IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo, Masime JJA & Kwach Ag JA)

CIVIL APPEAL NO. 24 OF 1987

BETWEEN

SAMSON OWINO GER.....APPELLANT

AND

MARMANET FOREST CO-OPERATIVE

& CREDIT SOCIETY LTD.....RESPONDENT

JUDGMENT

(Appeal from a ruling of the High Court at Nairobi, Shields J)

November 17, 1988, **Apaloo, Masime JJA & Kwach Ag JA** delivered the following Reasons for Judgment.

This appeal came before us on November 10, 1988, and at the conclusion of arguments we dismissed it with costs reserving our reasons for doing so, which we now give.

Samson Owino Ger, the appellant in this case, is an advocate of the High Court of Kenya and practices under the name and style of Ger and Company Advocates, at an address in Caxton House, Standard Street, Nairobi. We shall hereinafter refer to him as "the advocate".

On December 16, 1985, Marmanet Forest Co-operative Savings and Credit Society Limited (the respondent) took out an originating summons against the advocate under order 52 rule (4) of the Civil Procedure Rules seeking the following reliefs:

> "(1)That an order be made that the respondent deliver a cash account in respect of all the monies paid to him as such advocate in respect of the purchase of land known as LR 9000 and LR 3884 Timau, Laikipia, particulars whereof are within the respondent's knowledge;
>
> (2)That the respondent do refund to the applicant any monies that may be found to be due from him upon his rendering the said account;
>
> (3)That the respondent do pay interest on all the monies found due from him at such rate or rates, not being less than the court rates, that this honourable court may direct;
>
> (4)That the respondent do pay the costs of this application together with interest thereon at

court rates."

Although the letters "OS" were not placed after the serial number given to the summons to distinguish it from plaints filed in ordinary suits as manadated by order 36 rule 8 of the Civil Procedure Rules and the parties were referred to as "applicant" and "respondent" instead of "plaintiff" and "defendant", the suit was dealt with for all intents and purposes as an originating summons.

The affidavit in support of the application was sworn by one Joram Mwarari, the Secretary of the respondent Society. In his affidavit he deponed *inter alia*:

> "(2) That the respondent is an advocate practising as such in Nairobi under the name and style Ger & Company Advocates.
>
> (3) That the applicant instructed the respondent as such advocate to act on its behalf in the purchase by it of properties LR No 9000 and LR No 3884, Timau, Laikipia.
>
> (4) That in respect of the said transaction the applicant paid to the advocate certain sums of money towards the purchase price thereof in particular the following payments were made by the applicant:
>
> On April 11, 1979 Kshs 800,000.00
>
> On June 14, 1979 Kshs 350,000.00
>
> On August 9, 1979 Kshs 350,000.00
>
> Kshs 1,500,000.00
>
> ==========
>
> (5) That in his letter of February 25, 1980 the respondent admitted that the above stated amount had been deposited with him."

The advocate's reaction to the originating summons was most strange. Instead of filing a replying affidavit, he took out a chamber summons under order 6 rule 13 of the Civil Procedure Rules seeking to strike out the originating summons on the grounds that it was time barred; it disclosed no reasonable cause of action; it was scandalous, frivolous and vexatious; it was otherwise an abuse of the process of the court. In his supporting affidavit the advocate deponed that the last payment made to him by the respondent was on August 9, 1979 and that therefore the claim was time barred under the provisions of the Limitation of Actions Act; that the respondent was not entitled to the delivery of a cash account as the allegations in its affidavit raised triable issues of fact (*sic*); that he was not acting as an advocate of Marmanet Co-operative Savings and Credit Society Limited and could not therefore be called upon to deliver a cash account.

The matter came before O'Connor J, on March 21, 1986 when it was agreed by consent that the question whether or not the advocate was acting for the respondent as an advocate be determined first. And this was the order of business when the matter came before Shields J, on May 30, 1986.

Joram Mwararu gave evidence. His evidence was that accompanied by a gentleman called John Saba, a Co-operative Officer in charge of Laikipia and Nyandarua Districts, they went to see the advocate in his office where they found him. He said the advocate was instructed to act. He was paid his fees and 3 cheques totalling Kshs 1.5 million. This evidence was unchallenged in cross-examination.

The advocate also gave evidence and said:

> "On April 19, 1979 Co-operative Officer came to see me with officials of 2 Co-operative Societies.

Instructed me to draw them an agreement. Charged them Kshs 800 for the agreement. Loan from Co-operative Bank. Acted for both parties as their lawyer. Got Kshs 1.5 million from the plaintiff."

In cross-examination he said no money was paid in after August, 1979. On that evidence, the learned judge found that the relationship of advocate and client existed between the advocate and the respondent from April 19, 1979. It is against this finding that the advocate has appealed to this Court. In his memorandum of appeal he has cited 2 grounds namely:

> **"(1) That the learned judge erred in finding that the relationship of advocate and client existed between the appellant and the respondent for the purpose of appellant being required to deliver a cash account under the provisions of order 53 rule 4(1) of the Civil Procedure Rules.**
>
> **(2) That the learned judge's finding failed to take into account the fact that the appellant was not acting for the respondent as an advocate in both (*sic*) circumstances of this case."**

The agreement which was prepared for the parties on April 19, 1979 and for which on his own admission, the advocate was paid a fee of Kshs 800 expressly provided that the advocate would act for both parties and that each Society would contribute Kshs 1.5 million, making a total of Kshs. 3,000,000. It would appear that the professed intention to buy a farm did not materialise and in consequence the respondent asked the advocate to refund the deposit. As Kongasis Farmers Co-operative Society did not contribute its share of Kshs 1.5 million, there was obviously no refund due to it from the advocate.

When a person says that he has instructed an advocate to act for him all he means, and is understood by the officious bystander to mean, is that he has retained the professional services of an advocate in relation to a particular transaction or business and he has in consequence become that particular advocate's client.

Mr. Ombete, who appeared for the advocate before us, submitted that since the agreement was that each party would contribute Kshs 1.5 million and only the respondent kept its bargain and Kongasis Farmers Co-operativeSociety did not pay, the advocate did not therefore become an advocate of either party, the fact that he had been paid Kshs 1.5 million by the respondent notwithstanding. This submission is wholly unacceptable and needs only to be stated to be rejected. It is clearly a submission by a party desperately seeking to postpone the day of reckoning. Having been retained by the respondent, the advocate's duty to his client was clear. It was his duty to apply himself with utmost diligence to give effect to his instructions and if for any reason he was unable to do so as in this case, he was obliged to refund the deposit subject to any fees properly due to him being paid by the respondent.

Order 52 rule 4(1) gives the court power to order an advocate to deliver a cash account. It is a most useful summary procedure which circumvents the inevitable delay inherent in recovery by ordinary process of a plaint.

It provides:

> **"52(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 by the advocate of a cash account."**

If the advocate alleges that he has a claim for costs the court can make an order for taxation and payment and the protection of the advocate's lien if any as the court thinks fit.

For the definition of the term "client" one has to turn to section 2 of the Advocates Act (cap 16) where it is stated that "client" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs.

It is plain to us that in the events that took place between the parties in this case, the respondent became the advocate's client within the meaning of section 2 of the Advocates Act.

Client's money is defined under the Advocates (Accounts) Rules as money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity.

The advocate has made a half hearted attempt to show that he paid over the money to a third party but for the alleged payment to constitute a valid discharge from his duty to account to his client, he would have to prove that such payment was made with the authority of the respondent.

In our judgment, there is more than enough evidence to support the learned judge's finding that the relationship of advocate and client arose between the advocate and the respondent and when the advocate was paid Kshs 1.5 million by the respondent he did not receive it otherwise than as the respondent's advocate, and that being so he is under an obligation to account to the respondent for the money as his client. This finding was eminently justified on the evidence and at no time did Mr. Ombete suggest that it was either erroneous or perverse.

These are the reasons why we dismissed the appeal.

Date and delivered at Nairobi this 17th day of November , 1988

F.K APALOO

.....

JUDGE OF APPEal

J.R.O MASIME

.....

JUDGE OF APPEAL

R.O KWACH

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR