



Bluesand Holdings Limited v Mitei t/a Arap Mitei Advocates (Civil Suit E010 of 2024) [2025] KEHC 470 (KLR) (28 January 2025) (Ruling)

Neutral citation: [2025] KEHC 470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E010 OF 2024
RN NYAKUNDI, J
JANUARY 28, 2025**

BETWEEN

BLUESAND HOLDINGS LIMITED APPLICANT

AND

CHRISTOPHER MITEI T/A ARAP MITEI ADVOCATES RESPONDENT

RULING

1. The applicant approached this court vide Originating Summons dated 12th August, 2024 expressed to be brought under the provisions of Art. 47 and 159(2) and (d) of *the Constitution*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 52 Rule 4 and 10 of the Civil Procedure Rules. The applicant seeks order to wit: -
 - a. A declaration be and is hereby issued that the Respondent who is an advocate of the High Court of Kenya has illegally, fraudulently and in breach of his contractual and fiduciary duties to the Applicant withheld Kshs. 2,000,000/= sent to him by the applicant on 28th August, 2018 for onward transmission to Simon Kipsogei Changwony, the vendor of PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80.
 - b. A declaration be and is hereby issued that the Respondent who is an Advocate of the High Court of Kenya has illegally, fraudulently and in breach of his contractual and fiduciary duties to the Applicant withheld a total of Kshs. 7,000,000/= that had been sent to him on 4th December, 2018 by Simon Kipkosgei Changwony, the vendor of PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80, as a refund of the deposit of the purchase price for onward transmission to the applicant.
 - c. An order be and is hereby issued compelling the Respondent – Advocate to deliver the cash account of Kshs. 9,000,000/= that he illegally, unlawfully and fraudulently withheld in breach of his contractual and fiduciary duties to the applicant



- d. An order be and is hereby issued compelling the Respondent-Advocate to pay to the applicant immediately on the delivery of the judgment herein the total amount of Kshs. 9,000,000/= that he illegally, unlawfully, and fraudulently withheld, plus interest at court rates from 16th March, 2019 when demand and notice of intention to sue was issued until payment in full.
 - e. The costs of this suit be borne by the Respondent-Advocate.
2. The summons is predicated upon grounds that:
- a. The applicant instructed the Respondent-Advocate to represent it in the purchase of the parcel of land known as PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 (“the parcel of land”).
 - b. Consequently, the Respondent-Advocate prepared the agreement for sale dated 8th February, 2018 between the applicant and Mr. Simon Kipkosgei Changwony (“the vendor”).
 - c. The agreement for sale envisaged that the total consideration would be Kshs. 42 million, with the deposit of the purchase price of Kshs. 10 million being paid by the applicant to the vendor through the Respondent’s bank account.
 - d. On 8th February, 2018, the applicant requested Shawasha Company Limited to remit the sum of Kshs. 10 million to the Respondent for onward transmission to the vendor, which request was duly accepted by Shawasha Company Limited on 9th February, 2018.
 - e. On 14th February, 2018, Shawasha Company Limited as requested by the applicant remitted the sum of Kshs. 10 million to the Respondent through his bank account no. 0051320001 domiciled at Diamond Trust Bank Limited for onward transmission to the vendor.
 - f. On 28th August, 2018 the applicant further remitted Kshs. 2 million to the Respondent for onward transmission to the vendor as per the sale agreement.
 - g. On 23rd October, 2018 the applicant received a letter dated 22nd October, 2018 authored by the vendor’s advocates communicating that the Respondent had only paid to him Kshs. 10 million.
 - h. The actions of the Respondent in illegally, unlawfully and fraudulently withholding Kshs. 2 Million and remitting only Kshs. 10 million are a breach of both his contractual and fiduciary duties as an advocate.
 - i. Vide a letter dated 8th December, 2018 sent to the Respondent and copied to the applicant, the vendor in the sale agreement communicated his decision to rescind the agreement for the sale of the parcel of land.
 - j. The letter of 8th December, 2018 further stated that the vendor had refunded the applicant Kshs. 9 million through the Respondent, and retained the sum of Kshs. 1 million as liquidated damages for breach of contract.
 - k. In further breach of his duties as an advocate, out of the entire Kshs. 9 million that was refunded to the Respondent by the vendor on 4th December, 2018, the Respondent only remitted the sum of Kshs. 2 million to the applicant, leaving a balance of Kshs. 7 million that he continues to hold to date.
 - l. The total amount the Respondent illegally, unlawfully and fraudulently withheld is therefore Kshs. 9,000,000/=.



- m. Vide its demand letters dated 16th March, 2019 and 8th April, 2019, the applicant requested the Respondent to release the 9 million to it, but these letters did not elicit any response.
 - n. The Respondent has to date refused, failed, and neglected to release to the applicant Kshs. 9,000,000 he illegally and fraudulently withheld.
 - o. As a result, the applicant has suffered immeasurable damage and significant financial strain that has nearly forced it into liquidation.
 - p. Unless the orders sought are granted, the applicant will suffer irreparable harm as it will not only lose the Kshs. 9,000,000/= the Respondent illegally and unlawfully withheld, but also be subjected to further financial difficulties and distress that are forcing it into liquidation.
3. In response to the summons, the Respondent swore a replying affidavit in which he deposed as hereunder:
- a. That the applicant did not pay to his law firm Kshs. 10 million pursuant to the transaction relating to the sale agreement dated 8th February, 2018.
 - b. That the applicant cannot seek to recover money that it did not personally pay to his law firm.
 - c. That money paid by an entity other than the applicant which is a body corporate under the Companies Act, cannot be recovered by the applicant.
 - d. That the applicant is a separate juridical entity enjoying separate legal personality from Shawasha Company limited and cannot implead on its behalf.
 - e. That Shawasha Company Ltd was not privy to the sale agreement dated 8th February, 218 and it could not make any payments that would be recovered by the applicant from the Respondent.
 - f. That the applicant did not assign or carry out notation of its rights and interests under the sale agreement dated the 8th February, 2018 to constitute Shawasha Company Ltd into a party that could make payments on its behalf and proceed to recover.
 - g. That the resolution by Shawasha Company Limited is inchoate and void it has no company seal affixed to it.
 - h. That the resolution by Shawasha Company Limited was ineffective and inchoate for purposes of evidence and enforcement as it was not lodged for registration with the Registrar as required by section 27(1) of the Companies Act Cap. 486 within 14 days.
 - i. That the special ordinary resolution by the applicant of the meeting of 9th August, 2024 retaining Rapando & Odunga Advocates giving authority to Barmazze Chepngetich to sign documents and prosecute this matter is inchoate and void as it has no seal of the corporation duly affixed.
 - j. That the special ordinary resolution by the applicant of the meeting of 9th August, 2024 is void and inchoate for want of being lodged for registration with the Registrar within 14 days of its passing as required by section 27(1) and (2) of the Companies Act.
 - k. That in the absence of the registered resolution the originating summons and the accompanying documents are a nullity as they have been brought by a person who is not duly authorized and ought to be struck out with costs.



- l. That the written authority under Order 4 Rule 1(4) of the Civil Procedure Rules, 2022 is predicated on an unregistered resolution thus a nullity and the originating summons ought to be struck out with costs.
 - m. That the applicant did not pay legal fees for the retainer to his firm.
 - n. That his legal fees for the transaction considering the consideration for the transaction was Kshs. 42,000,000/= is computed.
 - o. That the applicant also unsuccessfully impleaded him vide Eldoret Chief Magistrate Court Civil Suit No. 1028 of 2019 over the matter herein and the action was struck out with costs to him and he claims as against it a sum of Kshs. 659,228 as party and party costs.
4. In further response to the foregoing averments, the applicant filed two supplementary affidavits. The first was done by Barmasse Eva Chepngetich, who is an officer of the applicant company.
5. In essence, she deposed that the Respondent-Advocate has not disputed that he received Kshs. 10 million from Shawasha Company Limited on 14th February, 2018, but claims that the applicant can neither recover the money as it did not personally pay it to him, nor can it purported to implead on behalf of Shawasha Company Limited.
6. She indicated that she is aware that on 8th February, 2018, the Respondent-Advocate on the applicant's instructions prepared the agreement for sale dated 8th February, 2018 for the sale of the parcel of land known as PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 between the applicant and Mr. Simon Kipkosgei Changwony ("the vendor").
7. That the agreement for sale envisaged that the total consideration would be Kshs. 42 million, with the deposit of the purchase price of Kshs. 10 million being paid by the applicant to the vendor through the Respondent's bank account.
8. She deposed that it is within her knowledge that the applicant requested Shawasha Company Limited to remit the sum of Kshs. 1 million to the Respondent for onward transmission to the vendor.
9. That there is evidence on record, in the form of the duly signed and sealed company resolution dated 9th February, 2018 that shows that Shawasha Company Limited duly authorized the applicant's request to transfer Kshs. 10,000,000/= to the Respondent-Advocate herein, who would then forward it to the vendor as the deposit for the purchase of the parcel of land.
10. That there is evidence on record in the form of the duly authenticated swift transfer evidencing remittance and payment of Kshs. 10,000,000 by Shawasha Company Limited to the Respondent on behalf of the applicant.
11. Further that there is evidence on record in the form of the vendor's letter dated 22nd October, 2018 communicating that he had only received 10 million towards the purchase of the suit property, and a further letter dated 6th December, 2018 stating that he had rescinded the sale agreement and refunded Kshs. 9,000,000/= through the Respondent-Advocate who was representing the applicant in the transaction.
12. On the issue of the Originating summons being a nullity since the applicant did not have a special resolution, she deposed that she has in her custody the applicant's original special resolution and authorizations dated 9th August, 2024 that are duly signed and sealed and she is ready to produce the same during trial.



13. As to the costs of defending the suit at the trial court, the applicant through the deponent deposed that the Respondent's party and party costs in Eldoret CMCC 1028 o 2022; Bluesand Holdings Limited versus Christopher Arap Mitei t/a Arap Mitei Advocates is not only excessive but has equally not been taxed so as to form a basis for withholding Kshs. 9 million owed to the applicant exclusive of interest.
14. That the said bill is untaxed and therefore cannot be a basis in law and in fact for the Respondent to withhold Kshs. 9 Million that the applicant is entitled to.

Applicant's written submissions

15. The applicant through Learned Counsel Mr. Rapando filed submissions in support of the Originating summons. Counsel gave a brief background of the suit and put the matter to context, out of which the following issues were couched for determination:
 - a. Whether there exists an advocate-client relationship between the applicant and the Respondent-Advocate.
 - b. Whether the Respondent-Advocate has in its possession monies or documents belonging to the applicant.
 - c. Whether the Respondent is holding the applicant's money without its consent.
 - d. There is no justification for the holding of the applicant's monies by the Respondent,
16. Learned counsel submitted that for one to be successful in a claim for the delivery and payment of cash commenced through an originating summons under Order 52 Rule 4(1) of the Civil Procedure Rules, he/she must demonstrate the aforementioned elements which have been couched as issues for determination.
17. Starting with the first issues, learned counsel argued that that the advocate-client relationship has been demonstrated and cited the case of Samson Owino Ger Marmanet Forest Co-operative & Credit Society Limited (1988) eKLR. He also relied on the case of Uhuru Highways Development Ltd and Other versus Central Bank of Kenya and other (2) (2002) 2 EA654 (CAK) where the court reasoned that an advocate-client relationship can be discerned from a careful consideration of the correspondence on record and in particular a fee-note and notice of taxation. It is on this strength that counsel submitted that there is evidence on record, to wit, the sale agreement dated 8th February, 2018, that is drawn by the Respondent. That there is further evidence on record, to wit, the draft advocate-client bill of costs annexed to the Respondent's replying affidavit that confirms that the applicant duly instructed the Respondent-advocate to represent it in the transaction.
18. On the second element, Mr. Rapando submitted that the Respondent has in his possession monies belonging to the applicant as a former client, and has therefore satisfied the second limb to warrant the grant of the orders sought.
19. Learned Counsel submitted that the Respondent has not disputed that he was instructed by the applicant; that he did receive money from the applicant through Shawasha Company Limited; that upon termination of the sale agreement on 6th December, 2024 the Respondent received through his bank account the refund of Kshs. 9,000,000/= from the vendor vide a swift transfer dated 4th December, 2018.
20. It is on that basis that the applicant through counsel submitted that the refund of Kshs. 9 million received by the Respondent on 4th December, 2018 and the Kshs. 2 million it failed to remit to vendor on 28th August, 2018 constitute client's money as defined under the Advocates (Accounts) Rules. This



is because they are monies that were received by the Respondent-Advocate account of the applicant for whom he was representing in the purchase of the property. That therefore, the applicant has satisfied the second limb for the grant of orders that seek for the recovery of these monies.

21. On the question as to whether the Respondent is holding the applicant's monies illegally, unlawfully, and fraudulently, learned counsel submitted that the Respondent has illegally, fraudulently in breach of his contractual and fiduciary duties as an advocate withheld a total of Kshs. 9 million that belongs to the applicant. The applicant further urges that given this illegal withholding, it has satisfied the third limb for the grant of the orders that seek for the recovery of these monies. In support of his submission on this limb, counsel cited the case of *National Bank of Kenya Limited V E. Muriu Kamau & Another* (2009) eKLR and the case of *Otieno Ragot & Co. Advocates v Kenindia Assurance Co. Ltd* (2017) eKLR.
22. Learned Counsel further submitted that the evidence on record notably shows that instead of releasing the entire Kshs. 9 million, the Respondent only remitted Kshs. 2 million to the applicant in a classic demonstration of a modern day impunity. That evidence in record further shows that the Respondent continues to withhold the sum of Kshs. 7 Million to date in breach of his contractual obligations, despite the applicant issuing demands and even instituting court proceedings.
23. On the final issue, learned counsel submitted that there is no justifiable basis for the Respondent's continued illegal, unlawful, and fraudulent withholding of the applicant's monies. That the Respondent claimed that it is only shawasha company and not the applicant who can recover Kshs. 10 million. According to the Respondent, Shawasha Company Limited was not privy to the agreement dated 8th February, 2018 and it could therefore not make payments that could be recovered by the applicant from the respondent.
24. Mr. Rapando learned counsel argued that such an argument is without legal and factual basis as there is clear evidence on record in form of the resolution dated 9th February, 2018 by Shawasha Company Limited authorizing the payment of the 10 million to the Respondent through its bank account on behalf of the applicant.
25. Learned counsel cited the case of *William Muthee Muthami v. Bank of Baroda* (2014) eKLR where the court of Appeal held that a person can enforce a benefit done on its behalf by another, which constitutes an exception to the doctrine of privity of contract.
26. In sum, Counsel submitted that the facts of this case show that the Respondent continues to withhold the sum of Kshs. 9 million due to the applicant without any justification. That the conduct of the Respondent not only amounts to breach of contract, but is also unjustified, disgraceful, dishonorable and incompatible with the status of the Respondent.

Respondent's written submissions

27. On the part of the Respondent, Learned Counsel Mr. Kagunza argued in opposition to the summons and submitted only one limb; proof of the claim.
28. Learned counsel started by submitting that the applicant had the onus of proof based on sections 107 and 108 of the *Evidence Act*. That the applicant was bound to establish that it actually gave the respondent kshs. 10,000,000/=. Counsel submitted that in this case, the applicant is a body corporate and it could transact and pay in its own name. The Relationship of an advocate and a client only existed as between the applicant and the Respondent. That in this case as presented by the applicant, it gives evidence of the payment having been made by Shawasha Company Limited to the Respondent which is a different person from the applicant.



29. Learned Counsel cited the provisions of Order 52 Rule 4 of the Civil Procedure Rules and submitted that the said Shawasha Company Limited is not a legal representative of the applicant. It was also not enjoined as a co-applicant to constitute it as a client of the Respondent. Counsel submitted that as things stand the applicant has not proved that it gave the Respondent the said sum of money. He urged this court to be guided by the case of KM (Minor suing through his mother next friend) RAN v Lydia Nthenya & Another (2017) eKLR.
30. It is submitted for the Respondent that no efforts were made by the applicant to demonstrate that privity of contract existed as between Shawasha Company Limited in respect of the land purchase agreement to constitute it as a person liable to pay the purchase price on behalf of the applicant. He invited this court to be guided on this by the case of Agricultural Finance Co-operation v Lengetia Ltd (1985) KLR 765.
31. Further that no evidence of assignment of any rights to the said Shawasha Company Limited was led to constitute as a person who could pay the purchase consideration. Further, the said Shawasha Company Limited who it is claimed paid the said money to the Respondent, it is the only one which could implead him. Counsel submitted that the resolution by Shawasha company limited is void and inchoate for want of a company seal. The resolution was not registered with the Registrar of Companies as require by section 27(1) of the *Companies Act* within 14 days of its making. The same fate befalls the special ordinary resolution of the 9th August, 2024 by the applicant.
32. Counsel further submitted that on the gravity attached to the matter, under sub – sections 4 and 5 of section 27 of the *Companies Act* therein criminal consequences of a fine of up to Kshs. 200,000/= and a default fine are provided for. He submitted on behalf of the Respondent that in the absence of the registered resolutions the originating summons and accompanying documents are a nullity and ought to be struck out with costs. The written authority under Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 is predicated on unregistered resolutions which render the action a nullity. The onus to tender the registered resolution was upon the applicant being a fact within its knowledge by dint of section 112 of the *Evidence Act*.
33. The Respondent further submitted that the applicant did not pay legal fees and which is not denied by the applicant. The Respondent has annexed his bill of costs of Kshs. 884,330/=. Counsel argued that the applicant also failed to pay party to party costs after unsuccessfully impleading him in the Magistrate court in the sum of 659,228. The Respondent submitted that a lien exists for any such money if there was proof it was paid to him by the applicant.
34. On the claim of interest, learned counsel submitted that if the applicant had proved that the respondent had received money from it and which has not been proved, the same would not be decreed as rule 2 of the Advocates (Deposit Interest) Rules made under section 83 of the *Advocates Act* stipulates that except as provided by the Rules, an Advocate is not liable by virtue of the relation between the advocate and the client to account to any client for interest received by the advocate on moneys deposited in a client account being monies received or held for or on account of his clients generally. On this counsel cited the decision in Meenye & Kirima Advocates v. MM (Suing on behalf of MFM, a minor) & Another (2020).

Analysis and determination

35. The edifice of justice rests not merely on the principles we uphold, but on the processes through which we arrive at truth. In this matter, the court confronts a delicate tapestry of professional obligations, corporate relationships, and fiduciary duties, woven together in a dispute that transcends ordinary civil



litigation. At its core lies a question that cuts to the heart of the advocate-client relationship: the sacred duty to handle client funds with unwavering fidelity.

36. The narrative unfolds against the backdrop of a land transaction gone awry, where Bluesand Holdings Limited engaged the professional services of respondent, an advocate of this court, for the purchase of land known as PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80. What commenced as a conventional conveyancing matter, with a consideration of Kshs. 42,000,000/=, has metamorphosed into a web of allegations centering on the fate of Kshs. 9,000,000/=, funds that the applicant contends have been wrongfully retained by their erstwhile advocate.
37. The intricacy of this dispute is further heightened by the presence of Shawasha Company Limited, an entity that, while standing outside the primary contractual framework, played an instrumental role in the financial arrangements. This peculiar triangular relationship has given rise to sophisticated questions of corporate law, agency, and professional responsibility that defy simple resolution through affidavit evidence alone.
38. The respondent has raised several defenses, including challenging the very basis of the advocate-client relationship and the applicant's standing to recover funds that were initially paid by a different company, Shawasha Company Limited. There are also disputes regarding the validity of various company resolutions and the respondent's claim to retain funds for unpaid legal fees.
39. As I consider the matter before me, involving allegations of professional misconduct and breach of fiduciary duty in the handling of client funds, I am compelled to reflect on whether the approach of determining this originating summons purely on affidavit evidence would sufficiently serve the interests of justice.
40. In the instant dispute unfortunately notwithstanding its complexity the parties elected to adjudicate the issues by way of affidavits and written submissions. The difficulties which arose, include the risk of reducing the content and the perceptions of the litigants on full disclosures regarding the history of this commercial transaction which seems to have involved other third parties who are not part of the current litigation. The current legislative approach in delivering procedural fairness efficiently ant to have the judicial focus on the rights of the parties as envisioned in Article 50 (1) of *the constitution* is for the issues to be canvassed by viva voce evidence tested with the protocols of evidence in chief, cross examination, and re-examination on matters where there is no convergence of minds as to what exactly happened leading to the current conflict subject matter of this court. Given the importance of procedural and substantive fairness as a component of justice there is surprisingly little support for disputants to elect to canvas their case by way of written submissions which sometimes leaves a lacuna as to the core of the dispute in question. This is one case which demonstrates that the statutory imperative for the rights of the parties to be determined.
41. The Kenyan Civil Procedure Legislation contains extensive provisions regarding pleadings and service of process and also prescribes evidentiary requirements so as to prevent any prejudice, mistrial and placing procedural fairness under Art. 50 of *the Constitution* at the core of any litigation. The content and text of the hearing rule whether to adopt the affidavits and submissions model or viva voce evidence depends largely on the circumstances of the case. The right to be heard which incorporates fair trial rights in Art. 50 of our supreme law has long been and remains a constitutional imperative to give each disputant an opportunity to state his/her case on the merits before an independent tribunal or court as defined in Art. 50(1) of the same Constitution. Due to the adversarial nature of the civil litigation in Kenya, the procedural fairness adopted by the parties to this commercial dispute of having the issues canvassed in a summary manner through affidavits and annexures has not sufficiently dealt with the variance issues to persuade this court to exercise discretion in one way or another. I am therefore of the



considered view that both parties be given a reasonable opportunity to present evidence and arguments in support of or against the claim in a viva voce forum to test the rival averments in the affidavits filed before this court.

42. For those reasons, the Originating summons be subjected to a full substantive hearing to give specific considerations on the scope of this commercial dispute. In adherence to the procedural fairness the hearing be and is hereby scheduled for the 13th of February, 2025. The costs of this interim orders abide the outcome of the main suit.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 28TH DAY OF JANUARY 2025.

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R. NYAKUNDI

JUDGE

