

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 50 OF 2005

ROBERT JAMES IMBAYA 1ST PLAINTIFF

DOLOROSA ACHOLA IMBAYA 2ND PLAINTIFF

VERSUS

PHILIP JUMA AKOTH DEFENDANT

RULING

Before me is the Notice of Motion dated 26th February 2015 wherein the Defendant seeks orders for taking of accounts. The merits of the case have been dealt with both in this Court and in the Court of Appeal which upheld the judgment of this Court. In his judgment dated 16th May 2012 my brother Chemitei J sanctioned the taking of accounts by the parties but also held that in the event that no settlement was reached by the parties once they took accounts then they were at liberty to make a formal application before the Deputy Registrar of this Court for taking of accounts. It is Mr. Onsongo's, Advocate for the Defendant, submission that this application is made pursuant to the orders of Chemitei J and that the same shall not prejudice the Plaintiffs in any way. He cited **Christopher Ndolo Mutuku & Another V. CFC Stanbic Bank Limited [2014] eKLR** as one of the cases where such an order was granted.

In opposition to the application Mr. Mwamu, Learned Advocate for the Plaintiffs has submitted that the order should not be granted as the Defendant has refused to make payments to the Plaintiffs as ordered by the Court. He also argues that filing of audited accounts without the Court's sanction is improper as the Court needs to give directions of the period of time within which the accounts ought to be taken. He puts reliance on the decision of P. J. Otieno J in **Jack J. Khanjira & Another V. Safaricom Limited [2016] eKLR**.

It is precisely because the parties could not agree on who owed what to the other that Chemitei J ordered them to take accounts. Firstly accounts were to be taken to ascertain the amount so far paid by the Defendant to the Plaintiffs. Secondly accounts were to be taken to ascertain the rents so far received by the Defendant from the date he took over the suit premises until the date of the order and thirdly the amounts received by the Defendant and the amount owed by him to the Plaintiffs once ascertained there was to be a set off and the balance if any would be paid by whoever was owing. It is clear from the submissions of the Advocate for the Plaintiffs that todate his client has not received any payments. It is his submission that for this reason accounts ought not to be taken. I do not agree. The only way parties can confirm who owes what is by taking accounts. There is no preliminary issue outstanding as the judgment of the High Court was upheld by the Court of Appeal. The accounts in this case are not being taken in a vacuum as the Judge did set out the terms upon which they ought to be undertaken and as no settlement has been reached by the parties I am satisfied that the application has merit. The same is allowed with costs to the Defendant/Applicant.

It is so ordered.

Signed, dated and delivered at Kisumu this 27th day of October 2016

E. N. MAINA

JUDGE

In the presence of:-

Miss Adwar for the Plaintiff/Respondent

N/A for the Defendant/Applicant

CA: Serah Sidera