



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 132 OF 2011

MANSON OYONGO NYAMWEYA.....PLAINTIFF/RESPONDENT

VERSUS

DR. KITHURE KINDIKI1ST DEFENDANT/ APPLICANT

OMWANZA OMBATI.....2ND DEFENDANT/APPLICANT

JUDGMENT

Introduction

1. The plaintiff herein HON. MANSON OYONGO NYAMWEYA describes himself as the Member of Parliament for South Mugirango Constituency, in Kisii County.
2. The Defendants are male adults of sound minds and advocates of the High Court of Kenya practicing under the name and style of M/s Kithure Kindiki & Associates Advocates.

The claim (plaint)

3. In his plaint filed on 30th July 2011, the plaintiff states that on or about January/February 2008, he engaged/instructed 1st Defendant to represent him in an election petition in which the plaintiff challenged the election of one James Omingo Magara as the Member of Parliament for South Mugirango Constituency vide Kisii Hcc Election Petition no. 3 of 2008.
4. The 1st defendant successfully concluded the said election petition whose outcome was in favour of the plaintiff as the said petition was allowed with costs to the plaintiff herein whereupon the defendants filed the party and party bill of cost in the said Kisii Election Petition No. 3 of 2008 and the Bill of Costs was taxed and certified in the sum of Kshs. 7,554,331/=.
5. The plaintiff states that he had earlier remitted to the defendants the sum of Kshs. 2,375, 000/= on account of their Professional fees and that when subsequently the amount of Kshs. 7,554,331/=, on account party and party costs, was paid to the defendants, he demanded that the defendant remit the same to him which demand that the defendants did not comply with thereby prompting him to file an advocates/client bill of costs which was taxed at Kshs. 4,155,596/=.
6. The plaintiff's claim is that upon the taxation of the Advocates Client Bill of costs, it became apparent that the defendants were indebted to the plaintiff in the sum of Kshs. 3,398,735/= which is now the subject of the plaintiff's claim in the instant case.

7. The plaintiff contends that the defendants are guilty of breach of fiduciary duty to him and are hence obliged to render and/or pay the said sum of Kshs. 3,398,735/= to him.

8. The plaintiff has listed the particulars of breach of fiduciary duty as follows:

i. Breaching and/or contravening the tenets of fiduciary relationship.

ii. Retaining and/or withholding monies due and payable to the plaintiff.

iii. Dishonestly failing to account for monies received for and on behalf of the plaintiff.

iv. Failing to pay the monies due and payable to the plaintiff.

v. Disregarding and/or ignoring the Certificate of Taxation of the Advocate-Client's Bill of Costs

vi. Failing to heed and/or abide by the provisions of the Advocates Act, Chapter 16, Laws of Kenya.

vii. Defrauding the plaintiff of his lawful entitlement.

9. The plaintiff's claim is for judgment to be entered against the defendants in the following terms:

a) Payment of Kshs. 3,398,735/= only, details of paragraph 10 hereof,

b) Interests of Court rates of 14% per annum w.e.f 2nd December 2010.

c) Costs of the suit be borne by the Defendants.

d) Any such further and/or other relief as the Honourable Court may deem and expedient so to grant.

Defendants defence and Counter-claim/set off.

10. In their joint defence and counter-claim filed on 22nd July 2011, the defendants accuse the plaintiff of forum shopping by filing the case in Kisii when the instructions given to them by the plaintiff to represent him in the election petition were issued at the defendant's Nairobi Office.

11. The defendants aver that the plaintiff, after due consultation with the defendant, bearing in mind the nature of the election petition that the defendants were pursuing for him, instructed the defendants to engage the services of an assisting counsel/advocate preferably an advocate based in Kisii after which the defendants contracted the services of one Justus Onchari Otiso advocate.

12. The defendants contend that plaintiff paid the sum of Kshs. 1,250,000/= for the services rendered on the understanding that the fee balance would be settled later.

13. The defendants concede that indeed the party and party costs were taxed at Kshs. 7,554,331 but that they received Kshs. 6,134,638.05/= only from the Independent Electoral Commission who withheld Kshs. 377,715.50 and Kshs. 1,041,967.45/= for income tax and value Added tax respectively.

14. The defendants claim that the plaintiff owes them pending fees in respect to several cases in which they had acted for the plaintiff which they have listed as follows:

a) Kisii High Court Election Petition No. 3 of 2008;

b) Civil Appeal No. 8 of 2010;

- c) In the Court of Appeal at Nairobi, Civil Application No. 369 of 2009;**
- d) In the Court of Appeal at Nairobi, Civil Application No. 282 of 2009, and;**
- e) Kisii High Court Election Petition No. 1 of 2010.**

15. The defendants state that they held several meetings with the plaintiff with a view to urging the plaintiff to settle their pending fees to no avail and that the plaintiff continues to owe them fees to-date and that they were therefore entitled to hold the Kshs. 6,134,638.05 remitted to them as party and party costs in lien under common law and by dint of Section 52 of the Advocates Act.

16. The defendants also acknowledge that party and party costs was indeed taxed and certified at Kshs. 4,155,596 as stated by the plaintiff but that they continue to hold in lien, the amount of Kshs. 1,979,042.05 out of which they discounted an amount of Kshs. 729,042/=.

17. The defendants deny having contravened any known tenets of a fiduciary relationship and reiterate that they have already filed bills in all the other matters that they had acted for the plaintiff for which they make a counter – claim as follows:

a) Miscellaneous Application No. 412 of 2010 at the High Court in Nairobi, where they claim Kshs. 8,154,048.00 in relation to representation in Civil Appeal No. 8 of 2010;

b) Miscellaneous Application No. 81 of 2011 at the High Court in Kisii, where they claim Kshs. 8,709,855.00 in relation to representation in Election Petition No. 1 of 2011 coming up for taxation on 26th September 2011;

c) Miscellaneous Application No. 300 of 2011 at the High Court in Nairobi, where they claim Kshs. 3,582,097.00 in relation to representation in the Court of Appeal, Civil Application No. 282 of 2009.

d) Miscellaneous Application No. 301 of 2011 at the High Court in Nairobi, where they claim Kshs.2,727,084.00 in relation the representation in the Court of Appeal, Civil Application No. 282 of 2009.

e) Kshs. 1,250,000 paid to Mr. Justus Onchari Otiso Advocate for services rendered on behalf of the Plaintiff herein.

Total claim – Kshs. 24,423,084.

18. In the end, the defendants pray for judgment against the plaintiff in the following terms:

a) That is the premises judgment be entered for the Defendant's against the plaintiff for the said sum of Kshs. 24,423,084 together with interest thereon at the commercial rates prevailing from time to time from filing of this suit until payment in full.

b) Alternative and without prejudice to the foregoing, judgment be entered for the amounts taxed and certified by the Deputy Registrar in the pending Advocate/Client bill of costs and set off against Kshs. 729,042/= held in lien.

c) That the plaintiff's suit against the Defendants' be dismissed with costs to the Defendants.

d) That the Defendants be awarded the costs of the Counter-claim together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order.

e) That any such other or further relief as this Honourable Court may deem appropriate to

be made.

19. The plaintiff thereafter filed a reply to the defendants defence and a defence to the counter-claim in which he reiterated the contents of the plaint and denied owing the defendants the alleged pending fees in respect to several cases which the defendant claimed they had acted for him.

20. On 22nd July 2011, the defendants filed an application dated 21st July 2011 under Order 51 Rule 1 and 10 in which they sought the directions of the court as to whether their bill of costs filed by them in other suits have a bearing on the instant suit and whether the said bills of costs should be taxed before the instant suit is heard. The defendants also sought the transfer of this case to the High Court Civil Division at Nairobi. The said application was opposed by the plaintiff and in a ruling rendered on by this court (differently constituted) on 31st July, 2015 the court dismissed the application and held that the directions sought by the defendants were incapable of being granted in view of the fact that the said bills of costs had no relation to the instant suit.

21. When the case came up before me for hearing on 12th October 2016, Mr. Oguttu, advocate for the plaintiff informed the court that he had duly served the defendants with the hearing notice which was properly received and stamped by M/s Nchogu, Omwanza & Nyasimi advocates for the said defendants. Mr. Oguttu then asked the court to allow him to proceed with the plaintiff's case, the defendants' absence notwithstanding.

22. Upon perusing the affidavit of service dated 12th October 2016, this court noted and was satisfied that the defendants were properly served with the hearing notice and ordered that the case proceeds to hearing.

Evidence

23. PW1, Manson Oyongo Nyamweya, the plaintiff herein, testified that he hired the legal services of Dr. Kithure Kindiki, the 1st defendant herein, to represent him in Election Petition No. 3 of 2008 (hereinafter the "Petition") and that the 2nd defendant later on took over the case from the 1st Defendant. The plaintiff stated that he had filed the petition in which he challenged the election of one Omingo Magara as the Member of Parliament and that he was successful in the said petition whereupon the defunct Electoral Commission of Kenya (hereinafter "ECK") was ordered to pay to him the costs of the petition.

24. The plaintiff's case was that his party and party costs in respect to the petition was thereafter taxed by the court at Kshs. 7,554, 331/=. He produced a copy of the ruling in respect to the said costs, dated 24th June 2010 as Pexhibit 1. The plaintiff further stated the he had at the inception of the petition paid to the defendants the sum of Kshs. 2,375,00/= as their professional fees and that following the taxation of the party and party costs, he requested the defendants to refund to him the said sum of Kshs. 2,375,000/= that he had paid as professional fees, but the defendants were unwilling to make the said refund and instead escalated their fees to Kshs. 17,000,000/= whereupon the defendants filed an advocate/client bill of costs under Kisii High Court Misc. 178 of 2010 in which the defendants claimed the total sum of Kshs. 17,639,916 as their costs in the petition but that the said advocate/client bill of costs was later taxed at Kshs. 4,155,596/=. The plaintiff produced a copy of the said advocate/client bill of costs and the certificate of costs as Pexhibits 2 and 3 respectively.

25. The plaintiff's case was that following the taxation of the advocate/client bill of costs, at Kshs. 4,155,596/= there was a balance of Kshs. 3,398,735/= out of the taxed party and party costs of Kshs. 7,554,331/= which the defendants owed him and which they did not refund to him thereby prompting him to engage the services of his current lawyers to file the instant case against the defendants after a demand notice sent to them did not yield any positive response. The plaintiff produced a copy of the demand notice as Pexhibit 4.

26. The plaintiff contended that the defendants had no valid reason for withholding the sum of Kshs. 3,398,135/= due to him in respect to party and party costs considering that this court had on 31st July 2015 ruled that the instant case had no relation to other pending cases that the defendant had alleged were

their basis for withholding the amount of money due to the plaintiff.

27. The plaintiff produced a copy of the court's ruling of 31st July 2015 as Pexhibit 6. The plaintiff prayed for the payment of the claimed sum of Kshs. 3,398,735/= together with interest at the rate of 14% to be calculated from 12th December 2010 when the party and party costs were paid to the defendants till the date of payment of the said sum to the plaintiff. The plaintiff also prayed for the costs of this instant case and the dismissal of the defendant's counterclaim.

28. Mr. Oguttu advocate for the plaintiff then prayed that the defendants' case be marked as closed following the defendants' failure to turn up in court which application was allowed. Mr. Oguttu thereafter gave a brief submission on the plaintiff's case before judgment which submissions consisted mainly of the genesis and summary of the plaintiff's case.

Analysis and determination

29. Upon considering the pleadings filed by the parties in this case and the testimony of the plaintiff, it is quite clear to me that it is not in dispute that the plaintiff engaged the services of the defendants to act for him in the petition whose outcome was in his favour whereupon he was awarded party and party costs of Kshs. 7,554,331/=.

30. It was also not in dispute that following the taxation of the party and party costs, a dispute arose between the plaintiff and the defendants over how much was due to the defendants as their advocate/client costs which dispute was resolved through the taxation of the advocate/client bill of costs at Kshs. 4,155,596/= as seen in Pexhibit 4.

31. The issue for determination is whether the plaintiff was deprived of his money by reason of the defendant's wrongful act and if so, what interest should be ordered. In sum, are the defendants justified in withholding the balance of Kshs. 3,398,735/= which the plaintiff claim is due to him in respect to the party and party costs awarded to him in the petition?

32. The defendants argued that they were justified to hold the said balance of Kshs. 3,398,735/= as lien over the pending bills in other cases wherein they have previously acted or were still acting for the plaintiff.

33. On the issue of the pending bills in other cases, I reiterate that this court, (differently constituted), had in the ruling delivered on 31st July 2015 found that the pending cases had no relationship with the instant case. I concur with the findings of Sitati J. in the said ruling and wish to add that the defendants would only have had a lien over the said amount received for party and party costs if the plaintiff had not settled their legal fees which is not the case in the instant suit.

34. Having found that the instant case is different and distinct from the cases wherein it alleged that there are pending bills, there is no way that the defendants can import alleged pending bills into this case since the said pending bills will have to run their own courses in the respective cases before the various courts.

35. I also find that the bills mentioned by the defendants in the counter claim have not been actualized through their taxation and at this point it is not known whether they will be taxed in the defendants' favour or not so as to warrant their being part of this case as a counter claim to the plaintiff's claim for a refund of his party and party costs.

36. In the book by Richard Kuloba "**JUDICIAL HINTS ON CIVIL PROCEDURE**" 2nd Edition, Law Africa, page 94 it is stated as follows:

"The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. In the case of a criminal prosecution costs are not merely to increase the punishment of an offence. The

natural limit which exists as to ordering costs of proceedings is an amount up to the sum actually incurred. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting in an action.”

37. In the instant case, it is not in dispute that the plaintiff incurred expenses in the petition in which the defendant's acted for him. It is therefore only judicious, fair and just that he should be reimbursed the amounts expended towards pursuing the petition. Consequently I do agree with submissions by the plaintiff that upon the court determining the issue of client/advocates costs through the taxation of the advocate/client bill of costs, it is only logical that the defendants reimburse the plaintiff the balance of the costs due to him upon the defendants deducting the portion thereof due to them as their taxed costs.

38. Regarding the issue of interest and whether or not the plaintiff is entitled to interest on the party and party costs, the plaintiff argued that he is entitled to the same considering that the defendant's wrongfully withheld the costs due to him for no justifiable cause since 2nd December 2010 when the same was paid to them.

39. Section 26 of the Civil Procedure Act CAP 21 of the Laws of Kenya deals with the issue of interest in suits and provides as follows:

“ 26 (1) where and in so far as a decree is for the payment of money, the court may, in the decree order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) where such decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

40. In the case of Prem Lata Vs Peter Musa Mbiyu (1965) EA 592 the Court of Appeal held:

“Where the successful party was deprived of the use of goods or money by reason of a wrongful act on part of the defendant the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

41. Similarly, in the instant suit, I find that the plaintiff was successful in the petition but was wrongfully deprived of the money awarded to him as party and party costs and is therefore entitled to claim interest on the amount that he claims from the defendants which interest will start to run from 2nd December, 2010 being the date when the advocate client bill of costs was taxed.

42. In a nutshell, I am satisfied that the plaintiff was deprived of his money by the defendants' wrongful act. The plaintiff has made out a case against the defendants on a balance of probabilities. This was a claim for a specific amount of money which the plaintiff proved. Consequently, I enter judgment for the plaintiff against the defendants jointly and severally in the following terms:

a) Payment of Kshs. 3,398,735/= together with interest at court rates w.e.f 2nd December 2010 till payment in full.

b) Costs of the suit.

Dated, signed and delivered in open court this 6th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Oguttu for the plaintiff
- Mr. Begi holding brief for Omwanza for the Defendants
- Omwoyo: court clerk