



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 489 OF 2006

CHARLES WAHOME MWAI1ST PLAINTIFF/APPLICANT

EVERLYNE NDOTI WAHOME2ND PLAINTIFF/APPLICANT

- V E R S U S -

ISAAC KAMAU NDIRANGU..... DEFENDANT/RESPONDENT

AND

ALFRED NJERU NDAMBIRI1ST CITEE/APPLICANT

MAUREEN WANJIRU KIBE..... 2ND CITEE/APPLICANT

ORDER ON DIRECTIONS

1. On 11th November 2016, this court delivered a ruling over the defendant's notice of motion dated 30th June 2015 in the following terms:

i. Alfred Ndambiri and Maureen kibe are hereby convicted for contempt of court orders. They are consequently called upon to appear before this court on 5.12.2016 to submit facts in mitigation before being sentenced.

ii. This court issues a declaratory order to the effect that the decretal sum has been fully settled by the defendant.

iii. The plaintiffs and their advocates on record are jointly and severally ordered to forthwith refund to the defendant the sum of ksh.2,015,544/=.

iv. Costs of the motion dated 30.6.2015 is awarded to the defendant.

2. Alfred Njeru Ndambiri and Maureen Wanjiru Kibe, the 1st and 2nd citees respectively, subsequently took out the motion dated 28.11.2016 in which they sought for the following orders *interalia*:

1. THAT this matter be certified urgent and the application herein be heard exparte in the first instance.

2. THAT the proceedings in regard to the ruling delivered on 11th November 2016 and the orders issued on 22nd November 2016 that, Alfred Ndambiri and Maureen Kibe are hereby convicted

for contempt of court orders. They are consequently called upon to appear before this court on 05.12.2016 to submit facts in mitigation before being sentenced, be stayed pending the hearing and determination of this application.

3. THAT a declaration be and is hereby made that that the ruling delivered on 11th November 2016 and the order issued on 22nd November 2016 condemning Messrs Alfred Ndambiri and Maureen Kibe to conviction for contempt of court, breached and violated the applicants' rights and fundamental freedoms under the provision of Articles 50 of the constitution of Kenya 2010 hence it is null and void for all intents and purposes.

4. THAT costs of this application be provided for.

3. The aforesaid motion was fixed for mention on 5th December 2016. It is apparent from the ruling of 11.11.2016 that the contemnors and their advocates were required to appear in court on 5.12.2016 to submit facts in mitigation before sentencing. However on the aforesaid date the parties recorded a consent order to have the matter adjourned to 21st February 2017. Learned counsels informed this court that the plaintiffs and the contemnors would use the intervening period to make proposals to the defendant on how to refund the sum of kshs.2,015,544 plus costs. It was also expressly stated in the consent order that the court would give further orders and directions on the question of mitigation and the motion dated 1.12.2016.

4. On 21st February 2016, the parties appeared before this court and stated that the proposal made by the contemnors and the plaintiffs to the defendant was rejected. This court gave the parties more time upto 1st March 2017 to see whether an amicable solution could be reached and recorded.

5. On 28.2.2017, the firm of Gitonga Mureithi & Co. having filed a notice of change of advocates to come on record in place of A. N. Ndambiri & Co. Advocates for the plaintiffs filed the motion dated 28.2.2017 in which the aforesaid sought for the following orders *interalia*:

1. THAT this application be certified urgent and hearing dates be fixed on a priority basis.

2. THAT leave be granted that the firm of Gitonga Mureitthi & Co. Advocates come on record for the plaintiffs/applicants in place of A. N. Ndambiri & Co. Advocate.

3. THAT there be a stay of execution of the orders made on 11th November 2016 pending the hearing and determination of this application.

4. THAT the following defendant's pleadings to wit:

a) Notice of motion application dated 19th May 2015 together with the supporting affidavit sworn by Isaac Kamau Ndirangu on 19th May 2015.

b) Notice of motion application dated 30th June 2015 together with the supporting affidavit sworn by Isaac Kamau Ndirangu on 30th June 2015.

c) The replying affidavit sworn by Isaac Kamau Ndirangu on 21st March 2016.

d) The replying affidavit sworn by Isaac Kamau Ndirangu on 15th September 2016. be struck out and/or expunged from the court records.

5. THAT all court records and entries in which the firm of Gichuru & Gichuru advocates has appeared for the defendant herein be expunged from the court records.

6. THAT this court do give such further or other orders as it may deem fit in the interest of

justice.

7. THAT the costs of this application together with those of the entire suit be borne by the defendant.

6. The aforesaid motion was certified urgent and was fixed for interpartes hearing on 3rd April 2017.

7. When the matter came up for mention on 1st March 2017, learned counsels appearing in this matter sought for directions on the way forward this dispute.

8. I have carefully perused the file and it is apparent from the record that the following issues stand out First, that this court had already convicted Alfred Njeru Ndambiri and Maureen Wanjiru Kibe for contempt of court orders issued on 8.12.2014, 4.5.2015 and 21.5.2015. What is pending is for the contemnors and their legal advisers to submit on mitigation before this court can pronounce the appropriate sentence.

Secondly, that the contemnors have now taken out the motion dated 28.11.2016 in which they have sought for an order for stay of the order requiring the contemnors to submit facts mitigation pending the hearing and determination of the motion. The substantive order sought in the motion dated 28.11.2016 is for a declaration that the fundamental rights and freedoms of the contemnors under Article 50 of the Constitution of Kenya 2010 were breached hence the orders issued on 11.11.2016 are null and void.

Thirdly, that in the motion dated 28.02.2017, the plaintiffs are also seeking for *interalia*, an order for stay of execution of the orders made on 11.11.2016 pending the hearing and determination of the motion. In the same motion the applicants are seeking for the documents and pleadings filed by the firm of Gichuru & Gichuru Advocates to be expunged from record since the firm came on record in place of T.O.K Opere & Co. Advocates without seeking for prior leave.

9. The question which has kept lingering in my mind is what should be the way forward in the above scenario? Having considered the material placed before this court, I make the following directions:

i. The motion dated 28.2.2017 which had been fixed for interpartes hearing on 3.4.2017 should be heard together with the motion 28/11/2016 on priority basis. This court proposes to bring forward the hearing of the motion dated 28.2.2017 so that its hearing together with the motion dated 28.11.2016 can be expedited. Consequently the motions will be disposed of by oral submissions.

ii. Depending on the outcome of the aforesaid motions, the hearing of mitigation before sentencing of the contemnors shall remain pending.

Dated, Signed and Delivered in open court this 9th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant