



REPUBLIC OF KENYA



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**Wachira v Nderi t/a Nderi & Kingati Advocates & another (Civil Case E007 of 2023) [2024] KEHC 7757 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7757 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL CASE E007 OF 2023  
MA ODERO, J  
JUNE 28, 2024**

**BETWEEN**

**KAMONJI KANGARU WACHIRA ..... PLAINTIFF**

**AND**

**JAMES NJENGA NDERI T/A NDERI & KINGATI  
ADVOCATES ..... 1<sup>ST</sup> DEFENDANT**

**RICHARD NJOROGE T/A GREENBELL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Before this court for determination is the Originating Summons dated 24<sup>th</sup> April, 2023 by which the plaintiff Kamonji Kangaru Wachira seeks determination of the following questions;-
  - “(a) Whether the 1<sup>st</sup> Respondent should be compelled by this honourable court to deliver a cash account of the proceeds of the instructions to levy distress for rent against one Patrick Mathenge Kanyoro who was a tenant of the Applicant at Apartment in Nyeri Municipality Block 1/237.
  - (b) Whether the Respondent should be compelled by the Honourable Court to deliver up to the Applicant the proceeds of the instructions to levy distress for rent against one Patrick Mathenge who was the Applicant’s tenant in apartment in Nyeri Municipality Block 1/237 with interests from the date of receipt of such proceeds to payment in full.
  - (c) Costs of the suit.”
2. The summons which was premised upon Order 52 Rule 4 of the *Civil Procedure Rules* 2010 and all other enabling provisions of law was supported by the Affidavit of even date sworn by the plaintiff.



3. The 1<sup>st</sup> Defendant James Njega Nderi T/a Nderi & Kingati Advocates filed a Replying Affidavit dated 12<sup>th</sup> May, 2023. The matter was canvassed by way of written submissions. The plaintiff filed the written submissions dated 22<sup>nd</sup> November, 2023, whilst the 1<sup>st</sup> Defendant relied upon his written submissions dated 4<sup>th</sup> December, 2023.

## **Background**

4. The Plaintiff avers that during the period between 2008 and 2018 he had an Advocate – client relationship with the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant offered to the plaintiff legal services in respect of the plaintiff's properties including Nyeri Municipality Block 11237 (hereinafter the 'suit property').
5. The plaintiff further avers that sometime in November, 2018 he instructed the 1<sup>st</sup> Defendant to levy distress for rent against a tenant in one of the Apartments in the suit property. That at that point the rent arrears amounted to Kshs. 300,000/=.
6. That the 1<sup>st</sup> Defendant then instructed Richard Njoroge T/a Greenbell Auctioneers (the 2<sup>nd</sup> Defendant) to carry out the said distress which was successful. Thereafter in the year 2019 the plaintiff convened a meeting at which meeting the 1<sup>st</sup> Defendant accused the 2<sup>nd</sup> Defendant of having released part of the proceeds of the distress to a third party. On his part the plaintiff accused the 1<sup>st</sup> Defendant of having deviated from the instructions given to him.
7. The plaintiff states that he has consistently written to the 1<sup>st</sup> Defendant seeking full accounts of the proceeds of distress but none have been forthcoming.
8. That instead the 1<sup>st</sup> Defendant has moved to recover various fee notes and has obtained a Garnishee order Nisi against the plaintiff's Bankers for an amount of Kshs. 31,257.00.
9. The Plaintiff now seeks the intervention of this court to stop the Garnishee proceedings pending the hearing and determination of the originating summons and to compel the 1<sup>st</sup> Defendant to provide full and accurate accounts of the proceeds of the distress.
10. In his reply the 1<sup>st</sup> Defendant confirms that he is an Advocate of the High Court of Kenya. The 1<sup>st</sup> defendant denies that the plaintiff ever instructed him to levy distress on his behalf against a tenant in the suit property. According to the 1<sup>st</sup> Defendant he is only aware that the plaintiff instructed his brother one Timothy Njogu Kangaru to instruct an auctioneer to levy distress on his behalf.
11. That the plaintiff later instructed the 1<sup>st</sup> Defendant's law firm to institute recovery proceedings for Kshs. 400,000 arising from the rent arrears collected from the tenant. That however the plaintiff and the 1<sup>st</sup> defendant later fell out and the latter ceased acting for the plaintiff. That at the time they ceased acting the 1<sup>st</sup> Defendant had not received any amounts due to the plaintiff from either the auctioneer (2<sup>nd</sup> Defendant), or from any other party.
12. The 1<sup>st</sup> Defendant then proceeded to file their Advocates-client Bill of costs. The 1<sup>st</sup> Defendant contends that issue of accounting has no relationship to the certificates of costs and no stay is required. The 1<sup>st</sup> Defendant maintained that they have nothing to account for in relation to the distress levied for rent arrears. They urge court to dismiss the Summons entirely.

## **Analysis And Determination**

13. I have carefully considered the summons before this court, the reply filed thereto as well as the written submission filed by both parties.



14. The first question to be answered is whether there did exist an Advocate-client relationship between the plaintiff and the 1<sup>st</sup> Defendant as is claimed by the plaintiff. The 1<sup>st</sup> Defendant denies that any such relationship ever existed between the two.
15. An Advocate-clients relationship may be express, through a formal retainer but can also be implied.
16. In the case of *Mereka & Co Advocates -vs- Zakhem Construction (kenya) Ltd* [2014] eKLR Hon Lady Justice Ougo noted that instructions to an Advocate need not be in writing but can be inferred from the conduct of the parties. In that case the Hon. Judge stated;-
 

“It is trite law that a retainer need not only be in writing but can be implied from the parties conduct on this am guided by the case of *Ohaga -vs- Akiba Bank Limtied* [2008] I EA 300, where it was held that, “a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order.”
17. In the cited case of *Ochieng Onyango Kibet & Ohaga Advocates -vs- Akiba Bank Ltd* [2007] eKLR Hon Justice Warsame (as he then was) observed as follows:-
 

“The act of authorizing an advocate to act on behalf of a client constitutes the advocate’s retainer by the client. It is not the law that an advocate must obtain a written authority from the client before he commences a matter The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive; it may be wide. And nevertheless it can be implied from the conduct of the client/advocate relationship.”
18. Therefore the question would be is there evidence of an express and/or implied Advocate-client relationship between the parties.
19. Annexed to the Plaintiffs supporting Affidavit it is an e-mail dated 7<sup>th</sup> August, 2018 sent by the plaintiff at 9.33pm addressed to ‘Advocate Nderi’ (Annexure ‘KKW-1’. The Heading of the E-mail reads “Rent Collection - 11237 and flat - Mumbi Road and Block III.” The contents of said e- mail reads as follows:-
 

“Mr. Nderi

My brother Timothy Njogu Kanaru may have already asked you to provide collection and/or management services for the three properties shown above. I am writing to formally engage your services. In particular the tenant renting the upstairs Flat Block 1/237 is in arrears. Njogu will pass the details to your office via Ms. Gakii. Please advise as to the most appropriate way to get him to pay up. Thank you Kamoji Wachira.” [own emphasis]
20. The above is a clear indication that the plaintiff was retaining the 1<sup>st</sup> Defendant to provide legal services in particular with respect to collecting the arrears for an apartment in the suit property.
21. On the next day 8<sup>th</sup> August, 2018 at 1.30am the 1<sup>st</sup> Defendant responds as follows;-
 

“Thank you for your email on the above subject. We await instructions as directed for Nderi & Kiingati Advocates”



22. From the above I am satisfied that there is evidence that the plaintiff did retain the legal services of the 1<sup>st</sup> Defendant for purposes of pursuing rent arrears due from his tenant. As such I do find that an Advocate – Client relationship existed between the two. Moreover the very fact that by his own admissions the 1<sup>st</sup> Defendant did file an Advocate/clients Bill of costs against the plaintiffs is proof enough that an Advocate -clients relationship existed between them.
23. The plaintiff is seeking accounts in relation to the distress for rent levied to recover the rent arrears. In order to succeed on this claim the plaintiff must prove firstly that the 1<sup>st</sup> Defendant obtained orders from court to levy distress and secondly that the 1<sup>st</sup> Defendants instructed the 2<sup>nd</sup> Defendant to levy such distress. Thirdly the plaintiff must adduce evidence to show how much was recovered from the distress process, and fourthly the plaintiff must prove that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or either of them failed to remit the funds realized from the distress to the plaintiff.
24. All that the plaintiff has annexed are e-mails sent to the 1<sup>st</sup> Defendant requesting for an update of the status of funds collected. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant did not reply to those e-mails.
25. The plaintiff then through his Advocate wrote to the 1<sup>st</sup> Defendant a demand letter dated 13<sup>th</sup> October, 2020 (Annexure ‘KKW3’) seeking remittance of all funds collected by the 1<sup>st</sup> Defendant as rent arrears. Once again no reply was received to this demand letter.
26. The above do not amount to proof that the 1<sup>st</sup> or 2<sup>nd</sup> Defendants did in fact collect / receive funds arising from the distress process.
27. Further in my view this would require a Vive Voce hearing and not proof by way Affidavit evidence.
28. In short this court cannot and will not order the 1<sup>st</sup> or 2<sup>nd</sup> Defendants to provide accounts unless and until the court is satisfied that a proper basis has been laid to merit such an order. In this case I find that no such basis has been laid.
29. Likewise the prayer seeking to compel the 1<sup>st</sup> Defendant to deliver to the plaintiff the proceeds of the instructions to levy distress cannot be granted as it has not been proved on a balance of probabilities that such proceeds were ever received. There is no evidence of how much money was recovered by the 1<sup>st</sup> or 2<sup>nd</sup> Defendant. The plaintiff must seek orders for remittance of a specific amount of money. This prayer is couched in vague terms and cannot be granted.
30. Finally the plaintiff seeks to stay the Garnishee Orders arising from the Bill of costs filed by the 1<sup>st</sup> Defendant. This is an application which ought to have been made in the Taxation proceedings. Such a prayer is misplaced in this application. The plaintiff ought to have filed a reference against the Taxation Ruling together with an application seeking stay of the Garnishee proceedings. The Bill of costs and the subsequent orders thereto have nothing whatsoever to do with the current application.
31. Finally I find no merit whatsoever in this originating summons dated 24<sup>th</sup> April, 2023. The same is hereby dismissed in its entirety. Costs are awarded to the 1<sup>st</sup> Defendant.

**DATED IN NYERI THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**MAUREEN A. ODERO**

**JUDGE**

