



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISC. APPL. NO. 349 OF 2016

STANLEY MWANDOE RIGHA.....APPLICANT/RESPONDENT

-VERSUS-

RIGHA & MBURU ADVOCATES.....1ST RESPONDENT/RESPONDENT

OCCIDENTIAL INSURANCE CO. LTD....2ND RESPONDENT/APPLICANT

RULING

1. The Applicant through a Notice of Motion dated 28th May 2018, seeks the following order:-

a) That this Honourable Court be pleased to issue a temporary order of stay of execution of all the judgements, orders, decrees and any other subsequent proceedings or consequential orders arising out of all taxations within the court's jurisdiction between the 1st Respondent and the 2nd Respondent/Applicant pending the hearing and determination of this Application inter partes;

b) That this honourable Court be pleased to issue an order compelling the 1st Respondent to disclose all the matters where the law firm was acting for the 2nd Respondent/Applicant as well as the legal fees demanded;

c) That this Honourable Court be pleased to issue an order compelling the 1st Respondent to honour all the terms of the consent given on 8th February 2018 by participating in the process of taking accounts with the Applicant/Respondent herein;

d) That this Honourable Court be pleased to make such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to justice to be met;

e) That the costs of this Application be provided for.

2. The Application is based on grounds listed as Nos. 1 – 12 on the face of the Application and supported by an affidavit of Bernard Ayuko the Legal Manager of Occidental Insurance Company Limited, sworn on 28th May 2018 and annexures **BA1 – BA8**.

3. The Application by Occidental Insurance Company Limited is opposed by Stanley Mwandoe Righa, through a Replying Affidavit sworn on 26th June 2018.

4. The Application is similarly opposed by the 1st Defendant through a Replying Affidavit sworn on 24th July 2018.

5. The 2nd Defendant/Applicant filed written submissions dated 19th October 2018 on 23rd October 2018, whereas 1st Respondent filed submissions dated 29th October 2018. The 2nd Respondent S. M. Righa Advocates did not file any submissions nor did he attend court for the hearing of this matter.

6. The Applicant is seeking orders of Injunction. The threshold of granting orders of injunction are well settled as set out in the celebrated case of *Giela –vs- Osman Brown (1978) EA 358*; in which the party seeking injunction orders has; first to established that it has prima facie case with probability of success: secondly that it would suffer great loss if prayers sought are not granted and which cannot adequately be compensated by way of damages and thirdly that balance of convenience tilts in its favour.

7. In the instant matter, there is no dispute that there was a Notice of Appeal from the decision of Lady Justice Farah Amin delivered on 16th

December 2016 and a Notice of Motion dated 24th January 2017 against the Respondent seeking stay of the proceeding, which were accordingly withdrawn upon adoption of a consent order dated 16th June 2017 which consent provided as follows:-

“CONSENT

The said Miscellaneous Application No. 349 of 2016 between Stanley Wandoe Righa, Occidental Insurance Company Limited and Braihmoh Joseph Mburu Trading as Righa & Mburu Advocates and all other consequential and/or subsequent litigations arising out of taxations between the Parties herein be and are hereby marked as amicably settled on the following Terms and Conditions:-

1. That the firm of Righa & Mburu Advocates, the 1st Respondent herein, do continue with the process of taxation against the former clients of the firm that is to say Fidelity Shield Insurance Company Limited and Occidental Insurance Company Limited to establish fees owed to the firm as at 30th September, 2011.
2. That the first respondent will undertake full disclosure in respect of the entire taxation process to the applicant.
3. That the Applicant will disclose to the 1st Respondent the amount of money so far paid to the firm of S.M. Righa & Company Advocates by Occidental Insurance Limited and Fidelity Shield Insurance Company Limited and the anticipated fees for all the matters wherein the firm of Righa & Mburu Advocates had been instructed by the aforesaid insurance company up to and including 30th September 2011.
4. That upon the completion of the process of the taxation and establishing fees owed to the 1st Respondent and upon the applicant disclosing the fees already recovered and expected to be recovered by the firm of S. M. Righa & Company Advocates, accounts are to be taken to establish what is owed to each partner in respect of all briefs wherein instructions were received before the dissolution of the partnership. Date of 30th September 2011.
5. That the cost of taxation shall be deducted before the sharing of the proceeds of taxation and such costs shall include filing fees, court attendance fees, traveling costs and a reasonable compense to the 1st Respondent. The deducted costs shall be payable to the 1st Respondent.
6. That the net proceeds of taxation are to be divided equally between the Applicant and the 1st Respondent in equal proportion.
7. That the fees that has already been paid and expected to be paid to the Applicant through the firm of S. M. Righa & Company Advocates in respect of all briefs wherein the partners were instructed up to and including 30th September 2011 shall be deducted from the Applicant's share and he shall receive the balance after taking of full accounts.
8. The Applicant who has filed Notice of Appeal (from the decision of Lady Justice Farah Amin delivered on 16th December 2016,) and who has also filed a Notice of Motion dated 24th January, 2017 against the Respondents seeking stay of proceedings shall forthwith and upon the adoption of this consent order withdraw the same.
9. Costs awarded to the 1st Respondent shall be deducted from the Applicant's share of the taxation proceeds.
10. Upon payment of the said sums shares, neither party herein is to have any further claim whatsoever against the other in respect of this suit or against M/S Occidental insurance and Fidelity Insurance Company Limited originating from dissolution of the partnership
11. There shall be liberty to apply by either party.
12. Mention on 2nd August to report on progress.

GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON THE 8TH DAY OF FEBRAURY 2017

ISSUED AT NAIROBI ON THIS 16TH DAY OF JUNE 2017

SIGNED

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DEPUTY REGISTRAR”

8. The Court file reveals that similar Application by the Applicant/Respondent dated 17th November 2017, was also withdrawn.

9. This matter had been commenced as Miscellaneous Civil Application No. 349 of 2016 through a certificate of urgency in a Notice of Motion dated 14th July 2016. That no substantive suit was filed and as such the instant Application is hanging in the air, the Application before this Court cannot stand and is therefore incurably defective, if any interim were to be issued what outcome of which matter would be awaited for. Issuing any orders will mean the orders will be final orders, as there will be no other issue, pending determination by the Honourable Court. Further orders are issued they would not serve beyond determination of the application. As the Applicant seeks injunction orders after upto hearing and determination the Application inter partes and not beyond as there would be nothing else pending before the parties.

10. I now turn to the Application of the parties consent order, which is still valid and in force. The consent on record allows the process of taxation against the former clients of the firm, that is to say Fidelity Shield Insurance Company Limited and Occidental Insurance Company Limited Company establish fees owed to the firm as of 30th September 2011. That consent is yet to be challenged as the Applicant has neither filed any reference nor appealed against the certificate of taxation. There is further no denial by the Applicant of owing the 1st Respondent the alleged outstanding fees for services rendered.

11. It is contended that the Applicant is seeking orders in this matter similar to orders obtained by them in **HCCC NO. 224 of 2013** and this matter both of which were vacated by the Court. I find the Applicant has not been candid in its dealings in this matter. The Applicant admits that it is and has always been a party to these proceedings yet it has not disclosed of the existence of the orders which were withdrawn and substituted rather with consent order dated 16th June 2017. I find that Applicant guilty of non-disclosure of important and relevant material facts in this matter.

12. It is of great interest to note the Application seeking the orders in this Application, submits under paragraph 7 as follows:-

“In our very humble and respectful view to the firm of Righa and Mburu Advocates, there is nowhere in the consent where it is stated that execution proceedings would be commenced against occidental Company Limited, and more so where the aforesaid significant steps have not been taken”

13. The Applicant contention is in conflict with paragraph 4 of the parties consent which provide:-

“4. That upon the completion of the process of the taxation and establishing fees owed to the 1st Respondent and upon the applicant disclosing the fees already recovered and expected to be recovered by the firm of S. M. Righa & Company Advocates, accounts are to be taken to establish what is owed to each partner in respect of all briefs wherein instructions were received before the dissolution of the partnership. Date of 30th September 2011.

My understanding of paragraph 4 of the consent is that upon completion of the process of taxation and establishing the fees the 1st Respondent's, next logical step is to take up recovery process which includes execution.

14. Having said that much, I find the Applicant has not met the threshold of granting orders of injunction. It has not established a prima facie case with probability of success, nor that if injunctive orders are not granted it would suffer irreparable injury which cannot be adequately compensated by way of damages nor has it demonstrated that the balance of convenience tilts in its favour

15. In view of the above, I find no merit in the Applicant's Application dated 28th May 2018. The Application is accordingly dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

J. A. MAKAU

JUDGE