



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 489 OF 2006

CHARLES WAHOME MWAI..... 1ST PLAINTIFF/APPLICANT

EVERLYNE NDOTI WAHOME..... 2ND PLAINTIFF/APPLICANT

- V E R S U S -

ISAAC KAMAU NDIRANGU.....DEFENDANT/RESPONDENT

RULING

1. This ruling is the outcome of three applications dated 30.6.2015,19.1.2016 and 13.9.2016. However I will singularly consider those applications. The first application to be considered is the motion dated 30th June 2015 taken out by the defendant in which he sought for the following orders *inter alia*:

A. THAT this application be certified as urgent.

B. THAT interim stay of execution of the decree herein be granted in the first instance pending the inter-partes hearing of this application.

C. THAT stay of execution be granted pending the hearing and determination of this application.

D. THAT the following contemnors be summoned to appear before this court and be cited for contempt of this honourable court's orders;

1. Charles Wahome Mwai – 1st plaintiff/1st cite

2. Everlyn Ndoti Wahome – 2nd plaintiff/2nd cite

3. Alfred N.Ndambiri – 3rd citee

4. Maureen Kibe – 4th citee

5. Ballon Nangalama t/a Hebros Auctioneers – 5th cite

E. THAT this honourable court be pleased to find and hold that the decree and any sums payable there under has been fully and finally settled by the defendant/judgment debtor.

F. THAT the plaintiffs/decreed-holders and their advocates on record Messrs. A. N. Ndambiri and

Company Advocates be jointly and severally ordered to refund to the defendant/judgment debtor the sum of kshs.2,015,544.00 (Kenya shillings two million, fifteen thousand, five hundred and forty four) only together with interest at 12% per annum.

G. THAT the costs of this application be borne by the plaintiffs/respondents.

2. The motion is supported by two affidavits sworn by the defendant. When served Charles Wahome Mwai and Everlyne Ndoti Wahome, the 1st and 2nd plaintiffs/respondents filed two relying affidavits sworn by Alfred Ndambiri, a replying affidavit each filed by Maureen Kibe and Charles Wahome Mwai to oppose the motion. 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. I have further considered the rival oral submission made by learned counsels. Mr. Gichuru, learned advocate for the defendant/ applicant withdrew the application against Ballon Nangalama T/A Hebros Auctioneers. The learned advocate also indicated that the defendant no longer wishes to pursue prayers G and H of the aforesaid motion. The learned advocate indicated that the defendant was only pursuing prayers D, E and F.

3. It is the submission of Mr. Gichuru, learned advocate for the defendant that judgment in the sum of ksh.2,825,000/= was entered in favour of the plaintiffs and against the defendant. He argued that the aforesaid sum was not to attract any interest and that costs was taxed by consent at ksh.220,496/=. It was further pointed out that the decretal sum was settled by two instalments as follows:

i. On 15.7.2009 a sum of ksh.2,800,000/= was paid by bankers drawn in favour of Ndambiri & Co. Advocates.

ii. On 8.2.2010, a sum of kshs.590,000/= was also paid to the firm of Ndambiri & Co. Advocates.

4. Therefore as of 8th February 2010, a sum of kshs.3,390,000/= had been paid to plaintiffs advocate. It is further the submission of Mr. Gichuru that the aforesaid sum settled the principal sum of kshs.2,825,000/= interest on general damages from 17.4.2008 – 8.2.2010 of ksh.44,504/= and taxed costs of kshs.220,496/=.

5. The defendant also avers that despite having paid the aforesaid sum in excess of the decretal sum, the firm of Ndambiri and Co. Advocates went ahead and made an application for execution of the decree giving rise to the warrants attachment issued to **Eshikoni Agencies Auctioneers**. The defendant accused one Maureen Kibe, the 2nd citee, for failing to disclose that the plaintiff's advocate had by October 2014 received a sum of ksh.4,570,000/=. Mr. Gichuru further argued that the defendant was forced to pay **Eshikoni Agencies** a sum of ksh.1,180,000/= under duress to avoid the embarrassment of being attached in execution of the decree by **Ballon Nangalama T/A Hebros Auctioneers**. Mr. Gichuru also pointed out that the defendant was forced to pay another sum of kshs.559,129/= as auctioneers' charges to avoid further embarrassment. The learned advocate also argued that Mr. Ndambiri admitted while under cross-examination that he had received a sum of ksh.2,800,000/= and ksh.590,000/=. He also stated that Mr. Ndambiri had admitted that the principal sum would not attract interest. Mr. Gichuru further submitted that Mr. Ndambiri instructed the auctioneers to execute the decree yet he knew the decretal sum had been fully settled. He consequently asked this court to make an order directing the defendant to refund the amount paid in excess.

6. Mr. Gichuru asked this court to find the citees to be in contempt of court orders issued on 08.12.2014, 4.5.2015 and 21.5.2015. It is argued that they disregarded the aforesaid orders. He pointed out that on 08.12.2014 this court suspended and recalled the warrants issued to **Eshikoni Agencies** and that order was extended on 26.02.2016 to last upto 17.03.2016 in the presence of the plaintiff. The defendant further submitted that the plaintiff purported to circumvent the extended order by applying through Maureen Kibe for issuance of fresh warrants to be executed by **Hebros Auctioneers** thus being in contempt of the court orders. **Hebros Auctioneers** could not execute the warrants because the defendant had already obtained an order for stay of execution. The defendant also argued that on 15.5.2015, **Hebros Auctioneers** proceeded with a gang of over thirty men to descend on the defendant's movable property on the instructions of Alfred Ndambiri and Maureen Kibe, the 3rd and 4th citees respectively.

Mr. Gichuru further argued that on 21.5.2016 this court issued an order directing **Hebros Auctioneers** to halt further execution but the auctioneer ignored the order. This court was beseeched to make an order punishing the citees.

7. Mr. Ndambiri, learned advocate for the plaintiffs appeared for himself and on behalf of the other citees in opposing the motion. He raised a preliminary point of law stating that the motion is an abuse of the court process. He argued that the orders sought in the aforesaid motion were argued in an applications raising near similar grounds and asking for similar orders namely: the **motion dated 17.11.2015** and **19.5.2015**. The plaintiff averred that the decretal sum was not fully settled. The plaintiffs' learned advocate contended that there is no evidence that the sum of ksh.2,800,000/= was paid to the firm of A. N. Ndambiri & Advocate to settle the decree. Mr. Ndambiri has also denied the allegation that he received kshs.1,180,000/= from the firm **Eshikoni Agencies**. He however admitted that some cheques were issued which cheques were later counter-manded hence it is not true that the decretal sum was settled in full. The plaintiffs urged this court not to believe the averments made by the defendant because he has continuously contradicted himself.

8. In response to the application citing the 3rd and 4th citees for contempt, Mr. Ndambiri argued that the duo have never disobeyed any court orders. He stated that the defendant has never identified any specific order they breached. It is argued that the application was filed with the intention of intimidating them. The learned advocate pointed out that the judgment of 17.4.208 was never stayed and that the order issued on 08.12.2014 merely suspended and recalled the warrants of attachment issued to **Eshikoni Agencies**. The learned advocate further denied admitting while being cross-examined that the sum of ksh.2,800,000/= was paid to him to settle the decree. He argued that the cheque was issued to settle other transactions.

9. After a careful consideration of the grounds stated on the face of the motion dated 30th June 2015 and the facts deponed in the affidavits filed in support and against the motion plus the rival oral submissions, I am convinced that the defendant has presented credible affidavit evidence showing that payments were made to the plaintiffs' counsel to settle the decretal sum. I am also satisfied that the plaintiffs' learned counsel acknowledged the aforesaid payments in correspondences which were also copied to the judgment debtor. Mr. Ndambiri, the learned advocate for the plaintiffs has claimed that the payment he received from the defendant were meant to settle other fees arising from other transactions between his law firm and the defendant. With great respect, I am not convinced by Mr. Ndambiri's argument. The learned advocate failed to give the particulars of those transactions. I am satisfied that the defendant has demonstrated that the two citees namely **Alfred Ndambiri** and **Maureen Kibe** blatantly breached the court orders issued on 08.02.2014, 04.05.2015 and 21.05.2015. However, there is no cogent evidence that the other citees namely **Charles Wahome Mwai** and **Everlyne Ndoti Wahome** played a role in breaching the court orders. It is not in dispute that on 8.12.2014 this court issued an order suspending and recalling the warrants of attachment issued to **Eshikoni Agencies**. Those orders were subsequently extended by the court in the presence of the plaintiffs' advocate. The plaintiff purported to circumvent the extended orders by applying for issuance of fresh warrants to be executed by **Hebros Auctioneers**.

10. I am further convinced that the defendant has given detailed explanation showing that he paid in excess the decretal sum by instalments. I am also convinced that the defendant paid under duress money to the plaintiffs' advocate in excess of the decretal amount due hence the defendant is entitled to a refund of the same. Consequently the plaintiffs should forthwith refund to the defendant the sum of ksh.2,015,544/=being the amount paid in excess of the decretal sum.

11. The plaintiffs' advocate beseeched this court to grant the orders sought in the motion dated 19.1.2016 and the summons dated 13.9.2016. In order to understand the orders applied for, it is imperative to set out the orders sought in each application. In the motion dated 19.1.2016 the plaintiffs sought for the following orders:

1. THAT the court do issue and order compelling Isaac Kamau Ndirangu, the defendant herein to attend this honourable court for purposes of being cross-examined by the plaintiffs' counsel on the contents of his affidavits sworn on 17th November 2014, 19th My 2015 and 30th June

2015.

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

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

The aforesaid motion is supported by the affidavit of Charles Wahome Mwai.

12. In the summons dated 13.09.2016, the plaintiffs applied for *Inter alia*

1. THAT the defendant/respondent's replying affidavit sworn on 21st March 2016 and filed in court on 21st March 2016 be struck out.

2. THAT in the alternative, this honourable court do issue summons to the defendant/respondent Isaac Kamau Ndirangu for purposes of being cross-examined by this honourable court and/or by the plaintiffs advocates on the signature he has appended on the replying affidavit sworn on 21st March 2016.

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

4. THAT the costs of this application be provided for.

13. The summons is also supported by the affidavit of Charles Wahome Mwai. Mr. Ndambiri, learned advocate for the plaintiffs argued the two applications together. The learned advocate beseeched this court to summon the defendant to attend court to be cross-examined over the affidavits he swore on 17.11.2014 in which he allegedly admitted owing to the plaintiffs the decretal sum and even proposed to settle the same by instalments. Mr. Ndambiri further pointed out that the defendant filed another application dated 19.5.2015 in which he claimed he had over paid the plaintiffs by a sum of ksh.1,313,530/=. It is also stated that by the motion dated 30.6.2015, the defendant claimed he had overpaid the plaintiffs a sum of ksh.2,015,544/=. The learned advocate further pointed out that the signature appended to the replying affidavit sworn on 21.3.2016 and filed to oppose the motion dated 19.1.2016 is different from those appearing in other affidavits filed in this matter. For the above reasons, Mr. Ndambiri urged this court to grant the orders. This court was asked to in the alternative strike out those affidavits. Mr. Gichuru has urged this court to reject the application seeking to cross-examine the defendant. He stated that the defendant has no intention of using the affidavit sworn on 17.11.2014 hence it beats logic to cross-examine the deponent of an affidavit over an affidavit he does not intend to use having withdrawn the same. The defendant's advocate further pointed out that the motion dated 19.5.2015 is yet to be fixed for hearing therefore the plaintiffs' application is premature.

14. I have carefully considered the grounds stated on the face of each application. I have further considered the facts deposed in the affidavits filed in support and against the applications. I have also considered the rival oral submissions. The plaintiffs are basically seeking for two orders, first to summon the defendant to be cross-examined on alleged contradictory averments and secondly to have those affidavits struck out.

15. The plaintiffs' advocate admits that the affidavit sworn by the defendant on 17.11.2014 was withdrawn in the present of Mr. Ndambiri on 22.10.2015, therefore I find no reason to order for the cross-examination of a deponent on an affidavit which is non-existent having been withdrawn. With respect, I agree with the submissions of Mr. Gichuru that the application dated 19.5.2015 is yet to be fixed for interpartes hearing hence it is premature to challenge the contents of the affidavit filed in support through the current proceedings. The other serious issue which was ably argued is over the signature appended on the affidavit sworn on 21.3.2016. I am satisfied by the explanation given by the defendant's advocate that the deponent was given a power of attorney to execute the affidavit.

16. On the basis of the above grounds I find no merit in the motion dated 19.1.2016 and in the summons dated 13.9.2016. Those applications are ordered dismissed with costs to the defendant.

17. For the avoidance of doubt the defendant's motion dated 30.6.2015 is allowed as follows:

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 issued 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.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant