REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 110 OF 2009

JOHN KARUGA WAHINYA.....PLAINTIFF

=VERSUS=

VIOLET WANJA GATEI.....DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 10th June 2016 brought by the plaintiff/applicant in which the applicant prays for the following orders:-

1. Spent

2. That the Plaintiff's advocates do pay the amount of Kshs.8,474,546/= admitted as being held by them and as ordered by this Honourable Court and being part of the amount due to the plaintiff pending the final determination of the amount due to the plaintiff.

3. That the plaintiffs advocate's do give an undertaking on the balance due to be agreed upon or determined by the Deputy Registrar as ordered by this Honourable Court.

4. That costs o due to the plaintiff be agreed upon or taxed.

5. That the cost of this application be borne by the defendant.

2. The applicant had sued the respondents seeking a refund of purchase price in respect of a property whose transaction had aborted. The applicant thereafter applied for summary judgement. In a ruling delivered on 29th September 2010, Justice Muchelule entered judgement in favour of the applicant against the respondent in the sum of kshs.5,000,000/= together with interest at court rates as from 28th February 2008.

3. The execution process was commenced by the applicant. Before the execution process could be concluded, both the applicant and the respondent filed one application each. The application by the applicant sought review of the ruling which had been delivered by justice Muchelule. The application by the respondent sought stay of execution and indulgence to sale one of her properties by private treaty in order to clear the decretal sum instead of her property being sold through public auction.

4. In a ruling delivered by Justice Mutungi on 23rd July 2015 , the Judge declined to grant the applicant's application but proceeded to allow the one by the respondent in the following terms:-

i. Spent

ii. That the said parties advocates to agree on an acceptable professional undertaking as between themselves for the payment of the decretal sum, that will have been certified as at 31st August 2015 and as such further interest as may accrue on the decretal sum up to and including the date of payment.

iii. The parties to commit to co-operate and do whatever may be required of each of them to facilitate the completion of the sale of LR No.170/85 to the purchaser identified by the defendant which sale is to be completed on or before 30th November 2015.

iv. The Decretal sum together with all accrued interest to be paid to the plaintiff on or before 30th November 2015 failing which

the orders hereof will be vacated unless the same will have been mutually extended by the parties and or by order of the court.

v. There will be a stay of execution of the decree until 30th November 2015.

vi. Matter to be mentioned before the presiding judge on 18th September 2015 to confirm compliance with orders/directions (i), (ii),and (iii) above.

vii. The costs of the applications shall be in the cause.

5. The advocates for the parties herein engaged in correspondence in trying to comply with the orders of 23rd July 2015. There was however a stalemate as the advocates could not agree on the amount payable . This is wat prompted the applicant to file the notice of motion which is for ruling. The applicant's advocate had calculated the amount due at Kshs.11,274595/= but the advocate for the respondent offered a sum of Kshs.8,474546/= which was later increased to Kshs.8722546/=. The Advocate for the respondent offered to pay Kshs.8,722,546 as full and final settlement if this was acceptable to the applicant's advocate.

6. The amount proposed by the applicant's counsel appears to have been based on the expected purchase price of part of the property which the respondent had intended to sale to the applicant. The sale to a third party was said to be in the region of Kshs.45,000,000/= . As the advocate for the respondent had stated in one of the correspondence exchanged between the advocates that he had kshs.8,474,546/= which he intended to release, the applicant therefore argues that since this sum is held by the respondent's advocate, the advocate should be ordered to pay the said sum and he be made to offer a suitable undertaking as to the balance due to be ascertained by the Deputy Registrar of this Court.

7. The respondent did not file any replying affidavits specifically in response to this application. The applicant chose to rely on her counsel's affidavit sworn on 25th October 2016 in support of an application seeking to set aside ex-parte proceedings of 27th September 2016 as well as two further affidavits sworn on 9th November 2016 and 1st February 2017 in response to the affidavits by the counsel for the applicant. The application dated 10th June 2016 proceeded in the absence of counsel for the respondent. The counsel for the respondent was seeking to set aside the order allowing that application. The application for setting aside the orders of 27th September 2016 was allowed hence the hearing inter-partes of the application dated 10th June 2016.

8. In the three affidavits referred to in paragraph 7 hereinabove, the respondent's counsel stats why he cannot be made to pay the debts of his client under the guise of enforcement of a professional undertaking. The applicant's counsel argues that what he had made was an offer made on a without prejudice basis . This offer was not accepted and that therefore the correspondence exchanged cannot be given in evidence. He further argues that a professional undertaking is freely given and as such the court cannot order that a professional undertaking be made by an advocate.

9. I have carefully considered the application as well as the opposition to the same by respondent. The delay in realising the decretal amount in this matter has largely been caused by the counsel for the applicant. When the court made ruling of 23rd July 2015, it was upon the parties to agree and if they failed to agree, then the amount due was to be ascertained by the Deputy Registrar. Instead of the parties resorting to the Deputy Registrar, the applicant instead suspended further negotiations as he preferred an appeal against the ruling dismissing the application for review of judgement.

10. The offer made by the respondent was made on a " ***without prejudice'*** basis . That offer was not accepted and as such, correspondence arising therefrom cannot be given in evidence. The applicant did not exhibit the letter which offered settlement at Kshs.8,474,546. This is because it had been written on a "***without prejudice***" basis . The applicant instead has exhibited a letter dated 1st April 2016 which offered settlement at Kshs.8722,546/ though this letter was not written on a "***without prejudice"*** basis , it was in furtherance of other communications which had been written on without prejudice basis. In **Padlock Vs Forrester (1842) 3 Man & G 903**, the court held that the heading of the first of a series of letters invested later ones with the privilege. In the case of **Oliver Vs Nautilus SS Co. (1903)** It was held that labelling a letter "***without prejudice"*** invested an earlier one with the privilege , and that in the absence of any termination of such privilege, the privilege will continue to apply in closely related disputes.

11. The applicant's advocate's letter of 13th January 2016 was written on a "***without prejudice"*** basis. It cannot therefore be produced in evidence. The reference to the letters of 13th January 2016 and 8th March 2016 in the respondent's submissions cannot be taken as a waiver of the privilege or as blowing both hot and cold at the same time. The mention of those letters was to lay basis for the rejection of the letter which the applicant wants to rely on. In this regard, the correspondence which passed between the parties herein do not fall under the exception to the general rule as was stated in the case of **Ongata Rongai Total Felling Station Ltd Vs Industrial** and **Commercial Development Corporation (2009) eKLR**.

12. Upon failure to agree, the orders by justice Mutungi were clear that the Deputy Registrar of the court was to ascertain the amount due. The applicant seems to have been pricked by the fact that whereas in his transaction which had aborted, five acres were going at kshs.5,000,000/= , the respondent later sold a portion of that property to a third party for Kshs.45,000,000/=. This is why the applicant tried to have the judgement of justice Muchelule reviewed so that the amount on which costs were to be taxed could go higher. This to me was a misconception and this is what has delayed the realization of the fruits of the applicant's judgement . Even the rejection of the offer made by the respondent was based on the fact that the respondent had sold a portion of the property at Kshs.45,000,000/= yet , she wanted to offer an amount which was not commensurate with the benefit she had derived from the sale. The amount which the respondent was to get from the sale was for purposes of defraying what she owed. The amount realised was not to be the basis of determination of the costs or amount due to the applicant.

13. There can be no judgement on admission as submitted by the applicant. I have already found that the correspondence were made on a "***without prejudice"*** basis . That being the case, there is no way the applicant can move the court by way of notice of motion for entry of judgment in his favour. I find no merit in the applicant's application which is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this ***19th*** day of **July 2018.**

E.O.OBAGA

JUDGE

In the presence of :-

Mr Juma for Mr Mereka for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE