



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Miscellaneous Civil Case 623 of 2009**

**GICHUKI KINGARA & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**CHARLES MUNGAI NGURE.....1<sup>ST</sup> CLAIMANT**

**J. K NGARUIYA & CO. ADVOCATES.....2<sup>ND</sup> CLAIMANT**

**KIRUNDI & CO. ADVOCATES.....3<sup>RD</sup> CLAIMANT**

**JULIUS NDUNG’U KABERERE.....4<sup>TH</sup> CLAIMANT**

**KEMBI GITURA & CO. ADVOCATES.....5<sup>TH</sup> CLAIMANT**

**BRITISH-AMERICAN INSURANCE CO.....6<sup>TH</sup> CLAIMANT**

**F. W. NJOROGE & CO. ADVOCATES.....7<sup>TH</sup> CLAIMANT**

**RULING**

The applicant filed interpleader proceedings by originating summon pursuant to the provisions of **Section 58** of the **Civil Procedure Act** and **Order XXXIII Rule 1 & 2** of the **Civil Procedure Rules** seeking the determination by the court to whom it should pay the sum of Kshs.6.3 million among the competing claimants, a sum of which the applicant has already deposited in court. The court is yet to hear and determine the interpleader proceedings. On 7<sup>th</sup> September 2009, the 4<sup>th</sup> claimant Julius Ndung’u Kaberere filed an application purportedly pursuant to the provisions of **Order XXXVI Rule 12** and **Order XXXIII Rule 2(c)** of the **Civil Procedure Rules** seeking orders of the court to compel the applicant to deposit the said sum of kshs.6.3 million in court together with interest at the rate of 11% per annum with effect from 29<sup>th</sup> October 2008 pending the hearing of these interpleader proceedings. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the 4<sup>th</sup> claimant. The application is opposed. The applicant filed notice of preliminary objection in opposition to

the application. Peter Gichuki King'ara, an advocate practicing in the name of Gichuki Kingara & Co. Advocates, swore a lengthy replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Miss Wawira for the 4<sup>th</sup> claimant and by Miss Ithondeka for the applicant. I have carefully read the pleadings filed by the parties to this application in support of their respective opposing positions. I have also considered the submissions made by the respective counsel for the said parties. As stated at the commencement of this ruling, the applicant has already deposited in court the said sum of Kshs.6.3 million that is the subject of these interpleader proceedings. The applicant made the said deposit on 30<sup>th</sup> October 2009. The issue that is left for determination by this court is whether the applicant should be compelled to pay the interest claimed by the 4<sup>th</sup> claimant.

To understand the 4<sup>th</sup> claimant's application, it is imperative that the facts in support of this application be set out, albeit briefly. The 4<sup>th</sup> claimant entered into an agreement with the 1<sup>st</sup> claimant whereby the 1<sup>st</sup> claimant agreed to sell to the 4<sup>th</sup> claimant four parcels of land namely Makuyu/Kimorreri/Block 1/820, Makuyu/Kimorreri/Block 1/821, Makuyu/Kimorreri/Block 1/822 and Makuyu/Kimorreri/Block 1/823. The purchase consideration for the said parcels of land was agreed at Kshs.7 million. The 4<sup>th</sup> claimant paid a deposit of the sum of Kshs.700,000/= to the 1<sup>st</sup> claimant on the signing of the agreement on 20<sup>th</sup> November 2006. The 4<sup>th</sup> claimant paid a further sum of Kshs.200,000/= to the 1<sup>st</sup> claimant. The 1<sup>st</sup> claimant's advocate is the 2<sup>nd</sup> claimant in these proceedings. The 4<sup>th</sup> claimant appointed the applicant as his advocate for the purposes of the conveyance. It was agreed that the balance of the purchase consideration would be paid to the 1<sup>st</sup> claimant's advocate seven (7) days upon receipt of the duly registered transfer in favour of the 4<sup>th</sup> claimant.

The 4<sup>th</sup> claimant applied, and was granted a loan facility for the said sum of Kshs.6.3 million by the 6<sup>th</sup> claimant being the balance of the purchase consideration. The said sum was deposited with the applicant. The applicant gave professional undertaking to the 1<sup>st</sup> claimant's advocate (the 2<sup>nd</sup> claimant) that he would pay him the said sum of Kshs.6.3 million upon the successful registration of the 4<sup>th</sup> claimant as the owner of the suit parcels of land. From the time the agreement was executed between the 1<sup>st</sup> claimant and the 4<sup>th</sup> claimant, it took a considerable period of time before the transfer was effected. The 4<sup>th</sup> claimant was eventually registered as the owner of the suit parcels of land.

On 22<sup>nd</sup> October 2008, the applicant sent to the 2<sup>nd</sup> claimant a bankers cheque No.001409 of Kshs.6.3 million being the balance of the purchase consideration. The said advocates upon receipt of the cheque, returned the same to the applicant alleging that the 1<sup>st</sup> claimant considered the agreement as terminated as the same was not concluded within ninety (90) days from the date it was entered into between the 1<sup>st</sup> claimant and the 4<sup>th</sup> claimant. The said cheque was returned to the applicant on 28<sup>th</sup> October 2008. In effect, the 1<sup>st</sup> claimant was saying that he was not bound by the terms of agreement. The dispute between the 1<sup>st</sup> and 4<sup>th</sup> claimants is yet to be resolved. That dispute is not a matter in issue in this application.

According to the 4<sup>th</sup> claimant, from the time the said cheque for the sum of Kshs.6.3 million was returned to the applicant, he made a request to the applicant to deposit the amount in an interest earning account. It is the 4<sup>th</sup> claimant's case that since he was paying interest on the said amount that he had borrowed from the 6<sup>th</sup> claimant, it was only just and fair that the said amount attracts interest pending the resolution of the dispute between himself and the 1<sup>st</sup> claimant. On his part, the applicant argued that since he had given a professional undertaking to the advocate of the 1<sup>st</sup> claimant, he could not part with the money until he had fulfilled the terms of the professional undertaking that he had given to the 2<sup>nd</sup> claimant. It appeared to the court that the 4<sup>th</sup> claimant's assumed position is that the money belongs to him yet he is already registered as the owner of the suit parcels of land. Although the 4<sup>th</sup> claimant has not taken possession of the suit parcels of land due to the dispute between him and the 1<sup>st</sup> claimant, the uncontroverted fact is that the 4<sup>th</sup> claimant is the registered owner of the said parcels of land. In my considered opinion, the 4<sup>th</sup> claimant is misguided in his view that the said sum of Ksh.6.3 million is his property before a determination has been made by the court. The court will determine who will be entitled to the said amount upon hearing and determining the pending interpleader proceedings.

Has the 4<sup>th</sup> claimant established a case to compel the applicant to pay interest on the said sum of Kshs.6.3 million" I do not

think so. Under **Rule 5(a) of The Advocates (Accounts) Rules**, the applicant was required to deposit the said sum of Kshs.6.3 million in his clients' account. The applicant at the material time, was holding the said amount in trust for the 1<sup>st</sup> claimant having given a professional undertaking to pay him upon the successful registration of the 4<sup>th</sup> claimant as the owner of the suit parcels of land. Under **Rule 10 of The Advocates (Accounts) Rules**, an advocate is prohibited from withdrawing any sum from the clients' account which is to the credit of the client for whom the sum is deposited. There is therefore no requirement in law for an advocate to deposit an amount that he is holding pursuant to a professional undertaking that he has given in an interest earning account. Even if the advocate were to deposit the said amount in an interest earning account, under **Rule 2 of The Advocates (Deposit Interest) Rules**, the advocate is not liable to pay the client the interest that has been earned in respect thereof.

For the reasons stated above, it is evident that the 4<sup>th</sup> claimant's application is misconceived. It lacks merit. It is hereby dismissed with costs to the applicant.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF NOVEMBER 2009**

**L. KIMARU**

**JUDGE**



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