



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 895 OF 1999(OS)

THE OFFICIAL RECIEVER.....PLAINTIFF/RESPONDENT

- V E R S U S -

WACIRA WAMBUGU t/a WACIRA

WAMBUGU & CO. ADVOCATES.....DEFENDANT

RULING

1) Wacira Wambugu t/a Wacira Wambugu & Co. Advocates, the defendant/applicant herein, took out the motion dated 24.2.2017 in which he sought for the following orders:

i. THAT this application be certified urgent and heard ex-parte in the first instance.

ii. THAT this honourable court be pleased to lift the warrants of arrest issued against the defendant/applicant herein on the 26th January 2017 in execution of the decree of the court.

iii. THAT the warrants of arrest issued on 26th January 2017 against the defendant/applicant be stayed and/or lifted.

iv. THAT the costs of this application be awarded to the defendant/applicant as well as any other orders that this honourable court deems fit.

2) The motion is supported by the affidavit sworn by John Wacira Wambugu. When served, the Official Receiver, the plaintiff/ respondent herein, filed the replying affidavit of Tabitha Mwaniki to oppose the application. When the motion came up for interpartes hearing this court gave directions to have the motion disposed of by written submission.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion plus the rival written submissions. It is the defendant/ applicant's submission that he was never served with the notices to show cause and that a warrant of arrest was issued without affording him a chance to be heard.

4) The applicant further pointed out that the averments in the affidavit of service sworn on 26.1.2017 purporting that service of the notice to show cause was effected were falsehood. The defendant also stated that the parties to this dispute had amicably settled the matter.

5) The plaintiff/respondent opposed the motion arguing that a notice to show cause was served upon the defendant/applicant for 26.1.2017 as explained in the affidavit of service of one Nelson K. Mwangi. It is the averment of Tabitha Mwaniki, that the defendant/applicant acknowledged receipt of the notice to show cause when he personally called the firm of Gatonye Waweru & Co. Advocates asking for the judgment sum to be set aside on 24.1.2017.

6) The plaintiff further argued that the defendant's argument that he was not given an opportunity to be heard is geared toward misleading the court with a view of evading the defendant his obligation.

7) The history of this case appear to be short and straightforward.

This dispute relates to a claim to Closed Life Fund as it was a matter under the mortgage portfolio of the plaintiff. Prior to the transfer of the Life Fund to KNAC (2001) Limited on 16.12.1997, the plaintiff/respondent instructed the defendant/applicant to effect the transfer. The respondent than handed over documents together with the discharge to enable him execute the instructions.

- 8) In return the defendant issued a professional undertaking for ksh.7,017,572/= together with interest accruing thereon within 14 days of the registration of the documents in favour of his client.
- 9) Pursuant to the said professional undertaking, the defendant issued cheque no. 147409 for ksh.7,424,398/= to the respondent which cheque was later dishonoured when presented to the bank.
- 10) There are a couple of correspondences which show that the defendant/applicant had approached Mssrs Waweru Gatonye & Co. Advocates, the plaintiff's advocate in which he indicated that he was willing to settle the matter by set off.
- 11) The plaintiff's advocate was categorical that the plaintiff had no outstanding legal fees with the defendant that can set off the debt due to the plaintiff. The plaintiff pointed out that the defendant had failed to plead a counter-claim in form of set off therefore the application before this court is an afterthought and was filed in bad faith.
- 12) It is not in dispute that the plaintiff was prompted to issue a notice to show cause against the defendant/applicant when he refused to settle the decretal sum.
- 13) It is apparent from the record that the defendant/applicant has evaded service in many occasions. I am satisfied that the defendant/applicant was eventually served with a hearing notice of the notice to show cause on 26.1.2017.
- 14) It is therefore not true that the defendant/applicant was not served. I am equally satisfied that the defendant/ applicant was not denied a right of hearing. It would appear the defendant's application was meant to delay the conclusion of this matter.
- 15) In the end, I find no merit in defendant's motion. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 16th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants