



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 45 OF 2013 (OS)
IN THE MATTER OF: THE ADVOCATES REMUNERATION ACT CAP 16 LAWS OF
KENYA
BETWEEN
INVESCO ASSURANCE COMPANY LTD.....PLAINTIFF
V E R S U S
J. G. KARIUKI T/A GACHIRI KARIUKI & CO. ADVOCATES.....DEFENDANT

RULING

1. The Defendant's Advocate at sometime acted for the Plaintiff. They therefore had a Client Advocate relationship. It is obvious from this action that their said relationship broke down. Defendant filed bills of costs in the various matters he acted for the Plaintiff and in some cases began to execute for the taxed costs. Plaintiff filed this action by Originating Summons seeking for reconciliation to be done to determine how much fees had been paid to the Defendant. By this Originating Summons Plaintiff sought the following prayer which I shall reproduce because it is relevant to the application under consideration-

“The Respondent (Defendant) do render account for the deposit paid on account of each matter.”

2. The Court on 7th April 2014, in the absence of parties and with a view to ensuring that his case is dealt with expeditiously gave directions which were communicated to the parties by the Deputy Registrar-

“April 07, 2014

1. Gichuki Kingara & Co.

Advocates

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5th Ngong Avenue,

NAIROBI.

2. Mogaka Omwenga & Mabeya

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MOMBASA

RE: MOMBASA HCCC NO. 45 OF 2013 (O.S)

INVESCO ASSURANCE COMPANY LTD

-VS-

J. G. KARIUKI T/A GACHIRI KARIUKI & CO. ADVOCATES

The following are the directions made by Hon. Lady Justice Mary Kasango in this matter.

TAKE NOTICE that on **5th May 2014** the Court shall proceed to hear the Originating Summons and shall thereafter deliver judgment on the issues raised in the Originating Summons filed herein on 25th April 2013. Hearing shall be by way of affidavit and by oral evidence. Parties are granted leave to file and serve any further affidavits on or before **28th April 2014**.

TAKE FURTHER NOTICE that the Defendant shall on or before **16th April 2014** file and serve particulars as sought in prayer (c) of the Originating Summons filed herein on 25th April 2013.

TAKE FURTHER NOTICE that **PAUL GICHUHI** and **GACHIRI KARIUKI** shall be present before Court on **5th May, 2014** for purpose of cross examination.

G. O. KIMANGA

CIVIL, COMMERCIAL & APPEALS DIVISION,

MOMBASA.

3. The Plaintiff's Notice of Motion dated 23rd July 2014 is for the Court to order-

1. That this Honourable Court do cite the Respondent John Gachiri Kariuki for contempt of this Court's Order of April 7, 2013 and commit him to Civil Jail for a period of 6 months or less as the Court shall please.

2. That Warrant of Arrest and detention to Civil Jail do issue against John Gachiri Kariuki.

4. The affidavit in support of the application sworn by Carolyn Shavulimo, Plaintiff's Legal Officer set out the Order made by the Court on 7th April 2014 then stated that the Defendant was in blatant disobedience of that Order having failed to supply the particulars as sought by Plaintiff and as ordered by the Court. That the Defendant's action was defiance of the Court and that Defendant had failed to explain the reason for its said failure.

5. The application was opposed by the Defendant on various fronts.

6. Defendant submitted that what Plaintiff refers to was not an Order but rather were directions given by the Court as envisaged under Order 37 Rule 16 and 17 of the Civil Procedure Rules which provide-

"16. The Registrar shall, within thirty days of filing of the Originating Summons and with Notice to the parties list it for directions before a Judge in Chambers.

17. The day and hour of attendance under an Originating Summons to which appearance is required to be entered shall after appearance be fixed for hearing in Chambers of the Judge to whom such summons is assigned."

Accordingly Defendant's Counsel submitted that what was issued by the Court on 7th April 2014 was Directions and not an Order and that if it had been an Order the extracted Order was not served on the Defendant.

7. Defendant also faulted Plaintiff's Notice of Motion for having failed to strictly follow the Procedure of seeking leave to file a contempt application as that used by High Court of Justice in England as per Section 5(1) of the Judicature Act Cap 8.

8. Defendant also challenged the Court to consider the effect of the application for contempt which Defendant submitted would be tantamount to ordering the Defendant to prove Plaintiff's case. That in any case Defendant had, subsequent to the Court issuing the Directions filed its documents.

ANALYSIS

9. Whether or not parties should obey orders made by the Court was considered in the case of **HADKINSON –Vs- HADKINSON (1952)P 285** viz-

"It is plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an Order believes it to be regular or even void."

10. Justice A. Mabeya in the case **AFRICA MANAGEMENT COMMUNICATION INTERNATIONAL LIMITED –Vs- JOSEPH MATHENGE MUGO & ANOTHER [2013]eKLR** refers to another decision which is useful to consider and also is a guide when the Courts are considering applications such as the present one. He stated-

"Closer home, in the case of TEACHERS SERVICE COMMISSION –Vs- KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS [2013]eKLR Ndolo J observed that-

'38. The reason why Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the Applicant who moves the Court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.'"

WAS LEAVE REQUIRED?

11. Defendant submitted that Plaintiff needed to have obtained leave before filing the Notice of Motion before Court. Indeed until the Court of Appeal in the **CHRISTINE WANGARI GACHEGE –Vs- ELIZABETH WANJIRU EVANS & 11 OTHERS (2014)eKLR** interrogated the correct procedure that needs to be followed with an application for contempt, most Courts, except for orders under Order 40 Rule 3(1) of the Civil Procedure Rules, were requiring and entertaining application for leave to file for contempt. The Court of Appeal in the case of **CHRISTINE WANGARI** (supra) examined the changes in the Law and Court structures of England, to which we are subject to on application for contempt, and stated thus-

“It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12 – committal “for interference with the due administration of justice” and 81.17 – Committal “for making a false statement of Truth or disclosure statement” where, in the former it is expressly provided that:-

‘The application for permission to make a committal application must be made by a part 8 claim form’

And in the case of the latter,

‘A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

(a) With the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made”

12. It follows from the analysis in that case that this Court needs to determine whether what is alleged to be disobeyed is an Order, in which case leave is not required, or was it Directions, in which case leave ought to have been sought. The pre amble of the Order which led to the Directions communicated to the parties will assist in such determination. The Court in that pre amble stated-

“In an attempt to ensure the trial of this case is expeditiously dealt with in accordance with Section 1A Cap 21 and to ensure justice is not delayed as per Article 159(2) (b) of the Constitution I hereby make the following orders:” (underlining mine)

The Court then proceeded to make orders that were communicated to the parties. In my view what was issued by the Court on 7th April 2014 was an Order of Directions. That being so going by the holding of **CHRISTINE WANGARI CASE** (supra) leave was not required to be obtained by the Plaintiff before filing the contempt application.

13. Since it is now clear that the Court issued an Order for Directions on 7th April 2014 was it mandatory that such an order be extracted, with a Penal Notice, to be served on Defendant, for Defendant to be found to have disobeyed. Justice Lenaola found otherwise, and I am fully persuaded by his holding in the case **BASIL CRITICOS –Vs- ATTORNEY GENERAL & 8 OTHERS [2012]eKLR** where he stated that-

“... the law has changed and as it stands today knowledge supersedes personal service ... where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary.”

Knowledge of an Order of the Court does now suffices as Notice of such Order.

14. What however I find most persuasive is the Defendant’s submission that firstly to order it to serve documents as sought by Plaintiff by its present application would be shifting the burden of proof; and

secondly that Defendant did file their documents subject to the Order of 7th April 2014.

15. Defendant is correct that the burden of proof as per Section 107 of the Evidence Act lies upon the party who desires the Court to give judgment in their favour. In this case the Plaintiff has alleged that it fully paid Defendant's legal fees. It however sought orders for Defendant to prove the deposits paid to him by Plaintiff. To order Defendant to specifically supply such evidence would in my view be shifting the burden of proof. In any case the Defendant did file documents on 28th April 2014 and on 17th June 2014. Having so filed this Court cannot require Defendant to file any further documents. The only responsibility Defendant has in a Civil action is to prove his case not also assist Plaintiff to prove theirs. It is because of those findings that I make the following orders-

a. The Notice of Motion dated 23rd July 2014 is dismissed with costs to Defendant.

b. Unless further Directions are given by the Court Defendant is not required to file or supply any further documents in this matter.

c. At the reading of this Ruling the Court shall give a further hearing date to this part heard matter.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE