



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISC CIVIL APPLICATION NO. 51 OF 2019

MULANYA & MAONDO ADVOCATES.....ADVOCATES/APPLICANTS

VERSUS

NOAH SAPATI OLE MPAMAE.....CLIENT/ RESPONDENT

RULING

What is before Court for determination is the Advocates/Applicant's application dated the 29th May, 2019 (amended on 22nd July, 2020) and Client/ Respondent's applications dated the 24th November, 2019 and 3rd February, 2020 respectively. In the Advocates' application, they seek registration of a prohibition in respect to land parcel number Kajiado/ Kaputiei North/ 113123 measuring seven (7) acres created as a result of the subdivision of land parcel number Kajiado/ Kaputiei North/ 5924 in favour of the client Noah Sapati Ole Mpamae pending the settlement of the Advocates/Client legal fees fixed at Kshs. 2, 000,000. Further, a declaration that the Client/ Respondent is directed to pay in full the Advocates/ Applicant legal fees fixed at Kshs. 2,000,000 for representing him in Milimani Law Courts ELC Case No. 260 of 2016. The application is premised on the grounds on the face of it as well as the supporting affidavit of GEOFFREY MULANYA where he deposes that he is an advocate and senior partner in the firm of messrs Mulanya & Maondo Advocates. He explains that in March 2016 the Respondent instructed them to institute a suit to recover his parcel of land known as Kajiado/ Kaputiei North/ 474 which was subdivided to create 5923 and 5924. He confirms that they proceeded to file Nairobi ELC 260 of 2016 against Absolute Organic Agro Products Limited to recover the said parcel of land. Further, at the time of instructions, it was agreed that the Client who did not have money to pay for the legal services would first pay Kshs. 30,000/= for disbursements but for the legal fees, the Client agreed to allocate one (1) acre of land to the advocates. He avers that the suit was compromised by consent and the Client was only allocated seven (7) acres of land. Further, following the reduction in size of the land to be recovered, the Client renegotiated with them on the legal fees payable culminating in the parties' execution of the Agreement dated the 9th July, 2018 where the Client/ Respondent agreed the fees payable to be Kshs. 2 million. He contends that the Client did not have money to pay the said fees and it was agreed after subdivision and creation of the seven (7) acres, they would hold the title issued for the said seven (7) acres as lien for recovery of their fees. He claims after signing the consent, they proceeded to jointly with the advocates for Absolute Organic Agro Products Limited embarked on the process of reconstruction of the Deed files to ensure the lost title for Kajiado/ Kaputiei North/ 5924 was complete and new title issued to enable the process of subdivision. He explains that the Client/ Respondent failed to act in good faith to ensure the process of subdivision was finalized. Further, he proceeded to file a Notice to Act in person after the suit had been compromised. He reiterates that the Client/ Respondent has no known source of income apart from the aforementioned land.

In the Client/ Respondent's application dated the 24th November, 2019, he seeks to set aside the orders issued on 2nd October, 2019 and striking out the Advocates/ Applicant Chamber Summons dated the 29th May, 2019. The Application is premised on the ground on the face of it and the supporting affidavit of Noah Sapati Ole Mpamae.

In the Client/ Respondent's application dated the 3rd February, 2020, he seeks to have the legal fees agreement dated the 9th July, 2018 which he executed together with the Advocates Applicant set aside. The application is premised on the grounds on the face of it and the supporting affidavit of Noah Sapati Ole Mpamae where he admits the averments in paragraphs one to nine of the Advocate/ Applicant affidavit dated the 29th May, 2019. He deposes that he filed the ELC Case No. 260 of 2016 to get 60 acres of land but the Advocate convinced him to take seven (7) acres. He admits that they had agreed that if he got 60 acres, he would give the advocate one (1) acre. Further, that he pushed the Advocates for his land and it is only on 9th July, 2018 that he entered into an Agreement for legal fees and the Advocate promised that he would have his land before close of the month of August, 2018. He insists the Advocates represented him partly in the case up to the consent but did not participate in the acquisition of the seven (7) acres. He claims from the time they signed the Agreement, the Advocates went totally quiet and failed to furnish him with tangible progress. Further, he only heard from the Advocate when he resolved to represent himself. He has been apprehensive and suspicious that the two advocates were colluding though he had no tangible evidence to the effect. He reiterates that the Advocates have withheld material facts as they were negligent in view of the Agreement for Legal fees dated the 9th July, 2018.

The Advocates filed a replying affidavit sworn by Geoffrey Mulanya Advocate where he deposes that the application is baseless, frivolous and vexatious and complete abuse of the court process. Further, the same was filed to defeat the Advocates from getting their legal fees for services rendered to the client. He contends that the Client instructed the Advocates to represent him in Milimani ELC 260 of 2016 for which the parties negotiated and fixed a legal fees payable at Kshs. 2 million. He confirms that the Client is yet to pay the Advocates' fees for services rendered. He reiterates that the Advocates discharged their duties fully to the satisfaction of the Client as a result of which he was allocated seven (7) acres of land through a consent recorded in court. Further, the Client has not demonstrated grounds upon which this court can intervene with the valid agreement executed by the parties.

The three applications were canvassed by way of written submissions.

Submissions

The Advocates/Applicant reiterated their claim and contended that the Legal Fees Agreement between the parties dated the 9th July, 2018 was enforceable. They submitted that they had demonstrated sufficient grounds for entering an order of prohibition restricting any dealings on land parcel number Kajiado/ Kaputiei North/ 113123 pending settlement of their fees. Further, that the client failed to establish requisite grounds for the court to set aside the agreement dated 9th July, 2018. They relied on section 45 (6) of the Advocates Act as well as the following authorities: **D N Njogu & Co Advocates Vs National Bank of Kenya Limited (2016) eKLR; Ahmednasir Abdikadir & Co. Advocates Vs National Bank of Kenya Limited (2) (2006) 1 EA 5** to support their arguments. They contended that the client's first application had been overtaken by events. They further submitted that an agreement dated the 9th July, 2018 is a valid, legally binding agreement which can only be vitiated on grounds capable of vitiating a valid contract to wit fraud, undue influence and misrepresentation. They further relied on the decisions of **Kakuta Maimai Hamise Vs Peris Pesi Tobiko & Other (2017) eKLR and Otieno Ragot & Company Advocates Vs National Bank of Kenya Ltd (2018) eKLR.**

The Client/ Respondent insisted that the Advocate did not represent him fully to the conclusion of the matter as had been agreed. Further, agreement for fees was done after the matter had been compromised. He relied on section 45 (2) & (5) of the Advocates Act and the case of **DG Wachira t/a DG Wachira & Company Advocates V James Muchene Ngei (2020) eKLR** to buttress his averments.

Analysis and Determination

Upon consideration of the three aforementioned applications including the rivaling affidavits and submissions the following are the issues for determination:

- Whether the Agreement dated the 9th July, 2018 should be set aside.
- Whether the Prohibition Order should be registered against land parcel number Kajiado/ Kaputiei North/ 113123 pending the settlement of the Legal fees amounting to Kshs. 2 million.
- Whether a declaration should issue directing the Client/ Respondent to pay in full the Advocate fees of Kshs 2 million for representing him in Milimani ELC No 260 of 2016
- Who should bear the costs of this application.

As to Whether the Agreement dated the 9th July, 2018 should be set aside. It is not in dispute that the Advocates/Applicant entered into the said Agreement wherein the client/Respondent was supposed to pay Kshs. 2 million as legal fees. The Client has sought for setting aside of the said Agreement and relied on section 45 (6) of the Advocates Act. I will first proceed to reproduce the contents of the said Agreement: **'As discussed and agreed in our office between yourselves and the undersigned, we have accepted the renegotiated legal fees of Kenya Shillings Two Million (Ksh, 2, 000,000/=) instead of the one (1) acre of land which had been agreed upon by yourself and our firm as your advocates at the time of receipt of the instructions herein. We further confirm that from the time you instructed us, we have only received a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) paid on 7th March, 2016 which was to be utilized on account of court filing charges and disbursements. Kindly confirm that you shall pay us our outstanding and agreed legal fees of Kshs. 2,000,000/= by signing on this letter as provided hereunder.**

G O Mulanya

MULANYA & MAONDO ADVOCATES

ACKNOWLEDGEMENT

I, NOAH SAPATI OLE MPAMAE of ID Card Number 0791331 do hereby confirm that I shall pay the firm of Mulanya & Maondo Advocates the sum of Kshs. 2 million for representing me in the above cited case and the acquisition process of the 7 acres of land from LR KJD/ KAPUTIEI NORTH/5924 FROM ABSOLUTE ORGANIC AGRO PRODUCTS LIMITED.

I note the Client signed this Agreement. Section 45 (1) (c) allows an advocate and client to enter into an agreement fixing the amount of the advocate's remuneration. The section broadly provides that: **(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof; (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both; (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof; and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.**

Section 45 of the Advocates Act contemplates an Agreement which is unambiguous, and should be signed without any duress. From a perusal of the said Agreement, it provided the basis as well as the type of legal work which was undertaken and the one pending. The Advocates/Applicants support the said Agreement but the Respondent seeks for the same to be set aside. The Respondent insists the Advocates/Applicant did not fully represent him. I note the said agreement was executed after the determination of the ELC Case. In the said Agreement it is clear the Respondent was yet to pay any legal fees. Further, he initially promised to give one acre but renegotiated to pay Kshs. 2 million. I note in pleadings furnished in Court, the Advocate filed pleadings including witness statement and documents. Further in the Consent Order which resolved the ELC suit, the Respondent managed to get seven (7) acres of land. From the correspondence annexed to the Applicant's affidavit, I note they actually engaged the opposing counsels messrs Koskei Monda & Co Advocates in following up on the subdivision of the land. This is evident in the correspondence exchanged between the two law firms dated the 22nd June, 2018, 9th March, 2018, 7th June, 2018, 8th March, 2018, 5th February, 2018, 19th February, 2018, 21st February, 2018 and 11th January, 2019. The Respondent contends that the Advocate failed to enable him get the 7 acres of land but I note he proceeded to file a Notice to Act in person dated the 26th January, 2019, at the point the subdivision process was almost concluded as evident in the letter from Koskei Monda & Company Advocates dated 11th January, 2019. I further note that there is no indication if leave was sought before the said Notice to Act in person was filed. I hence find the Respondent's averments that the Advocates/Applicant failed to proceed with the process of subdivision uncandid. In the case of **D N Njogu & Co Advocates Vs National Bank of Kenya Limited (2016)** eKLR Justice Warsame held that; ' **under section 45 (1) of Cap 16, the agreement negotiated and entered into by the parties is valid and binding on the parties thereto so long as it is in writing and signed by both parties.**'

The Respondent seeks to set aside the Agreement but does not indicate the real reasons why he seeks to do so. It is trite that for a court to set aside an Agreement, which is a contract, there has to be an element of fraud, collusion, undue influence, misrepresentation and or coercion. I have considered the arguments by the respective parties and find that the Respondent has actually not demonstrated any duress, fraud or coercion in executing the said agreement and in the circumstances am unable to set the same aside. I will hence proceed to uphold the said Agreement and find that it is binding upon the Client. I further declare that the Client/ Respondent be and is hereby compelled to pay in full the Advocate fees of Kshs 2 million for representing him in Milimani ELC No 260 of 2016.

As to whether the Prohibition Order should be registered against land parcel number Kajiado/ Kaputiei North/ 113123 pending the settlement of the Legal fees amounting to Kshs. 2 million. The Advocates/ Applicant have sought for entry of a prohibition order against the Client's parcel pending the payment of the Kshs. 2 million. The Client opposed the said prayer but has not indicated how he intends to pay the legal fees. He has not furnished court with any security for costs.

In the current scenario, the Client owes the Advocate Kshs. 2 million as legal fees. Further, there is an Agreement which this court has upheld and to my mind should be deemed as a judgement of this court. Looking at conduct of the Client, and having filed a Notice to Act in person which I deem irregular as there is no indication that leave was sought prior to filing it, and relying on the case of **ECO Bank Kenya Limited V Harvey Engineering Limited & 2 Others (2018)** eKLR where the Court issued an order prohibiting the 3rd Judgement Debtor including his servants or agents from transferring property that belonged to the said judgment debtor in pursuit of the decretal sum. I will proceed to direct that a prohibition order be registered against land reference Number Kajiado/ Kaputiei North/113123 belonging to the Client pending the settlement of the legal fees.

It is against the foregoing that I find the Advocates/Applicant's application dated the 29th May, 2019 (amended on 22nd July, 2020) merited and will allow it. I however find the Client/ Respondent's applications dated the 24th November, 2019 and 3rd February, 2020 unmerited and will disallow them. I award the costs of the applications to the Advocates/ Applicant.

It is against the foregoing that I will proceed to make the following final orders:

- The Agreement dated 9th July, 2018 between the Advocates/Applicant and Client/Respondent be and is hereby upheld.
- A declaration be and is hereby issued directing the Client/ Respondent to pay in full the Advocate fees of Kshs 2 million for representing him in Milimani ELC No 260 of 2016
- The Land Registrar, Kajiado be and is hereby directed to register a Prohibition Order in respect to land parcel number Kajiado/ Kaputiei North/ 113123 pending the settlement of the Legal fees amounting to Kshs. 2 million by the Client/Respondent.
- The costs of the application is awarded to the Advocates/ Applicant.

Dated Signed and Delivered at Kajiado this 27th of October, 2020.

CHRISTINE OCHIENG

JUDGE