



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 136 OF 2011

BIPINKUMAR DHIRAJLAL SHAH.....1ST PLAINTIFF

SITACHANDRA DHIRAJLAL SHAH.....2ND PLAINTIFF

BAWANI STORES LIMITED.....3RD PLAINTIFF

VERSUS

GITHUI JOHN T/A GITHUI & CO. ADV.....DEFENDANT

RULING

This is a Notice of Motion brought pursuant to **Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A and B and Section 63(e) of the Civil Procedure Act** in which the plaintiffs, Bipinkumar Dhirajlal Shah, Sitachandra Dhirajlal Shah and Bawani Stores Limited, seek orders against Githui John t/a Githui & Co. Advocates. The applicants seek an order that pending hearing and determination of this suit, this court do issue an order of stay of proceedings and execution of the decrees and/or orders arising from Advocate-Client Bills of costs taxed as follows:-

- a) Nakuru Misc. Application No. 54 of 2010;
- b) Nakuru Misc. Application No. 55 of 2010;
- c) Nakuru Misc. Application No. 56 of 2010;
- d) Nakuru Misc. Application No. 57 of 2010;
- e) Nakuru Misc. Application No. 215 of 2010;
- f) Nakuru Misc. Application No. 216 of 2010;

The application is premised on the grounds and facts found in the body of the application and supporting affidavit of Bipinkumar Dhirajlal Shah dated 10/6/2011. The applicants were represented by Ogolla Advocate.

There existed a client/advocate relationship between the plaintiff and the respondent which has now ceased. During that relationship, the respondent used to receive monies on behalf of the plaintiff for Oil Crop Development Ltd. After the relationship ceased, the applicant's counsel asked the respondent to disclose the monies he had received on behalf of the applicants. Gatu Magana Advocate wrote back to the applicants giving a tabulation which was Kshs.730,000/- (BDS2). The respondent then filed his bill of

costs all totaling Kshs.612,343/- (Para.8 of affidavit) and in August 2010, the respondent obtained a warrant of arrest against Bipinkumar in Msc. 54/2010 and Kshs.247,000/- was paid. The applicants asked the respondent to set off the balance still owed, which according to them, was Kshs.92,889/-. The 2nd applicant was arrested on account of a debt of Kshs.240,000/- which was also paid. The applicants were asked to file an application as to whether or not they could be committed to civil jail for monies owed or not. It is the applicant's contention that the respondent is harassing them with the execution yet he owes them and that is why they seek interim orders.

In opposing the application, Mr. Githui swore a replying affidavit on 29/6/2011 and a further replying affidavit dated 24/10/2011. He does admit to having received cheques from Mirugi Kariuki Advocates and Kshs.300,000/- was paid to the plaintiffs. Other cheques were made in the name of Mirugi Kariuki Advocates totaling Kshs.348,000/- but that he never received them. He received other monies from debt collection and he gave a breakdown (para. 3 of replying affidavit). He admits having filed his bill of costs as per paragraph 5 of his affidavit (GJ2) and that upon severance of the relationship he paid the plaintiff Kshs.300,000/- through Njuguna Matiri Advocate (GJ3); that the defendants tried to have the decree stayed but it was dismissed. When requested, he gave a breakdown of what was received and what was paid. The respondent contends that the allegation that he failed to render account as being defamatory of him and that the allegation that he received Kshs.730,000/- is untrue. It is his contention that infact he is the one owed Kshs.530,343/-. Mr. Githui contends that the applicants want to use the court in oblique ways.

From a consideration of the rival arguments, it is my view that the issue at hand is the taking of accounts between the parties to determine what the respondent received and held on behalf of the applicants, what he remitted to the applicants and whether he still owes them money or they owe him.

For an order of stay to issue, the applicant should demonstrate that if stay is not granted, the applicants will suffer irreparably. The applicants have not even suggested that. The respondent is an advocate of the High Court who has been handling their accounts and it was for the applicants to demonstrate that he is impecunious and not able to repay them if execution proceeds.

The applicants did not offer any security for the due performance of the decree in respect of the bill of costs.

No good reason has been advanced for the grant of an order of stay under the circumstances. The matter can proceed to hearing and if owed the applicants will be able to recover from the respondent. The application for stay is dismissed with costs being in the cause.

DATED and DELIVERED this 2nd day of March, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the plaintiffs

Mr. Githui for the defendants

Kennedy – Court Clerk