



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
MISC. APPLICATION NO. 578 OF 2011

KIPKORIR, TITOO & KIARA ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

PAN AFRICA BUILDERS & CONTRACTORS LTD,,.....,CLIENT/RESPONDENT

AND

IN THE MATTER OF NAIROBI HCCC NO. 701 OF 2005 (O.S) (MILIMANI)

PAN AFRICA BUILDERS & CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....DEFENDANT

R U L I N G

On 28th June, 2011 the applicant filed a notice of motion under Section 48 of the Advocates Act, Cap 16, paragraphs 1 and 6 of the Advocates (Remuneration) Order, Rule 5 of the Advocates (Accounts) Rules, section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 and Orders 40, Rule 11 and 51, Rule 1 of the Civil Procedure Rules. The applicant seeks the following orders

1. That, the application be certified as urgent and that it proceeds without service in the first instance.
2. That, National Social Security Fund Board of Trustees, the Defendant/Judgment Debtor in Nairobi HCCC No. 701 of 2005 (O.S) (Milimani) be and is hereby compelled to remit to the Advocate/Applicant the sum of Kshs. 143,815,873.98 to be held in the Advocate/Applicant's Trust Account pending the hearing and determination of the Advocate/Applicant Bill of Costs dated 20.06.11 and filed on even date.
3. That, the honourable court be pleased to make such further or any other orders as maybe necessary for the ends of justice and to prevent abuse of the process of the court.
4. That, costs be provided for.

According to the applicant's counsel the judgment was entered in favour of his client in the parent suit and thereafter warrants were issued against NSSF for Kshs. 744,548,513.05/-. However the clients later on negotiated and agreed to reduce their amount to Kshs. 590 million and they recorded a consent before this court on 30th May 2011. While the applicant counsel was awaiting further instructions, the NSSF decided to pay its client directly the sum of Kshs. 250,000,000/-. The learned counsel was also informed that the next payment will be made in July 2011 though the NSSF has undertaken to withhold the payment till the applicant and his client resolve their dispute. Besides the above, he also submitted that his client called him to Dar-es-Salam on 10th June 2011 to enable them resolve the matter. While there it was

agreed that he would retain Kshs. 160 million for legal fees and payment to other parties. They also agreed that the applicant would remit to him the sum of Kshs. 180 million. In addition to the above they also agreed that he would be paid Kshs. 10 million on 13th June 2011. Surprisingly, the applicant found out that Mr. Harbinder Sethi had transferred all the money from his account. Due to the above reasons, the applicant has filed a bill of costs for Kshs. 143,815,873.98/-. He pointed out that the said amount is below the sum of Kshs. 160 million that they had agreed he should be paid. Apart from the above, the applicant has also submitted that the client company exclusively belongs to Mr. Sethi who is a permanent resident of South Africa. The applicant is apprehensive that NSSF may pay the client directly and that he may wire the said amount of money outside the country. In support of his submissions, the applicant has quoted the following authorities:

- *Abuya & Co. Advocates and Kuguru Food Companies NBI HC Misc. App. No. 400 of 2001 (Milimani) (Unreported).*

- *Owino Okeyo & Co. Advocates and Pelican Engineering & Construction Co. Ltd. Nai HC Misc. Appl. No. 156 of 2003 (Milimani) (Unreported).*

- *Nderitu & Partners Advocates and Mamuka Valuers (Management) Limited NBI HC Misc. Appl. No. 462 of 2004 (Milimani) (Unreported).*

- *The Advocates Act, Cap 16*

This court has carefully considered the application together with the submissions by the learned counsel. Apart from the above, this court also notes that it had recorded a consent order relating to **Pan Africa Builders and Contractors Limited vs. National Social Security Fund**. The parties agreed before me that there be a settlement for the sum of Kshs. 590 million in favour of the plaintiff in that particular case. From the correspondence that has been attached to this application, it is apparent that the NSSF decided to pay the plaintiff a sum of Kshs. 250 million directly without involving the counsel who was on record. The NSSF has also confirmed that the next payment is due in July 2011. This court has also been shown an email from Harbinder which was sent to the applicant in this case. Though he has assured the applicant that he is going to pay his fees, this court appreciates the apprehension that has been caused to the applicant. It must be appreciated that the applicant in this case has acted for Pan Africa Builders and Contractors Limited for a period of about 6 years. Under those circumstances it would only be fair and just for the plaintiff in that case to pay for the legal fees that he has incurred. So far the conduct of the plaintiff in that case cannot give anybody confidence that he would comply with the obligations that have been imposed on him. In view of the above analysis, I hereby concede to the application in terms of prayer No. 2. In that regard, the NSSF Board of Trustees who are the defendant/Judgment Debtor in Nairobi HCCC No. 701 of 2005 are hereby compelled to remit to the advocate/applicant the sum of Kshs. 143,815,873.98 to be held in the advocate/applicant's Trust account pending the hearing and determination of the advocate/applicant Bill of Costs dated 20th June 2011 and filed on even date. Costs in the cause.

Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read, signed and delivered in open court in the presence of:

- Kipkorir - Applicant's Counsel

MUGA APONDI
JUDGE
29TH JUNE, 2011