



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL No. 65OF 2019**

**(Formerly Bungoma HCCA No 36 of 2014)**

**BETWEEN:**

**JOHN OKELLO SIANGANI.....APPELLANT/ RESPONDENT**

**AND**

**GERMAN ASSISTED SETTLEMENT PROGRAMME (GASP) alias GERMAN  
TECHNICAL CO-OPERATION (GTZ) alias GERMAN INTERNATIONAL  
CO-OPERATION (GIZ).....RESPONDENT/APPLICANT**

*(Being and Appeal from the Decision of Hon. Hazel Wandere*

*PM delivered in Mumias Senior Principal Magistrate's Court*

*Civil Case No. 105 of 2013 on the 17<sup>th</sup> October 2013)*

**RULING AND J U D G M E N T**

**RULING**

1. This Matter has a long and chequered history. It started life as a Small Claim in the Mumias Principal Magistrate's Court. It has then evolved into a matter with several applications before several High Court eventually ending up in Kakamega High Court under this file number. What brings the matter before the Court now is the Application of the Defendant/Respondent.

2. The Application is dated 20<sup>th</sup> August 2015. It is brought by a Notice of Motion under **Section 3A and 3B of the Civil Procedure Act** and all other enabling provisions of Law. The Applicant (Respondent to the Appeal) seeks the following Orders, THAT:

*“1. The Memorandum of Appeal and any further proceedings filed by the Appellant herein be struck out.*

*2. The Appellant and/or the Appellant's Advocate do comply with the order of the Senior Resident Magistrate's Court in Mumias made with 17<sup>th</sup> October 2013 and the subsequent order made on 28<sup>th</sup> May 2014 forthwith*

*3. The Appellant do pay the Respondent the costs of this Application.*

3. The Application is premised on the Grounds that appear on its face which are THAT:

*“1. The Senior Resident magistrate's Court in Mumias made an order on 17<sup>th</sup> October 2013 for the deposit in court of the decretal sum of Kshs. 780,000/= by the firm of JW Sichangi & Company Advocates.*

*2. On 28<sup>th</sup> May 2014, the Senior Resident magistrate's Court in Mumias delivered a ruling and:*

*(a) Set aside the judgment entered on 25<sup>th</sup> May 2013 and granted the Respondent leave to defend the suit.*

*(b) Ordered on 28<sup>th</sup> May 2014 that the decretal sum of Kshs. 780,000/= that was paid to the Appellant and/or the Appellant's advocate be deposited in a joint interest account in the names of the advocates for the parties.*

*3. The Respondent's advocates filed and served the defence together with the supporting documents as ordered by the court but the Appellant's Advocates failed to comply with the order requiring them to deposit the decretal sum in court.*

*4. The Appellant and/or the Appellant's advocates have to date not complied with the court order despite numerous reminders from the Respondent's advocates.*

*5. The Appellant and/or the Appellant's advocates have displayed brazen contempt for the court by disobeying the aforesaid two Court Orders.*

*6. The Appellant has not served the Respondent or its advocates the Memorandum of Appeal or any record of Appeal in this matter.*

*7. The Appeal herein is an abuse of court process on the part of the Appellant. The Appellant's intended appeal is brought in bad faith with the sole to delay compliance with the orders made by the lower court on 17<sup>th</sup> October 2013 and on 28<sup>th</sup> May 2014.*

*8. It is just and fair that the Memorandum of Appeal and any further proceedings filed by the Appellant herein be struck out.*

*9. It is in the interest of justice that the orders sought be granted.*

4. The Application is also supported by the Affidavit of Faith Githinji. In it she states that she is the head of administration and finance of the Defendant/Applicant. The Affidavit is in support of the Application to strike out the Memorandum of Appeal. She relates that the Respondent obtained judgment in default in CMCC 105 of 2013. She says that she only became aware of the proceedings on 14<sup>th</sup> October 2013 when she was served with a warrant for the attachment of the Organisations property together with the Auctioneer's invoices in execution of a degree "passed against the Organisation on 25<sup>th</sup> May 2013". From paragraph 5 onwards she states

*"5. Upon enquiry as to how the court documents were received by the organization, I established that the summons were received by Evance Mundia, a Programme Officer who only p[l]aced them in the file and did not notify the Organisation;s Administration. The said Evance Mundia is not authorized to receive court summons and had no knowledge as to the effect of the summons. The summons ought to have been served on either myself or the Organisation's County Director, Hendrik Linneweber. Copies of the proclamation notice, the summons, the plaint and the amended plaint, the notice of entry of judgment and the decree that were.... Received by the said Evance Mundia are at page 6-14 of the exhibit.*

*6. The plaint filed in Court on 11<sup>th</sup> March 2013 (page 8 to 9) sought judgement for a sum of Kshs 27,247 plus interest and costs. The amended Plaint was stated to be amended on 31<sup>st</sup> May 2013 ..... the record reflects that judgment was entered for the sums set out in the amended Plaint long before the amended Plaint itself had been filed.*

*7. In addition, the decree also contained an award of interest computed at Kshs 496,496 without any indication of the rate applied or indeed the basis for such award.*

*8. I verily believe that is indication of professional ethics on the part of the lawyer for the Appellant who as an officer of the Court should endeavour to do justice and assist the Court and not mislead it....*

*10. At the same time, the Organisation was compelled to issue a cheque for the decretal sum in the name of the lawyers after the auctioneer on the lawyer's instructions, rejected a cheque drawn for payment into Court. The Organisation was also compelled to settle the auctioneers charges of Kshs. 110,000/-...*

*12. I was further informed by Ezra Makori which information I believe to be true that on 17<sup>th</sup> October 2013, they were informed by Mr. Kweyu advocate from the firm of E.K. Owinyi & Co Advocates that:*

*(a) The application had been filed and heard ex parte under certificate of urgency*

*(b) The court had issued on order requiring the plaintiff's advocate to deposit the decretal sum in court pending the hearing and determination of the application.*

*(c) He was in the process of extracting the order so he could have it signed by the court for service upon the plaintiff's advocate together with the application.*

5. The Respondent filed a Replying Affidavit on 16<sup>th</sup> December 2015. In it he says;

*"3. That I impeded the Applicant herein over payment of dues in respect of my deceased father.*

*4. That I filed suite vide Mumias SPM case No. 105 of 2013 and caused all p leadings to be served upon the applicants who equally admitted they were served...*

5. *That upon service of the pleadings the Applicants ignored the court process wherein the suit proceeded ex parte and judgment was entered in my favour .*
6. *That the warrants of attachment were issued to Eshikoni Auctioneers who levied execution and two cheques were issued one in favour of the Auctioneer and another in satisfaction of the decree....*
7. *It is not true that the cheques were paid upon the undertaking of my Advocate that we shall return or deposit the monies in court as as such.*
8. *That at any rate the Applicants called me and informed me of the payments done to my Lawyer and I sent him a test to the effect that I was aware of the Ks. 780,000 deposited on his account.*
9. *That I then called my Advocate and we agreed on his gees then released the decretal sum to my account at Equity Bank.*
10. *That we sat as a family of the late and shared out the monies among the beneficiaries of father's estate as I was just Administrator.*
11. *I was surprised to later learn from my Advocate that he had been served with an order and an application seeking to set aside judgment.....”*

That confirms the sequence of events put forward by the Applicant.

6. The long and the short of it is that the Advocate at first said that the cheque had been returned unpaid. Then under the threat of execution by Auctioneers, the cheque was re-presented. The monies were cleared into the Advocates account and then released to the Client instead of depositing them into the Court as required.

7. The Application to set aside the judgment in default in its various permutations was heard inter partes on 17<sup>th</sup> January 2014. By a ruling delivered on 28<sup>th</sup> March 2014 the judgment was set aside, the defendant was granted leave to defend and the plaintiff and/or his advocate were to pay the sum of Kshs.780,000/= into an interest earning account in the joint names of the advocates of the parties. The monies were never paid into a joint account. The Deponent of the Supporting Affidavit states that she believes that the Plaintiff's Advocate Mr Sichangi was fully aware of the terms of the order of 17<sup>th</sup> October 2013 before he released the monies to his client and therefore he circumvented the order knowingly. Mr Sichangi answers this by saying that the Professional Conduct Committee have considered this and did not find him culpable. The Plaintiff did not appeal against the order setting aside the judgment. Instead there was an application for a review. That application was unsuccessful. It is that refusal to review that is the subject of the Appeal that the Applicant is asking the Court to strike out. The Applicant also states that neither the Organisation nor its Advocates have been served with a memorandum of appeal.

8. The Appellant/Respondent to the Application filed Grounds of Opposition. The Grounds set forth are:

1. *That the application herein is a non-starter, unmeritorious and malafides.*
2. *That the Applicant has not cited the Respondent for any disobedience of the orders in question or at all prior to filing this application.*
3. *That the Applicant did file a similar complaint or application before the Advocates Disciplinary Committee and a decision was made appropriately.*
4. *The Applicant are the authors of all misfortunes that befell them and cannot now paint dirt on innocent players as they admitted having been served with all the court documents including proclamation, yet they ignored the court process which they now shout that the appellants abused.*
5. *That the Applicants Advocates became seized of the matter before payments were made, if indeed they wanted to challenge the decree, they could have been the ones to deposit the decretal sums in court not to pay off the decree in total settlement then purport to now reverse the process which they know is essentially untenable.*
6. *That the Applicants have all along made false allegations to implicate counsel for the Respondent or trap him in this matter unfairly and that seems to be their objective all through.*
7. *That Applicants affidavits contain serious falsehoods that were made before the Advocates Disciplinary Committee and we demonstrated that all due processes were followed and payments made without any disclosure or service of the alleged court orders or at all.*
8. *That the issues raised in the application are materially the merits of the appeal or otherwise hence determining them at a preliminary stage is like preempting the appeal.*
9. *That the Applicants have frustrated the efforts of the Appellant to have this appeal heard and concluded by instituting many parallel proceedings and numerous letters to the court that interfered with processing and typing of proceedings.*
10. *That the Applicant is unnecessarily making repetitive applications without recourse to any known procedure.*

11. *That the application is therefore incompetent and discloses no genuine cause to be granted hence it ought to be dismissed with costs.*”

9. There is also a Notice of Preliminary Object on the following grounds:

*“1. That the issues raised were canvassed before the Advocates Disciplinary Committee where the Applicants herein filed a complaint in accordance with the law to have them deliberated and a decision was made on the same.*

*2. That no appeal or decision has been made overturning the findings of the Advocates Disciplinary Committee decision yet same issues are being made or brought before another jurisdiction.*

*3. That at any rate, the Advocate or law firm acted in its capacity as Advocates for the Appellant herein and at no time were they made parties to proceedings and no professional misconduct or act were occasioned by the said firm of Advocates to enable this Honourable Court make orders now being sought.*

*4. The matters raised as against the firm of Advocates on record are res judicata hence the application ought to be stuck out with costs.*

*5. That the issues raised in the application are the very material issues of the appeal and determining them will amount to a preliminary determination of the merits of the appeal.”.*

10. The Appellant herein John Okello Siangani filed a Plaintiff. He was represented by the firm of J.M Sichangi & Co Advocates of Mumias. In his Plaintiff he identifies himself as the (Personal Representative of the estate of Joseph Siang’ani). The Plaintiff was clearly entitled “Small Claims”. The Suit relates to the dues payable to Joseph Siang’ani (“the Deceased”). Joseph Siangani was an employee of the Respondent/Applicant until his death on 21<sup>st</sup> July 1996 aged 46 years. The Deceased was based in Lamu at the time of his death. In the Death Certificate he is said to have been a resident of Bugasi Sub-Location (Butere). On 29<sup>th</sup> November 1996 the Respondent/Defendant’s Officers in Lamu wrote to the wife of the Deceased at an address for Sigombere via Kisumu. The Letter enclosed a cheque for Kshs.27,247/- (Kenya Shillings 27,247 only) being the amount due to the Deceased. On 7<sup>th</sup> June 1997 the Respondent wrote to the Widow explaining that the final dues had been deposited into an interest earning account on legal advice. It also said that the funds will only be released to a Court Appointed Administrator. The Appellant Plaintiff obtained Letter of Administration from the Principal Magistrate in Maseno issued on 9<sup>th</sup> July 2010. In his Plaintiff, the Appellant pleads that the defendant arrived at the figure of Kshs.27,247 as final dues. The amendment states that the amount states was “an erroneous figure intended to fleece the widow and heirs of the late Siang’ani. Also that no sums were every paid.

11. Attached to the Plaintiff alongside the Verifying Affidavit are TWO separate death certificates for the Parents of the Plaintiff. The First was issued on 27<sup>th</sup> August 1996 by the Registrar of Kakamega District. The Deceased was said to have been resident in Kakamega (Serial No 304784). The Second was issued on 21<sup>st</sup> October 2008 by the Registrar in Butere for Selina Ongwel Siangi who passed away aged 58 on 26<sup>th</sup> June 2005 in Bungasi (which is in Butere) (Serial No. 15984). However the Letters of Administration were applied for and issued in Maseno by the Plaintiff who claims to have lived in Musanda which is near Kisumu. The Letters of Administration record the date of death as 1<sup>st</sup> July 1996 (which is inconsistent with the Death Certificate). The Plaintiff was issued in Mumias and the Plaintiff averred that the cause of action arose within the jurisdiction of that Court.

12. On 31<sup>st</sup> May 2013, the Plaintiff with the assistance of the same advocate filed an amended Plaintiff. In it he claimed that the Defendant had “fleece” the Deceased by making unjustified deductions to the entitlement. At paragraph 8 of the Amended Plaintiff, it is averred “That from the defendant’s computation referenced KC/KK/29/II/1996 the import of the document is that, if the deceased would not have had any unsubstantiated deductions owing to illness and death, he would have earned a total sum of Ks.212,784 in terms of salary up to July including gratuity, medical insurance and group life insurance.”. At paragraph 9 it is pleaded “That the recoveries are not supported by documentation or otherwise and that the family of the late including the plaintiff footed the bill for transportation of personal effects and coffin and quite a lot was spent on the deceased’s medication...”. The truth of those averments is confirmed by the Verifying Affidavit sworn by the Plaintiff and Commissioned by Advocate Kevin Luchivya of Bungoma. The Plaintiff was able to pay the sum of KShs.8,905/= in Court fees. The Affidavit of Service dated 5<sup>th</sup> June 2012 states that service was made on “an officer therein by the name MUNDIA” on 26<sup>th</sup> March 2013. However, the copy with the signature affixed is not attached. The second Affidavit of Service dated 26<sup>th</sup> June 2013 depones that the Amended Plaintiff was served on 7<sup>th</sup> June 2013 by handing in to a “female officer ... who introduced herself ... as Pauline. The copy of the Amended Plaintiff attached is stamped as received by Pauline on 9<sup>th</sup> June 2013. The Request for Judgment was filed on 25<sup>th</sup> June 2013. It states that the Defendant has not filed a defence nor entered an appearance within the prescribed period of time.”.

13. By 1<sup>st</sup> July 2013 Judgment in default for the full sum claimed had been entered. That suggests that in the three working days between the Request and the Notification, the SRM’s Court in Mumias was able to hear the application for judgment in default as well as hearing the proof of the debt. Even in this era of performance measurement, that is an admirable feat! The typed (but not certified) version of the proceedings on the file show that the Magistrate who came to that decision, took into account only the date the Plaintiff was filed and not the Amended Plaintiff, AND the order made is “*I hereby enter judgment as **prayed in the plaintiff***.”. It is signed by H. Wandere, PM.

14. The Notice of Entry of Judgment was served by the same Process Server (Peter Lubia) on the 8<sup>th</sup> of July 2013 upon the same female officer called Pauline, however the Process server states that at the offices he met “*some female officer who I cam to learn is called Pauline...*” It is not clear, therefore, if that is the same Pauline he met on earlier occasions or a different one. On the next day, 9<sup>th</sup> July 2013, the firm of J.W. Sichangi & Company Advocates filed a request for a decree seeking the Principal sum contained in the Amended Plaintiff. The Request contains a section entitled “Certificate of Costs”. A Certificate of Costs in the true meaning of the term is a certification issued by a taxing master after costs have been taxed. In this case it appears to have been sued in lieu of a bill of costs. Included in the costs is an

item for “service of decree and certificate of costs”. Both events that had not taken place yet appear to have been allowed.

15. On 25<sup>th</sup> July 2013 Hon Hazel (Wandere) issued a decree. The Decree was not consistent with the Judgment in Default ordered by the same judicial officer as it included the principal amount of KShs.212,784 from the Amended Plaintiff and not the amount in the Plaintiff as adjudicated upon. Interestingly, both the Certificate of Costs and the Decree use the same amounts but for different categories of expense. For example the Advocate’s Certificate of Costs claims KShs.2,290 as Court Fee on the Plaintiff. However, the Decree categories an identical amount as Attendance Fee when the Advocate had not claimed any attendance fee. Further, the Instruction Fee included in the figure of taxed costs (KShs.16,800/=), is repeated as Party and Party Costs. A completely new entry for Witness expenses of KShs.39,805/= is included. On 19<sup>th</sup> August 2013 that decree was served by Peter Lubia “*on a brown lady who has oftenly introduced herself to me as Pauline throughout the time ....*”. The Decretal sum was calculated as KShs.709,280. On 29<sup>th</sup> August 2013, the Firm of J.W. Sichangi filed an Application for Execution of the Decree at the SRM’s Court. With the addition of further costs the amount rose to KShs.769,925. The Request describes the “*mode of assistance*” as “*issuance of warrants of attachment and same to be executed by Eshikoni Auctioneers*”. The Warrant was duly issued and signed by the same judicial officer “Hazel” in the sum of KShs.780,000/=. There was an increase of KShs.10,000/ or thereabouts which cannot be explained by the documents on the Court File.

16. It appears that the Warrant was not executed within the 30 days suggested on its face, but on or around 11<sup>th</sup> October 2013. On 14<sup>th</sup> October 2013 the Respondent/Applicant issued two cheques drawn on its account at Citibank. The First Cheque was made out to Eshikhoni Agency (purportedly the auctioneers) in the sum of KShs.110,000/= and the Second Cheque was made out to the firm of S.W. Sichangi & Co Advocates in the sum of KShs.780,000/=. The Invoice issued by Eshikoni Agency/Auctioneers suggests the charges were variable and/or negotiable rather than a fixed assessment of work done/sums recovered. It appears that Eshikoni Agency/Actioneers attended for proclamation on 19<sup>th</sup> September 2013.

17. On 16<sup>th</sup> October 2013, the Defendant/Respondent/Applicant filed an application under a certificate of urgency. The Application sought the following orders:

*“1. This application be certified urgent and be heard ex parte in the first instance.*

*2. Pending the hearing and determination of this application, the sum of Kshs 780,000/- be paid by the Defendant to the plaintiff’s agents on 14<sup>th</sup> October 2013 in satisfaction of the judgment herein be deposited in court or be otherwise secured as the court directs.*

*3. The judgment entered herein against the Defendant and all consequential orders be set aside and the Defendant be at liberty to defend the suit.*

*4. Pending hearing and determination of the suit, the sum of Kshs 780,000/- paid to the plaintiff and/or the plaintiff’s advocate be deposited in a joint interest account in the names of the advocates for the parties herein.*

*5. The costs of the application be provided for”.*

18. The Application was brought on the 10 grounds which appear on its face. These included that the application was made without delay, that there is a good defence and the Defendant has already paid the Auctioneer’s costs.

19. On 17<sup>th</sup> October 2013 the Application came before Hon H. Wandere PM. Neither Party was present. The Record shows that the Learned Magistrate allowed prayers 1 and 2 of the Application pending inter-parties (sic) hearing on 08/11/13. When the order was served on Messrs J.W. Sichangi on 23<sup>th</sup> October 2013. The next day, it became received under protest with the annotation that the “same has been overtaken by events”. That is interesting because on 17<sup>th</sup> October 2013, the Respondent/Defendant’s Advocates wrote to the firm of J.W. Sichangi & Co Advocates informing them that an application seeking to set aside the judgment had been made. It was further stated that; “This is to notify you that the Magistrate gave an order that the sum of KShs.780,000/= that was paid to you by the defendant in satisfaction of the judgment should not be released to the plaintiff until the application is heard. We are in the process of having the order extracted and served on you. We trust that the Court order which you now have notice of will be obeyed.” Clearly, the expectation was optimistic. At the same time, the same Advocates sought to suggest that the cheque was dishonoured. It seems it was re-presented on 22<sup>nd</sup> October 2013 when Mr Sichangi had given an undertaking not to divest the funds, however, he instructed the auctioneers to attend the premises of the Defendant/Respondent again to demand more money.

20. On the 5<sup>th</sup> November 2013 the Appellant through his Advocate filed a Replying Affidavit and Grounds of Opposition. The Grounds relied upon are:

*“1. That the application is an afterthought misconceived and untenable.*

*2. The decree and the entire court process was duly and properly served upon the defendant/Applicant. The details of the transactions were contained in a Further Affidavit filed by an Advocate also acting for the Defendant.*

On 17<sup>th</sup> January 2014, Mr Sichangi filed a Preliminary Object seeking to have the Further Affidavit struck out because the Defendant/Respondent had allowed its privileged documents to be disclosed.

21. The Ruling on the Application which was scheduled to be delivered on 14<sup>th</sup> February 2014 was eventually delivered on 24<sup>th</sup> May 2014 for the reasons that are recorded in the proceedings. In her Ruling the Learned Principal Magistrate said,

*“I have perused the court record. Indeed there is an ammended(sic) plaint filed five days after judgement, it has been alleged that the claim is time barred, and there are beneficiaries who have been deprived.*

*All these are triable issues. I have also considered the preliminary objection raised by the Respondent Advocate. The same does not raise any legal issues.*

*In this matter I will allow the notice of motion dated 16<sup>th</sup> October, 2012 as no prejudice will be suffered by this plaintiff. The defendant to pay him throw away costs. The defendant to have his day in court in the best interest of justice. Each party to bear it's own costs.”.*

22. On 25<sup>th</sup> April 2014, the Appellant filed a Memorandum of Appeal appealing against the entire ruling and or judgment which was delivered on 28<sup>th</sup> March 2014. The Memorandum was filed in the High Court at Bungoma as Civil Appeal No 36 of 2014, although the Court with supervisory jurisdiction over Mumias is the High Court at Kakamega. That meant the Lower Court File ended up in Bungoma for the purposes of the Appeal. It was subsequently transferred to Kakamega.

23. In addition to the complaints made in relation to how the judgment in default for the amended sum was obtained and executed, the Applicant has also raised the question whether the Plaintiff was in fact the proper administrator for this family given that the Deceased appeared to be polygamous. If he is not then he set out to actively mislead the Court in Mumias to that effect.

24. However, the Application that the Court has to decide now is only whether to allow the Application and strike out the Appeal. In substance, the Appeal is an appeal against a refusal to review. Whether or not a court, however comprised, decides to review its decision is an exercise of discretion. It is that exercise of discretion that is being appealed against. The Parties were directed to serve written submissions. Those that were filed have been carefully considered.

25. The Applicant argues that the Appellant's failure to comply with the magistrates' court's orders should be dealt with firmly by striking out the memorandum of appeal. It is also said that the Appellant has not prosecuted his Appeal.

#### **JUDGMENT**

26. It appears to this Court firstly that the Appellant does not feel himself bound by court orders. In relation to the Appeal, the Appellant has failed to prosecute his appeal for very much more than 12 months. It is said the Appeal was admitted for hearing but the memorandum was not served, nor has a record been filed. Further, the Appeal has very little chance of success as the Appellant will have to satisfy the Court that there was an incorrect exercise of discretion in the face of the flagrant disregard of Court orders enumerated in the Application.

27. In the circumstances, the Appeal is dismissed with costs.

28. It was not possible to deliver this Judgment when it was scheduled due to the Covid -19 containment rules. Any inconvenience is regretted. Further, after the Judgment was delivered electronically the file became corrupted and had to be re-constituted. In the circumstances, time will only begin to run from 15<sup>th</sup> December 2021.

**Order accordingly,**

**FARAH S. AMIN**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS THE 19TH DAY OF NOVEMBER 2021 IN KAKAMEGA ONLINE USING MS TEAMS PLATFORM.**

**In the Presence of:**

Court Assistant: Dennis Wasilwa