



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 436 OF 2017**

**BETWEEN**

**JOHN MUGAMBI**

**T/A MUGAMBI & COMPANY ADVOCATES.....1<sup>ST</sup> PLAINTIFF**

**BEATRICE KARIUKI T/A**

**BEATRICE KARIUKI & ASSOCIATES.....2<sup>ND</sup> PLAINTIFF**

**AND**

**SHOWCASE PROPERTIES LIMITED .....DEFENDANT**

**RULING NO. 6**

1. This is Ruling No. 6 in this matter. The application before the court is the Defendant's Notice to Motion dated 30<sup>th</sup> March 2021. It is made under **sections 3A and 96** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and **Order 22 rule 22** of the **Civil Procedure Rules**. The application seeks an order that, "*This Honourable Court do find the Plaintiffs, their servants and/or agents had attempted to defraud the Judiciary/Court by use of a fraudulent filing fees receipt.*" It also requests the Court to find that, "*the discretions (if any) exercised by the Deputy Registrar of the court so as to allow the Plaintiffs to pay the filing fees was obtained through misrepresentation and further fraud on the court.*"

2. The grounds of the application are set out in the affidavit and supplementary affidavit of the Defendant's director, Francis Gachanja, sworn on 30<sup>th</sup> March 2021 and 9<sup>th</sup> April 2021 respectively. The application is opposed through the replying affidavit of John Mugambi sworn on 7<sup>th</sup> March 2021. Both parties relied on their respective written submissions.

3. It is common ground that this suit was filed by the firm of *Arimi Kimathi and Company Advocates* on behalf of the Plaintiffs on 31<sup>st</sup> October 2017 and were issued with Receipt No. 8561096 for KES. 73,560.00. On 14<sup>th</sup> January 2020, the Defendant's Director wrote to the court requesting for verification of the aforesaid receipt. In response, the court, by a letter dated 30<sup>th</sup> January 2020 stated that the receipt did not emanate from the court. By a letter dated 17<sup>th</sup> February 2020, the Deputy Registrar wrote to the 1<sup>st</sup> Plaintiff requesting him to regularize his pleadings in the matter. The 1<sup>st</sup> Plaintiff thereafter paid KES. 70,740.00 on 18<sup>th</sup> February 2020.

4. It is on the basis of the aforesaid facts, that the Defendant argues that the Plaintiffs have attempted to defraud the court. It contends that the firm of *Arimi Kimathi and Company Advocates* has not filed any affidavit showing that it paid the filing fees in the matter. Counsel for the Defendant submits that the law under **section 96** of the **Civil Procedure Act** is clear that a party must be granted discretion or permission of the court to pay the filing fees and in this case what the Plaintiffs did was by use of fraud and misrepresentation, deceive the Deputy Registrar to write the letter dated 17<sup>th</sup> February 2020 advising the Plaintiffs to regularize their pleadings by payment of the requisite court fees. It contends that the letter from the Deputy Registrar although copied to the Defendant's Director was never sent to the Defendant although the same was received by the Plaintiffs on 18<sup>th</sup> February 2020 and they made the payment the same day at the bank.

5. Counsel for the Defendant submits that the Plaintiffs have used the judicial system/process to fraudulently obtain a decree against the Defendant yet they did not pay any filing fees. That in such a case, the consequence of their acts must be for the court to declare all the proceedings null and void and strike out the suit.

6. The Plaintiffs oppose the application based on the ground that that the application is res-judicata and an abuse of the court process as the court did strike out the Defendant's application dated 24<sup>th</sup> November 2020 raising the same issue as an abuse of the court of process. In their view, the court handled and settled the issue of court filing fees.

7. In their replying affidavit, the Plaintiffs' position is that the suit was filed on their behalf by the firm of *Arimi Kimathi and Company Advocates* to whom they paid filing fees. They aver that once the issue of non-payment of filing fees was brought to their attention, they appealed to the Deputy Registrar under **section 96** of the **Civil Procedure Rules** and the Deputy Registrar allowed them to regularize their position by paying duly assessed fees whereupon they were issued with a filing fee receipt.

8. Resolution of this matter is governed by **section 96** of the **Civil Procedure Act** which states that:

*96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.*

9. This provision is permissive and the court has discretion to excuse the failure to pay fees where there are reasons given for such failure and in that case condone the consequences of the default (see ***Mombasa Cement Ltd v Speaker, National Assembly & Another NRB Pet. No. 177 of 2015 [2018] eKLR*** and ***Agnes Kwamboka v Philemon Matoke Mosioma & 2 Others KSI Civil Appeal No. 135 of 2018 [2019] eKLR***).

10. In this case the court filing receipt was found to be fraudulent. The suit was filed, not by the Plaintiffs in person, but by the firm of *Arimi Kimathi and Company Advocates*. That firm by the letter dated 18<sup>th</sup> February 2020 to the Plaintiffs stated that, "Upon filing the suit above described, our clerk was in the normal course of the Court Registry procedure issued with the receipt; a copy of which you sent with your letter under reference." Based on this letter, I do not see any evidence that the Plaintiffs were involved in the fraud as the matter was clearly filed by the firm instructed by them. In the circumstances, it was not even necessary for the firm of *Arimi Kimathi and Company Advocates* to file an affidavit as contended by the Defendant.

11. Further, the Deputy Registrar stated in the letter dated 17<sup>th</sup> February 2020 that this and other matters in the Commercial and Tax Division were subject to audit and investigation and in accordance with the resolution of the Bar Bench Committee, the Deputy Registrar required the Plaintiffs to regularize the position under **section 96** of the **Civil Procedure Act**. In my view, the issue of filing fees has been resolved within the law and for over a year, the parties have participated in and taken further proceedings in the matter. I also hold that if any criminal proceedings are to be taken, they would not affect the suit or the Plaintiffs as it is the clerk in the firm of the *Arimi Kimathi and Company Advocates* who filed suit and the court clerk who may have issued the receipt who should be called upon to answer to any charges.

12. In the submissions, the Plaintiffs called on the court to restrain the Defendant from filing any further application. I reject this entreaty as it not founded on any application. Further, I cannot say the applications the Defendant had filed lacked bona fides.

13. The Notice of Motion dated 30<sup>th</sup> March 2021 is now dismissed with costs to the Plaintiffs.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 21<sup>ST</sup> day of APRIL 2021.**

**JOHN M. MATIVO**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiffs.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.