



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISC APPLICATION NO 236 OF 2018**

**ANASTACIA WAGICIENGO.....APPLICANT**

**VERSUS**

**EZEKIEL WAFULA T/A**

**WAFULA & ASSOCIATES ADVOCATES.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated and filed on 13<sup>th</sup> April 2018 was filed pursuant to the provisions under Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rules 1,2,3 and 4 and Order 51 Rule 1, of the Civil Procedure Rules and all enabling provisions of law. Prayers No (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT an order be given to NIC bank to furnish the court with certified bank statements for the Account No [particulars withheld] for the period between August 2014 and April 2018.**

**4. THAT this Honourable court be pleased to issue orders for the Respondent to deposit Kenya Shillings Forty Eight Million, Eight Hundred and Four Thousand, Nine Hundred and Ninety Four (Kshs 48,804,994/=) in an interest earning account and upon the *interparties* hearing of the application, the said funds be transferred to the account of the Applicant.**

**5. THAT costs of this application be provided for.**

2. The Applicant's Written Submissions were dated 27<sup>th</sup> July 2018 and filed on 30<sup>th</sup> July 2018 while those of the Respondent were undated and filed on 25<sup>th</sup> July 2018.

3. When the matter came before the court on 31<sup>st</sup> July 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The present application was supported by the Applicant's Affidavit that was sworn on 13<sup>th</sup> April 2018.

5. Her case was that she appointed the Respondent to follow up payment from Kenya National Examination Council (KNEC) but he arm-twisted her to enter into a Retainer Agreement yet he had indicated that he would only charge her fees for following up the said payment.

6. She averred that the Respondent received a sum of Kshs 29,000,000/= but only remitted to her a sum of Kshs 11,000,000/=. She then terminated her Client- Advocate relation to the Respondent. However, he continued to act for her without her permission and he received a sum of Kshs 48,804,994/= but he transferred to her a sum of Kshs 16,000,000/= and retained a sum of Kshs 9,000,000/= being costs. The Respondent had since refused to remit to her any more monies.

7. It was her assertion that the Respondent had denied her, her right to enjoy the fruits of her judgment against KNEC and thus urged this court to allow her application as prayed.

### **THE RESPONDENT'S CASE**

8. In opposition to the said application, Ezekiel Wafula, the Respondent's proprietor, swore a Replying Affidavit on 21<sup>st</sup> May 2018. The same was filed on 25<sup>th</sup> May 2018. He also filed a Notice of Preliminary Objection dated 21<sup>st</sup> May 2018 on 25<sup>th</sup> May 2018.

9. He stated that the present application was incurably defective because it had been brought by a person who was not a party in the case of **Nairobi HCCC No 447 of 1998 Caledonia Supermarkets Ltd vs KNEC** and that there were no substantive proceedings between him and the Applicant herein for the present application to have been instituted as a Supplemental proceeding.

10. He added that all the payments to Caledonia Supermarkets Ltd was made in accordance with the Fee Agreement. He was emphatic that he could not comply with the orders the Applicant had sought because his firm did not operate Account No 1214828477 with NIC Bank.

11. He therefore urged this court to dismiss the Applicant's application with costs to him.

### **LEGAL ANALYSIS**

12. Right at the outset, this court found it prudent to deal with the issue of competence or otherwise of the Applicant's application.

13. The Respondent submitted that there was no main suit for which the Applicant could have sought an interlocutory order. He referred this court to the case of **Nyamira F.C.S vs The Chief Land Registrar & Another [2005] eKLR** where it was held that the main suit had to be alive for an interlocutory order to be made.

14. He also referred to the meaning of Supplementary Proceeding given in the Black's Law Dictionary 10<sup>th</sup> Edition as "**a proceeding that supplements another or a proceeding's held in connection with the enforcement of a judgment...**"

15. On her part, the Applicant argued that the issues she had raised did not fall within the purview of Section 45 of the Advocates Act Cap 16 (Laws of Kenya) but that the application primarily disputed the validity of the said Retainer Agreement as drafted on behalf of a company that was not part of the agreement in the first place and the Respondent's failure to remit to her or Caledonia Supermarkets Ltd the sums he had received on the strength of the said Agreement.

16. She urged this court to take into account the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities. In this regard, she relied on the case of **Okoth Obado vs Edward Akong'o Oyugi & 2 Others [2014] e KLR** where it was held that:-

**"... a party's right should not be abruptly excluded blatantly from non-compliance with a procedure rule, especially where no apparent injustice to the other party can be deduced".**

17. The substantive provision under which the Applicant's present application was hinged was Section 63(e) of the Civil Procedure Act. The same stipulates as follows:-

**"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed (emphasis court) **make such other interlocutory orders as may appear to the court to be just and convenient**".**

18. It is important to point out that interlocutory orders envisaged under Section 63(e) of the Civil Procedure Act cannot be granted in a vacuum. The limbs they stand on must be supported by provisions expressly provided under the Civil Procedure Rules. It therefore follows from the said Section that the interlocutory orders must be premised on substantive proceedings, they must be so prescribed and they must be to prevent the ends of justice from being defeated.

19. Taking into account that the Applicant was primarily disputing the validity of a fee Retainer Agreement, it was necessary that she seek substantive reliefs in a main proceeding.

20. Indeed, this court noted that in Prayer No (3) of her application, the Applicant had sought that she be furnished with certified copies of bank statements for Account No 1214828477. A perusal of the documentary evidence attached to her Supporting Affidavit did not give any form of evidence to prove and/or show that the aforesaid Account number belonged to the Respondent.

21. In view of the Bank-Client confidentiality, it would be proceeding on a wrong principle if this court were to grant the order for NIC Bank to issue a statement belonging to the aforesaid Account without first ascertaining to whom the said Account belonged to.

22. Going further, Prayer No (4) of the Applicant's application appeared to be of the nature of a mandatory injunction. It sought orders that the Respondent be compelled to do a particular act. An order such as this must be supported by a substantive relief in the main pleading. It is not an order that can be interrogated and granted on the basis of affidavit evidence only.

23. The orders sought in her application would require interrogation of the same as they were not of the nature to be granted in an interlocutory stages. In the absence of such substantive proceedings, her application was right at the outset, incurably defective and

incompetent.

24. This court was not persuaded to agree with her that she had demonstrated that the orders she had sought were so prescribed and that they were so prescribed and that they were intended to prevent the ends of justice being defeated because from the way the orders were drafted, they were final in nature. They were not a stop gap measure as is contemplated to be achieved by an interlocutory order.

25. This court therefore agreed with the Respondent's submissions that there were no proceedings within which interlocutory orders could be granted as was ably observed by Wanjiru Karanja J (as she then was) when she stated in **Nyamira E.C.S vs The Chief Land Registrar & Another [2005] eKLR** that:-

**“The word interlocutory refers to something that is intermediate- between the beginning and the end. In a civil suit, it denotes any application between the filing of the suit and the final judgment or decree. The main suit has to be alive for there to be an interlocutory order...”**

26. Accordingly, having considered the affidavit evidence, the Written Submissions by the respective parties and the case law that they each relied upon, this court came to the firm conclusion that the Applicant had not demonstrated grounds for being granted the orders she had sought and that the application as presented to court was incurably defective and incompetent as it was premised on a miscellaneous application. Bearing in mind the aforesaid observation, this court did not deem it necessary to interrogate the question of whether the Fee Retainer Agreement (Letter of Engagement) dated 4<sup>th</sup> April 2014 was valid and/or whether the Respondent could have purported to collect monies on behalf of a party that was not party to the proceedings herein.

27. The incompetence of the application herein was not one that could be cured by the provisions of Article 159 (2) (d) of the Constitution of Kenya for the reason that the flaw was substantive and was not a procedural technicality that this court could overlook.

#### **DISPOSITION**

28. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated and filed on 13<sup>th</sup> April 2018 was not merited as it was incurably defective and incompetent *ab initio*. The same is hereby dismissed with costs to the Respondent. Conversely, the Respondent's Preliminary Objection dated 21<sup>st</sup> May 2018 and filed on 25<sup>th</sup> May 2018 was merited and the same is hereby upheld.

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of November 2018**

**J. KAMAU**

**JUDGE**