



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 31 OF 2017

BETWEEN

CHARLES WAHOME MWAI.....1ST APPELLANT

EVERLYNE NDOTI WAHOME.....2ND APPELLANT

AND

ISAAC KAMAU NDIRANGU.....RESPONDENT

(An appeal from the Ruling & Order of the High Court of Kenya at Nairobi, (Sergon, J.) delivered on 11th November, 2016

in

H. C. C. C. No. 489 of 2006)

JUDGMENT OF THE COURT

This is an appeal against the Ruling of **Sergon, J.** delivered on 11th November 2016.

A brief background to this appeal is that on 12th May 2006, **CHARLES WAHOME MWAI** and **EVERLYNE NDOTI WAHOME**, the appellants herein, (the then plaintiffs) filed suit against **ISAAC KAMAU NDIRANG'U**, the respondent herein (the then defendant). The appellants claim was for a refund of Kshs 2,825,000/- being sums of money paid to the respondent for a failed land transaction and the attendance loss.

In a statement of defence filed on 26th July 2000, the respondent admitted having received some money from the appellants but which sum according to him stood forfeited on account of the appellant's breach of the terms of sale.

The dispute therein was arbitrated by Ang'awa J. (as she then was) and by a judgment dated 17th April 2008 ordered that the appellants be refunded a sum of Kshs 2,825,000/-. The learned Judge also awarded the appellants damages of Kshs 300,000/- plus costs.

Thereafter, a total of three motions dated 30th June 2015, 19th January 2016 and 13th June 2016 were filed by the appellants and the respondent. In the motion dated 30th June 2015, the respondent sought

several orders, including:

“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. Everlyne Ndoti Wahome – 2nd plaintiff/2nd cite**
- 3. Alfred N. Ndambiri – 3rd citee**
- 4. Maureen Kibe – 4th citee**
- 5. Ballon Nangala 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.”

In the motion of 30th June 2015 the respondent contended that he had fully paid the decretal sum of Ksh.2,825,000/- plus costs of Ksh. 220,496/-; that inspite of the payment, the firm of Ndambiri & Co. Advocates had caused the issuance of warrants of attachment to Echikhoni Agencies Auctioneers; that in order to avoid harassment, the respondent paid Eshikhoni Agencies a sum of Kshs 1,180,000/- and a further sum of Kshs 559,129/- as auctioneers charges; that on 8th December 2014 the court suspended and recalled the warrants issued to Eshikhoni Agencies; that the appellants circumvented the stay and applied for issuance of these warrants to Hebros Auctioneers; that on 15th May 2015, Hebros Auctioneers attached the respondent's goods; that on 21st May 2016, the court directed Hebros Auctioneers to stay execution but that this order was ignored.

The motion was opposed by the affidavits of the two appellants and their counsel on record, Mr. Alfred Ndambiri. Mr. Ndambiri refuted the contention that the sum of Ksh.2.8 million was paid. He also denied that he received Ksh. 1,180,000/- from Echikhoni agencies. In his ruling Serگون, J. found Mr. Alfred Ndambiri and Maureen Kibe to be in breach of the court orders as inspite of ordering the stay the two breached the orders by causing re-issuance of warrants of attachment to Hebros Auctioneers. The trial Judge directed that the sum of Ksh.2,015,544/- being the amount paid in excess of the decretal sum be refunded to the respondent.

On their part, the appellants in the motion dated 19th January, 2016 sought an order inter alia compelling the respondent to attend court for purposes of cross-examination on the contents of his affidavits sworn on 17th November, 2016, the appellants sought an order that the respondent’s affidavit sworn on 21st March, 2016 and filed in court on the 21st March, 2016 be expunged from the record and in the alternative the respondent be summoned to attend court for purposes of cross-examination.

The learned Judge aptly summed up the contestations in the two motions as follows:

“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."

After hearing the oral arguments, the learned Judge ordered 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 25th December 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 Kshs 2,015,544/=.

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

The appellants were dissatisfied with the said outcome and hence this appeal. In its lengthy Memorandum of Appeal dated 3rd February 2017, the appellants listed 45 grounds of appeal. In essence, the appellants faulted the orders of the Judge made on 11th November 2016.

On 2nd October 2017, the appeal came before us for plenary hearing. Mr. Ndambiri, learned counsel for the appellants relied on the appellant's Memorandum of Appeal and its filed submissions dated and filed on 21st August 2017. The appellants contended that the learned Judge erred in not dismissing the respondent's notice of motion dated 30th June 2015 yet the motion dated 19th May, 2016 which was still to be heard, sought the same orders; that the motion dated 30th June 2015 was an abuse of court process; that the learned Judge erred in issuing a declaratory order that the decretal sum had been fully paid in spite of contradictory evidence; erred in ordering the appellants and their advocate on record to refund the respondent the sum of Kshs 2,015,544/- and yet there was no proof of the payment; erred in citing Mr. Ndambiri and Everlyn Ndoti for contempt in the absence of evidence of breach and/or violation of the court orders and finally that the court erred in dismissing the appellant's notice of motion dated 19th January, 2016 and 13th September 2016. In the motion dated 19th January 2016, the appellants prayed for an order that the respondent be summoned to appear in court for cross-examination on the contents of his 3 affidavits sworn on 17.11.2014, 19.5.2014 and 30.6.2015. The trial Judge was faulted for disallowing the motion on the basis that the affidavit of 17th November, 2014 had been withdrawn and further that it was premature to challenge the contents of the affidavit sworn on 19th May 2015 as the motion for when the motion had been sworn was yet to be heard.

In opposing the motion, Mr. Gichuru, learned counsel for the respondent pointed out that in spite of the decretal sum having been fully paid, Mr. Ndambiri had caused the re-issuance of the warrants of attachment and that this was clearly in contempt of court; secondly, the respondent had established that the two recovered further monies which they were not entitled to.

We have considered the entire record, the written submissions of the appellant, the oral representation made before us by counsel for the respondent and the law.

As pointed out by the learned Judge, in the motions heard by him, the appellants were seeking orders to have the respondent be summoned for purposes of cross-examination on alleged contradictory averments

and secondly to have the respondent's affidavit sworn on 17.11.2014 struck out. The Judge found that there was absolutely no reason to have the respondent cross-examined on an affidavit sworn on 17th November, 2014 and which was withdrawn on 22nd November, 2015. Further, he found that the application dated 19th May, 2015 was yet to be fixed for inter-parties hearing, hence it was premature to challenge the affidavit in support thereon. In our view, the learned judge was right in arriving at the conclusions he made. The appellants sought to cross-examine the respondent on an affidavit which had been withdrawn. If the judge was to order otherwise then this would defeat the purpose of the withdrawal. Secondly, we too think it was premature to challenge an affidavit in support of an application which was yet to be heard. We find no merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 8th day of December, 2017.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR