



REPUBLIC OF KENYA



KENYA LAW
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Madison Insurance Company Limited v Wanjiku & another (Suing as the Administrators of the Estate of Dorothy Muthoni) (Civil Miscellaneous E183 of 2023) [2024] KEHC 14994 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14994 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL MISCELLANEOUS E183 OF 2023
GL NZIOKA, J
NOVEMBER 18, 2024**

BETWEEN

MADISON INSURANCE COMPANY LIMITED APPLICANT

AND

RACHEAL WANJIKU 1ST RESPONDENT

ROBERT NJIRU 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF DOROTHY MUTHONI

RULING

1. By a Notice of motion application dated 30th November 2023, the applicant is seeking for orders as follows
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That in default of paying, the applicant be allowed to commence execution proceedings against the respondent's advocates, Wainaina Benjamin Gathiru trading as B.G. Wainaina & Co Advocates to recover the decretal sum of Kshs. 1,571,717 together with interest at 14% per annum 26th October 2020 until the date of payment in full.
 - e. That this Honourable court be pleased to order the respondent's advocates, Wainaina Benjamin Gathiru trading as B.G. Wainaina & Co. Advocates to refund to the applicants' law



firm of Kinyanjui Njuguna & Co. Advocates the sum of Kshs. 1,571,717 together with interest at 14% per annum effective 26th October 2020 until payment in full.

- f. That the applicant be awarded costs.
2. The application is based on the provisions of section 1A, 1B of the Civil Procedure Act, (cap 21) Laws of Kenya, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
 3. It is based on the grounds thereto and an affidavit in support sworn by Kinyanjui Theuri an Advocate of the High Court practising in the firm of; Kinyanjui Njuguna and Co. Advocates which represents the applicant.
 4. He avers that, summary judgment was entered against the applicant vide Naivasha Chief Magistrate Civil Case No. 354 of 2019 for the sum of Kshs. 1,571,717.
 5. That, the applicant being aggrieved by the decision of the trial court, lodged an appeal against the judgment. Consequently, the court directed that the firm of B.G. Wainaina & Co. Advocates, to hold the decretal sum of Kshs. 1,571,717 already been released to it by the respondent as security pending the hearing and determination of the appeal.
 6. That judgment in the appeal was delivered on 26th May 2022, wherein the court set aside the summary judgment rendered by the trial court. Further that, the applicant obtained another judgment vide High Court Civil Appeal No. E077 of 2021 which set aside the judgment delivered in Naivasha Chief Magistrate Civil Case No. 661 of 2017.
 7. That the appellate court ordered that the applicant was entitled to repudiate the insurance policy and was therefore not liable to make any payments in any claim arising from the insurance policy.
 8. That, respondent's advocate has not appealed nor obtained a stay of execution pending appeal and therefore does not have any judgment against the applicant.
 9. However, despite several requests for a refund the respondent's advocates have failed to comply with the same. That in the circumstances, the respondent's advocate, Wainaina Benjamin Gathiru trading as B. G. Wainaina & Co. Advocates should be ordered to refund all the monies with interest at court rates of 14% per annum from 26th October 2020 to date of payment. Further, in the event the monies are not paid, the applicant be allowed to execute against the respondent's advocates.
 10. However, the application was opposed vide a replying affidavit dated 20th January 2024 sworn by Benjamin G. Wainaina an Advocate of the High Court representing the respondent.
 11. He averred that the application is frivolous, and an abuse of the court process as the jurisdiction of the court has not been properly invoked and therefore lacks merit.
 12. However, he conceded that the firm of B.G. Wainaina & Co. Advocate represented the respondent in trial court and on 27th August 2020 it received on behalf of respondent the decretal sum of Kshs. 1,571,717 through two cheques of Kshs. 785,859 each.
 13. That the firm proceeded to pay the entire sum to the respondent as instructed by the respondent. That, on 14th October 2020 the applicant's advocate served firm of B.G Wainaina with an unfilled notice of motion application dated; 21st October 2020 filed Vide High Court Civil Appeal N0. 23 of 2020, together with a mention notice indicating that the application was scheduled for mention for 26th October 2020.



14. That, on the same day, the respondent's advocates informed the applicant's Advocate that, the application did not have a court stamp and they should serve a duly filed application. Further, that the orders sought for in application had been overtaken by events. That the applicant's Advocate never served the respondent's Advocates with the duly filed application nor a hearing date for the application.
15. He averred that, on 22nd January 2021 the respondent's Advocates were served via email with a court order issued on 26th October 2020 and dated 19th January 2021. On the same date, the respondent's Advocates vide an email dated 22nd January 2021 informed the applicant's Advocate that the said order had been overtaken by events as the firm was no longer holding any funds on behalf of the respondent.
16. That he perused the court file and ascertained that there was no evidence that a duly filed application was served upon the firm of B. G. Wainaina & Co Advocates. Further, there was no application fixed for hearing or a hearing notice served on the respondent's Advocates firm.
17. In additionally the orders were granted ex parte on 26th October 2020 when the matter was coming up for mention and yet no substantive orders can be issued on a mention date. Further, the application is yet to be fixed for inter parties hearing.
18. He further averred that, the subject orders were directed to the firm of B.G. Wainaina & Co Advocates and not to him personally and neither him nor the respondent's Advocates firm is holding any funds on behalf of the respondent that are capable of being paid with interest.
19. I have considered the application in the light of the material placed before the court and the highlight of submissions on 21st August 2024 by the parties. It is evident therefrom that, the respondent's counsel who has been enjoyed in these proceedings as an interested party is not holding and/or in possession of the subject sum of Kshs 1,571,717. As such no orders can be made against him in his individual or personal capacity.
20. The question that arises is whether, at the time the counsel and/or the firm representing the respondent released the subject sum to him there was an order for withholding the said sum as security pending the hearing and determination of the appeal.
21. In addressing that issue, I note from the court record that, judgment in Chief Magistrate's case was delivered on 29th May 2020 by Hon. J. Karanja SRM (as then was).
22. That an appeal was filed against the judgment and the application for stay of execution filed on 25th August 2020, heard in chambers on 26th August 2020 and stood over to 1st September 2020.
23. On 2nd September 2020, Mr. Otury informed the court that, the appellant; "had issued cheques for the entire decretal sum and that the application may have been overtaken by events". Apparently the parties appeared before the Hon. Lady Justice Mumbua T. Matheka during vacation and the court referred the matter back to High Court at Naivasha and stood over to 17th September 2020.
So far there was no order for stay of execution and/or deposit of security for stay.
24. On the 17th September 2020, Mr. Otury informed the court that "the lower court had issued orders to deposit decretal sum as security". The counsel went to state: -

"That was not done on time by our client. They paid direct to the respondent's counsel the full decretal sum. We are seeking extension of time but application is overtaken due to payment. The civil appeal No. 23 of 2020 is being pursued. Seek section 3A- that money



paid out be held by respondent as stakeholder. The money was 1,517,717 to avoid recovery proceedings.”

In the response Mr. Wainaina for the respondent stated: -

“Appellant should file proper application not oral to which we can respond.”

The court then directed as follows: -

“By consent the status quo be maintained to allow parties to record consent on stakeholding of the decretal sum paid. The matter was stood over to 22nd September 2020.”

25. That on 5th October 2020, the applicant’s Advocate indicated that they would file a formal application, however, on 26th October 2020, the court allowed the applicant’s application dated 21st October 2020 deeming it unopposed.
26. The court ordered as follows:
 - “1. That pending hearing and final determination of Naivasha HCCA 23 of 2020, the entire decretal sum in Naivasha CMCC 354 of 2019 – (KSHS 1,571,717/=) already paid out to the counsel on record for the respondent herein, be held by the said firm of; B. G. Wainaina & Co Advocates as a stake-holder on behalf of the parties to the appeal hereto as security to preserve the substantive appeal.
 2. That the cost of the application be in the cause.”
27. The question that arises is whether when the afore order was made the firm of respondent’s B. G. Wainaina & Co. Advocate was still holding the subject sum or had already been released to the respondent?
28. In considering the same, I note that the respondent avers that, it was only served with the order issued on 26th October 2020, on 22nd January 2021 and were never served with the notice of hearing of the application that gave rise to the subject order. Yet the applicant has not proved service of the application. On the other part there is no evidence as to when funds were released to the respondent.
29. To resolve the subject matter herein, the applicant must prove that, the respondent was aware of the hearing of the subject application on 26th October 2020 and the respondent to provide evidence when the money in question was paid to the respondent by the law firm.
30. The additional evidence should be filed in form of further affidavit with the necessary documents to enable final orders in the matter. The applicant will file and serve the affidavit in seven (7) days from the day after delivery of this order and upon service the respondent will file and serve in seven (7) days. The matter reverts in court on a date to be fixed herein for final orders.
31. It is so ordered

DATED, DELIVERED AND SIGNED THIS 18TH DAY OF NOVEMBER 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Otieno for the applicant



Mr. B. G. Wainaina for the respondent

Ms. Doreen: Court Assistant

