



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 64 OF 2019(O.S)

SAMUEL GACHIE KAMITI.....APPLICANT

VERSUS

OSEKO & OUMA ADVOCATES LLP.....RESPONDENT

RULING

1. Brought under order 42 Rule 6(1) and (2), is a Notice of Motion dated 17th January 2020 seeking to stay execution of the Ruling of this Court dated 20th December 2019 and consequential orders pending the hearing and determination of an Appeal from that decision

2. Emerging from the Application is that the orders sought to be stayed are:-

[23.2] The monies now held in deposit by the Advocates and all accrued interest thereon shall, within 30 days hereof, be moved into an interest earning account in the joint names of the Advocates or their lawyers on record in this matter and the lawyers for the client and shall remain in the said account pending the hearing and determination of the Arbitration or further orders of this Court.

[23.3] The Advocates shall release the client's file in Nairobi HCCC No. 543 of 2010 Samuel Gachie Kamiti –vs- Equity Bank Limited & 6 Others to the firm of Kipkenda & Company Advocates within 30 days hereof.

3. A suitor of stay under the provisions of Order 42 Rule 6 (2) needs to demonstrate that;

i. The application is made without undue delay.

ii. Substantial loss may result to the applicant unless the order is made.

iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

All three must be satisfied and as,has previously said, are of equal worth.

4. From my assessment of the Motion before Court, its success or failure has to turn on whether the applicant has demonstrated the risk of substantial loss.

5. In an affidavit sworn on 17th January 2020, Christine Ouma Oseko, the managing partner of the applicant firm sets out the firm's apprehension. The first is that the client's file is the only lien to fees and once released without full payment then the loss to be suffered by the firm is substantial.

6. The firm makes the point that it has provided reasonable security for the funds because it is deposited in an interest earning client account and has no intention to release, disburse or in any way deal with the funds until the appeal is determined.

7. The application is opposed.

8. The firm's demand of 25th January 2019 for fees is pertinent in determining whether there is a true risk of substantial loss. In the letter the

firm writes to the client and reveals that it holds Kshs.45,000,000/= on its behalf and that fees due to it is Kes.44,290,900.08. It then states:-

“We shall deduct the outstanding amount from Kshs.45,000,000/= as agreed and forward Kes.709,099.12 to the following account...”

9. Simply, the firm was stating that the amount it was holding was more than the fees demanded.

10. Now, this Court is aware that an Advocate may charge interest on outstanding fees, but that charge has to be triggered. Paragraph 7 of The Advocates Remuneration Order reads:-

“An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

The proviso to the Rule is all important. The claim for interest must be raised before the fees has been paid or tendered in full.

11. It is common ground, and it has to be, that the client does not agree on the fees demanded. The effect is that although the demand for fees has been made, and whilst the Advocates hold Kshs.45,000,000.00, the fees has not been paid or tendered in full.

12. The Engagement and Retainer Agreement of 13th November 2015 is the cornerstone of the Advocates claim to fees of Kshs.44,290,900.08. Clause 2.4 thereof reads:-

“We will seek retained sums from you to ensure that all legal services and related costs are always paid on a current basis. The term for payment of our invoices is thirty (30) days from the date of the invoice. The firm is entitled to charge you interest on any sum unpaid thirty (30) days after the date of delivery of a bill at the rate prescribed under the Advocate’s Remuneration Order.”

13. It may be argued for the client that the entitlement to charge interest has to be manifested by a demand. For the Advocate on the other hand, that the terms of clause 2.4 is sufficient notice that interest will be claimed.

14. If the client’s argument carries the day, then the sum of Kshs.45,000,000.00 which this Court ordered be moved into the joint interest earning account would be more than sufficient to meet the Advocates fees and is therefore adequate lien for fees.

15. If however, the Advocates are entitled to interest then it may be argued that the interest to be earned from the account may be less than the 14% per annum provided in Paragraph 7 of the Advocates Remuneration Order and that the deposit may, eventually, be less than what the Advocates may be found to be deserve.

16. What this Court has not been told is that the client’s financial status is such that he is unable to pay the shortfall that may arise from the charge on interest. That not being stated or alleged, then the risk of substantial loss is not demonstrated.

17. I say again, as in the Ruling of 20th December 2019, that there can be no reason to hold the client’s file while the deposit of Kshs.45,000,000.00 is available to meet a demand of fees of Kshs.44,290,900.08.

18. The upshot is the Notice of Motion of 17th January 2020 is without merit and is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 6th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ochieng Oduol for the Applicant.

Odoyo for the Respondent.