



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 508 OF 2010

DHIRAJLAL V PATANI. PLAINTIFF

VERSUS

DAVID MAJANJA & STEVE LUSENO t/a

MAJANJA LUSENO & CO. ADVOCATES. DEFENDANT

J U D G M E N T

By an amended originating summons amended on the 17th May, 2010, the Plaintiff/Applicant has moved the court under Section 47 and 51 of the Advocates Act Cap 16, Rule 62A of the Advocates' Remuneration Order and Order 52 Rule 4 of the Civil Procedure Rules.

In the amended Originating Summons, the Applicant has sought the following orders: -

1. David Majanja and Steve Advocate deliver a cash account for Ksh.2,066,135/- to the Applicant.
2. David Majanja and Steve Luseno deliver a receipt for the payment of Ksh.2,066,135/- to the Applicant.
3. David Majanja and Steve Luseno Advocates deliver a Bill of Costs to the Applicant.
4. David Majanja and Steve Luseno Advocates pays the Applicant forthwith any sums found due to the Applicant upon taxation of the Advocates Bill of Costs.
5. In the event that David Majanja and Steve Luseno Advocates defaults in payment of the sum found due to the Applicant, an order of execution do issue forthwith.
6. David Majanja and Steve Luseno Advocates do pay the cost of this suit.

The originating summons is supported by the Affidavit of Dhirajlal V. Patani wherein he depones that he instructed the firm of Majanja Luseno & co. Advocates on the 22nd April 2009 to act for him in HCCC No. 2250 of 2007 (**Ramaben Ramniklal Patani & 2 Others Vs Dhirajlala V Patani**). The said instructions were given vide a letter dated 22nd April, 2009.

Before the firm of Majanja & Luseno took over the conduct of the matter, there were two other Advocates namely P. K Njoroge and Mr. Harrison Kinyanjui who acted for the Applicant in the same matter. The suit was settled by consent of the parties on the 30th September, 2009 after which the Applicant requested the Respondent to hand over the entire file together with the sums that he had paid the firm. The file was delivered but the Respondent refused to give him a statement of Accounts for the money paid to him totaling to Ksh.2,066,135/=.

According to the Applicant, considering the work done by the Respondent, he is not convinced that they are entitled to charge fees in the sum of Ksh.2,000,000/- and taking into account the fact that the

Applicant had previously engaged the services of two other lawyers whom he had paid a total of Ksh.1,300,000/-, he believes that the Applicant overcharged him and it's for that reason that he seeks the intervention of this Honourable court through the orders sought in the Amended Originating summons.

The summons is opposed by way of a Replying Affidavit sworn by Mr. Steve Luseno Advocate on the 16th September, 2013. In the said Affidavit, he depones that the firm of Majanja & Luseno was instructed by the Applicant herein on the 22nd April, 2009 to take over the conduct of the matter and represent him in a contentious matter involving the registered owners of all those properties known as L.R. No's 209/2632 and 209/4355 whereon there is an improvement erected thereon known as Garden Chambers.

The instructions entailed the conduct of HCCC No. 2250/2007 wherein the property was to be sold for a purchase price of Ksh.100,000,000/- and wherein conditions of sale had to be settled by the court. The 4 registered owners of the property, the Applicant herein included agreed on the conditions of sale which required a deposit of Ksh.20,000,000/- to cater for expenses including land rent, rates, real estate and legal fees. The said deposit was to be maintained by the firm of W. J. Ithondeka & Co. Advocates.

According to Mr. Luseno Advocate, by the time the Defendant was instructed, there was an agreement on legal fees pursuant to a consent order recorded in court and according to which, it was agreed that each Advocate representing the parties to the dispute would be paid Kshs.2,000,000/- out of the deposit of Ksh.20,000,000/- held by the firm of Ithondeka & Co. Advocates.

On the 24th April, 2009, the Applicant authorized the firm of Ithondeka & Co. Advocates to issue a cheque of Ksh.696,000/- as deposit of the fees for the Respondent and on the 14th July, 2009 Mr. Steve Luseno Advocate wrote to the Applicant requesting for a final payment of the Respondent's legal fees of Ksh.1,475,960/= which was in response to the Plaintiff's letter dated 10th July, 2009.

The Defendant's contention is that there was an agreement on Fees vide a consent that was recorded in court and that the Plaintiff had given his unconditional discharge to the Defendant by a letter dated the 1st day of October, 2009 and in the circumstances the Plaintiff is estopped in law from filing the instant suit and that the same is frivolous and vexatious and should be dismissed with costs.

I have carefully considered the Amended Originating Summons together with the Affidavit in support, the Replying Affidavit and the annexures thereto.

It is not in dispute that the Plaintiff instructed the firm of Majanja & Luseno Advocates to act for him in HCCC No. 2250/2007 following which the said firm filed a notice of change of advocates on the 23rd April, 2009.

It is also not in dispute that the said firm of advocates was paid a total sum of Ksh. 2 million or thereabouts as legal fees by the firm of W. J. Ithondeka & Co. Advocates which was part of the money the said firm was holding on behalf of the Plaintiff herein and the rest of the Plaintiffs in HCCC No. 2250/2007.

While the Defendant contends that there was an agreement on fees, the Plaintiff contends otherwise. The issue that the court will have to determine is whether there was an agreement on fees or not and whether the orders sought in the amended originating summons should issue.

Before the Defendant came on record for the Plaintiff, he had previously instructed the firm of P K Njoroge & Co. Advocates and the firm of Harrison Kinyanjui & Co. Advocates whom he had paid Ksh.1,000,000/- and Ksh.300,000/- respectively.

The Defendant in paragraph 7 of the Replying Affidavit depones that by the time the firm of Majanja & Luseno came on record, there was already an agreement on fees pursuant to a consent order recorded in court. A copy of that order dated 20th May, 2008 is annexed to Mr. Luseno's Replying Affidavit. I have looked at the said order and the same is very clear in paragraph 4 (a) that the lawyers' fee was to be

agreed upon. It is not therefore true, as alleged that the lawyers' fees had been agreed at Ksh.2,000,000/- and if there was any other agreement alluded to, then the same was not exhibited to the court by way of an annexure or otherwise.

On record, is a letter dated 14th July, 2009 by the Defendant to the Plaintiff asking for a cheque of Ksh.1,475,960/- being the balance of the legal fees. In the said letter the Defendants wrote and I quote: -

“Kindly note that we shall exercise our option to file the bill of costs in the event the sums sought are not paid before the next listing.”

The question then would be, why threaten to file a Bill of Costs if the fees had already been agreed?

I have also looked at the letter dated 1st October, 2009 by the Plaintiff to the Defendant. The said letter reads: -

“I confirm that I have this afternoon received all the sums due to me under the consent order of 30th September, 2009. AND to hereby discharge the firm from any liabilities and obligations herein”.

This in my opinion meant that the Defendant was being discharged from any liabilities with respect to the balance of the 20 million held by W. J. Ithondeka & Co. Advocate amounting to Kshs.3,480,540/- which was shared equally among the 4 owners or their representatives in which each was to get Ksh.870,135 (see the consent). The said consent does not say anything about the legal fees payable by the Plaintiff to the Defendant.

Similarly, if there was an agreement on fees between the Plaintiff and the Defendant, the Plaintiff would not have written the letter dated 8th September, 2009 requesting for a sum of Ksh.900,000/- which the Defendant had received from the firm of Ithondeka & Co. Advocates on his behalf.

I agree with the counsel for the Plaintiff that there was no agreement entered into in respect of the fees to be charged. This is because there was no written agreement signed by the client which is clear and unequivocal.

For those reasons, I would allow the amended Originating Summons in the following terms: -

- 1. The firm of David Majanja and Steve Luseno do deliver a cash account for Ksh.2,066,135/- to the Plaintiff within 21 days from today.***
- 2. The firm of David Majanja and Steve Luseno do deliver a receipt for the payment of Ksh.2,066,135/- to the Applicant.***
- 3. The firm of David Majanja and Steve Luseno do file a Bill of Costs within 21 days after delivering a statement of accounts to the Plaintiff.***
- 4. Costs of the suit are awarded to the Plaintiff.***

Dated, signed and delivered at Nairobi this 10th day of March, 2016.

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L NJUGUNA

JUDGE

In the presence

None Appearance for the Plaintiff

Miss Mugo for the Defendant