



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 605 OF 2010

ANN NJERI MWANGI ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

-VERSUS-

NJOMAITHA INVESTMENTS LTD. ::::::::::::::::::::::: DEFENDANT

RULING

1. The application before this Court is the Notice of Motion dated **2nd July 2014** and filed in Court on even date. It is expressed to be brought under **Section 3A** of the **Civil Procedure Act** and **Section 52** of the **Advocates Act** as well as **Rule 4** and **5** of the **Advocates Remuneration Order**.
2. The application is seeking for the following orders;-

1. *Spent*
2. *This Honourable Court be pleased to declare Wafula Simiyu & Co. Advocates, on record for the Plaintiff Decree Holder, entitled to a charge or lien on the decretal amount herein in the sum of Kshs 51 million plus party and party costs certified in the consent Judgment adopted on 19th May 2014 and order the Defendant, its Bankers or Advocates to pay by Real Time Gross Settlement (RTGS) through the Plaintiff Advocates Account Wafula Simiyu & Co. Advocates, Diamond Trust Bank Kenya Limited, Nation Centre Branch, Account Number [particulars withheld] for the Advocate to deduct his outstanding legal fees and disbursement and release the balance to the Plaintiff.*
3. *The Court be pleased to certify the party and party costs herein at Kshs. 2million as agreed by the Parties.*
4. *This Court be pleased to order and certify that the Plaintiff's suit as being of an exceptional importance or unusual complexity and order the Advocate entitled to payment of Kshs. 3 million over and above the Advocate Client Scale fees under the Remuneration Order.*
5. *The Court be pleased to direct the Plaintiff and her Advocate to agree on the Advocate Client fees herein, in HCCC No. 49 of 2011, HCCC No. 49 of 2011, HCCC No. 507 of 2012, CMCC No. 4921 of 2011 and Conveyance transaction of sale and intended purchase of a portion of Ngong/Ngong/34184 belonging to David Kimohu Waititu and execute a contentious legal fee agreement or in default the Advocate do file his respective itemized Bill of Costs for taxation by the Court on a priority basis.*
6. *Costs of this application be in the cause.*

3. The application is based on the grounds stated therein and is supported by the affidavit of JIMMY WAFULA SIMIYU, Advocate, sworn on **2nd July 2014**.

4. Briefly, this suit was settled by way of a Consent Judgment adopted as an order of the Court on **19th May 2014** settled in the Plaintiff's favour against the Defendant for a Sum of **Kshs. 51 million**. The decretal sum was to be paid in two instalments, the initial one being Kshs. 5,000,000/= within 24 hrs and the balance of Kshs. 46,000,000/= within 30 days from the date of the Consent. The 1st instalment was remitted directly to the Plaintiff's account.
5. The Advocate avers that out of the Kshs. 5 million, the Plaintiff promised to pay him Kshs. 1 million in part payment of the legal fees. However, it appears that the Plaintiff did not honour her promise. It is the Advocate's case that the Plaintiff switched off her phone after receiving the said money and declined to pick the Advocate's various phone calls. Further, she did not respond to emails and invitations to meet the Advocate to resolve the issue of payment. According to the Advocate, the Plaintiff only resurfaced on **27th May 2014** and paid him **Kshs. 200,000/=** in respect to legal fees due in another matter.
6. The Advocate further avers that he entered into an agreement with the Plaintiff sometime in 2010 whereby he was to represent her in several Court matters as well as a Conveyancing transaction and charge the resulting legal fees from the recovery in this suit after its determination. It is the Advocate's position that a copy of the said agreement got destroyed in the fire that razed the Advocates former office. It is the Advocate's assertion that no legal fees have been paid by the Plaintiff for the current suit and other related suits since 2010 to date.
7. It is further the Advocate's assertion that on **26th June 2014** he received a letter from the Law Society of Kenya demanding his response to a complaint lodged by the Plaintiff against him with regard to all the cases his firm was handling for her. The Advocate states that it occurred to him that the Plaintiff was out to breach the agreement between them to recover legal fees.
8. The Advocate is apprehensive that the Plaintiff may be colluding with the Defendant or its Advocates to disenfranchise him of his legal fees. According to the Advocate, this apprehension is based on the fact that the Defendant's Advocates have also declined to pick his calls or reply to his correspondences.
9. The application is opposed. The Defendant filed the Grounds of Opposition dated **14th July 2014**. In the said Grounds, it is the Defendants position that the issue as to whether the decretal sum is payable to the Plaintiff or its Advocates is a matter between the aforesaid parties. It is also the Defendant's position that part of the decretal sum was remitted directly to the Plaintiff upon instructions from her Advocates and that no grounds have been given or evidence adduced that the balance be paid otherwise.
10. The Defendant states that the monies payable to the Plaintiff's Advocates on account of his costs were agreed at **Kshs. 2,000,000/=** and the act upon which the undertaking for the payment of the said sum was given has not accrued. It is therefore the Defendant's case that the application is an abuse of the process of the Court for the reason that the monies payable to the Plaintiff's Advocates have been secured by the undertaking given to the said Advocates by the Consent dated **16th May 2014**.

ANALYSIS

11. The application came up for hearing on **16th July 2014**.
12. Mr. Simiyu, Counsel for the Plaintiff abandoned prayer No. 5 of the Application and submitted to the Court that he was pursuing prayer No. 2.
13. With regard to prayer No. 4, this Court has no Jurisdiction to determine the same or give such orders. This is within the jurisdiction of the taxing master. The Advocate did not submit on the same at the hearing of his application and I therefore believe he abandoned the said prayer just as he did with prayer No. 5. That leaves us with prayer No. 2 and 3 of the current application.
14. I will begin with prayer No. 3 which seeks this Court to certify the party and party costs at Kshs. 2 million as agreed by the Parties. From the Court record (annexure "JWS 2" of the Application) I note that the Defendant's Advocates gave an irrevocable professional undertaking to pay the Plaintiff's Advocates Kshs. 2,000,000 on account of party and party costs upon the successful completion of the sale of property L.R No. 10884/3. There is no evidence that the said undertaking has been breached or whether or not the act upon which the undertaking for the payment of the said sum was given has accrued. On that basis, this Court has no mandate to enforce or interfere

with the said undertaking.

15. I now turn to prayer No. 2 which is the main prayer. The Parties entered into a consent dated 16th May 2014 and filed in Court on 19th May 2014. The same was adopted as the Judgment of the Court. I have perused the said consent which gave details of how the decretal amount was to be paid. The decretal sum was to be paid in two instalments, the initial one being Kshs. 5,000,000/= within 24 hrs and the balance of Kshs. 46,000,000/= within 30 days from the date of the Consent. The consent states that the same was to be paid to the Plaintiff. The first instalment of Kshs. 5,000,000/= was deposited directly in the account of the Plaintiff.
16. The balance is yet to be remitted to the Plaintiff or her Advocates. This is so because the Plaintiff's Advocate has brought the current application seeking to protect his interest being the legal fees and costs in the matter by charging the decretal amount.
17. Under **Section 52 of the Advocates Act**, an Advocate has a right to apply to the Court for a charging order on property recovered or preserved through his instrumentality in a matter where he defended the client. **Section 52 of Cap 16 states;**

“Any court in which an Advocate has been employed to prosecute or defend any suit or matter may at any time declare the Advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter and may make orders for taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit and all conveyances and acts done to defeat or operating to defeat that charge shall except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the Advocate”.

18. In this case there was an award of Kshs. 51,000,000 as the decretal sum and it is not in dispute that the Advocate represented the Plaintiff to the conclusion of her case. Therefore the Advocate wants to protect his interest being the legal fees and costs in the matter by charging the decretal amount. However, this Court is not aware as to any agreement on fees between the Plaintiff/Client and her Advocates. There is no taxation yet with regard to the matters the Advocate handled on behalf of his client. Therefore it is difficult to determine what amount or what fraction of the decretal amount the Plaintiff's Advocate is entitled to.
19. The Advocate is apprehensive that if the Decretal amount is allowed to be paid to the Plaintiff directly then she will refuse to pay the outstanding legal fees. The Advocate's apprehension is legitimate given the fact that the Plaintiff did not honour her promise to pay him Kshs. 1 million out of the 1st instalment of Kshs. 5 million directly remitted to her. That notwithstanding, the balance of Kshs. 46 million being the balance of the decretal amount still remains the property of the Plaintiff. What the Advocate is entitled to is a lien over the same and not the whole sum exclusively.
20. In view of the above and having established that the Advocate is yet to tax his costs or is in the process of doing so, I hereby make the following orders;-
- a. ***The balance of the decretal sum being Kshs. 46 million or any other amount be deposited in a Joint interest-earning account in the names of Jimmy Wafula Simiyu, Advocate, and the Plaintiff as and when that amount is paid by the Defendants.***
 - b. ***In the alternative, if the parties fail to open a joint account to facilitate the depositing of the said balance, the same to be deposited in Court immediately it is paid by the Defendant.***
 - c. ***The Defendant's advocates, Havi & Company Advocates shall ensure that the said balance is not paid to the Plaintiff directly but as ordered and directed herein.***
 - d. ***There is no order as to costs.***

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Wafula for Plaintiff

M/s Ngania for Defendant

Teresia – Court Clerk