



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 313 OF 2010 (O.S.)

(IN THE MATTER OF THE ADVOCATES ACT, CAP 16)

BETWEEN

SLYVESTER HASUSA MAKHOKHA.....PLAINTIFF

AND

- 1. JAMES OKAO (t/a OKAO & COMPANY ADVOCATES)**
- 2. NJOROGI WACHIRA**

(t/a NJOROGI WACHIRA & COMPANY ADVOCATES)

- 3. PLACID ROSTORN EGESA**
- 4. FRANCIS PETER BARASA**
- 5. FATUMA AMIN ABDULLAHI.....DEFENDANTS**

R U L I N G

1. The original originating summons herein dated 16th June 2010 was against all the five Defendants. The originating summons was brought under **Order 52, rule 4** of the **Civil Procedure Rules** (the **Rules**) which provides for advocate and client disputes over money, etc.

2. Together with the originating summons was filed chamber summons dated 15th June 2010 which sought temporary injunction to preserve some KShs 8.2 million apparently held in a joint account by the 1st and 2nd Defendants (who are advocates of the High Court) pending hearing and determination of the suit. That application was heard *inter partes*. In a ruling dated and delivered on 29th March 2011 the court (Dulu, J) granted the temporary injunction.

3. On 26th March 2012, upon application by the Plaintiff's advocate, the 3rd, 4th and 5th Defendants were struck out from this suit. The 4th and 5th Defendants were awarded costs as against the Plaintiff; there was no order as to costs in respect to the 3rd Defendant. The Plaintiff was then to appropriately amend his originating summons. He indeed filed amended originating summons dated 24th April 2012, properly reflecting the 1st and 2nd Defendants as the only defendants, this being an advocate/client dispute.

4. There was then an attempt to consolidate the present originating summons with another

substantive suit (Nairobi HCCC No 256 of 2009). After perusing that other suit, the court, in directions dated and delivered on 6th July 2012 (Waweru, J), declined to order the consolidation sought, principally upon the ground that Nairobi HCCC No 256 of 2009 appeared to have been settled and was no longer pending.

5. The amended originating summons was subsequently heard by way of written submissions. In a ruling dated 26th and delivered on 27th September 2013 the court (Waweru, J) allowed the originating summons as against the 1st Defendant, **James Okao (t/a Okao & Company, Advocates)**. The court directed him to

“...deliver to the Plaintiff a cash account of all the money he may have received on account of the Plaintiff in respect to the land sale transaction in question within twenty-one (21) days of delivery of (the) ruling”.

In default the parties would have liberty to apply. The court further ordered that the temporary injunction granted on 29th March 2011 do remain in place until further orders. Costs of the amended originating summons were awarded to the Plaintiff as against the 1st Defendant.

6. As for the 2nd Defendant, **Njoroge Wachira (t/a Njoroge Wachira & Co, Advocates)**, the court held that there was no advocate/client relationship between him and the Plaintiff, and the Plaintiff could thus not demand an account from him. The originating summons as against the 2nd Defendant was dismissed with costs.

7. On 17th October 2013 the 1st Defendant filed in court a **Statement of Cash Account dated 16th October 2013** in compliance with the order of 27th September 2013. This statement was as follows

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“Amount received	<u>KShs 28,000,000/00</u>
1) Sylvester Hasusa Makokha.....	4,340,000/00
2) Francis Peter Barasa.....	4,340,000/00
3) Ronston Placid Egesa.....	4,440,000/00
4) John Egesa Bernard.....	3,000,000/00
5) Agreed Legal fees	500,000/00
6) Agent’s fees (as agreed at 3% of the purchase price).....	780,000/00
7) Amount held in joint account between M/s Okao & Col Advocates and M/s Wachira & Co. Advocates on behalf of FATUMA AMIN ABDULAHI pursuant to a consent order entered in HCC No. 256 of 2009 dated 18 th	

**May 2009 and as per the instructions
of the sellers but whose released
has been stopped by the court order
in this matter8,400,000/00**

**8) Amount released to Enonda,
Makoloo Makori & Co Advocates
under the instruction of
Sylvester Hasusa Makokha
and Francis Peter Barasa.....200,000/00

Total.....KShs 26,000,000/00**

8. In response to this Statement of Cash Account the Plaintiff filed **chamber summons dated 6th December 2013** in which he seeks one main order –

“That (the) court be pleased to issue an order directing the 1st and 2nd Defendants to release the amount of KShs 8,400,000/00 to the Plaintiff.”

The main ground for the application is that this money is held in the joint account by the 1st and 2nd Defendants “on behalf of the Plaintiff”. There is a supporting affidavit sworn by the Plaintiff to which a number of documents are annexed.

9. There is also an application filed by the 2nd Defendant on behalf of the 5th Defendant. It is by **chamber summons dated 12th November 2013** and seeks the main order that the Court be pleased to

“issue an order directing the 1st and 2nd Defendants to release the amount of KShs 8,400,000/00 to Fatuma Amin Abdullahi”.

The main ground for this application is that in the 1st Defendant’s Statement of Cash Account filed on 17th October 2013 it is “crystal clear that the amount of KShs 8,400,000/00 is held by the 1st and 2nd Defendants on behalf of Fatuma Amin Abdullah”. There is a supporting affidavit sworn by the 2nd Defendant, **Njoroge Wachira**, to which a number of documents are annexed.

10. There is a third application, by **notice of motion dated 11th November 2013** filed by the 4th Defendant. It seeks a similar order, that the sum of KShs 8,400,000/00 held by the 1st and 2nd Defendants be released to him, in addition to “an order for proper accounts as the Statement of Accounts dated 16th October 2013 is disputed”. The main ground for this application appears to be that the 4th Defendant has not received his full and proper share of the proceeds of sale. There is a supporting affidavit sworn by the 4th Defendant.

11. On 22nd January 2014 the Court directed that all three applications be heard together. They were canvassed by way of written submissions. The 4th Defendant’s submissions were filed on 6th March 2014, those of the Plaintiff on 26th March 2014 and those of the 2nd Defendant on 15th May 2014. The 1st Defendant did not file any submissions. There were also no direct responses to any of the applications by way of grounds of opposition and/or replying affidavit. Nevertheless, given the contested

nature and history of this matter, which is apparent on the face of the record of the court, the three applications can be considered hotly contested by the respective parties, except the 1st Defendant.

12. I have considered the said submissions. Let me first deal with the applications by the 4th and 5th Defendants - notice of motion dated 11th November 2013 and the chamber summons dated 12th November 2013 respectively. These two applications are misconceived and unsustainable. To begin with, the 4th and 5th Defendants are no longer in these proceedings, they (along with the 3rd Defendant) having been struck out from the proceedings by the order entered on 26th March 2012 at the behest of the Plaintiff. They no longer have the necessary standing to apply as they have.

13. More importantly, these proceedings as instituted by the Plaintiff are very limited in nature and scope. They are in the essence summary proceedings between the Plaintiff and the 1st Defendant (advocate and client) under Order 52, rule 4 of the Rules seeking in the main an order for a cash account. The rival claims for the KShs 8,400,000/00 between the Plaintiff, the 4th Defendant and the 5th Defendant cannot be adjudicated in these limited proceedings. Those rival claims can only be adjudicated in a proper, fully-fledged suit, most likely commenced by plaint or by an originating summons under Order 37 of the Rules!

14. If, as has been stated in the pleadings and submissions of some of the parties, a final order regarding the KShs 8,400,000/00 was made in another suit (Nairobi HCCC No 256 of 2009), then an appropriate application in regard to the money (which is now held jointly by the 1st and 2nd Defendants) ought to be made in that suit.

15. I therefore have no hesitation at all in striking out the two applications by the 4th and 5th Defendants respectively with no order as to costs for being misconceived.

16. As for the Plaintiff's application (chamber summons dated 6th December 2013), as already pointed out, the proceedings between the Plaintiff and the 1st Defendant are under Order 52, rule 4 of the Rules which provides –

“4. (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 of the advocate of a cash account;**
- b. **the payment of delivery up by the advocate of money or securities;**
- c. **the delivery of 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 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.”

17. The Plaintiff sought, *inter alia*, a cash account. The court ordered in its ruling dated 26th and delivered on 27th September 2013 that the 1st Defendant do provide such cash account. The 1st Defendant filed a cash account dated 16th October 2013. In it the 1st Defendant does not admit that he holds any money to the credit of the Plaintiff. The KShs 8,400,000/00 in dispute is stated in that cash account to be held in a joint account between the 1st and 2nd Defendants –

“... on behalf of FATUMA AMIN ABDULAHI pursuant to a consent order entered in HCCC No 256 of 2009 dated 18th May 2009 and as per the instructions of the sellers...”

18. The Plaintiff has disputed the cash account provided by the 1st Defendant. There is thus a major dispute over the KShs 8,400,000/00 between the Plaintiff, the 4th Defendant and the 5th Defendant. That dispute cannot be resolved in these present proceedings under Order 52, rule 4 of the Rules which by their nature are very limited. This dispute requires proper, fully-fledged proceedings, commenced either by originating summons under Order 37 of the Rules or by plaint – that is if the dispute was not settled by the consent order in Nairobi HCCC No 256 of 2009 mentioned in the 1st Defendant’s Statement of Cash Account and elsewhere.

19. For the above reasons the Plaintiff’s application by chamber summons dated 6th December 2013 cannot be granted. It is dismissed with no order as to costs. The 4th and 5th Defendants applications have already been struck out with no order as to costs. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF JULY 2014

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 16TH DAY OF JULY 2014