



Daniel Orenge t/a Daniel Orenge & Company Advocates v Mohammed Muigai Advocates & another (Commercial Civil Suit 31 of 2018) [2023] KEHC 17993 (KLR) (Commercial and Tax) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT 31 OF 2018**

A MABEYA, J

MAY 31, 2023

BETWEEN

**DANIEL ORENGE T/A DANIEL ORENGE & COMPANY
ADVOCATES APPLICANT**

AND

MOHAMMED MUIGAI ADVOCATES 1ST RESPONDENT

RECOVERY CONCEPT AUCTIONEERS 2ND RESPONDENT

RULING

1. Before Court is an application dated 7/4/2022. It was brought under Order 51 Rule 1, Order 22 Rule 22 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The application sought orders for the setting aside the 2nd respondent's warrants of attachments dated 31/3/2022.
3. The grounds for the application were to be found on the face of the Motion and on the supporting affidavit of Daniel Orenge sworn on 7/4/2022.
4. It was contended that the applicant received Kshs. 15 million from the 1st respondent as per the sale agreement dated 28/9/2016. That the sale transaction did not go through and the 1st respondent rescinded the agreement by calling for the deposit time by which the applicant had released the amount to his client to facilitate subdivision of the suit property being L.R. No. 12422/3.
5. That the professional undertaking issued by the applicant was unconditional since the money was to be released to the applicant's clients to facilitate the said subdivision. That upon the 1st respondent instituting the mother suit herein, the same was compromised by consent dated 18/6/2021.



6. That it was agreed that the vendor's advocate would refund Kshs. 10 million to the purchaser and Kshs. 5 million would be waived upon receipt of the Kshs. 10 million.
7. That upon payment of Kshs. 10 million, the suit was settled and no amount was outstanding. That the 1st respondent taxed its bill of costs and was awarded Kshs, 787,643/= and the vendor undertook to pay. That the settlement was communicated to the 1st respondent yet it had now procured a decree for Kshs. 23,321,054/= which sum was not owed. That unless the orders sought were granted, the applicant would suffer irreparable loss.
8. The 1st respondent opposed the application vide the replying affidavit of David Angwenyi sworn on 28/7/2022. It was contended that vide judgment delivered on 16/9/2022, the court ordered the respondent to honor the professional undertaking of 4/10/2016 and pay the 1st respondent herein Kshs. 15 million plus interest and cost of the suit. That the applicant did not appeal nor has the judgment been reviewed.
9. That the 1st respondent successfully taxed its costs and was awarded Kshs. 787,643.67 vide certificate of taxation dated 13/1/2022. That despite demand issued vide letter dated 21/1/2022 for settlement of the total debt of Kshs. 24,915,862.85/= inclusive of interest, the applicant failed to pay and the 1st respondent instructed the 2nd respondent to extract warrants of attachment and execute the decree.
10. That no consent has ever been recorded as averred by the applicant and there was no court appearance on 18/6/2021 when it was alleged that the consent was adopted as an order of the court. That the 1st respondent did not receive the letter of 7/4/2022 as alleged communicating that a consent had been entered. That the applicant had failed to settle the decretal amount and was not deserving of the orders sought.
11. The 1st respondent filed written submissions dated 23/1/2023. The applicant did not file any submissions. The main task for this court is to determine whether the impugned decree ought to be set aside.
12. The applicant's case is that Kshs. 10 million was refunded by the firm that was retained by its client and it was agreed that Kshs. 5 million would be waived upon receipt of the Kshs. 10 million. That after payment of the said sum of Kshs.10 million, the case was settled and the applicant's client undertook to pay the 1st respondent's costs as well as auctioneers costs.
13. Though the applicant claims that a consent was entered settling the mother suit between the vendor and purchaser, the same was not produced before this Court. The Court file does not have any entry of such proceedings. However, attached to the application was the letter dated 7/4/2022 allegedly sent to the 1st respondent. Though there is no indication that the 1st respondent received the letter as there is no stamp thereon, the contents of the letter corroborates the applicant's averments.
14. The contents of the letter indicate that the firm of J.M Kariuki & Company Advocates was retained by the applicant's client on whose behalf the professional undertaking had been given. It was stated that Kshs. 10 million was paid by the said firm to the 1st respondent's client after negotiations were held and the matter was settled.
15. The said firm however indicated that the client was agreeable to settling the 1st respondent's costs and auctioneer's costs within 60 days. From the information given, the 1st respondent was asked to halt any adverse action against the applicant including the proclamation on its property.



16. More importantly, there was also attached a swift advice indicating that Kshs. 10 million was transferred from J.M Karikui & Co. Advocates to Gulf Energy Limited (the purchaser) on 15/7/2020 and it was indicated that the same was for refund of payment LR 12422/3.
17. The applicant also attached a search from the court's e-filing system using this suit's tracking number being PRNP2018 and the results indicated that the matter had been settled and case closed.
18. It thus appears that by the time the judgment dated 16/9/2020 was delivered, the repayment had already been made unawares to the Court which found that the applicant ought to have honoured the professional undertaking. It then follows that the judgment and any consequential decree had been overtaken by events and the 1st respondent, as an officer of the Court, had a duty to inform the Court that its client was in receipt of the Kshs. 10 million paid by the applicant's client through its current advocate.
19. In any case, when the parties appeared before this Court on 26/5/2022, counsel for the applicant indicated that the parties had agreed on the decretal amount and they were discussing on costs. Mr. Angwenyi Advocate, who swore the replying affidavit herein appeared for the 1st respondent and informed the Court that "It is fees for us and the auctioneer?".
20. The question then that arises is, if the parties had already agreed on the decretal amount and what was pending was the fees for the 1st respondent and the auctioneer, where then does the whooping sum of Kshs. 23,321,054/- being executed for arise from? If what the applicant alleges is true, why did he not enjoin the firm that made the payment directly to the purchaser for him to shed light on this matter?
21. Further, if the purchaser had been paid what he was demanding from the applicant's client, can the 1st respondent insist in enforcing the professional undertaking and by extension the judgment that it had obtained on the basis thereof? There seems to be more to it than what is in the affidavits.
22. On the part of this Court, there seems that no Notice to Show Cause was ever served upon the applicant. In that regard, the application is meritorious and the same is hereby allowed in terms of prayer nos. 4 and 5 of the Motion dated 7/4/2022.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

