



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS CAUSE NO. 713 OF 2012

WAFULA SIMIYU & CO. ADVOCATES APPLICANT

VERSUS

EAST LAND HOTEL LIMITED RESPONDENT

R U L I N G

1. The firm of Wafula Simiyu & Co., Advocates has filed this Application before Court by way of Notice of Motion dated 9th July 2013 under Certificate of Urgency. Apart from being grounded in respect of the provisions of **section 3A** of the *Civil Procedure Act*, the same was brought under the provisions of **Order 45 Rule 1 (1) (a)** and **Order 51** of the *Civil Procedure Rules, 2010*. It was also brought under the provisions of **section 52** of the *Advocates Act* and the *Kenya Constitution*. The Application prays of this Court that it do review its Orders of 3rd and the 8th July 2013 requiring the amount of Shs. 5,000,000/-to be deposited in a Joint Account at Kenya Commercial Bank, Milimani High Court Branch and, instead, that the monies do be paid to the said Advocates on account of legal fees. The Court had ordered, on 3rd July 2013, that there be a stay of further execution of the Decree, herein dated 10th May 2013, subject to the deposit of the said sum of Shs. 5 million in the joint names of the Advocates and Messrs. Kenyariri & Company, advocates for the Client/Applicant. The cash deposit would therefore result in the release of motor vehicles registration numbers KBP 101R and KBP 580Z belonging to the Client/Applicant which had been attached in execution of the said Decree.
2. Following a subsequent application to Court, my learned brother Justice Mabeya made a further Order on 8th July 2013 which read as follows:

“1. THAT the application be and is hereby allowed and that all the items removed from Eastland Hotel Ltd by Keysian Auctioneers on 3rd July, 2013 be released to the Client/Respondent forthwith.

2. THAT the Client/Respondent shall pay the storage charges incurred at the Leakey’s Storage Ltd for the said items.

1. THAT the costs of the auctioneer assessed at ¼ of the costs under the Auctioneers Act and Rules be paid by the Respondent. The costs are to be agreed or assessed by the Deputy Registrar of this Court.

2. **THAT The Directors and Shareholders of the Client/Respondent, Qian Guo Jun and Qian Zengde do execute an undertaking to be filed in this Court within three days binding themselves to pay the balance of the decretal sum in the sum of Kshs. 14,377,932/= together with interest thereon at Court rate in the event Eastlands Hotel Ltd is sold during the pendency of these proceedings.**
 3. **THAT as regards the prayer for the Advocate to pay for damages caused to the premises, the damages were never assessed and the same is hereby declined.**
 4. **THAT for the avoidance of any doubt, the release of the items to the Client is only subject to the payment of the storage charges to enable it resume business whilst the other formalities can be gone into.**
 5. **THAT the parties should now list down the pending application for hearing at the registry.**
 6. **THAT costs of today in the cause”.**
9. The Application of the said Advocates dated 9th July, 2013 was based on the following grounds:

“1. THAT on or about the 3rd July 2013 this Honourable Court issued an Order of stay of execution on and release of the client’s motor vehicles on condition that Kshs. 5 million was deposited in a joint account within 3 days.

2. THAT on 8th July 2013 this court specified that the joint account be opened at KCB Bank Millimani Branch before close of business of the same day.

3. THAT the court allowed the Client Directors and shareholders personal guarantees to secure the balance of the decretal amount and the Applicant prays that on the same breath the court be minded to order a release of the Kshs. 5 million to the Applicant Advocate firm on its undertaking to refund the same in the event the court so order on determination of the application dated 3/7/2013 or at any other time.

4. THAT it appears that due to the Honourable Courts involvement in the Election Petitions the application dated 3rd July 2013 may take a while to be determined whereas the Applicant who has earned his fees and is entitled to the legitimate remuneration under the Constitution and the Advocates Act is kept away from it despite the fact that the applicant equally has financial obligations to fulfill just like the Respondent.

5. THAT Retainer is not disputed and the client had already accepted to pay the Kshs. 5 million in the Agreement dated 24th May 2013 which has been held to be valid and binding.

6. THAT the Applicant is desirous of the protection of court to ensure the Agreement dated 24th May 2013 is enforced having offered to exercise its discretion to accommodate the client in the release of its tools of trade in the interest of justice.

7. THAT it is in the interest of justice and section 52 of the Advocates Act that an Advocate should not be denied the fruits of his labour as they have immediate pressing financial obligation and are only seeking to access a quarter of the decretal amount against their undertaking to refund if need be.

8. THAT this Application is brought without delay and in waiver of the right to appeal against the courts order sought to be reviewed.

10. The Advocates’ Application was supported by the Affidavit of **Jimmy Wafula Simiyu** sworn on

9th July, 2013. The deponent detailed that he was an advocate of this Court and was practising under the name of the Applicant/Advocates' firm. Having set out the details of the Orders given by this Court on 3rd and 8th July, 2013, the deponent launched into a number of paragraphs specifying the reasons why his firm should be paid the said sum of Shs. 5 million rather than the same being lodged in the said Joint account as ordered by the Court. He noted that it was the Advocates' Constitutional right to be remunerated for services rendered. There were special circumstances including the necessity for the Applicant to cover pressing financial obligations including the payment of rent, salaries and continued recovery of documents lost in the fire that destroyed the Advocates' offices in Kimathi House, Nairobi on 1st April 2013. He referred to his firm's Professional Indemnity cover at Shs. 20,000,000/- as protection against any Decree that may be obtained against the firm over and above the Undertaking that the deponent had given under oath, in the event that the Court finds that money to which his firm was entitled should be refunded to the Client/Respondent. The deponent also mentioned that he was servicing a loan and attached a Ruling of this Court delivered on 8th March 2013 restraining the sale of the deponent's property in Ngong, pending the hearing of a civil case brought against him personally by the Fidelity Commercial Bank Ltd being *HCCC No. 658 of 2012*.

11. Apart from the Affidavit in support of the Application, the said **Jimmy Wafula Simiyu** swore a Supplementary Affidavit on 10th July 2013 and a Further Supplementary Affidavit on 17th July 2013. However, these two Affidavits were put in merely to exhibit in the first place, the Order of this Court dated 8th July, 2013 which had been extracted subsequent to the date of the Supporting Affidavit and, in the second place, to exhibit a copy of the Advocates' Professional Indemnity insurance cover. On 15th July, 2013, one Qian Zengde describing himself therein as the Chairman of the Client/Respondent's, swore a Replying Affidavit. He maintained that the Applicant/Advocates' Application before court was mischievous and extortionate in character. The deponent maintained that it was immoral for the advocates to prevail upon this Court to have the Client/Respondent to be their insurers in order for the firm's financial obligations to be shouldered. The deponent noted that the Client/Respondent's advocates on record had moved this Court on 3rd July 2013 seeking an extension of time to file a reference as regards the advocates' ex-parte taxation herein. Such application was to be considered by this Court on 26th July 2013. The deponent maintained that his company disputed the retainer as detailed in the taxation proceedings hence seeking leave to file a reference out of time. The deponent then detailed before Court the attachment of the Client/Respondent's motor vehicles and the circumstances of their release including the payment of Shs. 5,000,000/-to be lodged in the said Joint interest-bearing account with Kenya Commercial Bank Ltd, Milimani Branch. Mr. Zengde then attached to his Replying Affidavit, a copy of the Ruling by the Taxing Officer dated 12th April 2013, in which this Court noted that the Applicant/Advocates' Bill of Costs dated 23rd November 2012 had been taxed in the amount of Shs. 19,374,317/-. The deponent also attached to his Replying Affidavit copies of receipts of monies paid to the Advocates being Shs. 780,000/-by cheque dated 18th December 2012, Shs. 150,000/-on 27th of June 2012, Shs. 500,000/-on 22nd August 2012, Shs. 270,000/-by cheque dated 2nd May 2012 and finally Shs. 500,000/-on 23rd February 2012. By my calculations, the said Advocates have received a total of Shs. 2,200,000/-to date.
12. Further, by Supplementary Affidavit sworn on 16th July 2013, a Qian Guo Jun a director of the Client/Respondent put forward further information that had been obtained by the Client/Respondent's advocates. He attached copies of correspondence from the Applicant/Advocates' firm together with an agreement that he maintained that he had been coerced into signing at the Client/Respondent's premises when the auctioneers enforcing the said Decree herein had forcibly gained access to the premises, threatening to carry away the Client/Respondent's goods of trade. I have perused that hand written Agreement dated 24th May 2012 which details, in the first paragraph thereof that the said motor vehicles as above would be released upon payment of Shs. 5 million (the same figure as per the Court's Order dated 3rd July 2013). The second paragraph of the said hand written Agreement details that the Shs. 5 million will be paid on or before 7th June 2013 failing which the said motor vehicles may be sold at a public auction. There was a reference to the payment of the full decretal amount after a meeting as between the parties to be formally held at the Client/Respondent's hotel premises or before the 20th June 2013. In default of the above, the execution would proceed.
13. Before Court on 18th July 2013, Mr. Simiyu for the Applicant/ Advocates submitted that the basis

of the Application was that there exists an error on the face of the record. He maintained that the ex-parte Orders issued by this Court on 3rd July 2013 were issued in error. He referred to the hand written Agreement (as above) attached to the Supplementary Affidavit of the Qian Guo Jun dated 16th July 2012 which he maintained covered the negotiations for the removal of the attachment herein. The said vehicles would be released pending the payment of Shs. 5,000,000/-. He noted that the Client/Respondent had derived benefit from the Agreement from 23rd May 2013 until it filed an application for stay of execution dated 3rd June 2013. Such was amended on 5th June 2013 and the Court awarded a stay of execution pending the filing of a reference on taxation. Counsel noted that the parties had filed written admissions on consecutive days, the same being highlighted before Court, which delivered its Ruling on 28th June 2013 dismissing the Client/Respondent's stay application. In counsel's view the Orders issued on 3rd July 2013 were contrary to the Ruling of 28th June 2013. He referred to paragraph 17 of the said Ruling in which the Judge had found that the said hand written Agreement dated 24th May 2013 was valid and enforceable as between the parties. No suit or application had been filed to challenge that Agreement.

14. In the said Orders of the 3rd July 2013, the Court in granting prayers 2 and 3 thereof were in contradiction to the Agreement of 24th May 2013. As a result, prayers 2 and 3 amounted to this Court rewriting the Agreement to the prejudice of the Applicant/advocates. It was for this reason that counsel requested the Court to review the interim orders of the 3rd July 2013 and order that the amount of Shs. 5 million be released to the Applicant/Advocates. He maintained that the Order of stay issued on 3rd July 2013 would not have been meant to operate retrospectively to alter the said Agreement. That part of the Order as above referred to, disenfranchised the entitlement of the Applicant/advocates to their professional fees. As regards the Replying Affidavit, counsel maintained that this was an attempt to introduce the issue of retainer retrospectively. Paragraph 18 of the said Replying Affidavit contained an admission that the Client/Respondent had engaged the advocates and that part fees were paid. He maintained that a total of Shs. 1,750,000/- had been received by the Applicant/Advocates in this connection. He denied that there had been any concealment of information as the monies paid had not been detailed in the taxed Bill of Costs. The advocates' offices had been consumed by fire on 1st April 2013 and the records of monies received were burnt. Finally, he noted that the Decree was to recover the sum of Shs. 19 million and even if the Shs. 5 million was released, the Applicant/Advocates would have received a total of Shs. 6.75 million which was only about one third of their entitlement to fees.
15. In response, Mr. Kenyariri for the Client/Respondent, submitted that the Ruling delivered by this Court on 28th June 2013 had detailed that the taxation review was not properly before Court and dismissed the Application. He maintained that the Applicant/Advocates' Notice of Motion before Court could not stand in that the Agreement dated 24th May 2013 was not attached to the Supporting Affidavit thereto and upon the fact that the Client/Respondent was coerced into signing the same. When the matter had come before Mabeya J. prior to his Ruling of 28th June 2013, there was no challenge to the said Agreement but now there is, as the Supplementary Affidavit of Qian Guo Jun dated 16th July 2013 detailed that the deponent thereto was coerced into signing the same. The Application of the Client/Respondent made on 3rd July 2013 was seeking leave to file a reference against the taxation of the Applicant/Advocates' Bill of Costs. The Judge had granted a stay of execution pending the filing of the Application to file the reference out of time and, in so doing, ordered the deposit of Shs. 5 million in the said Joint interest-bearing account. The said Order of 3rd July 2013 expressly details, at paragraph 6, that the issue being raised by counsel for the Applicant/Advocates would be heard on 26th July 2013. The Applicant/Advocates would not suffer any prejudice by the deposit of the Shs. 5 million as ordered.
16. Further, counsel noted that after the Orders of the Court were issued on 3rd July 2013, the Applicant/Advocates went back to the Client/Respondent's premises to execute again, the goods, which prompted the Client/Respondent's Application dated 6 July 2013. That Application was made under the provisions of **Order 22 Rule 22 (2) and (3)** of the *Civil Procedure Rules, 2010*. The Court had directed that the directors of the Client/Respondent Company should file an undertaking in damages which was executed on 10th July 2013. The said directors had guaranteed the amount of Shs. 14,377,932/-. The 2 Orders are distinct and stand alone. As regards the Application, Mr. Kenyariri submitted that the law detailed that the Applicant/ Advocates could

appeal the Orders of the Court dated 3rd July 2013 but not review the same. He noted that the Application coming for hearing on 26th July 2013, was seeking leave to file a reference and that the monies awarded in the taxed Bill of Costs were guaranteed. He commented that during the proceedings on 8th July 2013 before Mabeya J., the Applicant/Advocates had not raised any of the issues as had been done in this Application before Court. The Orders issued on that day had been very clear. Finally, counsel submitted that the question of whether the Agreement dated 24th May 2013 will be enforced is dependent on whether the Client/Respondent is given leave to file the reference as regards taxation. Mr. Simiyu, in a short reply, commented that the issue of whether the Agreement of 24th May 2013 was made under duress had already been determined by the Court. The Client/Respondent had already admitted the debt.

17. **Order 45** for review, sets out the grounds which such an application should be predicated upon. **Rule 1(1)** of the Orders reads;

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".

The parameters from which such an application for review are to be set out, as stated herein above, are that there should be discovery of new and important evidence, an error apparent on the face of the record or for any other sufficient reason.

12. It is the Applicant/Advocates' submission that there is an error apparent on the face of the record in that prayers 2 and 3 of the Order made by this Court on 3rd July 2013 contradict the Ruling of **Mabeya J.** delivered on 28th June 2013. I have carefully perused the said Ruling and the following matters raised therein:

(a) At paragraph 7, the learned Judge recorded the submission that the said Agreement between the Client/Respondent and the Applicant/Advocates dated 24th May 2013 was not binding on the Client/Respondent on the grounds that it was entered into under duress.

(b) At paragraph 12, the Judge noted that it was clear that taxation of costs could only be contested in the High Court as laid down in Rule 11 of the Advocates Remuneration Order. He found that, without a reference, the Court lacked the jurisdiction to entertain any matter touching on the taxation.

(c) The Judge noted that it had been alleged before him that the taxation was done ex parte. Having reviewed the affidavit evidence before him, the Judge entertained doubts that he could set aside the Ruling in connection with the taxation proceedings dated 12th April 2013.

(d) In his view, Mabeya J. felt that if the Client/Respondent intended to challenge the Ruling on taxation having been undertaken ex parte, its correct way to proceed would have been to make an application as before the taxing officer and not the Court.

(e) As regards the prayer for stay of execution of the Decree, the Judge noted that,

although the attachment by way of execution was effected on 24th May 2013, no steps had been taken by the Client/Respondent to regularise its position under Rule 11 and to challenge the subject taxation. Indeed, the Client/Respondent had not stated when it intended to file a reference. As this had not been disclosed, the learned Judge did not see what purpose the stay sought would serve.

(f) In a further reference to the said Agreement dated 24th May 2013, the Judge noted that the Client/Respondent contended that the same was unenforceable as it was entered into under duress, whereas the Applicant/Advocates maintained otherwise. Taking into account the circumstances as per the affidavit on record, the learned Judge found that as there had been no proceedings undertaken by the Client/Respondent to invalidate the Agreement, the same remained binding upon the parties. Thereafter, the Client/Respondent's Application dated 3rd June, 2013 was dismissed with costs and the interim orders discharged.

13. The Client/Respondent's Chamber Summons dated and filed on 3rd July 2013 came before Mabeya J. ex parte on the same day. The three substantive prayers sought in that Application were prayers 2, 3 and 4 as follows:

"2. Pending inter-parties of this application, there be a stay of execution of the Decree dated 10th May 2013 and any consequential orders therefrom.

3. The warrants of attachment and sale both dated 16th May 2013 be set aside.

4. There be extension of time under Rule/Paragraph 11 (4) of the Advocates (Remuneration) Order to enable the Applicant move the Court under Rule 11 (1) and 11 (2) of the Advocates (Remuneration) Order and file a reference out of time."

The learned Judge was inclined to allow the Application ex parte having noted that there was an agreement between the parties of 24th May 2013, though disputed, for the payment of Shs. 5 million. He then made the following Orders:

"(a) Pending the inter-partes hearing of the application dated 03/07/13, there shall be a stay of further execution of the Decree dated 10/5/2013.

(b) The above Order is subject to the Client/Applicant depositing a sum of Kshs 5M in an interest-bearing account in the joint names of Ms. Kenyariri & Company and Wafula Simiyu & Co. Advocates

(c) Such deposit to be within three (3) days of the date hereof.

(d) Further Order under S 3A

(i) On depositing the said sum of Kshs 5 million as per Order (b) above the attached Motor vehicles reg.nos. KBP 101R and KBP 580Z be forthwith released to the Client/Applicant.

(ii) However, the costs of the attachment of the said Motor Vehicles shall be borne by the Client/Applicant.

(e) The application be served before inter-partes hg on 26/07/13."

14. To my mind, the above Orders issued by Mabeya J. on 3rd July 2013 have been correctly captured by the extracted Order signed by the Deputy Registrar of this Court both dated and issued on 3rd July 2013. When the counsel for both parties submitted before this Court on 18th July 2013, I picked up the point made by learned counsel for the Client/Respondent as to why the Applicant/Advocates had not annexed or exhibited to the Affidavit in support of the Application the said Agreement dated 24th May, 2013. I think I have now worked out the reason why. I have perused the said Agreement particularly paragraph (2) which reads:

“THE SAID SUM OF KSHS 5,000,000/= SHALL BE PAID ON OR BEFORE 7/6/2013 FAILING WHICH.....”

The paragraph is silent as to just whom the Shs. 5 million should be paid to – the auctioneers, the advocates, into Court? I believe that my learned brother **Mabeya J.** took such into account hence his Order of 3rd July 2013 that it should be paid into a joint interest-bearing account in the names of the advocates for the parties. As a consequence, I do not consider that there is an error on the face of the record as the Applicant/Advocates have submitted. Accordingly, I dismiss their Application dated 9th July 2013 with costs to the Client/Respondent. The Client/Respondent’s Application by way of Chamber Summons dated 3rd July 2013 will now come for hearing, as scheduled on 26th July 2013 before Mabeya J. as he is seised of this matter.

DATED and delivered at Nairobi this 23rd day of July, 2013.

J. B. HAVELOCK

JUDGE