputy Registrar. He therefore urged for the dismissal with costs of the suit.
- [12] Having perused and considered the Originating Summons and its Supporting Affidavit as well as the Replying Affidavits filed by and on behalf of the respondents, it is indubitable that, at all times material to this suit, there existed an Advocate/Client relationship between the applicant and the respondents. It is agreed that the applicant engaged the respondents to handle a conveyance in respect of the sale and subdivision of his property known as L.R. 10014/Section 1/MN in favour of one Mbaruk Ayub Ali. A copy of the Sale Agreement was exhibited as Annexure A to the applicant's Supporting Affidavit and as "KM-1" to the 1<sup>st</sup> respondent's Replying Affidavit. The said Agreement was evidently drawn by the 2<sup>nd</sup> respondent and signed by the applicant in the presence of the 1<sup>st</sup> respondent.
- [13] At paragraph 2 of the Supporting Affidavit, the applicant deposed that, whereas the agreed purchase price was Kshs. 13,000,000/= he received only Kshs. 8,000,000/= through the respondents as follows:
- (a) Kshs. 2,000,000/= being the deposit sum, on 11<sup>th</sup> April 2016 per Exhibit B;
  - (b) Kshs. 6,000,000/= on 3<sup>rd</sup> December 2014 vide swift remittance per Exhibit D.
- [14] The applicant therefore averred that the respondents withheld Kshs. 5,000,000/= which they had received on his behalf from the purchaser. In support of his assertions, the applicant relied on the documents marked Exhibits C and E to the Supporting Affidavit. There appears to be no dispute that,



in respect of the sale transaction, the applicant paid all the sums due to the respondents by way of fees. Hence, the issues for determination are:

- (a) How much did the respondents receive on behalf of the applicant from the purchaser's Advocates?
- (b) Whether the respondents have fully accounted for those sums to the satisfaction of the Court in accordance with the provisions of the applicable law, including the Advocates (Accounts) Rules.

**[a] On the sums paid by the Purchaser:**

- [15] This suit was predicated on the foundation that the entire purchase price of Kshs. 13,000,000/= was paid by the purchaser to the respondents and that the respondents paid the applicant only Kshs. 8,000,000/= thereof. The applicant relied on a copy of a Statement made by the 1<sup>st</sup> respondent for purposes of Mombasa Judicial Review Case No. 35 of 2019: Republic v The Chief Magistrate Mombasa, Ex Parte Kennedy Mokaya, wherein the 1<sup>st</sup> respondent admitted that the purchaser's Advocates paid out a total sum of Kshs. 12,600,000/= and that they (the respondents) remitted only Kshs. 8,000,000/= to the applicant.
- [16] The applicant further relied on the Judgment passed in his favour for Kshs. 5,000,000/= against the respondents in Mombasa Chief Magistrate's Civil Case No. 2185 of 2016: Klaus Milinski vs. Kennedy Mokaya and Mokaya Ogutu & Company Advocates; as well as the Ruling made by Hon. Mabeya, J. in Mombasa Judicial Review Case No. 35 of 2019 by which the learned Judge quashed the proceedings and Judgment in Mombasa CMCC No. 2085 of 2016 and directed the applicant to pursue his grievance by way of an Originating Summons under Order 52 Rule 4 of the Civil Procedure Rules.
- [17] While I appreciate that under Sections 43, 44 and 45 of the *Evidence Act*, Chapter 80 of the Laws of Kenya instances when judgments orders and decrees are admissible are provided for, Section 45 is explicit that such judgments are not conclusive proof. Thus, by referring the parties to the procedure set out in Order 52 of the Civil Procedure Rules, Hon. Mabeya, J. thereby recognized that the dispute was the kind that would best be determined under the aforesaid provision of the law; and that his conclusions were not intended to hamstring the Judge who would later hear the subsequent suit thus filed. I will proceed to consider this matter in that context.
- [18] In proof of the payments by Hassan Abdi & Company Advocates on behalf of the purchaser to the respondents, the applicant relied on the documents marked Exhibits B, C, D and E to the Supporting Affidavit. Those documents account for, not Kshs. 13,000,000/= but only Kshs. 12,600,000/= and therefore confirm the respondent's posturing that some Kshs. 400,000/= was withheld by the purchaser's Advocates. According to the respondents, the applicant thereafter gave them instructions to sue the purchaser's Advocates for recovery of that money. He annexed documents with a view of showing that he proceeded accordingly and filed Mombasa HCCC No. 268 of 2014 (OS) (per Annexure "KM-2"). At paragraph 10 of the applicant's affidavit in support of the Originating Summons No. 268 of 2014, he averred that:

"...it is clear that the Transaction on the Sale of my Property has totally collapsed as the Purchaser is clearly unable to pay the balance of the agreed Purchase and it is fair and just that Hassan Abdi Advocate should be Ordered and Compelled to return all the Title Documents given to him by my Advocates."



[19] That affidavit was sworn on 30<sup>th</sup> October 2014, and therefore pre-dated Exhibits D and E aforementioned. In any case, the application sought orders for release of the original Title for the suit property and not for payment of Kshs. 400,000/=. The previous application cannot therefore be an explanation as to why Kshs. 400,000/= was not remitted to the applicant's counsel by the Advocates for the purchasers. The explanation is to be found in the letter dated 28<sup>th</sup> April 2014, marked Exhibit F to the applicant's Supporting Affidavit; by which the 1<sup>st</sup> respondent instructed M/s Hassan Abdi & Co. Advocates as hereunder:

“ ...

Kindly ask your client to pay the under mentioned their agency fees of Kshs. 400,000/= which is to be deducted from the balance of the purchase price as follows:

1. David Charo Katana– I.D. No.xxxx.....KShs. 130,000.00
2. Mohamed Abdulrahman– I.D. No.....KShs. 130,000.00
3. John Dickson Oguta.....KShs. 140,000.00

Total.....KShs. 400,000.00

Yours faithfully, Mokaya Ogutu & Co. Advocates

(signed)

K.O. Mokaya

...”

[20] Although the letter was allegedly copied to the applicant, there is no demonstration by the respondents that the payments were made with the express authority of the applicant. Indeed, as correctly pointed out by Ms. Moolraj the tenor and effect of the letter marked Exhibit F appears to be at variance with the contents of the handwritten note marked Annexure “JDO-1” which was exhibited by the respondents to support the alleged payment of some Kshs. 1,000,000/= to John Dickson Oguta. It is therefore my finding that the respondent had no authority to cause payments of Kshs. 400,000/= to be made by the purchaser's Advocates from the funds due to the applicant as the proceeds of the land sale agreement.

**[b] On whether the respondents have fully accounted for the sum of Kshs. 12,600,000/=:**

[21] In general terms, an advocate is obligated to separate clients' funds from office monies. Hence Rule 4 of the Advocates (Accounts) Rules stipulates that:

Subject to rule 8, an advocate shall without delay pay into a client account all client's money held or received by him.”

[22] Thereafter, such funds can only be withdrawn in accordance with Rule 9(1) of the Advocates (Accounts) Rules, which provides that:

Subject to rules 10 and 12, an advocate may withdraw from a client account—

- a. money properly required for payment to the client;
- b. money properly required for or towards a payment authorized by the client;



- c. money properly required for or towards a payment on behalf of the client within the mandate of the advocate in the matter or any of the matters in which he is acting for or on behalf of the client;
- d. money which he is transferring to a separate account opened or to be opened in the name of the client;
- e. money properly required for or towards payment of a debt due to the advocate from the client or in reimbursement of money properly expended by the advocate for or on behalf of the client;
- f. money properly required for or towards payment of the advocate's costs where a bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client;
- g. money paid into the account in contravention of these Rules;
- h. money paid into the account under rule 5(b); and
- i. money not being client's money paid into the account under rule 6(1)(b).

[23] As indicated herein above, the applicant acknowledged receipt of Kshs. 8,000,000/=. The 1<sup>st</sup> respondent explained that he paid Kshs. 1,000,000/= to the applicant's agent, John Dickson Oguta. To this end, the respondents relied on the Replying Affidavit sworn by Mr. Oguta and, in particular, the document marked Annexure "JDO-1" by which the applicant allegedly agreed to pay the agent Kshs. 1,200,000/= for his services; out of which Kshs. 200,000/= had already been paid. The document is dated 29<sup>th</sup> April 2014.

[24] As correctly pointed out by Mr. Omollo, the averments in the respondents' two Replying Affidavits were never rebutted by the applicant; and therefore it was to no avail that Ms. Moolraj disowned the document marked Annexure "JDO-1" in her written submissions. What was expected was rebuttal evidence to refute the respondents' assertions. Needless to mention that disputed facts cannot be proved by way of written submissions; a point well explicated by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi* [2014] eKLR thus:

...Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented..."

[25] In the premises, it is my finding that the respondents have satisfactorily accounted for the Kshs. 1,000,000/= paid to the estate agent. As for the Kshs. 3,600,000/= allegedly retained as lien for fees due to the respondents, the applicant demonstrated that it fully paid the respondents their fees for the land sale transaction. A bundle of receipts marked Exhibit H were annexed to the applicant's Supporting Affidavit in that regard. There was therefore no justification for the defendant to withhold payment. In this regard, I am in full agreement with the position taken by Hon. Lesiit, J. (as she then was) in *John Karungai Nyamu & Another v Muu Associates Advocates* (supra) that:

The advocate has no right under any law to hold monies which have come to him for onward transmission to his client, as lien, at least, no such law has been cited to the court. What the



Advocate is doing by holding onto the Plaintiff's monies is irregular, and the court cannot condone the same."

[26] The Court of Appeal took the same view in Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investments Ltd (supra) thus:

To allow advocates to retain client funds for no reason at all would be a travesty of justice and would be an abuse of the fiduciary trust given and by extension would amount to conversion and criminal activity. It would amount to deceit and unjust enrichment and ultimately erode public confidence in the administration of justice...We are unable to understand the appellant's argument that it could claim a right of lien over that sum of money..."

[27] In the result, it is my finding that the respondents wrongfully retained the amounts due to the applicant in the sum of Kshs. 4,000,000/=. It is disconcerting that the funds have been withheld from 2014 to date; and that in spite of the order by Hon. Mabeya, J. in Mombasa Judicial Review Case No. 35 of 2019 for the respondents to have their Bills of Costs tasked, such taxation is yet to happen. In the premises, I find merit in the applicant's claim and hereby order that:

- (a) The respondents do pay to the applicant the sum of Kenya Shillings Four Million (Kshs. 4,000,000/=) with interest at court rates (12%) from 17 January 2021 to date, together with costs;
- (b) A declaration be and is hereby granted that the 1<sup>st</sup> respondent t/a Mokaya Ogutu & Company Advocates, engaged in professional misconduct by withholding monies due to their client, the applicant herein, from 2014 to date.
- (c) Each party to bear own costs of the Originating Summons.

It is so ordered

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 3<sup>RD</sup> DAY OF JANUARY, 2023.**

**OLGA SEWE**

**JUDGE**

