



Kiarie t/a Uvasho Enterprises v Thuku t/a SN Thuku & Associates (Commercial Case E524 of 2023) [2024] KEHC 13645 (KLR) (Commercial and Tax) (5 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E524 OF 2023
JWW MONG'ARE, J
NOVEMBER 5, 2024**

BETWEEN

MICHAEL MAINA KIARIE T/A UVASHO ENTERPRISES PLAINTIFF

AND

SAMUEL NGAARI THUKU T/A SN THUKU & ASSOCIATES DEFENDANT

RULING

1. For determination by this court is the Plaintiff's Originating Summons(OS) application dated 31/10/2023 filed pursuant to order 36 rule 1 and 4 of the Civil Procedure Rules and order 50 Rule 4 of the Civil Procedure Rules.
2. The Plaintiff has prayed for an order to direct the advocate to pay the sum of Kshs.1,050,741.38/= plus interest from the date of the judgment in COMMSU No.E765 of 2021 until payment in full.
3. The grounds of the application were that a judgement was delivered in favour of the Plaintiff in COMMSU No. E765 of 2021 for a sum of Kshs.1,256,563.88/= inclusive of costs; that the Defendant/ Advocate was paid the said amount on or about 20/7/2023 but has refused to remit the money to the Plaintiff unjustifiably.
4. The Plaintiff averred that the holding of the client's money without any justification is unprofessional, uncalled for and conduct unbecoming of an officer of the court.
5. In opposition to the application, the Defendant filed a preliminary objection dated 27/2/2024 and a replying affidavit sworn on the same date by himself.
6. In the said P.O the Defendant contended that the instant originating summons is incompetent as the business name, Uvasho Enterprises is currently owned by two partners whereas the applicant is only



one person and there is no verifying affidavit by the other partner named George Waweru Kiarie. On this basis, the Defendant prayed to have the suit dismissed for being incurably defective.

7. In his replying affidavit, the Defendant averred that he was approached by a lady known as Ann Wanja Njiru who informed him that her business partner, the Plaintiff herein, had supplied some goods to a company and that they had not been paid.
8. That thereafter the Defendant instituted the suit COMMSU No. E765 of 2021 where judgement was entered in favour of the Plaintiff and the decretal sum was sent to his bank account as the Plaintiff's advocate.
9. The Defendant contended that the said Ann Wanja Njiru paid for court filing fees through her Mpesa and that she was supposed to split the decretal sum with the Defendant however they have been unable to agree on how to solve their issues.
10. The Defendant stated that this dispute should be subjected to mediation where the Plaintiff and Ann Wanja Njiru would best resolve their issues.

Analysis and Determination:

11. In support of his application, the Plaintiff filed written submissions dated 1/3/2024 while none are on record for the Plaintiff.
12. While looking at the court file on the Case Tracking System, I note that the Defendant filed an interpleader application dated 12/6/2024 seeking a declaration on the rightful beneficiaries of the money he holds in his account in NCBA. The grounds of the application are similar to those brought out in his replying affidavit discussed hereinabove.
13. The court will first consider the P.O dated 27/2/2024 by the Defendant. The Defendant sought to have this matter stuck out on the grounds that:

“The application is incompetent as the Business name, Uvasho Enterprises, is currently owned by two partners whereas the applicant is only one person. There is no verifying affidavit of George Waweru Kiarie.”

14. In Joseph Ruhoni Njoka V Registrar Of Titles, Nyari House Limited, Michael Shaw And David Kariuki Kuria [2008] KEHC 3064 (KLR) it was held:

“It is true when the application was filed it was not supported by an affidavit. Instead, a verifying affidavit was filed in support thereof. It would appear the applicant did not distinguish between filing matters in Court by way of plaint or by Originating Summons. In the former case; Order VII Rule 2 provides as follows:

“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments in the plaint.”

By the applicant filing a verifying affidavit in support of his pleadings he took the view that the Originating Summons filed in Court was as good as a plaint which is not the correct position.”



15. In *Otulo Oloo Siso V Andrian Spencer Dearing & John Staneley Ward T/a Price Waterhouse Coopers & 5 Others* the court observed as follows:

“Thirdly, even if the originating summons was well premised, it is not supported by an appropriate affidavit containing all the relevant depositions as would enable the court and the other parties to understand clearly what the issues in contention are. The verifying affidavit that was annexed to the originating summons is non-suited. It is the kind of affidavit that is filed to verify a plaint, which is not the case. It appears from the contents of paragraph 3 of the said verifying affidavit that the deponent thereto was verifying the contents of a plaint.”

16. From the authorities above, an originating summons application is normally accompanied by an affidavit containing relevant depositions that help the court and other litigants to understand it.

17. In this case the originating summons was accompanied by a supporting affidavit sworn by the Plaintiff which is in order. I therefore find the P.O which claimed that the subject originating summons is defective as it was not supported by the verifying affidavit of George Waweru Kiarie, to be baseless and without merit.

18. The second issue for determination is whether the instant application ought to be allowed as prayed.

19. A background of this dispute is that the court in COMMSU No. E765 of 2021 entered judgement and decree in favour of the Plaintiff against a company known as Renova Limited whereby Kshs. 1,256,503.88/= was awarded to him. This is evidenced by the decree dated 30/6/2023 and marked “MMK1” in the Plaintiff’s supporting affidavit.

20. The Defendant who was the Plaintiff’s advocate in the matter received the decretal amount from the judgment debtor and the Plaintiff requested him to forward the said sums to him after subtracting his legal fees.

21. The Plaintiff averred that the Defendant is holding the decretal sum unjustifiably. On his part, the Defendant stated that the Plaintiff had agreed to split the decretal sum with one Ann Wanja Njiiru who was the Plaintiff’s ex-lover and that she had paid court filing fees.

22. From the material availed to this court, I am satisfied that the judgment and decree in COMMSU No. E765 of 2021 was entered in favour of the Plaintiff herein. I further note that Uvasho Enterprises is a business owned by the Plaintiff and one Michael Maina Kiarie, as evidenced in by the Certificate of Registration of Change of Particulars marked as “MMK 3” in the Plaintiff’s supporting affidavit.

23. Although the Defendant advocate averred that Ann Wanja Njiru was the business partner of the Plaintiff herein and that she paid for the court filing fees, he has not provided any evidence to buttress that allegation.

24. In the absence of such evidence and in light of the judgment issued in COMMSU No. E765 of 2021 . I am inclined to grant the prayers sought in the application dated 31/10/2023, that is, an order to direct the Defendant/Advocate to pay the Plaintiff the sum of Kshs. 1,050,741.38/= plus interest from the date of the judgment in COMMSU No. E765 of 2021 until payment in full. Costs awarded to the Plaintiff. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF NOVEMBER 2024

J.W.W. MONG’ARE



JUDGE

In the Presence of:-

Mr. Kipkorir holding brief for Mr. Maina for the Applicant.

Mrs. Maina holding brief for Mr. Thuku for the Respondent.

Amos - Court Assistant

