



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC APPL. NO. 875 OF 2013

MUEMA KITULU T/A MUEMA

KITULU & CO. ADVOCATES.....PLAINTIFF/RESPONDENT

- V E R S U S -

GATEWAY INSURANCE CO. LTD.....DEFENDANT/APPLICANT

RULING

1. The subject matter of this ruling is the motion dated 11.8.2016 taken out by Gateway Insurance Co. Ltd whereof it sought for the following orders:

1. THAT the application herein be certified urgent.

2. THAT service of the applicant be dispensed with at the first instance.

3. THAT the honourable court do stay execution commenced by the plaintiff/respondent through Prodigy Auctioneers on 25th July 2016 proclaimed and attached the office furniture belonging to the defendant/applicant and the same shall be carted away today – 11th August 2016 and placed on sale.

4. THAT the decree herein be amended to conform with the court order and directions given on 20/5/2016 requiring the plaintiff/ respondent to discount from the taxed amount a sum of ksh.7,502,208/= which he has already received as legal fees but not acknowledged in the said decree.

5. THAT the costs of this application be borne by the plaintiff/respondent.

2. The motion is supported by the affidavit of Linda Olweny and a supplementary affidavit of the same deponent. When served, Muema Kitulu T/A Muema Kitulu & Co. Advocates, filed a replying and a further affidavit to oppose the motion. When the motion came up for interpartes hearing, learned advocates appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting and opposing affidavits. I have further considered the rival submissions. It is the submission of the client/applicant that on 25.7.2016, the advocate/respondent instructed Prodigy Auctioneers to attach its furniture. According to the applicant, the aforesaid furniture was carted away on 11.8.2016 and later sold. It is said that the execution was based on an erroneous decree of ksh.8,617,463. The applicant

argued that a sum of ksh.7,502,208/= already paid and received by the advocate/respondent, had not been factored in the decree. The respondent urged this court to factor in the aforesaid amount so that the decree should basically show the outstanding amount to be ksh.530,641/=. The applicant beseeched this court to issue an order for stay pending the adjustment of the decree.

4. The advocate/respondent vehemently opposed the motion claiming that the client had previously filed a similar application dated 27.7.2016 which application is still pending contrary to the provisions of Section 6 of the civil Procedure Act. The respondent further argued that the applicant has lied on oath that he had been paid ksh.7,502,208/= prior to the execution. The respondent submitted that the applicant has failed to attend court to challenge entry of judgment and is now precluded from raising the issue of alleged payments. He also argued that if any such payments existed, nothing would have been easier than for the applicant to exhibit copies of the legible cheques paid to him. The advocate/respondent enumerated a number of meetings he has had with the client's officials to reconcile accounts on the amount paid and outstanding. It is argued that the process of reconciliation of accounts has been frustrated by the client/applicant who kept on changing its advocates. The advocate urged this court to find that the client has approached this court with unclean hands by filing repetitive applications to frustrate his intention to recover the balance of the decretal amount due to him. The advocate/respondent gave a schedule of payments he has received as at 25.8.2016 to be ksh.6,980,353 thus leaving the balance payable to him to be ksh.1,637,110/=.

5. Having considered the arguments put forward by the parties, it is apparent that the decree being executed as of 22.7.2016 seeks to recover ksh.8,617,463/=.

6. It is also clear from the submissions of the parties that a substantial amount had been paid to the advocate/respondent which amount has not been factored in the certificate of taxed costs. According to the client/applicant, the outstanding amount is ksh.530,641/= while the advocate/respondent is of the view that the outstanding amount is ksh.1,637,110/=. There is no doubt that some of the documents showing payments made to the advocate and attached to the affidavits filed in support of the application are not legible. There is therefore need for the parties to file and exchange legible documents and thereafter appear before the Deputy Registrar of this court to make submissions.

7. I hereby direct the parties to file and exchange documents which are legible and appear before the Deputy Registrar of this court who also doubles up as the Taxing Officer to make submissions within 30 days from the date hereof. The exercise will assist the Deputy Registrar come up with a figure representing the outstanding legal fees payable to the advocate/ respondent. The Deputy Registrar should thereafter adjust the certificate of taxed costs which will be used to amend the decree. The Deputy Registrar to file his/her report in this court within 45 days from today's date. In order to make the exercise of reconciling accounts smooth, I grant an order for stay of further execution of the decree to last for 60 days. Mention on 5/6/2017 for further orders and directions.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant