



**Kamiti v Oseko & Ouma Advocates LLP (Commercial Civil Case E64 of 2019)  
[2022] KEHC 50 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 50 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E64 OF 2019  
DAS MAJANJA, J  
JANUARY 31, 2022**

**BETWEEN**

**SAMUEL GACHIE KAMITI ..... PLAINTIFF**

**AND**

**OSEKO & OUMA ADVOCATES LLP ..... DEFENDANT**

**RULING**

1. What is before the court for determination is the Plaintiff's Notice of Motion dated 26<sup>th</sup> January 2021 filed under *inter alia* sections 1A, 1B, 3A and 63 (c) of the Civil Procedure Act, Order 40 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 5 of the Contempt of Court Act, No. 46 of 2016 seeking the following orders:
  1. Spent
  2. THAT Michelle Adhiambo Ouma and Christine Achieng Ouma Oseko, being Partners of the Respondent herein be committed to civil jail for a period not exceeding six (6) months for being in flagrant disobedience of the orders of this Honourable Court made on 20/12/2019.
  3. THAT the Respondent be directed to provide a complete certified copy(s) of Statement of Account for the client separate account where the sum of Kshs. 45,000,00000 was deposited as ordered by the Honourable Court on 20/ 12/2019.
  4. THAT the Respondent be directed to disclose the date it received the sum of Kshs.45,000,000.00 from the Defendants in Nairobi Hccc No. 543 of 2010 Samuel Gachie Advocates -vs - Equity Bank Limited & 6 Others.



5. THAT an order be and is hereby issued to NCBA Bank to make full disclosure of when it received and/or to confirm whether it received Kshs. 45,000,000/= from the Defendants in Nrb Hccc No. 543 of 2010, Samuel Gachie Kamiti — vs- Equity Bank Limited & 6 Others, on 22/11/2018.
  6. THAT an order be and is hereby issued to NCBA Bank to make full disclosure of the accrued interest and applicable negotiated interest rate and tenor from the date of receipt/deposit of Kshs. 45,000,000/= to 06/03/2019 when the money was placed in a separate designated Client interest earning account.
  7. THAT an order be and is hereby issued to NCBA Bank to make full disclosure of the applicable interest rate, tenor and frequency of interest application and rollover of the Principle Amount plus Accrued Interest in the separate designated Client account.
  8. THAT an order be and is hereby issued to NCBA Bank to make full disclosure of the gross accrued interest earned and applied and/or compounded to the principle amount of Kshs. 45,000,000/= from the date it received the said principle amount from the Defendants in Nairobi HCCC No. 543 of 2010, to the date of the ruling.
  9. THAT any other or further orders that this Court Honourable court will deem necessary to ensure that the dignity and authority of the court is respected.
  10. THAT the costs of this Application be met by the Respondent.
2. The application is supported by the Plaintiff's affidavits sworn on 26<sup>th</sup> January 2021 and 25<sup>th</sup> March 2021 respectively. It is opposed by the Defendant ("the Advocates") through the Replying Affidavit of their Managing Partner, Christine Ouma Oseko, sworn on 17<sup>th</sup> March 2021 and a Notice of Preliminary Objection of even date. The Advocates have also filed skeleton written submissions in support of their respective positions.
  3. The facts giving rise to the application are common ground and have been highlighted by the court in its previous rulings but for ease of reference and context, I will rehash them. The parties were in an advocate-client relationship that was cemented by a Retainer Agreement dated 13<sup>th</sup> November 2015 ("the Retainer Agreement") where the Plaintiff engaged the services of the Advocates to represent him in NRB HCCC No. 543 of 2010; Samuel Gachie Kamiti v Equity Bank Limited & 6 Others ("the Civil Suit").
  4. The Plaintiff was successful in the Civil Suit and was awarded the sum of KES 78,934,010.00 together with interest thereon at court rates from the date of filing suit until payment in full together with costs. The consequent decree issued in the Civil Suit was partially settled when the judgment debtors therein paid KES 45,000,000.00 to the Advocates which was held by them in a client interest-earning account in the name of the Advocates. However, the Advocates laid a claim of KES 44,290,900.00 over this sum on account of fees and in respect of the Retainer Agreement. A standoff and dispute ensued over the Advocates' claim as the Plaintiff asserted that he has already paid the Advocates a sum of KES 20,053,705,00 as legal fees, actuarial valuation fees and other charges which he considered to be more than enough in fees.
  5. In order to resolve the standoff which resulted in the Advocates exercising its lien over the decretal sum and Civil Suit documents, the Plaintiff filed the Originating Summons dated 7<sup>th</sup> February 2019



seeking release of his file and KES 40,000,000.00 of the partial decretal sum, with the balance of KES 5,000,000.00 being held in a joint interest earning account pending hearing and determination of the Originating Summons. The Advocates assailed the Originating Summons mainly on the ground that the Retainer Agreement contained an arbitration clause and thus the dispute ought to be referred to arbitration.

6. The court heard the matter and by the ruling dated 20<sup>th</sup> December 2019 issued final orders referring the dispute to arbitration, directing that the monies held by the Advocates and all accrued interest be moved into an interest earning account in the joint names of the Advocates or their lawyers and the Plaintiff's lawyers and remain therein pending hearing and determination of the arbitration or further orders of the court. The Advocates were also ordered to release the file in the Civil Suit to the Plaintiff's advocates on record.
7. Being aggrieved by the decision, the Advocates evinced their intention to appeal the same and consequently, through their Notice of Motion dated 17<sup>th</sup> January 2020 applied to the court to stay execution of the said orders of 20<sup>th</sup> December 2019. The court, in its ruling dated 6<sup>th</sup> July 2020 dismissed the Advocates' application but the Advocates, through their counsel made an application in open court for stay of execution pending their filing of an application for stay pending appeal under Rule 5(2)(b) of the *Court of Appeal Rules* at the Court of Appeal. The court granted the Advocates' prayer of stay of execution for a period of 45 days which was extended on application by the Advocates and consent of the parties on 15<sup>th</sup> September 2020. The Court of Appeal, in a ruling dated 18<sup>th</sup> December 2020 dismissed the Advocates' application.
8. In due course, the arbitration proceedings came to an end with the Arbitrator publishing the Award on 21<sup>st</sup> December 2020 ("the Award") where the Advocates' claim for fees was dismissed. The Plaintiff filed before the Arbitrator an application under section 34(2) of the *Arbitration Act* seeking clarification of certain parts/areas of the Award while the Advocates filed a Notice of Objection also before the Arbitrator challenging the jurisdiction of the Arbitrator to tax the Bill of Costs filed therein.
9. The Advocates then filed an application dated 19<sup>th</sup> January 2021 in NRB HC Misc. Civil Application No. E034 of 2021 seeking to stay the enforcement of the Award and an interim order that the funds held by the Advocates in the separate client account at NCBA Bank Kenya be maintained in the said account pending hearing and determination of the application. The court, through the ruling dated 23<sup>rd</sup> February 2021 and delivered by Muigai J., held in part as follows:

In light of the uncontested fact that there are ongoing ought to await final conclusion or orders from the Arbitrator so as to pave way for recognition and enforcement proceeding and/or setting aside proceedings. The Arbitral Tribunal ought to be given an opportunity to address the issues pending before it such as the Applicant's Notice of Objection to the Arbitrator's jurisdiction as well as the Respondent's request for clarification on the Arbitral Award.

The instant application is stayed pending conclusion of Arbitrator's proceedings. Since proceedings for recognition and enforcement of the Award have not commenced, naturally and logically there is stay of enforcement of the Arbitral Award pending hearing and determination of the matters pending before the Hon. Arbitrator's proceedings.

With regard to the interim order sought that funds held by the Applicant in separate client Account at NCBA Bank of Kenya be maintained in the said Account pending hearing and



determination of this application or such further orders of the Court, this Court shall state as follows;

- a. The High Court in HC MISC 64 of 2019 on 20<sup>th</sup> December 2019 granted orders that funds held by the Applicant in separate client Account at NCBA Bank of Kenya be maintained in a joint interest earning account.
- b. This is a Court order by the Court which is of equal concurrent and competent jurisdiction as this Court. This Court has been referred to the Ruling by Hon. Tuiyott J of 6<sup>th</sup> July 2020 dismissing application for stay of execution of these orders. There is also the Court of Appeal Ruling on stay of execution of the said orders pending appeal of 18<sup>th</sup> December 2020 and the Court dismissed the stay of execution application. This Court, therefore, lacks supervisory or Appellate jurisdiction to allow it to attend to in any way the said Court orders.
- c. More so, the said orders are the subject of pending appeal in the Court of Appeal whose decision bind this Court.
- d. Until and unless the order is varied, amended, set aside or successfully appealed against, this Court lacks requisite jurisdiction to deal with the same.

10. With above rendition in mind, I now turn to resolve the matter at hand.

#### Analysis and Determination

11. Having read the parties' respective depositions and pleadings and considered the Advocates' submissions, I propose to first deal with the preliminary issues raised by the Advocates in their Preliminary Objection.

#### Preliminary Objection

12. The Advocates contest the court's jurisdiction to entertain the Plaintiff's application and any further proceedings on grounds that this court is now functus officio since the publication of the Award therefore the orders of 20<sup>th</sup> December 2019 have lapsed. The Advocates submit that the orders of 20<sup>th</sup> December 2019 have been superseded by substantive orders issued by the court in NRB HC Misc. Civil Application No. E034 of 2021. In response, the Plaintiff counter that the court's orders of 20<sup>th</sup> December 2019 are still in force following the dismissal of the Defendant's application for stay pending appeal on 18<sup>th</sup> December 2020 by the Court of Appeal hence the Court has jurisdiction to entertain his application.

13. For ease of reference, the final orders of the court dated 20<sup>th</sup> December 2019 were as follows:

23. 1 The dispute herein shall be referred to arbitration in terms of Clause 12 of the Retainer Agreement of 13<sup>th</sup> November 2015.
23. 2 The monies now held in deposit by the Advocates and all accrued interest thereon shall, within 30 days hereof, be moved into an interest earning account in the joint names of the Advocates or their lawyers on record in this matter



and lawyers of the client and shall remain in the said account pending hearing and determination of the Arbitration or further orders of this court

23. 3 The Advocates shall release the client file in Nairobi HCCC No. 543 of 2010 Samuel Gachie Kamiti –vs- Equity Bank Limited & 6 Others to the firm of Kipkenda & Company Advocates within 30 days hereof
  23. 4 In the meantime, these proceedings are stayed
14. It is clear that the orders above were to remain in force until the hearing and determination of the arbitration or further orders of the court. In as much as the Award from the arbitration has since been published, has the arbitration been concluded? In staying the Advocates’ application and proceedings therein, the court in NRB HC Misc. Civil Application No. E034 of 2021 found that there were matters pending before the Arbitrator. The Advocates have similarly deponed as such in their deposition herein that the issues raised by the parties before the Arbitrator are still pending determination before him. It is therefore my view that the arbitration is yet to be concluded and fully determined for the court’s orders of 20<sup>th</sup> December 2019 to lapse. This is also buttressed by the fact that the Court of Appeal has since dismissed the Advocates’ application for stay of the said orders thus clearing any doubt on whether the orders are still in force or not. I reject the Advocates’ argument that the court’s orders of 20<sup>th</sup> December 2019 have since lapsed after publication of the Award.
  15. I also reject the Advocates’ interpretation of the court’s ruling and orders in NRB HC Misc. Civil Application No. E034 of 2021 to mean that they have now superseded the court’s orders of 20<sup>th</sup> December 2019 or that the court called for status quo in respect of the funds held in the Advocates’ client account as opposed to the joint interest earning account of the parties. Muigai J., was very explicit in her ruling that the court’s orders of 20<sup>th</sup> December 2019 were issued by a court of equal, concurrent and competent jurisdiction and that she lacked supervisory or appellate jurisdiction to allow herself to attend to the said court orders in any way in respect of that issue of the client account. The status quo she referred to was not in respect of the Advocates’ client account but in respect of enforcement of the Award. The effect of the court’s orders of 20<sup>th</sup> December 2019 remained legally and judicially undisturbed.
  16. For these reasons, I find that the Advocates’ Preliminary Objection dated 17<sup>th</sup> March 2021 lacks merit and is hereby dismissed.

#### Contempt

17. Turning to the Plaintiff’s application, I find that he is essentially seeking an order of contempt against the Advocates’ firm partners for disobedience of the court order dated 20<sup>th</sup> December 2019 and an order of disclosure and accounts in respect of the decretal sum held by the Advocates in their client account.
18. In order establish contempt, the Plaintiff bears the burden of proving that the subject order was clear, unambiguous and binding, that the Advocates had knowledge of the order and that they wilfully and deliberately disobeyed the order. The standard of proof in cases of contempt of court was explained in *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held that, “In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”



19. The court's orders of 20<sup>th</sup> December 2019 were clear, unambiguous and binding upon the Advocates' firm and I have no doubt that the Advocates had knowledge of the court's orders. However, I cannot say that based on the material before the court, they willfully or deliberately disobeyed the court's orders despite such knowledge. I think the Advocates had an honest but mistaken belief that the orders of the court had lapsed as evidenced by the fact of this litigation. To this end, the Plaintiff's prayer for committal of the Advocates' partners for contempt fails and is dismissed.

#### Disclosure and accounts

20. As stated, the rest of the Plaintiff's prayers essentially seek disclosure and accountability of the decretal sum held by the Advocates in their client account. The Advocates have annexed a statement of accounts in their deposition with indicates a balance of Kshs. 50,518,485.22 inclusive of the interest accrued and the interest rate applied. Section 176 of the *Evidence Act* creates a presumption in favour of a statement of account as follows:

176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

21. Since there are no other statements of accounts to dislodge this position by the Advocates and the Plaintiff has not really challenged the correctness or validity of the said statement, I am satisfied that a full account and disclosure of the sums held by the Advocates has been provided therefore prayers 3-8 of the Plaintiff's application have been answered and the court does not need to order any further disclosure or account of the said client account held by the Advocates.

#### Conclusion and Disposition

22. In conclusion, I find and hold that the orders of 20<sup>th</sup> December 2019 are still in force as the arbitration is yet to be determined and there exists no order of stay of execution either from this court or from the Court of Appeal. This means that the Advocates must comply with the said orders by moving the funds to an interest earning account in the joint names of the parties or their advocates, a process which, from the Plaintiff's deposition, had already been commenced. The Advocates are also obligated to release the Plaintiff's file in the Civil suit to his advocates on record.

23. For the reasons I have set out above, I dismiss the Plaintiff's application dated 26<sup>th</sup> January 2021 but with no order as to costs. The Advocates are directed to comply with the orders of 20<sup>th</sup> December 2019 within seven (7) days from the date hereof.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2022.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Odoyo instructed by Kipkenda and Company Advocates for the Plaintiff

Mr Ochieng Oduol with him Mr Tole instructed by TripleOKLaw LLP for the Defendants.

