



**Kennedy Odhiambo Owiti t/a Odhiambo Owiti & Company
Advocates v Dominion Farms Limited & 3 others (Commercial Case
1 of 2020) [2024] KEHC 9877 (KLR) (5 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 1 OF 2020
RE ABURILI, J
AUGUST 5, 2024**

BETWEEN

**KENNEDY ODHIAMBO OWITI T/A ODHIAMBO OWITI & COMPANY
ADVOCATES PLAINTIFF**

AND

DOMINION FARMS LIMITED 1ST DEFENDANT

LAKE AGRO LTD 2ND DEFENDANT

THE REGISTRAR GENERAL OF COMPANIES 3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The Plaintiff herein is an advocate of this Court. He filed suit vide a Complaint dated 20th February 2020 on the even date seeking judgment against the Defendants and the following orders:
 - a. The 1st Defendant be ordered to pay to the Plaintiff the total sum of Kshs. 14,237,073.50 together with interest of Kshs. 1,241,887.03 as at 31st January 2020, making the total sum owed to be Kshs. 15,478,960.53.
 - b. A permanent Injunction to restrain the 1st and 2nd Defendants, their agents or servants or any other person acting through their direction or order from transferring the business of the 1st Defendant to the 2nd Defendant without settling the sum of Kshs. 15,478,960.53
 - c. An order restraining the 3rd Defendant, the Registrar General of Companies, from effecting any transfer of business either in whole, in part or fraction from the 1st Defendant to the 2nd Defendant and effecting any transfer of shares, and/or taking over any existing contracts that



bestows on the 2nd Defendant until and unless provision is made for the settlement of the sum of Kshs. 15,478,960.53 owed by the 1st Defendant to the Plaintiff.

- d. That provision be made for such amounts that shall cover the debt owed to the Plaintiff by the 1st defendant.
 - e. Costs of this suit and interest on (a) above.
 - f. Any other award that the court may deem fit.
2. The Plaintiff's claim was accompanied by a List of Documents dated 20th February 2020, the Witness Statement of Kennedy Odhiambo Owiti filed together with the List of Witnesses dated 20th February 2020.
 3. The defendants entered appearance and subsequently filed their varied statement of defence. In essence, the defendants largely denied the averments made by the plaintiff.
 4. I must note that despite service on several occasions, the defendants never filed any supporting documents in support of their case and failed to inform this court as to why they failed to do so rather claiming that they could not get in touch with their client.
 5. The matter was heard on 23rd May 2024 when the Plaintiff testified and closed his case. This court vide its ruling of 6th June 2024 closed the 1st, 2nd and 3rd Defendants' case without the defendants testifying. Parties were subsequently directed to file written submissions.

The Plaintiff's Case

6. It was the plaintiff's case that he was retained by the 1st Defendant to defend it in various claims within the country but that the 1st Defendant failed to settle the Plaintiff's professional fees which resulted in the Plaintiff taxing his professional costs as against the 1st Defendant which totalled to Kshs. 15,478,960.00.
7. The Plaintiff further averred that he later learned that vide a Gazette Notice No. 350 of 17th January 2020 Volume CXXII, the 1st Defendant was transferring its business to the 2nd Defendant and further that the said gazette notice equally stated that all the debts and liabilities of the 1st Defendant would not be assumed by the 2nd Defendant upon the transfer.
8. It was the plaintiff's case that he was apprehensive that should the 1st Defendant transfer its business to the 2nd Defendant without settling the sums owed to him, he stood to suffer loss as the 1st Defendant would remain a shell company with nothing attachable to repay any debts thus necessitating the filing of this suit.
9. The plaintiff testified as PW1 adopting his witness statement dated 20th February 2020 as his evidence in chief. The plaintiff reiterated that he was then the sole proprietor of the firm of Ms. Odhiambo Owiti & Co. Advocates, which firm was engaged by the 1st Defendant as their external advocates, to represent the 1st Defendant in all its legal matters within the country for which, the Plaintiff was entitled to be paid legal fees, allowances, expenses and commissions.
10. The plaintiff further narrated that his firm represented the 1st Defendant in various claims, until a time when the Plaintiff could no longer represent the 1st Defendant on account of failure by the 1st Defendant to pay legal fees and that he subsequently sent out fee notes in the various legal matters seeking that his professional fees be settled by the 1st Defendant but the same were never settled.



11. The plaintiff further testified that he applied for the taxation of costs in the various matters in which he represented the 1st Defendant and was issued with various certificates of costs for the total amount of Kshs. 14,237,073.50, which certificates of costs were respectively adopted as decrees pursuant to Section 51 of the *Advocates Act* together with interest on the various decretal sums, which interests cumulatively stood at Kshs. 1,241,887.03 thus the total sum due to him from the 1st Defendant was Kshs. 15,478,960.53.
12. In support of his case, the plaintiff produced exhibits 1 -the bundle of decrees in respect of the various cases he handled and/or on behalf of the 1st Defendant.
13. PW1 further testified that after seeing the gazette notice and being apprehensive that the 1st Defendant intended to transfer its business without paying attention to the debts owed to him, he raised an objection to the Registrar General objecting to the said transfer of business and issued a demand letter to the 1st and 2nd Defendants advocates.
14. In cross-examination, the plaintiff reiterated that the 1st Defendant was indeed indebted to him, and that no evidence had been availed to the contrary. It was his testimony in cross-examination that he objected to the 1st Defendant transferring its business to the 2nd Defendant since the 1st Defendant had no intention of settling the dues it owed to him.
15. On inquiry by the Court as to whether the gazette notice stipulated the time frame within which he was to issue an objection notice to the gazette notice, the plaintiff clarified that the gazette notice did not indicate the timeframe within which an objection was to be raised, however, that Section 8 of the Business Transfer Act stipulates that the limitation of bringing an action against the transferee in respect of any liability imposed by the act is 6 months from the date of the transfer which notice of objection to the gazette notice of 17th January 2020 he stated that he filed on the 12th February 2020.

The Plaintiff's Submissions

16. It was submitted that it was not in dispute that the total sum due to the Plaintiff from the 1st Defendant is Kshs. 15,478,860.53 which amount continues to accrue interest and remains unpaid and that there was no evidence availed by the 1st Defendant to challenge the Plaintiff's position that the 1st Defendant is indebted to it.
17. The plaintiff submitted that once he proved that the 1st Defendant was indebted to him, the burden shifted to the 1st Defendant and it was upon the 1st Defendant to prove that the sums due to the Plaintiff by the 1st Defendant as pleaded had been settled such that there would be no basis upon which the Plaintiff would be justified to file this suit preventing the 1st Defendant from transferring its business to the 2nd Defendant without first settling the sums owed to him.
18. The plaintiff further submitted that the 1st Defendant did not file any document or call any witness in court to corroborate its position and thus the Plaintiff's evidence remains unchallenged. Reference was made to the decision in *In Re Estate of Mwangi Kuria (Deceased) [2020] eKLR*, where the Court restated that "When a party fails to call a witness who is available and who would have assisted his case, the inference is that the evidence would have been adverse to his case."
19. Reliance was further placed in the cases of *North End Trading Company Limited (Carrying On The Business Under The Registered Name Of) Kenya Refuse Handlers Limited v City Council Of Nairobi (2019) eKLR*, *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No.23 Of 1997*, *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) Hccc No.834 Of 2002*, where the courts similarly held inter alia that claims made by a Defendant in his Defense



- and Counterclaim remain unsubstantiated in the absence of evidence of witnesses or otherwise being presented.
20. It was submitted that the effect of the said gazette notice was that the 2nd Defendant herein being the transferee, was not to take up the 1st Defendants, {transferors} liabilities upon the transfer of the business which meant that the Plaintiff would not be able to enforce his various unpaid decrees and he would never be able to receive the sum of Kshs. 15,478,960.53.
 21. The plaintiff submitted that the 1st Defendant acted in bad faith before the gazette notice by failing to inform its creditors of how it intended to settle any of its debts and/or liabilities pursuant to the transfer and thus it was highly probable that the 1st Defendant after transferring its business, would remain a shell company with no attachable assets to repay any debts owed to Plaintiff.
 22. It was submitted that the Defendants by their actions intended to circumvent the provisions of Section 3 of the Transfer of Business Act, by failing to first settle the liabilities of the Plaintiff before concluding the said transfer.
 23. It was submitted that the *Transfer of Businesses Act* provides that where a notice has been issued to the effect that the transferee would not take up the liabilities of the transferor as in the instant case, the 1st Defendant would be the one to take care of its own liabilities but that in this case, the 1st Defendant prior to the notice or even after the notice had been issued, did not indicate to its creditors how it intended to settle its debts and thus by its demeanour, the 1st Defendant would not settle the debts after the transfer.
 24. The plaintiff further submitted that the 1st Defendant equally did not indicate to this court that it was willing to settle the debt owed to the Plaintiff. Further, that the way the negotiations and the intended transfer of the 1st Defendant's business to the 2nd Defendant were held in secret with no input of its creditors or attention to the debts owed by the 1st Defendant to the Plaintiff clearly portrays that the 1st Defendant has no plans whatsoever of settling the debt owed to the Plaintiff.
 25. It was submitted that in compliance with Section 3(2) of the Business Transfer Act he issued objection notices to both the Registrar General of Companies and served demand letters to both the 1st Defendant and 2nd Defendant seeking settlement of its debts before the transfer and that neither of the parties responded to the Plaintiff notices and/or demand which prompted the Plaintiff to institute this suit.
 26. The plaintiff submitted that he had proved his case on a balance of probabilities and as such this court ought to enter judgment in his favour and further that it would be proper and in the interest of justice that a permanent injunction be issued to restrain the 1st and 2nd Defendants, their agents or servants or anyone acting through their direction from transferring the business of the 1st Defendant to the 2nd Defendant without settling the sum of Kshs. 15,478,960.53 and equally, it would be proper that the Registrar General be enjoined from effecting any transfer of any shares, business or facilities between the 1st and 2nd Defendant until and unless the debts owed to the Plaintiff are settled.
 27. It was also submitted that the plaintiff was entitled to costs as envisaged under Section 27 of the *Civil Procedure Act*.
 28. The defendants never fled any submissions.



Analysis & Determination

29. I have carefully considered the pleadings, testimony by the plaintiff, exhibits and submissions filed by the plaintiff. The only issue for consideration is whether the plaintiff merits grant of the orders sought.
30. The plaintiff seeks to have this court compel the 1st defendant to pay his legal fees totaling Kshs. 15,478,960.53. He further seeks a permanent injunction against the 1st, 2nd and 3rd defendants from transferring the 1st defendant's business unless provision for the payment of legal fees that are due to him from the 1st defendant is made.
31. I will commence with the prayer for a permanent injunction to restrain transfer of business. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.
32. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. See the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR.
33. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases, it accompanies declaratory orders.
34. In *Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012*; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- a. establish his case only at a prima facie level,
 - b. demonstrate irreparable injury if a temporary injunction is not granted, and
 - c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.
- These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”
35. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of Malier Unissa Karim v Edward Oluoch Odumbe (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory



Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

36. Further the same Court of appeal in the case of Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others CA 111/2002 held that: -

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

37. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of Locabail International Finance Limited v Agro Export and others (1986) All ER 906, the court held thus: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.”

38. The reason for this rule on granting of Mandatory Injunction is plain. Megarry, J put it succinctly in a subsequent passage in the case of “Shepard Homes Case (Supra) as follows: -

“.....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

39. In the instant case, the only evidence presented before this court was that by the plaintiff. The defendants other than filing statements of defence on the part of the 1st and 2nd defendant, did not file anything else.

40. It is trite that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere



allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

41. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

(See *Kirugi and Another v Kabiya and Others* [1983] e KLR).

42. Thus, the plaintiff, despite the absence of evidence from the defendants was obligated to prove its case on a balance of probabilities.

43. From the evidence adduced herein, there is no doubt that the 1st defendant owed the plaintiff legal fees as is evidenced from the decrees attached herein as exhibit 1. It is also not in doubt that the business of the 1st defendant was in the process of being transferred to the 2nd defendant.

44. The crux of the matter in this dispute is that the plaintiff seeks to have his fees paid to him first before the 1st defendant who was his client can transfer its business to a third party, the 2nd defendant, because the advocate had valid certificate s of costs against the client 1st defendant. The applicable law is found at Section 51(2) of the Advocates Act which reads as follows;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

45. The above-mentioned provision was reiterated in the case of *Musyoka & Wambua Advocates v Rustam Hira Advocate* (2006) eKLR where it was held: -

“Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit.....”

46. The procedure provided in Section 51(2) of the Advocates Act aids expeditious disposal of cases relating to recovery of advocate-client costs as long as:

- a. the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs;
- b. the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and
- c. there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate.



47. All the above demonstrate that indeed there is a way of recovering costs owed to an advocate from a client which the plaintiff herein had initiated but has not been successful. Furthermore, I have not seen any evidence of setting aside of certificates of costs issued in favour of the plaintiff in the various matters filed against the 1st defendant and thus they still remain in force.
48. Notwithstanding all the above, I do note that the Gazette Notice No. 350 of 17th January 2020 Volume CXXII regarding the transfer of the 1st defendant's business to the 2nd defendant equally stated that all the debts and liabilities of the 1st Defendant would not be assumed by the 2nd Defendant upon the transfer.
49. In essence, the plaintiff would have no recourse for recovery of his fees for work done. In my view this was the basis upon which the plaintiff filed the instant case. Why then can't the plaintiff proceed with execution of the decree that he already has? This court noted in its ruling of 19th January 2024 that the plaintiff could not execute the decrees that were being challenged by the 1st defendant and other 3rd parties who had gained ownership over the attached goods and were challenging the attachment.
50. In the circumstances of this case, I am persuaded that the plaintiff has established that his rights to legal fees certified by the court require legal protection by the court. The plaintiff had a legitimate expectation to be paid his legal fees which is not challenged by the 1st defendant client who should not be allowed to escape through the backdoor and leave the plaintiff with barren decrees, and a mere pious explorer in pursuit of justice. I am convinced that the plaintiff stands to suffer irreparable loss if the orders of injunction sought are not granted. The defendants have not been straight in their dealings with this court, they have on numerous occasions flouted the directions issued by this court.
51. This court is also alive to the fact that the 1st defendant has in proceedings on record been shown to be cash strapped to the point where it has disposed of some of its assets.
52. I am thus persuaded that this a case where the court is well guided to grant the orders of injunction sought. However, I decline to grant prayer No. a on payment of the sums as taxed plus interest on account that there is an established mechanism under the Advocates Act and the Civil Procedure Rules for recovery of Advocate/ client costs as taxed and certified.
53. The upshot of the above is that I grant the plaintiff prayers (b – e) as sought in his plaint. However, in the event that the transfer of the business has been effected, contrary to the injunctive orders of this court issued earlier on 19/1/2024 restraining such transfer, then the plaintiff is at liberty to apply for appropriate orders from the court.
54. The plaintiff shall have costs of this suit to be paid by the 1st defendant only. Mention on 26/9/2024 before the Deputy Registrar to confirm filing of the plaintiff's bill of costs against the 1st defendant only.
55. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

