



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE NO. 432 OF 1999

HEBBY ONDIEKIPLAINTIFF

VERSUS

BARCLAYS BANK (K) LTD.....DEFENDANT

RULING

1. This is a ruling on application dated 6th August 2020 seeking the following orders:

a. Spent

b. That the ruling on taxation on 2.06.2010 by the Deputy Registrar Hon. Mr. B Atyang be adopted as the judgment of this court.

c. That the taxed and allowed amount of Kshs. 161,327 vide the ruling on taxation on 2nd June 2010 by the Deputy Registrar the Hon. Mr. B Atyang be enhanced by adding 50% to become amount Kshs. 241,990.50/=

d. That the interest accrues at 14% p.a court rate.

e. That the costs incidental to this application be provided against the defendant at a higher scale.

2. The application is premised on the grounds that both the ruling and the certificate of taxation by Hon. Mr. B. Atyang on 2nd June 2010 in Nakuru Hccc 432/99 has neither been appealed against nor discharged, executed or varied. The adoption of the ruling is to facilitate the execution process; that the ruling and the certificate of taxation do not grant the enhancement of the taxed amount by 50% from Kshs 161,327 to Kshs 241,990.50 as provided schedule vi rule 1(b) of the Advocates Remuneration Order 2014.

3. The applicant further sought interest rate to accrue at 14% court rate for purpose of the execution process. That execution has been delayed by the appeal filed by the Respondent being no. 107 of 2012 which was dismissed by the court of appeal which further dismissed cross-petition seeking damages in compensation for loss of use of Kshs. 800,000/=.

4. The application is supported by the affidavit of the applicant Hebbly Ondieki reiterating the grounds of the application.

5. She further averred that on 14th January 2021, costs of the court of Appeal were not awarded and the consent filed was limited to the release of the monies deposited jointly in the firm of Kiplenge Ogola Walker Kontos Account and not the decision of Hon Justice D.K Maraga. Further that the extraction of the amended decree was irregular as it was not submitted to the other party for approval.

6. She further averred that there exist a cogent reason that requires the intervention of the court and the defendant has not filed affidavit to rebutt the application dated 27th October 2020.

7. The application was canvassed by way of written submissions.

APPLICANT'S SUBMISSIONS

8. The applicant submitted that she sued the Respondent through plaint filed in 1999 claiming money lost in their banking facility. On 3rd October 2008, Judgment was entered in her favor and the court granted costs. The Respondent being dissatisfied with the judgment filed appeal no. 107 of 2012. The appeal was dismissed by judgment delivered on 18th October 2017 and the court directed each party to bear

their own costs of the appeal.

9. She submitted that the consent was in respect to the application, and the same was limited to the contents of the application, thus the costs were in relation to the application.

10. On the issue of representation the applicant averred that she acts in person and there are no outstanding issues between her and her previous advocate. She urged the court to be guided by Article 159 (2), (d) of the constitution of Kenya that requires the exercise of Judicial authority for justice to be administered without undue regard to procedural technicalities.

11. She submitted that there are pending costs that were decreed by Hon justice D.K Maraga that are yet to be paid and have not been set aside. She urged this court not to shut its eyes and ears on the issue of costs and find merit in the application in order to put the matter to rest.

RESPONDENT SUBMISSIONS

12. In submissions dated 5th November 2021, the respondent submitted that the application is fatally defective and incurable and should be dismissed for failure to comply with Order 9 Rule 9 and 10 of the Civil Procedure Rules 2010 which provide requirements to comply with when a party wants to act in person after judgment has been delivered. Respondent submitted that the firm of Kiplenge and Kurgat Advocates are still on record and the applicant in her further affidavit dated 14th January 2021 does not deny the averment.

13. The respondent further submitted that the applicant filed similar application dated 20th September 2018, and the same was dismissed with costs which costs have not been paid to date. The respondent submitted that the applicant has not contested the same and the current application is therefore an abuse of the court process.

14. In respect to consent dated 15th February 2018, the respondent submitted that advocates of both parties settled the dispute in the matter and parties have fully complied with the terms of the consent; and further, the applicant does not dispute the terms of the consent. Respondent further submitted that clause 2 provided that “upon compliance, the matter be and is hereby marked as fully settled”; and Clause 3 stated “there be no orders as to costs” and submitted that the consent is therefore valid and it settled the matter fully; that the same has never been set aside.

15. The respondent further submitted that the amended decree of the high court was issued on 19th December 2017 after the judgment of the court of appeal and the consent is based on the amended decree which has not been set aside but fully complied with.

16. The respondent concluded that the application is dead on arrival; that it is vexatious, the prayers have no legal basis, is without merit and the same ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

17. I have considered the ground in support of the application, the averments and submissions herein. I wish to consider two issues

a. Whether the application is fatally defective.

b. Whether the matter is fully settled

(i) Whether the application is fatally defective

18. Order 9, rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

a. Upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.

19. The reasoning behind the provision of Order 9 Rule 9 was articulated in the case of **S. K. TARWADI VS VERONICA MUEHLMANN [2019] eKLR** where the judge observed as follows:

“...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

20. The applicant was represented by the firm of Kiplenge and Kurgat Advocates before judgment. There is no indication that he sought leave to act in person nor consent between him and his Advocate was filed to enable him act in person. He therefore failed to comply with Order 9 rule 9. In my view this is a fatal omission which cannot be cured by article 159 of the constitution.

(ii) Whether the matter is fully settled

21. I have perused the consent recorded on 15th February 2018 and note that parties agreed that a sum of kshs 516,793.39 deposited in joint interest account no.300xxxx in the names of kiplenge and Ogola Advocates and Wlker KantosAdvocate at HFC Limited be released to the plaintiff's standard Chartered Account number 010xxxx Account name Moraa Ondieki

22. Further they that defendant do deposit kshs 985,762.61 to the plaintiff's standard Account number 010xxxx Account name Moraa Ondieki being the balance of the decretal amount; and upon compliance of the terms of the consent,the matter to be marked settled.The defendants Advocate confirmed that the amount has been paid.

23. The applicant had filed a similar application to the current application which was dismissed with costs.No appeal has been filed against the dismissal.The applicant having failed to file appeal.In the absence of an appeal Litigation in this matter should come to an end.

24. In the circumstances, I find the application is without merit and I proceed to dismiss the same with costs.

25. FINAL ORDERS

1. Application dated 6th August 2020 is hereby dismissed

2. Costs to the respondents.

RULING DATED AND DELIVERED VIRTUALLY AT KIAMBU THIS 10TH DAY OF FEBRUARY, 2022

RACHEL NGETICH

JUDGE

Coram:

Court Assistant : Kinyua

For Plaintiff : - No appearance

For defendant : - Mr. Kimaini

Ruling delivered virtually.

RACHEL NGETICH

JUDGE