



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.171 OF 2014

ALICE NASAMBU WEKESA.....PLAINTIFF

VERSUS

STEPHEN SANGURA MAKHANU.....DEFENDANT

RULING

I have before me the Plaintiff's Notice of Motion dated 26th September 2017 in which she seeks the following Orders:

- (a) Spent**
- (b) That there be a temporary stay of execution of the Decree herein pending the hearing and determination of this application.**
- (c) That the firm of C.K. AREBA & CO. ADVOCATES be compelled to deposit into this Court Ksh.307,000 paid through it by the Plaintiff/Applicant for onward transmission to the Defendant/Respondent.**
- (d) Costs of the application.**
- (e) Any other Order that this Honourable Court may deem fit and just to grant.**

The application is based on the grounds set out therein and is also supported by the Plaintiff's affidavit dated 26th September 2018.

The gravamen of the application is that following a suit which she had filed against the defendant, judgement was entered in favour of the defendant on 23rd June 2015 for the sum of Kshs.308,060 together with costs and interest. That her advocate C.K. AREBA advised her to make payments towards the decretal sum to him and so she paid to the said advocate the following sum:

- 1. 19th August 2014 – Ksh.146,000**
- 2. 24th September 2014 – Ksh.81,000**
- 3. 2nd November 2015 – Ksh.55,000**
- 4. 17th November 2015 – Ksh.25,000**

Receipts for the said payments are annexed to the supporting affidavit as annexures ANW-1 to ANW-4 respectively. However C.K. AREBA ADVOCATE did not remit the above sums and she was committed to Civil jail at Kakamega Prison and is now at risk of being committed to Civil jail again.

The Defendant has opposed the application describing it as misguided as it seeks Orders against C.K. AREBA ADVOCATE who is not a party in these proceedings and that the application is an Advocate – Client dispute which should not therefore interfere with the Defendant's claim. In any case, the Plaintiff should have paid the decretal sum to the Defendant's advocate.

CHARLES KEAGO AREBA ADVOCATE has also filed a replying affidavit and confirmed that he was instructed by the Plaintiff's son to file this suit against the defendant who was represented by the firm of ANNET MUMALASI ADVOCATES and judgement was entered for the defendant against the Plaintiff in the sum of Ksh.308,060.

That he advised the Plaintiff to pay the decretal sum and Ksh.80,000 was paid by the Plaintiff's son towards off-setting the decretal sum of

which Ksh.15,000 was retained by Counsel as fees and Ksh.65,000 was forwarded to the firm of ANNET MUMALASI ADVOCATES. Later on 24th September 2014, the Plaintiff's son deponed Ksh.81,000 to be paid to the defendant but on the same day, he demanded a refund which was paid to him. That the payment of Ksh.146,000 which the Plaintiff purports to have made to the advocate was paid on 19th August 2014 yet this suit was filed on 18th September 2014 and the handwriting on the receipt appears to be that of the Plaintiff's son **JAPHETH WANYONYI**. That the receipt in respect to that sum is No.0096 which is a forgery as the original receipt bearing the same numbers was issued to one **DOUGLAS WANJALA BARASA** for Ksh.490,000. That he never met the Plaintiff in person but only dealt with her son one **JAPHETH WANYONYI** who gave instructions on behalf of his mother. That the matter has been reported to the CID for investigations and this application is an afterthought meant to circumvent the payment of the decretal sum since there is a warrant of arrest to commit the Plaintiff to Civil jail. That the Court should, before hearing this application, direct the Plaintiff to produce the original receipts No.0096 for Ksh.146,000 and No.0045 for Ksh.81,000. Counsel also annexed receipts annexures CKA 4 to CKA 5.

When the application was first placed before me on 24th May 2018 Mr. OLONYI ADVOCATE for the Plaintiff and Ms. MUMALASI ADVOCATE for the defendant agreed that the Plaintiff and her advocate be given time to sort out the issue. That appears not to have been successful and on 27th June 2018, it was agreed that the Court delivers its ruling on the basis of the Parties respective affidavits.

I have considered the application, the rival affidavits and annexures thereto.

This is an interesting application though not entirely strange. Ideally it should be a matter for the Advocates Disciplinary Committee and my first thought was whether I should handle it. I take the view, however, that the jurisdiction donated to this Court by Section 3 and 3A of the Civil Procedure Act read together with Article 159 of the Constitution empower this Court to consider the Plaintiff's application. In any event C.K. AREBA ADVOCATE who is the subject of the application has not doubted the jurisdiction of this Court to handle this application. The Plaintiff has deponed, and it has not been denied, that she has already served a jail term due to the issues raised herein and is likely to be committed again. I think that in a situation such as the one obtaining herein where a party's liberty is at stake, it is in the interest of justice for the Court to intervene if there is a possibility that the Court process may otherwise be abused or compromised.

As I understand the Plaintiff, it is her case that she has deposited the sum of Ksh.307,000 to the firm of C.K. AREBA ADVOCATES who should deposit the same in Court. She has annexed several receipts to her application and I shall consider each of the four (4) receipts and the rejoinder by MR. C.K. AREBA ADVOCATE.

1. Receipt for Ksh.146,000 dated 19th August 2014. It is clear from the record that the judgement in favour of the defendant in the sum of Ksh.308,000 was entered into by consent on 23rd June 2015. This is even confirmed by the plaintiff herself in paragraph three(3) of her supporting affidavit. This suit was filed on 18th September 2014 a month prior to that payment. Mr. C.K. AREBA's response is that the receipt No.0096 annexed to the Plaintiff's supporting affidavit is a forgery (annexture ANW1) and he has annexed to his replying affidavit the genuine receipt No.0096 for Ksh.490,000 issued to one DOUGLAS WANJALA BARASA. This Court has no capacity to determine which of the two receipts is a forgery and which one is genuine. However, I must up-hold Mr. C.K. AREBA on this receipt for the simple reason that judgement having only been entered for the defendant against the Plaintiff on 23rd June 2015, there is no way that the Plaintiff could have deposited with her advocate Ksh.146,000 a month before the suit was filed and almost one year before the judgement had been entered against her. I rule therefore that the Ksh.146,000 shown on the receipt produced by the Plaintiff, if it was paid at all, had nothing to do with this suit.

2. Receipt for Ksh.81,000 dated 24th September 2014. It is Mr. C.K. AREBA's case that although this sum was deposited by the defendant's son and a receipt issued, the same was released to the defendant's son on the same day and a payment voucher issued (annexture CKA 5). The Plaintiff has not rebutted the averment that it was his son JAPHETH WANYONYI, who deposited the Ksh.81,000 with the firm of C.K. AREBA advocate. JAPHETH WANYONYI was therefore the plaintiff's agent and Mr. C.K. AREBA was entitled to refund the Ksh.81,000 to him since he was the one who deposited it. In any event, the said JAPHETH WANYONYI has not also rebutted that averment. I therefore make a finding that although the Plaintiff paid Ksh.81,000 to C.K. AREBA on 24th September 2014 through her agent, that money was refunded to the agent on the same day. The firm of C.K. AREBA advocates cannot be held liable for the loss of that sum.

3. Receipt for Ksh.55,000 dated 2nd November 2015. Mr. C.K. AREBA advocate has not denied that his office issued the Plaintiff with the receipt No.0258 dated 2nd November 2015 for that sum.

4. Receipt for Ksh.25,000 dated 17th November 2015. This has also not been rebutted by Mr. C.K. AREBA advocate.

I therefore make the following Orders in respect of Motion dated 26th September 2017.

1. Mr. C.K. AREBA advocate to deposit in this Court the sum of Ksh.80,000 on account of A. MUMALASI advocate to be paid to the defendant. That be done on or before 24th September 2018 failure to which this Court will make any other necessary Orders.

2. Execution may however proceed against the Plaintiff for the balance of the decretal sum while giving her credit for the Ksh.80,000.

3. No Order as to costs.

BOAZ N. OLAO

JUDGE

31ST JULY 2018

Ruling dated, delivered and signed in open Court this 31st day of July 2018 at Bungoma.

Mr. Tsimonjero for Ms. Mumalasi for Defendant present

Mr. Wekesa for the Plaintiff

Plaintiff present

BOAZ N. OLAO

JUDGE

31ST JULY 2018