



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 414 OF 2016

CENTURION HOLDINGS LIMITED.....PLAINTIFF

VERSUS

WILLIAM KIMANI RICHU T/A

KIMANI RICHU & ASSOCIATES ADVOCATES.....DEFENDANT

RULING

1. The Relationship between an Advocate and his Client has hit an inclement patch and the Advocate has been sued for Professional negligence. In the meantime Centurion Holdings Limited (the Client) seeks the following Orders from William Kimani Richu t/a Kimani Richu & Associates Advocates (the Advocate):-

2. THAT in the first instance, pending hearing and determination of this Application, the Defendant's Account No.1000233575 with NIC Bank be frozen and the Defendant be restrained from accessing, withdrawing, diminishing, transferring or howsoever dealing with the funds to found in his Account for up to a maximum of Kshs.17,872,276/=.

3. THAT thereafter, pending determination of this suit, the Defendant, his servants or agents or whosoever be restrained from accessing, withdrawing, diminishing, transferring or howsoever dealing with the funds to found in his Account No.1000233575 with NIC Bank, Kenyatta Avenue Branch, for up to a maximum of Kshs.17,872,276/.

4. THAT further, or in the alternative, the Defendant be ordered to deposit Kshs.17,872,276/- together with interest thereon in the joint names of Advocates on record.

5. THAT further, pending a determination of this application, the Defendant and his agents, servants or whosoever be restrained from taxing his bills of costs in Misc. HCC No.224 of 2016, Kimani Richu & Associates Advocates vs. Centurion Holdings Limited or any bill arising from the sale of L.R NO.12565/37 and L.R No.12565/38.

6. THAT thereafter, pending hearing and determination of this suit, the defendant and his agents, servants or whosoever be restrained from taxing his bills of costs in Misc. HCC NO. 224 of 2016, Kimani Richu & Associates Advocates vs. Centurion Holdings Limited and Misc. HCC No. 225 of 2016, Kimani Richu & Associates Advocates Vs. Centurion Holdings Limited or any bill arising from the sale of L.R NO. 12565/37 and L.R No. 12565/38.

2. This Suit and Application is brought against the following backdrop. Desirous of purchasing two properties being LR NO.12565/37 and LR 12568/38 (jointly “**the properties**”) from Kathumo Holdings Limited (Kathumo), the Client duly instructed the Defendant to Act for it in the transaction and deposited a sum of Kshs. 88,420,000/= into the Advocate’s Account on or about 7th April, 2014.

3. The Client and Kathumo executed an Agreement of Sale dated 10th April 2014 and a sum of Kshs.17,000,000/= being the agreed Deposit was paid to the firm of TrippleOKlaw Advocates.

4. The transaction did not complete and unhappy with what it perceived as a breach on the part of Kathumo, the Client instructed the Advocate to lodge HCC NO.946 of 2014 **Centurion Holdings Ltd vs. Kathumo Holdings Limited (Kathumo Suit)** seeking, amongst others, orders for specific performance, general damages for breach of Contract and in the alternative a refund of the Deposit of Kshs.17,000,000/=. As part of the strategy to protect the interests of the client, it was agreed by the Client and the Advocate that caveats would be registered against the said properties.

5. The Client has shown to Court a letter dated 7th July 2014 from the Advocate to the firm of TrippleOKlaw in which the former informs the latter that it had already lodged Caveats against the two properties. The Client and Advocate do not agree on what should be made of that letter. The Clients position is that this was information by the Advocate that the Caveat had been registered while the Advocate maintains that there was no representation that the Caveat would definitely be registered once lodged at the Lands Registry.

6. Anyhow, and in the meantime, the Client instructed the Advocate to utilize the balance of Kshs.71,420,000/= towards the purchase of other properties including, inter alia:-

(i) Stonebridge Apartment Flat C9, Rhapta Road

(ii) Stonebridge Apartment Flat C11, Rhapta Road

(iii) Shatana Investment, Brookside Gardens.

7. In instruction acknowledged by the Advocate through Letter of 8th September 2015 and 21st September 2015, the Client asked the Advocate to pursue an amicable settlement of the Kathumo Suit. Shown to Court is a Letter dated 28th January 2016 in which the Advocate informs the Client of the progress of the matter. In it the Advocate, partly, advises:-

“Kindly note, our counterparts are quite adamant in settling this matter amicably in terms of damages for Breach of Contract and costs of the Suit. It is our humble opinion that it would not be prudent to abandon the general damages for breach of contract and the costs of the suit given the nature of the transaction. We are therefore intending to pursue this in Court”.

8. It turns out that at the request of the Advocate, TrippleOKlaw refunded the sum of Ksh.17,000,000/= together with interest of Kshs.875,276.45 to the Advocate on 30th March, 2015. This has aggrieved the Client because it asserts that it only learnt of this refund when the firm of TrippleOKlaw responded to an inquiry by its current Lawyers through a Letter of 20th September 2016.

9. The Advocate has refused to pay out the sum of Kshs.17,872,276 as he claims it as a lien of fees owed to it by the Client and its subsidiary companies. On the other hand the client takes the position that the only fees that may be due to the Advocate is for Ksh.2,742,425 as Instruction Fess for filing the Kathumo Suit and Kshs.1,578,800/= as fees for the failed transaction involving the properties.

10. This Court has considered the rival submissions in the context of the background set out above and has come to a conclusion that the matter is not involved.

11. This is no doubt that under the Provision of Section 52 of the Advocates Act, an Advocate can protect

his fees by holding a lien over his Clients property. Section 52 provides:-

“Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate:

Provided that no order shall be made if the right to recover the costs is barred by limitation”.

12. There is common evidence that some Kshs.88,420,000 was transferred by James Boro Karugu to the Advocate on 8th April 2014. Mr. Karugu is a Director of the Client Company. It is not in dispute that a Sale Agreement was entered between the Client and Kathumo and part of the sum deposited being Kshs.17,000,000/= was paid over to the Law firm of TrippleOKlaw as deposit in respect to the transaction. The evidence is that this sum was paid on the express instruction of Mr. Karugu.

13. Whether Mr. Karugu was advancing these monies to the Client company or whatever arrangements the two may have had in respect of the monies, the Kshs.17,000,000/= had become or became the money of the Client Company once it was paid over to consummate its transaction with Kathumo.

14. This Deposit together with interest of Ksh.875,726.45 was paid to the Advocate on 30th March 2015. Whether this money was kept in a Client Account or not does not concern the Court for now. What is clear is that this money now held by the Advocates is the property of the Client Company (Centurion).

15. It would also seem that other than the Client Company, the Advocate acted for other Companies which include Malewa Bay Investment Company Limited and Mathara Holdings Limited in which Mr. Karugu was at all material times associated with as either a Director or Shareholder. What this Court must determine is whether the Advocate is entitled to hold a lien over the money now with him for fees that may be due to him from the Client Company and/or Companies related to it.

16. The Advocate has taken out 7 Bills of Costs. 2(two) against the Client Company, 4(four) against Malewa Bay Investment Company Limited and 1(one) against Mathara Holdings Limited. Although the Advocate argues that the two Companies are subsidiaries of the Client Company there is no evidence that it is the Client Company that instructed the Advocate to act for the two Companies in the matter in which fees is sought. It is trite law, that a Company is generally a distinct and separate entity from its subsidiaries and no material has been placed before me to persuade me that the Client Company should answer to the fees of Malewa and Mathara (see the observation of ROSKILL LJ in The Albazero [1975]3 ALL ER 21 at Page 28). And even if this Court were to accept that it was Mr. Karugu who instructed the Advocate to act for Malewa and Mathara, the money held by the Advocate belongs to Centurion and not Malewa or Mathara (see paragraph 13 and 14 above). I take a view, and so hold that only a sum of Kshs.4, 321, 225 /- being the amount claimed by the Advocate against the Client in the 2 Bills of Costs can be held as lien by the Advocate.

17. This Court would have had no difficulty ordering that the balance thereof be paid to the Client Company but will not do so as the Client Company did not seek such an order. So, in consonance with the request in Prayer 4 of the Notice of Motion of 11th October 2016, the Court shall be making an Order that the balance thereof with interest be deposited into a Joint Account in the names of the Defendant and the current Advocate of the Client Company pending the hearing and determination of this suit.

18. I turn to a different aspect of the Application. The substance of the suit before this Court is that the Advocate was negligent in the manner it acted in the conveyance of the two properties and in the conduct of the Civil Suit that ensued. This Court is asked to therefore stay the Taxation of the Advocates costs until this suit is heard and determined.

19. An advocate is entitled to fees once he/she has carried out instructions given to him/her by a client. And unless there is good reason, it should be the policy of the Law to support an Advocate's quest for recovery of fees and more so where a Retainer is not disputed. Generally speaking, a Client should not be permitted to hold back the Taxation of an Advocate's fees merely because it has a pending suit in respect to the manner in which the Advocate carried out its instructions. To do otherwise could encourage Clients to set up frivolous claims against their Advocates simply to delay or frustrate their Advocates from obtaining their fees.

20. For the Client to succeed in the plea for Stay it now seeks it will have to demonstrate that its case of Professional negligence against its Advocate has a prima facie case with probability of success and in addition that to allow the Advocate to take steps towards recovery of fees would render its suit nugatory.

21. As I assess the prospects of the claim herein, I am consciously aware that at this Interim stage the Court should restrain itself from making any firm determination that prejudices the final outcome hereof.

22. Paragraph 21 of the Complaint sets out the particulars of negligence of the Defendant as follows:-

1. Failing to prosecute HCC No.946 of 2014, Centurion Holdings Limited Vs. Kathumo Holding Limited as a result of which injunctive orders have not been issued leading to a transfer of L.R NO.12565/37 and 12565/38.

2. Failing to register a caveat against LR.No.12565/37 and 12565/38 once the properties the Plaintiff had entered had entered into an Agreement for Sale.

3. Misleading the Plaintiff that he had registered caveats when he had not done so.

4. Seeking a refund of the deposit of Kshs.17,000,000/= plus interest thereon without obtaining instructions from the Plaintiff.

5. Failing to inform the Plaintiff that he had received Kshs.17,872,276/= from TrippleOKlaw Advocates on 30th March 2015.

6. Deliberately misleading the Plaintiff to pursue HCC NO.946 of 2014, Centurion Holdings Limited vs. Kathumo Holdings Limited in an effort to conceal that he had recovered the deposit of Kshs.17,872,276/=

7. Utilizing the deposit of Kshs.17,872,276/= and interest thereon for his own benefit.

8. Failing to account for all monies received.

9. Threatening to utilize monies he had received to settle third party fee notes.

10. Acting unethically and in breach of his calling as an Advocate.

11. Failing to act in the interests of the Plaintiff.

23. A strategy that was agreed between the Client and the Advocate is that Caveats needed to be lodged against the properties even as it pursued the Kathumo Suit. A complaint of the Client is that the Advocate not only failed to have the Caveats registered but also misled the Client into believing that the Caveats had been successful registered.

24. That misrepresentation is said to be contained in the Letter of 7th July 2014 to TippleOKlaw which letter was copied to the Client. The Letter reads:-

Monday, July 7, 2014

Messrs. Tripple OK law

Advocates

ACK Gardens House, Wing C, 5th Flr

1st Ngong Ave. Off Bishops Road

P.O. Box 43170-00100

NAIROBI

Dear Sirs,

RE: SALE/PURCHASE OF PLOT NO. 12565/37 &

L.R NO. 12565/38 – KATHUMO HOLDINGS TO CENTURION HOLDING LIMITED.

We are in receipt of your email dated 2nd July 2014.

In response, we wish to remind your client that there is a binding Agreement for Sale between the Client and our Client is not willing to add anything to the agreed Purchase Price.

Further to this, we wish to inform you that our Client has learnt from highly reliable sources that your client owes the bank less than five million shillings.

It would therefore appear that your client has been, to put it mildly, economical with the truth and is only using the excuse as a ploy to increase the Purchase Price arbitrarily.

In order to protect the interests of our client, we are proceeding to file suit against the Vendor for specific performance.

In the meantime, we already lodged caveats against the two properties. We have also addressed a letter to N.I.C Bank intimating our intention to join them as a party and are enclosing a copy of the same for your client's information.

This is therefore to give you notice that we shall file suit for specific performance if we will not have received all the Completion Documents on the expiry of seven (7) days from the date hereof.

Yours faithfully,

For: KIMANI RICHU & ASSOCIATES

ADVOCATES

CC. Client

Signed.

(My emphasis)

25. It is submitted for the Advocate that there was no misrepresentation that the Caveats had been registered or that they would certainly be registered once lodged. And given a plain reading of the letter

one may side with the Advocate. The Advocate was communicating that it had lodged Caveats against the two properties, i.e; it had presented the Caveats for registration. Under the Provisions of Section 71 (4) of the Land Registration Act, the prerogative to accept a Caution is on the Registrar and it does not seem illogical for the Advocate to maintain that it could not assure that the Registrar would accept the lodged Cautions.

26. The Advocate explains that the Caution could not be registered as the files were missing at the Central Land Registry. What the Advocate has not explained is what efforts he made to have the Registrar trace the files. The Advocate may have been under a duty to press the Registrar to timeously trace the files and consider the cautions, and once faced with inaction from the Registrar to, in the very least, share the frustration with the client. In these two respects the Client's complaint of negligence may not be a trifle.

27. The other grievance raised by the Client is that the Advocate failed to prosecute the Kathumo Suit as a result of which Injunctive Orders were not issued and that this led to the transfer of the properties. In answer to this the Advocate submits that an Order of Injunction is a discretionary equitable Order of the Court and so it is unfortunate that it should be blamed for the non-issue of the Injunction Orders.

28. In the arguments before Court, the Advocate made the point that the Court did not issue the Injunction because the properties had been sold to 3rd parties. From the Advocate's Letter of 23rd March, 2015, the Advocate became aware of the disposition on 4th February 2015 when Ms. Oduor of TrippleOK informed Court of the sale.

29. The information that has not been availed to Court includes:-

- (i) Whether and when the Advocate filed an Injunction.
- (ii) Whether and when the Application was prosecuted.
- (iii) The outcome of the said Application.

Without such information this Court is unable to assess, for purposes of these interim proceedings, whether the Advocates acted negligently.

30. What however raises queries about the manner in which the Advocate carried out his Instructions is that the Advocate sought and obtained a refund of the deposit without instructions of the Client and without informing it. The Client maintaining that such instructions were not given and on the part of Advocate there is a loud silence on this important issue of Instructions.

31. In the assessment of this Court and on the evidence before it, the Plaintiff's claim is not trivial. But this Court must still consider whether to allow the Advocate to tax the Bill and thereafter to recover the fees will render the claim nugatory.

32. On this aspect The Application was passive. The Client had simply submitted that the taxation ought to be stayed as the Advocate had acted negligently and in breach of instructions. What the Client needed to demonstrate to Court, for instance, was that it would never be able to recover or it would have immense difficulty in recovering any fees paid out to the Advocate should it ultimately succeed in its action. It has not been said that the Advocate is financially weak as to be unable to pay back the fees or that the firm is about to fold up or close shop or leave the jurisdiction of the Court or such like reason that would demonstrate that recovery of any fees paid out at this stage is imperilled. I am afraid that the Client has not established a case for stay.

33. These now are the orders of Court. The application of 11th October 2016 is allowed in the following terms:-

- (a) The sum of Kshs.4,321,225/= shall be held by the Advocate as lien for his fees and that sum shall be deposited and held in a Client Account.**

(b) The balance of all monies now held by the Advocate shall be deposited in an Interest Earning Joint Account of the Advocates on record herein pending the hearing and determination of this suit. The Deposit to be made within 21 days of this Ruling.

(c) The prayer for stay is disallowed.

(d) Each party to bear its own costs on the application.

Dated, Signed and Delivered in Court at Nairobi this 16th day of March,2017.

F. TUIYOTT

JUDGE

PRESENT;

Mwasau h/b for Singh for Applicant

Wanjohi h/b for Kihara for Defendant

Alex - Court Clerk