



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 18 OF 2016 (OS)

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF SALE/PURCHASE OF NGONG/NGONG/63516

BETWEEN

DAVID MCLAUGHIN.....APPLICANT

VERSUS

S. GICHUKI WAIGWA & ASSOCIATES.....RESPONDENT

RULING

The applicant herein brought an Application under **section 47** of the **Advocates Act Cap 16 and Order 52 rule 4(1) &(2)** of the Civil Procedure Rules and all other enabling provisions of Law by way of Originating summons dated 18th December, 2015. The Application related to the provision of legal services to the Applicant by the Respondent advocate regarding a transaction involving **Ngong/Ngong/63516 Nairobi**. The Applicant noted that by a letter dated 29th June, 2015 the Respondent had forwarded an outlay required to complete the purchase of the land as **Kshs. 11,355,870**. The Applicant deposited Kshs. 12,720,000 into the Respondent's Account. The Application sought the refund of Kshs. 1,365,000 (subject amount) paid to the Respondent over and above the total amount agreed by the parties for the transaction based on the Applicant's fee note. The Deponent noted by a letter dated 29th June 2015 the Respondent had forwarded the fee note.

The supporting Affidavit of **David Mclaughin** the Applicant was sworn on 18th December, 2015. He deponed that he had approached the Respondent herein to act for him in the purchase of the property whereby the Respondent proceeded to forward an outlay that was required to conclude the transaction totaling to **Kshs. 11,355,870/-**. The Applicant proceeded to deposit **Kshs. 12,720,000/-** expecting a refund of Kshs. 1,365,000. He further deponed that the Respondent instead of refunding the subject amount he unlawfully converted it to offset the agreed legal fees yet no additional work had been done by the Respondent outside the initial instructions neither was there an additional fee note from the Respondent in relation to any extra work. The Respondent instead tried to justify the utilization of the extra money on advise of a contract which the Applicant considers as 'off the cuff talk' that had lasted barely fifteen minutes. The Applicant stated that no written legal opinion was issued and if at all it had been issued it would not have costed him the whole subject amount.

The Replying Affidavit of **S. Gichuki Waigwa** advocate practicing in the name and style of the **S. GICHUKI WAIGWA & ASSOCIATES** was sworn on 24th February 2016. He noted that the Applicant had requested him to offer legal services in purchase of Land. He conducted a search on the land but informed the Applicant that the Land was not available to him since he was not a Kenyan Citizen. The Respondent stated that he proceeded to process a Personal Identification Number for the Applicant who had insisted on the purchase of the land.

The Respondent further deponed that the extra amount was to facilitate transfer and/or ownership of the purchase property which according to him, was not legally available to the Applicant. He stated that the Applicant had sought advice from the Respondent on terms of Agreement from two Architectural firms. He maintained that the discussion on the Agreement was not 'off the cuff' as the Applicant had put it.

The Respondent stated that the Applicant cannot argue that the land was acquired illegally while he aided in acquisition of the same. Acquisition of land in Kenya by a foreigner can only be leasehold. The vendor would be at liberty to lease the land to the Applicant for as long as he would so wish.

On 14th March 2016, the Applicant swore a Supplementary Affidavit in response to the Respondent's Replying Affidavit. The deponent emphasised that the Respondent did not at any given time advise on the non-availability of the property to him but only got a confirmation of the search results from the Respondent, and the Respondent did not decline taking his instructions if it was illegal. He further emphasized that the Respondent did not have the Applicant's legal interest protected and was only ardent in making his legal fees out of the transaction. He stated that the Respondent offered to get him a Personal Identification Number where he was charged a separate **USD 500** which he obligingly paid but was not issued with a receipt despite numerous demands. The Applicant concluded his supplementary Affidavit by reiterating that he settled the full outlay amount presented by the Respondent and was seeking a refund of Kshs.1, 365,000 paid over and above the Respondent's fee note. The Respondent cannot claim illegal acquisition since it was his duty to advise his client on ownership whether the client insisted or not. This in my opinion is a reserve for the Land Court. This court's duty as far as this matter is concerned is to determine whether the Respondent should do a bill of cost for taxing by the taxing officer.

DETERMINATION

1. Illegality of the land purchase transaction

The Respondent in his submission has raised the issue of illegality of the land sale/purchase transaction. He went ahead to quote the maxim "*Ex turpi causa non oritur action*". The Respondent was approached by the Applicant, seeking his counsel on acquisition of land. The Respondent knowing well that a foreigner can only acquire land in Kenya through a leasehold, he failed to advise the Applicant the same and went ahead to conduct the transaction and even forwarded him a fee note of what it would cost him. The Respondent then cannot be heard to say that the Applicant cannot pursue a legal remedy that arose in connection with his own illegal act. In fact from the circumstances surrounding this case, it is the Respondent who acted unprofessionally by failing to advise his client accordingly and ended up misdirecting him and even proceeded to give him a fee note. The question is, why would the Respondent involve himself in what he alleges to be illegal transaction. In my opinion it is not illegal for a foreigner to acquire land in Kenya since the Constitution of Kenya 2010 provides on how a foreigner may hold land in Kenya. Nothing stopped the Respondent from explaining to the Applicant the mode on which to hold the land. However, this whole acquisition issue should be a preserve for the Land court if the Applicant so desires. This court can only determine the issue of bill of costs.

2. Whether the Respondent should tax his client through a bill of costs.

In Peter Furmetz v James G. Mouko T/A Mouko & Company Advocates [2015] eKLR

"In order to resolve the dispute, it is prudent to have the costs claimed by the defendant evaluated and assessed by the Deputy Registrar. The taxing officer will hear the submissions of all the parties and make a ruling as to whether any amount is payable to the defendant and if so, how much. Thereafter, the plaintiff can decide, depending on the outcome of the taxation, decide to either amend, withdraw or make any other action in relation to this matter."

The Applicant a foreigner in the country diligently approached an Advocate for advise on acquisition of land, this Advocate proceeded with the process of acquisition and even sent the Applicant a fee note tabulating the costs as shown in "**DM1**". The Applicant did not have an issue paying as he deposited the money. The problem arose when the Respondent refused to refund the amount over and above what was agreed. The Respondent did not deny that the subject amount existed, in fact he tried to explain how and for what he used the money for. If the Respondent felt that there additional work was work done other than the one in the letter of 29th June, 2019, he should have done another fee note explaining to the Applicant why he could not refund the whole or part of the amount. But he chose not to respond until the filing of this matter before this court. The Respondent has tried explaining how the subject amount was used but none of what he explained can take up the whole amount of **Kshs.1,365,000/-**. Guided by **section 47** of the **Advocates Act**, I opine that the Respondent should draft an Advocate/client bill of costs and serve it upon Applicant.

The issue before determination before Court is whether by Originating Summons filed on 26th January 2016, this Court can declare that the agreed Professional Fees payable to the Respondent was/is Ksh 228,660/-

Secondly, that the Respondent S.K. Gichuki Waigwa & Company Advocates refund Ksh 1,365,000/- to the plaintiff.

From submissions filed by respective parties through their Counsel, I find matters regarding ownership and use of land is within the jurisdiction of the **Environment & Land Court** and therefore this Court cannot competently determine the same.

Secondly, if and when an agreement of instruction fees is presented before Court, that agreement binds the parties and there is no recourse to renegotiate, renege the Agreement but to comply with the terms of the agreement.

This Court has not been furnished with an Agreement of the Instruction fees payable by Plaintiff to the Defendant and/or deliverables by the Defendant to the Plaintiff.

In the absence of such agreement that binds the parties on payment of instruction fees, the matter procedurally and legally ought to commence with a Bill of Costs filed for taxation before Taxing Master/Deputy Registrar of the relevant Division of the High Court or Court of Equal Status. Thereafter, after taxation of the Bill of Costs if any party is aggrieved with the outcome then the party may pursue a reference in the High Court.

DISPOSITION

1. In the absence of such evidence of Instruction Fees Agreement and /or filing of Bill of Costs for taxation before Taxing Master, the instant application fails.

2. The Respondent shall file Bill of Costs for taxation before Taxing Master.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND OCTOBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

WAISIGWA H/B FOR OMULULE TOLLO FOR THE APPLICANT

N/A FOR THE RESPONDENT

MS JASMINE – COURT ASSISTANT