



Nyarimbo t/a IN Nyarimbo & Co v Onyamby t/a Nyaudi Tuiyott & Co; Diamond Trust Bank (Interested Party) (Miscellaneous Application E117 of 2020) [2023] KEHC 3800 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E117 OF 2020
FG MUGAMBI, J
APRIL 28, 2023**

BETWEEN

ISHMAEL NYARIMBO T/A LN NYARIMBO & CO APPLICANT

AND

TOM ONYAMBY T/A NYAUDI TUIYOTT & CO RESPONDENT

AND

DIAMOND TRUST BANK INTERESTED PARTY

RULING

1. Before the court is an application dated November 24, 2022. It is brought under section 3&3A of the *Civil Procedure Act*, Order 51 and Order 40 of the *Civil Procedure Rules 2010* and all enabling provisions of the law. The application seeks the following orders;
 - i. Spent
 - ii. That this Honourable court be pleased to order for the immediate refund of Kshs 200,000 together with interests thereon deposited in the nominal party DTB Account no 08xxxxx01 to the depositor.
 - iii. That the costs of this application be waived.
2. From the record presented before me, the genesis to this dispute is an application and subsequent loan facility granted to the applicant by Household Credit Co Ltd. The applicant offered his motor vehicle registration No KBB 2B2F as security for the due payment of the loan.



3. Following the alleged default in the repayment of the loan and pursuant to the terms of the loan agreement, the said motor vehicle was repossessed by Ms Westminster Merchants Auctioneers for sale to offset the outstanding amounts. The proceedings in the lower court being CMCC 342 of 2010 (*Ishmael Nyaribo vs Household Credit Ltd & Westminster Merchants*) were sparked off by the defendants alleging default of repayment, a matter disputed by the applicant and whose merits remain undetermined. The applicant was granted interim orders but after inter partes hearing, the application for release orders was dismissed. This prompted an interlocutory appeal to the High Court in HCCA 493 of 2010 (*Ishmael Nyaribo vs Household Credit Ltd & Westminster Merchants*) seeking to set aside the lower court's ruling and for release of the motor vehicle.

4. The High Court granted the following orders on January 12, 2012 which I wish to reproduce here as they are the basis on which the amount was deposited;

An order be and is hereby made and ordered that the subject motor vehicle KBB 282F be and is hereby released to the appellant/applicant pending hearing and disposal of the appeal on condition that he deposits pending hearing and determination of the appeal an amount of Kshs 200,000/- to cushion the main loan, accrued interest and storage charges, should he be adjudged to be the one to meet the same at the end of the trial, in an interest earning account in any sound financial institution of mutual choice in the joint names of the counsels for both parties within 60 days from the date of the reading of this ruling.

5. Following the ruling, the amount of Kshs 200,000/- was deposited with Diamond Trust Bank (the Interested Party). Meanwhile, it would appear that after this order was granted the applicant did not bother to prosecute the main suit. CMCC 342 of 2010 was eventually dismissed for want of prosecution on June 6, 2016. The interlocutory appeal in HCCA 493 of 2010 was also dismissed, for want of prosecution. It is for this reason that the applicant has filed this application seeking a refund of the Kshs 200,000/= deposited in court as security.

6. The motion is premised on the grounds on the face of it and on the supporting affidavit sworn by Ishmael Nyaribo, Advocate and on written submissions dated February 6, 2023. It was the applicant's contention that the Kshs 200,000/= was paid in as ordered by the court as deposit for security in HCCA 493 of 2010. Since the suit in which it related was no longer before the court, the applicant seeks an order that the amount be released, having failed to get the respondent's agreement for the withdrawal of the monies. It is the applicant's contention that the interested party herein had written variously to the parties warning that the amount risked being remitted to the Asset Recovery Authority as the account had remained dormant since 2010. Notices of dormant account had also been sent to the parties by the interested party.

7. The respondent in response to the application filed grounds of opposition dated December 19, 2022 stating the following grounds;

- i. That the application is incompetent, and it ought to be struck out with costs.
- ii. That an application for the release of funds deposited in a joint account pursuant to an order of the court can only be made in the same cause the order was made in a court equal jurisdiction or higher.
- iii. That there was no evidence that the suit originating the dispute had been determined in favour of the applicant or otherwise.



- iv. That there is no basis upon which the court can order for the release of the funds in absence of the evidence of determination of the primary suit, Nairobi CMCC No 2010, in favour of the applicant.
 - v. That the security was released by the court to the applicant and the money herein deposited by the applicant as a condition precedent to the release of the secure the custody of the respondent's client, and it is now dishonest for the applicant to want the money without prosecuting his case in the subordinate court at all as his case in lower court was that the monies were not due to the respondent's client.
 - vi. That the funds were deposited to secure the respondent's client's claim and in the sub strum(sic) of the suit is lost the monies shall be paid out to the respondent's client.
8. The respondent also filed written submissions which are captioned Applicant's written submissions although the same are signed off as having been filed on behalf of the respondent. The submissions are dated February 8, 2023 and are in support of the respondent's objection to the release of the money. It was averred that the applicant had not disclosed to the court the status of the loan, interests and charges to warrant a release of the money to the applicant. Counsel further submitted that Ms Household Credit Co Ltd and Ms Westminster Merchants, in whose favour the order for deposit of security had been made, were not parties to the application and were therefore not in a position to make any submissions that would guide the court. The submissions by the respondents also alleged that there was a difference between Ishmael Nyaribo (the party in the previous proceedings) and Ishmael Nyaribo, advocate for the applicant (the party in the application currently before the court) and that the law firm of Nyaundi Tuiyott & Co Advocates was an agent thus could not be sued as a party.
 9. The respondent also submitted that the application was incompetent for two reasons; First that it was not anchored on any sound provision of the law. Section 3A of the CPA and Order 51 were general provisions of the law and Order 40 dealt with Injunctions and was therefore irrelevant in the present application. Secondly, the respondent submitted that money deposited pursuant to a court order could only be dealt with in the same suit rather than a separate claim.
 10. In response to these submissions the applicant filed further submissions dated February 8, 2023. He pointed out that for purposes of identification, there was no difference between himself, Ishmael Nyaribo and Ishmael Nyaribo T/AIN Nyaribo & Co, advocate for the applicant, as he was a sole proprietor. The applicant further averred that since the suit had been dismissed and closed, the only way out would have been to apply for reinstatement of the suit or by a miscellaneous application such as the one before this court, seeking release of deposited funds. It was finally averred that the security was held for the loan that was to be proved and since the same was not proved and not ordered to be released to the respondent, the same should be released to the applicant who had deposited the same.

Analysis and determination

11. I have considered the pleadings and rival submissions by Counsel. In considering the question as to whether the applicant is deserving of the orders sought, I have taken note of the objections raised by the respondent. The first of this is that the application is fatally defective having been brought under the wrong provisions of the law. Indeed, the application dated November 24, 2022 is brought under section 3 and 3A of the [Civil Procedure Act](#) and Order 51 as well as Order 40 of the [Civil Procedure Rules](#). Order 40 deals with temporary injunctions and interlocutory orders.
12. While I do agree with the submission by the respondent, I am also aware that this Court has on many occasions taken the view that in the spirit of Article 159 (2) of the [Constitution](#) and sections 1A and



1B of the *Civil Procedure Act*, failure to cite the correct provisions of law is not fatal and would not per se warrant a dismissal of an application. For examples one may see: Meru Misc Civil Application No E007 of 2021 *Purity Kagendo Anampiu & Another vs Nellie Mugambi & Another* and *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)* Civil Appeal No 212 of 2015 [2019] eKLR. The Court will therefore go into the merits of the application.

13. The respondent further argues that the application is also fatally defective as it is brought separately from the proceedings where the security was deposited and because the parties in those proceedings are not parties in the present application. In response to this submission the applicant argued that the main suit having been dismissed meant that he would have had to apply for a reinstatement of the suit or file a miscellaneous application to deal with the security, as was the present case.
14. On this point I am inclined to agree with the respondent. Once final orders are made by the court, the decision on what should happen to the security falls due as one of various post judgment issues envisaged under civil litigation. Such a decision has to be made taking into account all the circumstances of the matter. For the court to make a proper determination, it is important that all the parties participate and state their cases to enable the security to be released on just terms as the court may order.
15. In the present circumstances the defendants against whom the claim that resulted to the security being deposited are not before the court. Instead, the person who is before the court is Counsel for those defendants, who was acting as an agent in that matter and who is not able to make a case for the defendants in their absence. This non joinder denies them an opportunity to inform the court their view on how the security should be handled or the current status of affairs with respect to which the security was granted. It is not even possible, without all the files and parties before me to say whether the issue has been dealt with or is pending before a court of competent jurisdiction. This application is not, therefore, the correct way of dealing with the issue and may well be an abuse of the process of the court.
16. Having said this, I have no doubt that the proper forum to seek the prayers sought in the present application is the case in which the order for deposit was made. I am take cue from the decision in *James S Kinyanjui v Gatitu Wang'oo & Co Advocates & another* [2015] eKLR.

Disposition and orders

17. In conclusion I find that the application dated November 24, 2022 is incompetent. The same is thus struck out with costs to the respondent. In making this order, I am aware that the interested party may have to hold on to the account and the funds for a while but I hope that this presents an opportunity for the parties to observe the procedural rectitude that attend to such matters.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2023

F. MUGAMBI

JUDGE

