



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL CASE NO. 7 OF 2016 (O.S)

THE COUNTY ASSEMBLY OF KWALE.....PLAINTIFF/APPLICANT

VERSUS

APOLLO MUINDE

DANIEL NGONZE TRADING AS

APOLLO MUINDE & NGONZE ADVOCATES.....DEFENDANT/RESPONDENT

JUDGMENT

1. The claim herein arises from an amended originating summons dated 15th September, 2016, brought under the provisions of Order 52 rules 4(1)(b) and (2) and Rule 10 of the Civil Procedure Rules. The plaintiff seeks the following orders:-

- i. The defendants herein do pay up to the plaintiff the sum of Kshs. 7,200,000/= being the purchase price paid to them by the plaintiff as purchaser in a transaction for the purchase of LR. No. KWALE/GALU KINONDO/1165 in Kwale on or about 30th June, 2015 in which the defendants acted as the plaintiff's Advocates, or in the alternative;
- ii. The defendants herein do deliver up to the plaintiff the transfer and Title documents of LR. No. Kwale/ Galu Kinondo/1165;
- iii. An order that the defendant do pay to the plaintiff the interest on the said sum of money of Kshs. 7,200,000/= at the rate of 12% per annum from 9th October, 2015 until payment in full; and
- iv. The defendants pay the costs of this suit.

2. The application is supported by the affidavit of Denis M. Mutui sworn on 14th September, 2016 and the grounds in support of the application. Prior to the originating summons being amended, the defendant had filed grounds of opposition on 3rd March, 2016.

3. Mr. Adala, Learned Counsel for the plaintiff in highlighting his submissions filed on 13th April, 2017 stated that the plaintiff's claim is for Kshs. 7,200,000/= being the purchase price for LR No. Kwale/Galu/Kinondo/1165 in Kwale and delivery of title documents for the said property. They also sought interest on the sum of Kshs. 7,200,000/= at the rate of 12% from 9th October, 2015 until payment in full.

4. Counsel stated that under the provisions of Order 52 rules 4(1)(b) and (2) and rule 10 of the Civil Procedure Rules, an Advocate/Client relationship must have existed in order for a suit to be filed based on the said provisions. He stated that such a relationship existed herein between the plaintiff and the defendant when the former retained the latter to act for it in purchase of 3 properties namely, LR No. Kwale/Galu/Kinondo/1165, LR No. Kwale/ Galu Kinondo/1166 and LR Kwale/Galu Kinondo/1167. A sale agreement was attached to the plaintiff's supporting affidavit and marked as DMM1. It was signed by the plaintiff and the seller, David Makau Ndolo, who was represented by the law firm of Mulwa Nduya & Co. Advocates. The purchaser's Advocates are reflected thereon as Apollo Muinde & Ngonze Advocates. Reference was made to Annexure DMM 3(a) which comprises a letter written by the plaintiff to the defendant over the subject transaction. Mr. Adala further submitted that the annexure marked as DMM 3(b) is a letter from the defendant to the plaintiff confirming instructions given to the former for the purchase of the 3 properties, which proves existence of an Advocate/ Client relationship.

5. Counsel indicated that the plaintiff remitted Kshs.21,600,000/= to the defendant for the purchase of the three properties as per the annexure marked as DMM 2(b) which is a payment voucher confirming the transfer of the money to Apollo Muinde & Ngonze Advocates. It was stated that the defendant failed to remit the amount of money to the vendor for purposes of completing the transaction.

6. Counsel for the plaintiff referred to the annexure marked as DMM 3(d) which is a fee note by the defendant addressed to the plaintiff for the sum of Ksh. 3,016,00/= out of which Kshs. 1,300,000/= was paid to the former. It was stated that the said sum was part payment of the Advocates fees.

7. It was submitted that the annexures marked as DMM 3(e) and DMM 3(f) and DMM 3(g) to the supporting affidavit are reminders sent to the defendant by the plaintiff.

8. The plaintiff's Counsel argued that out the sum of Kshs. 21,600,00/=, Kshs. 14,400,000/= was paid to the purchaser for two plots but Kshs. 7,200,000/= for plot No. Kwale/Galu Kinondo/1165 was retained by the defendant.

9. It was argued that the claim by the defendant that they had not been paid the balance of their legal fees has no basis for the reason that instructions had not been completed by the defendant. Counsel cited the case of **Piper vs Lewis** [1894] 2 QB 306, where Lord Esher stated that a solicitor should take all necessary steps to bring a suit to an end.

10. The plaintiff's Counsel prayed for the sum of Kshs. 7,200,000/= to be remitted by the defendant to the plaintiff. He cited the case of **Combe vs Combe** [1951] 2 KB 215 to support his submissions.

11. Reference was made to the defendant's letter marked DMM 3(h), stating that Mr. Muinde Advocate was outside jurisdiction and was unable to execute instructions to completion. Counsel for the plaintiff prayed for the sum of Kshs. 7,200,000/= to be remitted to the plaintiff with costs and interest at 12%.

12. Mr. Tindika, Learned Counsel for the defendant, relied on the grounds of opposition. He also relied on their written submissions filed on 10th October, 2017. He challenged the contents of the affidavit sworn by Dennis Mutui on behalf of the County Assembly of Kwale and claimed that the said deponent had not been authorized to swear the said affidavit. Counsel therefore prayed for the application to be struck out with costs.

13. It was contended that neither the seller, David Makau Ndolo nor his Advocate had sworn an affidavit to state that they had not received the sum of Kshs. 7,200,000/= being the balance of the purchase price. It was submitted that a sum of Kshs. 11,600,000/= was to be paid upon execution of the agreement dated 10th July, 2015 as per paragraph 3(a) thereof. He stated that LR No. Kwale/Galu Kinondo/1165 had not been processed.

14. It was submitted that a fee note of Kshs. 3,016,000/= was raised and Kshs. 1,300,000/= was paid and there was an outstanding balance. Counsel contended that fees is payable upon the raising of a fee note which was raised on 29th June, 2015. He asserted that an Advocate has a lien over the client's money or client's documents if fees was not paid. He posited that there was no agreement that fees was supposed to be paid after the conclusion of the transaction.

15. Mr. Tindika argued that the plaintiff seeks conflicting orders for a refund of the Kshs. 7,200,000/= plus interest at 12% per annum and an order for delivery of title documents for LR No. Kwale/Galu Kinondo/1165. It was the Counsel's view that as long as the agreement between David Makau Ndolo exists, there can be no refund of the said money.

16. The defendant's Counsel had no objection to prayer No. 2 of the originating summons being granted, provided the outstanding fees was paid prior to the delivery of the title deed for LR No. Kwale Galu Kinondo/1165.

17. Mr. Adala in responding to the above submissions stated that the issue of the plaintiff's affidavit having been sworn by an incompetent person should be disregarded as it was not raised anywhere in the defendant's grounds of objection or in the submissions.

18. Counsel stated that it was not for the vendor to disprove that they were not paid because the dispute was between a client and an Advocate and not between a client and a vendor. He asserted that the defendant should have proved payment of Kshs. 7,200,000/= to the vendor.

ANALYSIS AND DETERMINATION

19. The issues for determination are:-

i. If the originating summons should be struck out; and

ii. If the defendant should pay part of the money transmitted to it by the plaintiff or execute transfer of the land in issue.

20. It is not disputed that the plaintiff and the defendant herein had a Client/ Advocate relationship, respectively, which went south when the defendants failed to pay for and transfer land reference No. Kwale/Galu Kinondo/1165 to the plaintiff. It is not disputed that the defendant was paid the sum of Kshs. 21,600,000/= in full for three plots. The defendant duly paid for and transferred LR No. Kwale Galu Kinondo/1166 and 1167 to the plaintiff.

21. In their oral submissions, Mr. Tindika urged this court to strike out the originating summons for the reason that the deponent, Denis M. Mutui did not have the authority of the County Assembly of Kwale to depone the affidavit sworn on 14th September, 2016. The grounds of opposition filed on 3rd March, 2016 did not raise the said issue neither did the defendant's written submissions.

22. I have perused the annexures marked DMM 3(a), 3(g) and 3(j), which I note were written by Denis M. Mutui. He signed off the said

letters in his capacity as the County Clerk and Secretary of Kwale County Assembly Service Board. It is therefore my finding that by virtue of the office he held, he had the capacity and authority to swear the affidavit in support of the present claim. I therefore decline to strike out the originating summons herein.

23. In highlighting their submissions, Mr. Adala prayed for both the refund of the cash for the land in issue and for transfer of the property. That argument is untenable and this court cannot confer a benefit to the plaintiff which does not accrue to it by granting double compensation.

24. Order 52 rule 4 of the Civil Procedure Rules provides as follows:-

“(1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for –

(a) the delivery by the advocate of a cash account;

(b) the payment or delivery up by the advocate of money or securities;

(c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;

(d) the payment into or lodging in court of any such money or securities;

(e) the delivery up of papers and documents to which the client is entitled.

(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.

(3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate’s lien, if any as the court deems fit.”

25. The defendant did not dispute holding the sum of Kshs, 7,200,000/=. It however claims payment of its fees in full before executing the transaction for LR No. Kwale/Galu Kinondo/1165. Although in its grounds of opposition the defendant alleged that none of its fees had been paid, the statement of accounts marked as DMM6 shows that the law firm of Apollo Muinde was on 30th June, 2015 paid part of its fees in the sum of Kshs. 1,300,000/= after it sent a fee note of Ksh. 3,016,000/= which included VAT, to the County Assembly of Kwale on 29th June, 2015.

26. LR No. Kwale/Galu Kinondo/1166 and 1167 were transferred to the County Assembly of Kwale on 21st January, 2016. That was done after the Clerk to the said County Assembly wrote several letters to the defendant demanding for transfer of the land.

27. On 10th December, 2015, Mr. Apollo Muinde, a partner in the defendant's law firm wrote to the plaintiff alleging to have been out of jurisdiction hence the delay in executing the transfer. He implored the plaintiff to withhold any action and undertook to conclude the transaction within 21 days from the date of the letter.

28. When the transfer for Kwale/Galu Kinondo/1165 was not effected, the plaintiff filed an originating summons on 3rd March, 2016. It is apparent that the County Assembly of Kwale patiently waited for transfer of the property but it took the defendant six months from the time the purchase price was transmitted to its bank account, before effecting the said transfer.

29. The defendant from the outset knew that it was dealing with a Government entity which is guided by public procurement laws and cannot whimsically pay full legal fees to the defendant when only part performance has been made. I therefore decline to make any orders for the defendant to be paid the balance of its legal fees before it has effected transfer of LR Kwale/Galu Kinondo/1165 to the plaintiff.

30. It is my finding that this is a shut and open case of a plaintiff who is deserving of the orders sought. On the issue of interest, the defendant has been holding Kshs. 7,200,000/= belonging to the plaintiff since 30th June, 2015 when funds were transferred to its account. The plaintiff prays for interest for the sum of Kshs. 7,200,000 at 12% per annum since 9th October, 2015. It is my finding that the plaintiff is entitled to the said claim for it has been put out of funds by the defendant and the transfer of the land in issue is still outstanding.

31. I therefore allow the prayers sought in the amended originating summons dated 15th September, 2016 in the following terms:-

i. The defendant herein shall within 30 days from today transfer LR No. Kwale/Galu Kinondo/1165 and hand over title documents to the plaintiff;

ii. If the defendant fails to comply with the above order within the said timeline, it shall within 15 days thereof, reimburse the plaintiff the sum of Kshs. 7,200,000/= being the purchase price for LR No. Kwale/Galu Kinondo/1165;

iii. The defendant shall pay the plaintiff interest on the said sum of Kshs. 7,200,000/= at the rate of 12% per annum from 9th October, 2015 until payment in full; or until delivery of the title deed for Kwale/Galu Kinondo/1165; and

iv. Costs are awarded to the plaintiff.

It is so ordered

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr Adala for the plaintiff

Mr. Mohamed holding brief for Mr. Tindika for the defendant

Mr. Oliver Musundi - Court Assistant