



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 86 OF 2012

TOR ALLAN SAFARIS LIMITED PLAINTIFF

VERSUS

OMAR MSHAMU ISMAIL DEFENDANT

RULING

1. The plaintiff sued the defendant for the refund of Ksh. 3,249,200/- it paid on 30th July, 2010 to the defendant's advocates M/s Balala Abed Advocates, as deposit in respect of a sale agreement concerning land Title No. NGOMENI SQUATTER/SETTLEMENT/SCHEME/139 (the suit property).
2. The plaintiff who was the purchaser claimed that the sale could not be completed due to breach on the part of the defendant the vendor. The defendant through the firm of M/s Balala & Abed Advocates filed a defence inter alia, admitting the sale agreement and payment of deposit. However, the defendant accused the plaintiff of failing to complete the transaction despite notice and hence asserted rightful forfeiture of the deposit.
3. On 16th April, 2013 the plaintiff filed an application expressed to be brought under Order 1 Rules 4(sic), 14 and Order 8 rules 3 and 5 of the Civil Procedure Rules seeking the following key prayers.

“1. THAT the plaintiff be granted leave to add BALALA MOHAMED SALIM and ABED ABED OMAR practicing as BALALA & ABED, ADVOCATES as the 2nd and 3rd defendants in this suit;

2. THAT the plaintiff be granted leave to amend the plaint filed herein be amended in terms of the draft amended plaint annexed to the affidavit of JAN MATHEW ALLAN which has been filed herewith in support of this application;

3. THAT the costs of this application be provided for.”

4. The gist of the grounds (a-h) in support of the application is repeated in the supporting affidavit sworn by Jean Mathew Allan a director of the plaintiff. Grounds a-g are in the following terms:

“a) The intended 2nd and 3rd defendants were the advocates acting for the defendant herein in the course of the transaction that gave rise to the cause of action disclosed in the plaint filed herein;

b) That pursuant to the provisions of the sale agreement between the plaintiff and the defendant dated 20th August, 2010, the plaintiff through its advocates, Messrs Ghalia & Ghalia, Advocates paid to the intended 2nd and 3rd defendants a sum of Kshs. 3,049,200.00 to hold the same as stakeholders of both parties in the transaction comprised in the aforesaid agreement.

c) The intended 2nd and 3rd defendants as stakeholders were and still are under a legal obligation to hold on to the said deposit pending the determination of the dispute between the plaintiff and the defendant as to the entitlement thereof.

d) The intended 2nd and 3rd defendants as stakeholders have since the filing of this suit and despite demand, failed, refused/neglected to account for the said sum of Kshs. 3,049,200.00 and in particular have failed, refused/neglected to confirm whether they still have the said monies with them.

e) The plaintiff being one of the parties for whom and to whose account the said sum of Kshs. 3, 049,200.00 was being held by the said stakeholders in the transaction has an interest in the said monies.

f) It is necessary for the plaintiff to ask for an order for the taking/delivery of an account of the said sum of Kshs. 3,049,200.00 by the firm of Balala & Abed, Advocates which order can only be given if the intended 2nd and 3rd defendants are parties to this suit.

g) The amendment sought herein is necessary to determine the real questions in controversy between the parties.”

5. Two affidavits were filed in reply to the application. The first is by Mohamed Salim Balala, a partner in the firm of Balala and Abed Advocates. The second is by the Defendant Omar Mshamu Ismail. The affidavits raise several issues which properly belong to the main trial. However, with regard to the application at hand the Defendant admits that he has received the deposit upon due forfeiture and the present application *“serves no useful purpose except as part of an unethical strategyto drag a defendant’s advocate into the arena of the litigationto settle scores...”*
6. For his part Mohamed Salim Balala depones that the application has no merit. Of importance are paragraphs 5, 6, 7 and 13 of Balala’s affidavit. They are reproduced herebelow:

“5. THAT I read an attempt by the plaintiff to exert unlawful pressure on us so as to discourage us from acting in this matter for the plaintiff.

6. THAT what the plaintiff seeks after default and forfeiture of deposit as a result of the breach is to now force us to breach the advocates-client privilege and disclose information not necessary for determination of the suit. This is unlawful and contravenes our client’s right to confide in his lawyer freely and without fear of intimidation.

7. THAT our client has confirmed full receipt of the deposit amount in his affidavit in reply to the application, as he was entitled to do so in law, after forfeiture, and the application serves no useful purpose. To now ask that we be joined so as to provide information on our clients dealings with his money after disbursement is tantamount to lifting the advocate client privilege, thus setting a dangerous precedent.”

13. THAT the agreement for sale was made between the plaintiff and the defendant. We, as lawyers were not parties to the agreement which was clearly made subject to the Law Society Conditions of sale 1989 and provided for the deposit which had been

already been paid to us as vendor advocate to be held pending completion but subject always to the said conditions, which included rights and consequence upon default by a party.”

7. The plaintiff filed a further affidavit reiterating the allegation that the deposit was to be held by the advocates as stakeholders on a professional undertaking and should not have been released before completion. The plaintiff further stated that the intended defendant advocate firm ought to have eschewed taking up a brief in a matter where its partners were likely to be witnesses. The plaintiff therefore denies applying any pressure on the proposed defendant firm to withdraw from acting.
8. The parties agreed to dispose of the application by way of written submissions. I note from the record that on 3rd July, 2013 the firm of Balala & Abed Advocates filed an application to cease from acting, citing the present application. The application is yet to be heard. On 3rd October, 2013 the parties filed their respective submissions but due to heavy pressure of work arising from election petitions the ruling could not be delivered on 6th December, 2013 as reserved initially.
9. I have now considered the application and the parties’ respective affidavits and submissions. I take the following view of the matter.

Order 1 rule 3 and 14 of the Civil Procedure Rules allow, before trial, the joinder, striking out or substitution of a plaintiff or defendant. Order 1 rule 3 in particular states:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction a series of acts or transactions, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

10. It is evident from the admitted facts of the case that the plaintiff’s claim against the defendant and intended defendant arise from the same transaction and similar questions of fact will arise; namely whether the deposit was duly forfeited or not. Secondly, the legal question of liability on either defendant will have to be determined. As has been correctly argued by the intended defendants, they were not parties to the sale agreement between the plaintiff and present defendant. However, they no doubt stood in a special capacity as advocates of the plaintiff who held the deposit as stakeholder pending the completion of the agreement or other eventuality.
11. To avoid duplicity of suits, it is best that these questions be determined in one suit. The proposed defendants have raised many serious objections to their joinder but I believe most of these are matters to be canvassed through their defence. In **Eastern Bakery v Castelino (1958) EACA 461** the court stated that:

“It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”

12. The court further stated that it would not refuse to allow amendment simply because it introduces a new case but would do so where such amendment would enable the substitution of a distinct cause of action with another, or to change the subject matter of the suit, change the suit into one of a substantially different character or where such amendment would prejudice the rights of the adverse party existing at the date of the proposed amendment eg. deprivation of an accrued defence of limitation (with regard to the latter see the court’s discretion under Order 8 rule 3 (2-5) of the Civil Procedure Rules).
13. Despite the repeated assertions by the intended defendants and the present defendant, there is no evidence that this application is motivated by a desire on the part of the plaintiff, to interfere with the privileged relationship between an advocate and his client, with a view to obtaining privileged

communication in order to shore up the plaintiff's "weak" case. Moreover the present defendant admits freely that he has received the forfeited deposit.

As far as the proposed defendants are concerned, it seems to me that costs would be adequate compensation for any inconvenience they might be subjected to through being wrongly enjoined in the suit.

For the foregoing reasons, I do allow the plaintiff's application filed on 16th April, 2013. Costs will be in the cause.

Delivered and signed at Malindi this 13th day of June, 2014 in the presence of: Miss Fatma holding brief for Balala & Abed proposed defendants.

C. W. Meoli

JUDGE

FURTHER ORDER: Balala & Abed be supplied with copy of proceedings and ruling.

C. W. Meoli

JUDGE