



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLICATION NO. E 614 OF 2019**

**KWALUKO FARM ENTERPRISES LIMITED.....APPLICANT**

**-VERSUS-**

**MARGARET WANGARI NGUGI.....1<sup>ST</sup> RESPONDENT**

**NGISA R. MORARA T/A MORARA NGISA**

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

**RULING**

1. On 9<sup>th</sup> October 2019 this court transferred case HCC No 271 of 2015 from the High Court Commercial & Tax Division of Milumani court to the Milimani Court Chief Magistrates' Court. An application dated 26<sup>th</sup> November 2019 has been filed by **KWALUKO FARM ENTERPRISES LIMITED** (the applicant) seeking that the said case be retransferred back to the High Court at Milimani Commercial & Tax Division. That prayer is based on the ground that the said claim is premised on section 80 of the Advocates Act and since the said Advocates Act defines the court with jurisdiction to determine matters under that Act as the High Court that accordingly the Chief Magistrate's Court has no jurisdiction to hear the matter.

2. The application is opposed by **RONALD MORARA NGISA** the 2<sup>nd</sup> respondent. He opposes the application on the basis that the order of transfer of this case to Chief Magistrate's Court was effected and on the file being transferred to the Chief Magistrate it was allocated a new case number being CMCC No 725 of 2019 and that having occurred what the applicant seeks from this court is to have the court sit as an appellant court of its order of transfer. Further the application was opposed on the ground that the claim before court is not pleaded as though it falls within the provisions of section 80 of the Advocates' Act.

**ANALYSIS AND DETERMINATION**

3. I have considered the parties' affidavit evidence and their written submissions.

4. The applicant's claim, which it now seeks it be remitted back to this court is that it entered into an agreement of sale whereby it was to purchase property *L.R.No 7785/1028* (original number **LR No 7785/10/765**) from **MARGARET WANGARI NGUGI**, the 1<sup>st</sup> respondent. The agreed purchase price was Ksh 18 million. The applicant fully paid purchase price and on the completion documents being presented to the land office the applicant's advocate was informed that the title document was suspected to be a forgery. The applicant's claim is for the 2<sup>nd</sup> respondent, who acted as the advocate of the 1<sup>st</sup> respondent in the sale transaction, to be ordered to deposit the purchase price into an account that the court may direct and in the alternative that the court declare the contract of sale to be frustrated and do order a refund be made to the applicant together with all related expenses plus interest. The applicant also sought an injunction to issue against the 1<sup>st</sup> respondent barring her from transferring or dealing with the immovable property the subject of the purchase.

5. The applicant seeks the retransfer of its claim to this court on the sole ground that its claim against respondents is brought under the provisions of section 80 of the Advocates' Act and because the court with the jurisdiction under the Advocate's Act is the High Court. That the Chief Magistrate's Court lacks the jurisdiction to entertain the claim.

6. I have set out above the applicant's claim. To reiterate the claim is for an order that the purchase price money be deposited into a bank account as directed by the court, and declaration that the contract of sale was frustrated and therefore an order be made for the purchase price and expenses to be refunded and for an injunction to restrain the 1<sup>st</sup> respondent from dealing with the immovable property.

7. Section 80 of the Advocate's Act provides:

**80. Betrayal of trust**

Any person who, 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:

Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.

8. In the sale transaction the seller of the immovable property was the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent was represented in that transaction by the 2<sup>nd</sup> respondent. On the applicant presenting the title document to the land office for the transfer to be effected into its name the applicant was informed that the title document was a forgery. It is on the basis of that the applicant seeks the orders in its claim.

9. Does the applicant's claim fall within the ambits of Section 80 of the Advocates Act? In this court's view the claim certainly does not fall within the provisions of section 80. Section 80 criminalizes the act, by an advocates, of breach of trust in failing to account for money paid to him/her. That is not what happened in the case of the applicant. The applicant paid to the 2<sup>nd</sup> respondent the purchase price but the transaction could not be concluded because the title document was stated to be forged. It is also very clear that Section 80 refers to criminal action against an advocate who fails to account for money paid to him. The applicant's claim is not a criminal action and it therefore unequivocally does not fall within section 80. It follows that the applicant's ground to seek the retransfer of its claim to this court fails because it is erroneous to argue that the claim is within the ambits of section 80.

**CONCLUSION**

10. The Notice of Motion dated 26<sup>th</sup> November 2019 for reasons set out above is without merit and is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 13<sup>th</sup> day of OCTOBER 2020.**

**MARY KASANGO**

**JUDGE**

Before Justice Mary Kasango

C/A Sophie

For the Applicant

For the Respondents:

**ORDER**

This decision is hereby virtually delivered this 13<sup>th</sup> day of **October, 2020.**

**MARY KASANGO**

**JUDGE**