



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 121 OF 2015**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY, TREASURY**

**THE PRINCIPAL SECRETARY, MINISTRY OF**

**EAST AFRICAN AFFAIRS, COMMERCE & TOURISM**

**(FORMERLY MINISTRY OF TRADE.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**EX-PARTE SIMPSON SENDA KWAYERA T/A TELENEWS AFRICA & ATLANTIC REGION**

**JUDGEMENT**

1. The ex-parte Applicant, Simpson Senda Kwayera t/a Telenews Africa and Atlantic Region through the notice of motion dated 27<sup>th</sup> April, 2015 prays for an order of mandamus to compel the 1<sup>st</sup> Respondent to remit to him the sum of Kshs.128,218,288.62, less Kshs.65 million already paid, being the decretal sum as by the consent order entered between him and the 1<sup>st</sup> Respondent on 23<sup>rd</sup> August, 2013 in Nairobi HCCC No. 148 of 2012. The Applicant also prays for the costs of the application.
2. The respondents, although allegedly served with the application for leave and the substantive notice of motion, did not reply to the application.
3. The Applicant's case was supported by his Verifying Affidavit and the statutory statement filed together with the chamber summons application for leave on 16<sup>th</sup> April, 2015.
4. In his Verifying Affidavit sworn on 14<sup>th</sup> April, 2015 the Applicant averred as follows:

**“1. I am the Ex Parte Applicant herein, well versed with the matters herein, and hence competent to swear this deposition.**

**2. Being the Plaintiff in Nairobi HCC 148 of 2012, I was awarded general damages in the sum**

**Ksh.12,000,000/= together with costs and interest thereon computed at the rate of 26% per annum with effect from the year 2004 till payment in full as against the then Permanent Secretary in the Ministry of Trade. I annex thereto and marked as exhibit “SK 1” a copy of the said Judgement.**

- 3. I accordingly then has instructed the Legal firm of E. Wafula and Associates to conduct the prosecution of the said matter till the delivery of Judgement against the Ministry of Trade as of 24<sup>th</sup> July, 2012.**
- 4. It is not disputed that following the 2010 Constitution of Kenya’s designation of Cabinet Secretaries to assume the roles of hitherto Ministers and the Principal Secretaries to take over the roles of Cabinet Secretaries, the 1<sup>st</sup> Respondent is the proper person that ought to meet the terms of the said Judgement.**
- 5. I am aware that the 2<sup>nd</sup> Respondent herein, the Honourable Attorney General while acting on behalf of the Ministry of Trade declined to lodge an appeal against the said Judgment. Thus, it stands unchallenged to date, and the interest as Decreed continues to accrue on the unsettled part of the claim.**
- 6. I did in the circumstances instruct my previous advocates on record, M/S. E. Wafula and Associates Advocates to pursue the execution of the Decree in Nairobi HCC 148 of 2012 so as to recover the damages together with the costs awarded to me. I believe that litigation must come to an end.**
- 7. Notwithstanding, the said firm of Advocates never took upon themselves to advice me on the way forward regarding the execution of the said Decree against the 1<sup>st</sup> Respondent herein.**
- 8. This state of inactivity on the part of M/S E. Wafula Advocates, compelled me to instruct my present advocates on record , M/S. Maosa and Co. Advocates to pursue the matter on my behalf.**
- 9. Unfortunately, M/S. E. Wafula Advocate strongly resisted the efforts to further conclude the said matter undertaken by my said advocates on record, till the intervention of this Honorable Court after the lodging of a formal application on the part of Maosa & Co. Advocates wherein he sought leave of the Court so as to take over the conduct of my matter. I now annex hereto and marked as exhibit “SK 2” a copy of the said Order.**
- 10. It is common ground that a Consent Order was entered before the Hon. Mr. Justice Kimondo for the sum of Ksh.110,061,691/=, on 23<sup>rd</sup> August 2013, and this is what was available for execution. He had indeed ordered the THE ENTIRE Decretal sum be deposited in Court, which the 2<sup>nd</sup> Respondent declined to do. The interest however continued to accrue escalating the figure to well over the said sum of kshs.110,061,691/-.**
- 11. Upon the disagreement with my said Advocates M/S E. Wafula Advocates, some payment in the sum of Kshs.65 million was partially made to them by the covering their legal fees and a partial payment, forwarded to me, leaving as outstanding sum of Ksh.128,218,288.62 as of now, which includes the interest due.**
- 12. Thus, the order of 23<sup>rd</sup> August 2013 before the Hon. Justice Kimondo never having been set aside, is still due for execution, less what has been paid by the 1<sup>st</sup> Respondent as I have averred below.**
- 13. Towards the end of the month of August, 2013 and after failing to obtain the record from M/S E. Wafula and Associates Advocates, my advocates now on record, Maosa & Co proceed to peruse the Court file at the Central Civil Registry of the High Court in the said HCC 148 of 2012 in order to appraise himself as to the progress and status of the execution process.**
- 14. I was informed that upon perusal of the Court file, Mr. Maosa Advocate discovered that a consent had been entered into and duly executed by the Office of the Attorney General and Ms. Wafula & Associates Advocates wherein the award of kshs.110,061,691/= was apparently reduced to a paltry sum of Kshs.65,000,000/= all inclusive as full and final settlement.**
- 15. I now make this deposition in verification of the plea for Mandamus sought herein. I believe that the 1<sup>st</sup> Respondents will suffer no prejudice since Decrees and Court orders must be complied with.**
- 16. I am aware that in available correspondence addressed to the Permanent Secretary, Treasury, the Principal Secretary, Ministry of East African Affairs, Commerce and Tourism (formerly Ministry of Trade) has requested for a sum of Kshs.160,000,000/= from Treasury**

- on account of my outstanding liability herein made, I now annex hereto a copy of the said letter and the previous allocation in settlement of my said account marked “SK3”.
17. The Decretal sum of Kshs.12,000,000/= together with costs was ordered with interest thereon calculable at the rate of 26% till payment in full.
  18. There were attempts made between my previous advocates and the 2<sup>nd</sup> Defendant to defeat the cause of justice by unlawfully changing the Consent Order to a paltry Kshs.65 million which was subject of the proceedings before the Hon. Justice Ogola. I annex copies of the application marked as exhibit “SK 4”
  19. The Hon. Justice Ogola ruled on the same and he did NOT vary or set aside the Consent Order before Justice Kimondo which I seek enforced. I now annex hereto and marked as exhibit “SK 5” a copy of his said Ruling.
  20. However, before the said Ruling could be delivered, a part of the amount payable in the sum of Kshs.10 million was deposited in Court and the Judge directed that it be released to me as it was properly due.
  21. Consequently I seek the release of the Decreed sum less what has been paid to me which now stands at the sum of kshs.128,218,288.62 as at now.
  22. I stand prejudiced as the sums withheld from me have caused me great financial loss and Justice can only be done via an Order of mandamus to the 1<sup>st</sup> Respondent to enable me access my rightful dues of the Judgement already issued in my favour.
  23. What is deposed to herein is true and within my knowledge save what is deposed to on information whose source has been given.”

5. A little history of this matter is necessary. In a judgement delivered on 24<sup>th</sup> July, 2012 in Nairobi High Court, Milimani Commercial and Admiralty Division, Misc. Application No. 148 of 2012, Simpson Senda wa Kwayera T/a Tele News Africa & Atlantic Region v the Attorney General & another, judgement was entered “for the Plaintiff and against the Defendant for the sum of Kshs. 12,000,000/- together with interest thereon computed and compounded at 26% per annum from April 2004 until payment in full. The Defendant shall bear the costs of this suit.” It is the said judgment which the Applicant seeks to enforce through the issuance of an order of mandamus.

6. The Applicant was generous enough. He provided several exhibits to the Court. At paragraphs 9, 10, 11 and 12 of his Verifying Affidavit which I have already reproduced in full there is reference to a consent order entered by the parties before Kimondo, J on 23<sup>rd</sup> August, 2013 in which the judgment sum was allegedly identified as Kshs.110,061,691/=. The said consent judgment does not, however, refer to the said amount. The consent order which is annexed as Exhibit “SK 2” states:

**"IN COURT ON 23<sup>RD</sup> AUGUST 2013 BEFORE HON. JUSTICE KIMONDO**

**ORDER**

**This matter coming up for Mention on 23<sup>rd</sup> August 2013, in presence of counsel for the Applicant and counsel for the 1<sup>st</sup> Respondent AND in absence for the counsel for 2<sup>nd</sup> Respondent and Simpson Kweyera (Client)**

**IT IS HEREBY ORDERED BY CONSENT**

1. THAT the Plaintiff shall pay to the firm of E. Wafula & Associates the sum of Kshs.8,000,000 (Eight Million Only) in full and final settlement of their professional fees.
2. THAT it is further agreed that the sum is final and will not be subjected to taxation by either pay.
3. THAT the Decretal sum in the Judgment of court of 24<sup>th</sup> July, 2012 be paid into the court. Upon such payment into court, the sum of Kshs.8,000,000/= in order number 1

above shall be released to the firm of E. Wafula & Associates and the balance shall be paid to the plaintiff.

4. **THAT the Notice of Motion dated 16<sup>th</sup> May 2013 be and is hereby allowed. In the premises the firm of E. Wafula & Associates shall cease to act for the plaintiff while the firm of Maosa & Company is granted leave to come onto the record for the plaintiff.**
5. **That there be no orders on costs.**
6. **That this order shall be served upon the two respondents.”**

7. At paragraphs 18 and 19 of the Verifying Affidavit the Applicant avers that there was an attempt to change the consent order before Kimondo, J so that the amount payable would be Kshs.65 million. It is the Applicant's case that the said attempt which was between his previous advocates and the 2<sup>nd</sup> Respondent did not succeed before Ogola, J who refused to vary the consent entered before Kimondo, J.

8. As already demonstrated, there was no consent entered before Kimondo, J which indicated the decretal amount was Kshs.110,061,691/=. The Judge only directed that the decretal amount be paid but did not specify what decretal amount was. Secondly, the application to set aside the consent in which Kshs.65 million was paid as full and final settlement between the parties was made by the Applicant. In answer to the Applicant's application to set aside that particular consent, Ogolla, J in a ruling delivered on 19<sup>th</sup> December, 2014 delivered himself as follows:

**“20. However, if there is still any doubt that the Applicant was at all times involved in the said negotiations, and gave instructions on the filing of the consent on 14<sup>th</sup> February 2013, then the said doubt should be erased by what transpired on 23<sup>rd</sup> August 2013. On that day, the Applicant herein subsequently entered into another consent order with his former advocates apportioning the decretal amount between the Applicant and his former advocate Mr. Wafula. On that day, the Applicant was represented by his current advocate on record Mr. Maosa and cannot claim ignorance or lack of knowledge of consent order pre-existing and which he did not object to.**

**21. There is no evidence before the court that Mr. Wafula Advocate acted fraudulently or in collusion or contrary to public policy or that the said consent was given without sufficient facts or was a product of misrepresentation or was given in ignorance. The decision by the Applicant to challenge the said consent is clearly an afterthought probably premised on the fact that since the Respondents cannot now appeal the original award due to lapse of time, and if this court were to set aside the said consent, then there would be no forum for the Respondents to challenge the original award. If that is the case, then this is a clear case of practice by deceit. A party cannot purport to engage another party into negotiations leading that party to forego his right of appeal, only for the scheming party to disown the negotiated settlement and to purport to revert to the original settlements but without the benefit of the right of appeal to the opposing party. It is also noteworthy that the Applicant has already benefited from the said consent. The consent has been executed. It cannot be rescinded now in circumstances which reveal a depth of lack of good faith on the part of the Applicant.**

**22. It is clear to me from the foregoing paragraphs of this Ruling that the Applicant herein fully participated in the negotiations leading to the recording of the said consent on 14<sup>th</sup> February 2013. Soon after the said consent was filed, the Applicant still engaged the Respondents through correspondences urging them to pay the decretal sum then due, without appearing to question the said consent. Further, on 23<sup>rd</sup> August 2013, when the Applicant appointed his current advocates, there was no indication that he was not satisfied with the consent record on 14<sup>th</sup> February 2013. Indeed on that date, the Applicant merely asked the Respondent to deposit the entire decretal sum then due in court. Clearly, the application herein to challenge the said consent is an afterthought, acted out in bad faith and in the anticipating that all other parties involved would be**

deceived or would not recognise the drama for what it was.

**23. For the foregoing reasons, the application by the Plaintiff dated 6<sup>th</sup> December 2013 can only be dismissed. It is so dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.”**

9. In short, the learned Judge found that the consent entered between the Applicant’s previous advocates E. Sifuna and Associates and the respondents on 14<sup>th</sup> February, 2013 to the effect that Kshs.65 million would be paid as full and final settlement was valid.

10. A close look at the pleadings before this Court reveals that the Applicant has not been candid with the Court. By the time the consent was being recorded before Kimondo, J on 23<sup>rd</sup> August, 2013, the Applicant knew that the decretal amount that was being referred to by the Judge was the sum of Kshs.65 million which had been negotiated and agreed on 14<sup>th</sup> February, 2013. Ogola, J in his ruling of 19<sup>th</sup> December, 2014 demonstrates at paragraph 19, that the Applicant was indeed aware and informed of the negotiations between his former advocates E. Wafula and Associates and the respondents. It is important to reproduce paragraph 19 of Justice Ogola’s Ruling for completeness of record. It states:

**“19. The issue that now arises is whether the said consent was arrived at by way of fraud or misrepresentation. A court is entitled to believe, and to act upon such belief, that counsel appearing for a party when he enters into a consent has the authority to do the same, and to bind such a party. When the court is in doubt, pursuant to an application such as the one before the court to set aside the consent, the court will scrutinize the immediate circumstances surrounding the filing of the consent. The court will critically consider the correspondences and the conduct of the party and his advocate months or days before and after filing the said consent. In situations where the party alleges that there was no instruction to record a consent, what the party says or does before or soon after the consent is recorded is crucial. In the matter at hand the Applicant states that he never gave his authority to the advocate to enter into the consent, and that he never attended a crucial meeting on 31<sup>st</sup> October 2012 at 9.00 a.m. when the negotiation leading to the reduction of the decretal sum was made. This meeting was however, attended by the Applicant’s advocate on record Mr. Wafula. The Applicant was not obligated to attend the meeting in person since his advocate was already in attendance as the Applicant’s counsel. However, this court must still determine the conduct of the Applicant before and soon after the consent was recorded. To do that the following correspondences are relevant:-**

**i. Vide his letter dated February 14 2013 the Applicant writes directly to M/s Muthoni Kimani, Counsel for the Respondents, and states as follows:**

*“First I thank you for meeting me and my advocate, Ezekiel Wafula in your office and setting in motion arrangements aimed at settling this longstanding issue to finality . . .*

*. . . And in view of the fact that the amount was scaled down from Kshs.110,000,000/= to Kshs.65,000,000/=, Mr. Wafula’s advocates fees now becomes Kshs.5,000,000/=(five million) while mine is Kshs.60,000,000/= (60 million).*

*. . . Once more thank you for your guidance and assistance in this matter.”*

It is to be noted that this letter, which is attached to the Applicant’s own submissions at page 10, is dated 14<sup>th</sup> February 2013, the same day the said Consent was recorded in court. It is therefore logical to state without any fear of contradiction that on the very day the said consent was filed in court, the Applicant was aware of it, was happy and did not object to it. There is no indication that the Applicant did not give these instructions to his advocate, and in that letter the Applicant appeared to have very favourable view or

**opinion of his advocate.**

**ii. Vide an e-mail sent on 16<sup>th</sup> February 2013 at 1.46 a.m. the Applicant confirmed the contents of the said consent to his advocate Mr. Wafula. He also informed Mr. Wafula that his fees of Kshs.5,000,000/= would go directly to Mr. Wafula's account while the Applicant's part of Kshs.60,000,000/= would go directly to the Applicant's account. This letter is found at page 57 of the Applicant's own submissions.**

**iii. At page 58 of the Applicant's submissions is also another e-mail by the Applicant sent on November 15 2012 at 12.56 a.m. The e-mail discusses the negotiations and proposes a sum between Kshs.85,000,000/= and Kshs.95,000,000/=. This shows that months prior to the filing of the said consent, there were negotiations taking place which the Applicant was aware of, and participated in.**

**iv. At page 59 and 69 of the Applicant's submissions are e-mail correspondences by the Applicant showing the Applicant was aware of the said negotiations and participated in them.**

**Vide a letter dated 9<sup>th</sup> September 2014 found at page 124 of the Applicant's submissions is a letter by M/s Maosa & Co. Advocates addressed to the A.G. The last paragraph reads as follows:-**

***"Our client reluctantly accepted this arrangement purely as a sign of good will based on the trust he has in the office of the A.G. and as a guarantee that your good office will expedite the remittances of the decretal sum without further delay so as to forestall interest payables calculated at the rate of 26% per annum."***

**The decretal sum being referred to was the Kshs.65,000,000/= procured through a consent dated 23<sup>rd</sup> August 2013. There is no indication at this stage that the Applicant was not happy with the negotiations leading to the said decretal sum.**

**v. Vide Mr. Maosa's letter dated 31<sup>st</sup> July 2013 found at page 126 of the Plaintiff's submissions, there is indication of the ongoing negotiations. The Applicant herein, and his present advocate, M/s Maosa Co. Advocates, were well aware of the negotiations."**

11. I do not understand how the Applicant can make an application like the one before this Court knowing well that the decree has been satisfied. Maybe this application was motivated by the fact that the Treasury had allegedly allocated kshs.160 million for the satisfaction of his decree – see paragraph 16 of his verifying Affidavit. The fact that money has been allocated for the satisfaction of a decree does not mean that the money must be paid out by all means. The respondents cannot satisfy a debt they have already paid.

12. The Applicant acknowledges in his prayer for an order of mandamus that the respondents have paid him Kshs.65 million. The payment was made in full and final settlement of any claim the Applicant had against the respondents.

13. An overview of the pleadings and exhibits presented to this Court clearly shows that the Applicant no longer claims even a single cent from the state coffers. These proceedings were a waste of the Court's time, an abuse of the Court process and an attempted theft of taxpayers' money. In the circumstances, the application fails and the same is dismissed.

14. As the matter was not defended, I make no orders on costs.

**Dated, signed and delivered in Nairobi this 23rd day of July, 2015**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**