



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL SUIT NO.4 OF 2017(O.S)

AND

IN THE MATTER OF ORDERS 55 AND 56 OF THE ADVOCATES ACT

AND

IN THE MATTER OF ORDER 52 RULES 4 AND 7 OF THE CIVIL PROCEDURE RULE 2010

AND

IN THE MATTER OF AN UNDERTAKING BY THE FIRM OF ODHIAMBO & WEDA ADVOCATES

HENRY KIPKORIR KIMUTAI.....APPLICANT

-VERSUS-

WEDA AMBROSE OTIENO.....1ST RESPONDENT

ODHIAMBO DISMUS OMONDI WAKLA.....2ND RESPONDENT

(Both Respondent formerly trading as Odhiambo & Weda Advocates)

RULING

1. By a ruling of this court dated the 20th December 2018, the 1st Respondent, Weda Ambrose Otiemo Advocate was ordered to pay to the applicant the decretal sum of Kshs.4,000,000/= by depositing half of the said amount in an interest earning account while the other half was to be paid to the Applicant, pending hearing and determination of an intended appeal. This was a conditional stay order.

Seven months since, the advocate has failed to comply with the said orders.

2. In his **application dated 30th May 2019** the Advocate – the 1st Respondent seeks for orders:

1. That time for compliance with the court order made on the 20th December 2018 be extended and/or enlarged, and

(a) Kshs.2,000,000/= payable to Henry Kipkorir Kimutai be liquidated by monthly instalments of Kshs.75,000/=.

(b) Time for depositing Kshs.2,000,000/= in a joint interest earning account in the names of the parties advocates be extended by a further 120 days.

(c) Costs of the application be provided for.

3. The Advocate has invoked provisions of **Order 50 Rule 6 of Civil Procedure Rules** and **Section 3, 3A and 95 of the Civil Procedure Act**, on grounds that he is facing financial hurdles in compliance with the court orders and is making efforts to comply, thus the request for

time extension.

It is further supported by an Affidavit by the Advocate sworn on the 30th May 2019 as well as written submissions filed on the 8th July 2019.

4. The Applicant (in the Originating Summons), now Respondent opposes the application by his Replying Affidavit sworn and filed on the 3rd July 2019 and written submissions filed on the 5th July 2019.

5. I have considered the rival positions.

By the application the advocate confirms non-compliance with lawful court orders, and the continued enjoyment of unwritten stay orders from the 20th December 2018 to date. The court record shows a filed Advocate-client Bill of costs in the sum of Kshs.1,007,925. It is dated 21st June 2018 – but filed on the 28th February 2019. It is yet to be taxed. In my view, the outcome of the taxation will have no bearing or otherwise to this application.

6. In his affidavit in support of the application, the Advocate avers that he had Kshs.1,000,000/= at the time the orders were made, and is putting efforts to get the balance, by sale of one of his properties- situated at Syokimau, Machakos County.

If this be so, why then would the Advocate not have released at least, the Kshs.1,000,000/= to the client, if only to show good will, if not deliberate and blatant disobedience of court orders, as he contemplated approaching the court for an order to extent time for compliance? Is it a matter of abuse of court process?

7. In the case **Judicial Service Commission –vs- Mawell Miyawa & 7 Others (2018) e KLR**, the Court of Appeal Judges rendered that

“---to the respondents, this is an abuse of the court process because, despite the trial court having granted the applicant sufficient time within which to deposit the decretal sums, the applicant has failed and or refused to do so. And without complying the applicant has instead chosen to abandon the conditional stay in the lower court, and now comes in search of another stay of execution in this court....”

8. The inherent powers of the court conferred by **Section 3 and 3A of the Civil Procedure Act**, in my considered opinion are not open-ended, nor a panacea of all manner of applications. It is only by compliance with court orders that the court’s authority can be enforced and justice be seen to be done.

9. I am aware that the court ought not put an advocate to a tight corner and possible adverse effects on his practice of law. But the client’s interests must also be taken into account – and protected as well - **Oraro & Rachier Advocates –vs- Co-operative Bank of Kenya Ltd (1991) EA 236**.

10. I have been urged to enlarge time for the advocate to comply with the orders issued on the 20th December 2018.

The court’s discretion in that regard is wide and unfettered, more so where no real or substantial prejudice may be occasioned to the respondent as held by **Justice Kiage JA in Millie G.A. Odhiambo & 3 Others –vs- Tonny Moses Odera (2018) e KLR**. However the discretion ought not be abused or overstretched to cushion an otherwise not serious litigant or advocate.

11. Having considered the relevant factors as well as the legal provisions that underpin the nature of such applications, it is evident that the Advocate – 1st Respondent is clearly bent to undermine the court’s authority by his actions and conduct – See **Millie G.A. Odhiambo (Supra)**.

There is no doubt that the client (Applicant) in (O.S) has suffered, and continue to suffer substantial financial loss and prejudice by the non-compliance of the conditional stay orders of the 20th December 2018.

12. Justice is two edged; to both litigants. Neither is at liberty to disobey lawful court orders without demonstrable and plausible reasons. At the date the relevant court orders were issued, the advocate, by his own admission had Kshs.1,000,000/=. No reasons have been advanced as to why that sum has not been released to the client in the interim. Had that been done the court would have been persuaded of the genuineness by the advocate to comply, albeit in part, of the court orders.

13. In view of the above, I decline to grant the orders sought by the 1st Respondent (the Advocate) as no good faith has been exhibited by the 1st Respondent since the conditional stay orders were issued. Those orders remain in force unless set aside by the court.

14. The application dated 30th May 2019 is dismissed with costs to the Applicant – Henry Kipkorir Kimutai.

It is so ordered.

Delivered, Signed and Dated in Nakuru this 31st Day of July 2019.

.....

J.N. MULWA

JUDGE