



REPUBLIC OF KENYA



**Omo & another v Maosa t/a Maosa & Company Advocates (Civil Case 239 of 2018)
[2026] KEHC 2742 (KLR) (Commercial and Tax) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 239 OF 2018
F GIKONYO, J
FEBRUARY 26, 2026**

BETWEEN

**JOHN ODIRA OMO 1ST PLAINTIFF
EDEN ODHIAMBO ROBINSON 2ND PLAINTIFF**

AND

**TOMAS GICHANA NYAKAMBI MAOSA T/A MAOSA & COMPANY
ADVOCATES DEFENDANT**

JUDGMENT

1. The plaintiffs instituted this suit through originating summons dated 30th May 2018 under order 37 Rule 3 of the Civil Procedure Rules and the *Advocates Act*.
2. The plaintiffs claim that the defendant received Kshs. 7,800,000/- from the plaintiffs' advocates on the strength of a professional undertaking to hold the funds as stakeholder/ trustee pending the completion of the sale of all that property known as Land Reference Number 12565/22 (I.R. 36114) Nyari.
3. The plaintiffs therefore seek an order directing the defendant to refund them Kshs. 7,800,000/- plus accrued interest thereon at 24% per annum (being 3% above the base lending rate for Barclays Bank Limited being 21% per annum) from the date each of the two instalments were paid into the defendant's bank account by the plaintiff's advocates, the total due and owing from the defendant to the plaintiff's being Kshs. 18,012,630.74 as of 8th March 2018 until payment in full.
4. The plaintiffs also seek costs of the summons together with interest thereon at court rates from the filing date.



5. The originating summons is supported by the affidavit sworn by the 1st plaintiff on 30th May 2018. He averred that in July 2012, he was informed by Mr. Phillip Khamati, a gardener in his locality at Nyari, Nairobi that there was a piece of land for sale within the same Estate. He then sought to be introduced to Mr. Alfred Indiaka who confirmed that the land was on sale. Mr. Indiaka told him that Ms. Ashna Vinochandra Raikundalia was the vendor's advocate and the sales agent was called John.
6. Mr. Omo stated that he met Ms. Ashna, who held herself out as an associate of the defendant firm, the advocate for the vendors, Nimish Mahendra Shah and Suchma Nimish Shah. That Ms. Ashna informed him that she was assigned to carry out the transaction by her senior, Mr. Thomas Maosa, who was busy handling his responsibilities as a lecturer at a local university.
7. Mr. Omo averred that he settled with Ms. Ashna at a sale price of Kshs. 25,000,000/-. He then introduced the 2nd plaintiff as the co-purchaser as he could not purchase the property alone. He also informed Ms. Ashna that he had appointed Messrs. Mohammed Muigai Advocates to represent him in the transaction.
8. Mr. Omo stated that on 12th July 2012, his advocates conducted a search at the Lands Registry which revealed that the property was registered in the joint names of Nimish Mahendra Shah and Suchma Nimish Shah. That thereafter, on 16th August 2012 there was a meeting held between him, Ms. Joan Mutabari and Ms. Ashna at his advocate's offices.
9. Mr. Omo stated that an agreement dated 6th September 2012 was drawn by Maosa and Company Advocates. That it was a term of the agreement that he was to pay a deposit of Kshs. 2,500,000/- on or before execution of the agreement to Maosa and Company Advocates to hold as stakeholder pending completion of the transaction within 90 days of the execution of the agreement.
10. Mr. Omo went on to state that his wife and the 2nd plaintiff transferred the deposit to his advocates' bank account on 4th September 2012. On 5th September 2012, his advocates transferred the Kshs. 2,500,000/- to Maosa and Company Advocates Family Bank, Kenyatta Avenue Branch Bank Account No. 012000016410 through RTGS. That receipt of the funds was acknowledged in clause 3.1 of the sale agreement.
11. Mr. Omo further stated that on 2nd October 2012, Ms. Ashna convened a meeting at Yaya Center between Mr. Omo, Ms. Joan Mutabari, a lady representing herself as Suchma Nimish Shah, the wife of Nimish Mahindra Shah. That at the said meeting, Mr. Omo was persuaded to pay another Kshs. 5,300,000/- towards the purchase price. That this was to enable the defendant to give an undertaking on behalf of the alleged owners to the bank of their capacity to pay up a loan on account of which the title to the subject property had been pledged to the bank.
12. Mr. Omo deposed that he paid Kshs. 5,300,000/- to his advocates who transferred the funds on 11th October 2012 to Maosa and Company Advocates Family Bank, Kenyatta Avenue Branch Bank Account No. 012000016410 through RTGS.
13. Mr. Omo asserted that on 6th November 2012, he deposited the balance of the purchase price with his advocates on their request, to enable them to issue a professional undertaking to the defendant as per the agreement for sale.
14. Mr. Omo averred that on 17th December 2012, he was informed by his advocates that the completion documents had not been handed over to them by the defendant. That his call to Ms. Ashna, did not go through. That after a few days, when she was reachable, she requested a deposit of the entire balance. That this was not acceptable as the balance was to be paid upon registration of the transfer in favour of the plaintiffs.



15. Mr. Omo stated that on 7th December 2012, the plaintiffs' advocates lodged a caution forbidding registration of any dealing over the subject property to secure their interest.
16. Mr. Omo averred that on 10th January 2013, he received an email forwarding a letter from Maosa and Company Advocates which stated that their client (alleged seller) was awaiting confirmation of the further deposits upon which their client would execute the transfer and forward the same together with the other completion documents to his advocates.
17. Mr. Omo further averred that he reiterated that the payment of the further deposit before completion was not acceptable. That despite his readiness to complete the transaction, no original title to the property and other completion documents were availed despite demand.
18. Mr. Omo further stated that through a letter dated 25th January 2013, his advocates issued a 21-day completion notice to the defendant requesting delivery of the completion documents failure to which the contract would be rescinded and refund required.
19. Mr. Omo stated that upon expiry of the notice period, the documents were not availed, and the contract was rescinded. That his advocates sought a refund of Kshs. 7,800,000/- from the defendant. However, the defendant failed to make the refund.
20. Mr. Omo averred that Ms. Ashna was difficult to reach thereafter and that he made a police report. Through his advocates, Stanley Henry Advocates, lodged a complaint with the Land Fraud Department at the Criminal Investigations Department (CID) headquarters against the defendant and his agent Ms. Ashna for fraud.
21. Mr. Omo further stated that upon conclusion of police investigations, it was discovered that the alleged sale was fraudulent as the true owners had not put up the subject suit property for sale. That in breach of the terms of the agreement, the monies deposited by his advocates to the defendant's account were withdrawn immediately upon being deposited and converted into other use.
22. Mr. Omo further mentioned that the suspects were arrested and charged in court in Chief Magistrate's Court Criminal Cases Number 624 of 2013, Republic v Ashna Vinochandra Raikundalia, Mary Jane Kemunto and Thomas Nyakambi Maosa.

Response

23. The defendant filed a replying affidavit sworn on 23rd August 2018. He denied knowledge of the discussion held in July 2012 between Mr. Omo, Mr. Indiaka and Mr. Khamati.
24. The defendant claimed that he never received any instructions from Nimish Mahendra Shah and Suchma Nimish Shah in relation to the subject property. He also stated that he was neither involved in nor aware of the plaintiff's discussions with Ms. Ashna. He denied having any knowledge of her prior to being charged together with her in the criminal case. He denied having employed her in his firm as an associate. He contended that if he had employed her, she should have executed the agreement for sale as she is an advocate.
25. The defendant stated that he neither prepared nor executed the sale agreement entered on 6th September 2012. He also denied that the particulars were his. He stated that he could not have participated as at the material time, he was in remand at the Industrial Area Remand Prison.
26. The defendant denied receipt of the monies and contended that if they were sent, they were fraudulently procured by a known suspect who is now facing criminal charges, without his express knowledge.



27. The defendant claimed that he learnt about the matter when he was summoned by the Lands Fraud Department officers in 2013. That he told the police that he was not involved but was nonetheless charged alongside Ms. Ashna, as the first accused with a charge of obtaining money by false pretence on the pretext that he was able to sell Land Reference Number 12565/ 22 Nyari Nairobi.
28. The defendant averred that these proceedings are an afterthought following the criminal proceedings. He argued that these proceedings are grossly prejudicial to him because the criminal case was pending determination. He contended that he was not aware of the findings of the police.
29. Based on the foregoing, the defendant prayed that the plaintiffs' claim be dismissed with costs.

Reply

30. The plaintiffs filed a further/ supplementary affidavit sworn by Mr. Omo on 16th January 2019. Mr. Omo highlighted that the defendant has not denied that the money was deposited into his bank account. That he has also not denied that the money was withdrawn from the bank account.
31. Mr. Omo asserted that the pendency of criminal proceedings should not be a ground for stay or delay of the civil suit. He also asserted that criminal conviction on the part of the defendant will not result in a refund of the money claimed.

Evidence

32. Hearing of the suit commenced on 25th September 2019 and on 13th November 2019 before Rtd. Justice Kasango. The plaintiffs called Mr. John Odira Omo as PW1. He adopted his witness statement dated 30th May 2018, reflective of the plaint, as his evidence in chief. He also produced the plaintiffs' list and bundle of documents which was marked as PExhb1.
33. At cross examination, Mr. Omo admitted that he did not go to the defendant's offices. He also stated that he did not know Mr. Maosa before he entered the contract.
34. The plaintiffs called Ms. Joan Nyambura Mutabari, Advocate, as PW2. She adopted her witness statement dated 13th May 2018 as her evidence in chief.
35. Ms. Mutabari stated that in 2012, while she was working at Mohammed Muigai Advocates as the Partner of the Conveyance Department. She confirmed that she represented the plaintiffs in the subject transaction.
36. Upon cross examination, Ms. Mutabari asserted that she confirmed that Mr. Maosa was a qualified advocate. She, however, admitted that she did not confirm this of Ms. Ashna. She stated that she spoke with Ms. Ashna severally on phone and at the offices of Mohammed Muigai Advocates. That Ms. Ashna told her that she was assisting Mr. Maosa with the transaction. That the agreement for sale was prepared by Maosa & Company Advocates.
37. Ms. Mutabari confirmed that Mohammed Muigai Advocates sent Kshs. 7,800,000/- to the defendant's bank account. She stated that the account details were sent through a letter of 17th August 2012 from Maosa and Company Advocates.
38. The defendant called Mr. Thomas Maosa, Advocate as DW1. He confirmed that he swore the replying affidavit on 25th August 2018. He confirmed that the Kshs. 7,800,000 was deposited into his Family Bank Limited bank account. He denied withdrawing the money. He maintained that at the time when the funds were deposited, he was in remand in relation to the Criminal Case No. 6161 of 2013.



39. Mr. Maosa stated that the money was withdrawn by Jane and Patrick Macharia. That the bank statement at p. 157 of PExh1 shows that on 6th September 2012, Kshs. 2,350,000/- was withdrawn by the bearer of ID Number 21524026. On 12th October 2012, Kshs. 5,000,000/- was withdrawn by the bearer of ID Number 21524026. He indicated that he did not get any notification of these withdrawals as required. He also indicated that the account was an office account, not a client account.
40. At cross examination, Mr. Maosa admitted that he did not disclose the identity of the persons who withdrew the money. He also admitted that he had not taken any action against those persons. He further admitted that he signed a general power of attorney at page 188 of the record authorizing Mary Jane Kemunto to withdraw money from the account, among other powers. He acknowledged that Mary Jane Kemunto was his former spouse.

Submissions

41. The plaintiffs filed written submissions dated 6th October 2020. They submitted that they had proved their case to the required standard. They highlighted that since the defendant admitted that Mary Jane Kemunto was his employee, he is vicariously liable for her acts or omissions. They argued that if there was a fraud orchestrated by Ms. Ashna in conjunction with the defendant's employee, the same would not have materialized if the defendant had maintained his account and run it in accordance with the law.
42. The plaintiffs also submitted that the defendant, an Advocate of the High Court of Kenya, was negligent and in flagrant disregard of the Law Society of Kenya Rules regarding the running of client accounts by opening a joint account in his firm's name in partnership with Mary Jane Kemunto, making her a signatory and granting her the mandate to operate the account.
43. The plaintiffs relied on: -
1. Awili v Attorney General [1981] eKLR
 2. Kenya Power & Lighting Co. Ltd v Kenneth Lugalia Imbugua [2016] eKLR
 3. Kinluc Holdings Ltd v Mint Holdings Ltd & another [1998] eKLR
 4. Ajay Indravadan Shah v Guilders International Bank Ltd [2003] eKLR

Analysis and Determination

44. The issue before the court is whether the plaintiffs have proved their claim to the required standard.
45. The standard of proof in a civil claim is on a balance of probabilities. The burden of proof is upon the claimant. Section 107(1) of the [Evidence Act](#) provides that: -
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
46. The plaintiff's claim is for a refund of money paid to the defendant to hold as stakeholder under the terms of a botched agreement for sale.



47. The claim is brought by way of originating summons under Order 37 rule 3 of the Civil Procedure Rules, which provides that:-

“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”

48. The defendant claimed that he never received any instructions from Nimish Mahendra Shah and Suchma Nimish Shah in relation to the subject property. He also stated that he was neither involved in nor aware of the plaintiff's discussions with Ms. Ashna.

49. However, the plaintiffs produced copies of the duly executed agreement dated 6th September 2012. They also produced copies of the correspondence exchanged between Mohammed Muigai Advocates and Maosa and Company Advocates.

50. The agreement indicates that it was drawn by Maosa & Company Advocates, Cargen House, 4th Floor, Suite 401, Harambee Avenue, P. O. Box 42802-00100 Nairobi, Kenya.

51. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Section 109 of the [Evidence Act](#)

52. The defendant admitted that this is his firm's address. He did not adduce any other evidence to contradict the claim that he drew the agreement. He also participated in the communications regarding the agreement.

53. Therefore, I find that the defendant drafted the agreement.

54. Under the terms of the agreement for sale, the defendant was to hold the amount as stakeholder pending the completion.

55. The plaintiffs produced a copy of RTGS transfer documents evidencing payment of Kshs. 2,500,000 to Maosa and Company Advocates on 11th October 2012. The plaintiffs also produced a copy of the receipt from Maosa and Company Advocates dated 11th October 2012.

56. The defendant admitted that the plaintiffs' advocates Mohammed Muigai Advocates deposited a total of Kshs. 7,800,000/- in instalments of Kshs. 2,500,000/- and Kshs. 5,000,000/- deposited on 6th September 2012 and 11th October 2012.

57. The defendant denied withdrawing the funds. He claimed that Kshs. 2,350,000/- was withdrawn by the bearer of ID Number 21524026. That on 12th October 2012, Kshs. 5,000,000/- was withdrawn by the bearer of ID Number 21524026.

58. However, the record confirms that the bearer of ID Number 21524026 is Mary Jane Kemunto. A copy of the back of her National ID is at page 189 of the record. The defendant acknowledged that she was his former spouse. The record contains a copy of the account opening forms and an application and mandate form for legal entities account dated 25th May 2009 with Mary Jane Kemunto (accountant) as a proprietor, partner, director or joint holder. It also contains a general power of attorney to Mary Jane Kemunto.



59. Rule 2 of the Advocates Accounts Rules defines a client account as a current or deposit account at a bank or with a building society or a financial institution (as defined in the *Banking Act* (Cap. 488)) in the name of the advocate but in the title of which either the word "client" or the word "trust" appears;
60. Rule 2 also defines "client's money" 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 connexion with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity.
61. The money that is claimed by the plaintiffs was the deposit and part of the balance of the purchase price for the purchase of the subject property. The money was sent to the advocate to hold as stakeholder pending the registration of the transfer in favour of the plaintiffs.
62. By opening a joint account in his firm's name in partnership with Mary Jane Kemunto, an unqualified person, the defendant made her a signatory and granted her the mandate to operate the account. This was in contravention of the Advocates Accounts Rules.
63. A total sum of Kshs. 7,800,000/- was paid to the said defendant's advocate account. From the evidence adduced, I find that the plaintiffs have proved their claim for Kshs. 7,800,000/- deposited to the defendant's account.
64. On interest, Clause 1.1.4 of the sale agreement provides that: -
- "Interest Rate means the per annum rate of three per cent (3%) above the base lending rate as published by Barclays Bank of Kenya Limited from time to time"
65. Thus, I find that the plaintiffs are entitled to interest as per the agreement.

Disposition

66. In conclusion, judgment is entered in favour of the plaintiffs against the defendant for: -
1. Kshs. 7,800,000/- plus accrued interest thereon at 24% per annum (being 3% above the base lending rate for Barclays Bank Limited being 21% per annum) from the date each of the two instalments were paid into the defendant's bank account by the plaintiff's advocates, the total due and owing from the defendant to the plaintiff's being Kshs. 18,012,630.74 as at 08.03.2018 until payment in full.
 2. Costs of the summons together with interest thereon at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF FEBRUARY, 2026

F. GIKONYO M

JUDGE

In the presence of: -

Gacuna for Kihiko for Plaintiff

Otieno for Defendant

CA – Ivan/Aggrey

