



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 128 OF 2019

THE CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

VERSUS

HENRY NYABUTO ONDIEKI.....1ST RESPONDENT

CHEMELIL SUGAR COMPANY.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon P. Olengo (SPM) delivered

at Nyando in Senior Principal Magistrate's Court Case No 69 of 2016

on 31st October 2019)

RULING

1. In his Notice of Motion dated 18th December 2020 and filed on 22nd December 2020, the 1st Respondent sought an order that pending the hearing and determination of this application, this court be pleased to issue an order directing the Co-operative Bank Limited to release into his bank account No 01109294000100 Co-operative Kisumu Branch all that money amounting to Kshs 2,031,351.70 lying in account no 01120054662901 and Account No 01120054662900 Co-operative Bank Kisumu Branch which money belongs to the Judgment debtor, the 2nd Respondent herein.

2. He further sought an order that pending the hearing and determination of this application, the court be pleased to declare the appeal herein dismissed as there was no record of appeal filed nor served as ordered by Hon J. Cherere on 13th February 2020. On 18th December 2020, he swore an affidavit in support of his application. He also swore a Supplementary Affidavit on 22nd March 2021.

3. He contended that on 13th February 2020, Cherere J directed the Appellant to file its Record of Appeal and serve the same upon the 2nd Respondent but that to date, the Appellant had not file the same. He added that on 17th April 2020, he filed the application dated 16th April 2020 where this court gave orders that both parties were to comply with, however he was the only one who complied.

4. He complained that on several occasions, he had written to the Deputy Registrar seeking to have his matter placed before a judge to dispose of his said application dated 16th April 2020 but that to date, no date had been fixed thus compelling him to file the instant application.

5. He was categorical that the Appellant wrongly enjoined KCB Limited which had since been struck out from suit. He contended that since 13th February 2020, the Appellant had not moved the court to prosecute its Appeal and it was in his own motion that he moved this court to hear his application, served all parties and filed affidavits of service. He pointed out that it was clear that the Appellant's appeal was meant to derail justice on his part. He asserted that it was only fair that this matter be brought to an end and an order releasing the money be given by this court for the reason that justice delayed is justice denied.

6. In opposition to the said application, on 17th March 2021, the Appellant filed a Replying Affidavit sworn by George Odiyo, Branch Manager, Co-operative Bank of Kenya Limited Kisumu. The Appellant contended that the orders sought by the 1st Respondent were not premised on any provision of the law and therefore legally untenable before this Court.

7. It asserted that the 1st Respondent wrote to it calling for payment of the decretal sum into his account as ordered by the court in **Nyando Civil Suit No 69 of 2016** vide order issued on 31st October 2019. It instructed its advocates that it was willing to settle the said decretal sum

payable to the 1st Respondent. It was apprehensive that these sentiments were echoed by the 1st Respondent at paragraph (xvi) of his supporting affidavit.

8. It was their contention that its advocates contacted the 1st Respondent's with instructions to enter consent to settle this Appeal and withdrawal of **Kisumu H C OS No 21 OF 2020** which the Appellant and the 1st Respondent were parties therein. It added that the 1st Respondent was amenable to entering into the said consent and on 30th July 2020 its Advocates forwarded to him the draft Consent and the Notice of Withdrawal at his last known email address of henryondieki18@gmail.com.

9. It stated that vide letter dated 3rd August 2020, the 1st Respondent called for full details of the proposed settlement which its advocates responded by way of a letter dated 5th August 2020 confirming and assuring him that the Bank was willing and ready to pay the amount as ordered by the court. It further pointed out that the said letter was forwarded to the 1st Respondent via courier and electronic mail.

10. It added that the delay in filing the record of appeal in this matter was not inordinate and therefore inexcusable since its Advocates wrote to the Senior Principal Magistrate Nyando, vide letter dated 12th November 2019, calling for copies of the certified Ruling issued on 31st October 2019 and typed proceedings in **Nyando Civil Suit No 69 of 2016** but to-date the same have never been supplied.

11. It contended further that the 1st Respondent's application was bad in law, fraught with *malafide*, an abuse of court process and urged this court to dismiss the same.

LEGAL ANALYSIS

12. Having considered the Notice of Motion, Affidavit evidence and parties' rival submissions, this court was of the considered view that the question that had been placed before it for determination was of whether the 1st Respondent had made out a case for grant of the orders sought.

13. The 1st Respondent argued that there is no appeal in law pending in this matter since the Appellant failed to comply with the Court orders of filing and serving its Record of Appeal. He added that the Appellant's reason for not filling Record of Appeal did not hold water.

14. He submitted that the settlement agreement as espoused by the Appellant was not acceptable to him as it was adamant regarding paying costs and interests (**sic**) before the consent could be filed. He contended that costs and interests ought to be included in the decretal sum given the period that has since lapsed from the time the Judgement was delivered on 19th October 2017 in **Nyando Civil Suit No 69 of 2016**. He was categorical that there was no consent that was ever reached and that the Appellant could not purport to force a consent on him.

15. It was his submission that there was no point of sustaining the appeal herein or withholding money lawfully awarded to him as this would amount to an academic exercise and waste of the court's time as the appeal no longer exists having abated by operation of law.

16. On its part, the Appellant submitted that that it was desirous to have this matter settled but it is the 1st Respondent who has frustrated the whole process by failing to honour the request and/or consents it had proposed. In this regard, it relied on the case of **Gurpreet Singh vs Chatur Bhuj Goel (1988) AIR 400** where the court held that when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing, signed by the parties and there must be a completed agreement between them. It argued that it is from the consent that proper procedure for transferring the said amount could be addressed and thus an order for transfer could be appropriate for it to act upon being a banking institution.

17. It also relied on Sections 107, 109 and 112 of the Evidence Act Cap 80 (Laws of Kenya) in arguing that the burden of proof lay on the 1st Respondent to prove his case and show this court that the Appellant had failed to transfer the said amount as claimed. It was categorical that if proper procedure is followed as required by law then it has no objection in transferring the said amount into the 1st Respondent's account save the costs of this suit.

18. It also relied on the provision of Section 79B of Civil Procedure Act which states that a judge has to peruse the appeal before he can summarily reject the same. It submitted that under Order 42 Rule 11 of the Civil Procedure Rules, 2010, upon filing of the appeal the appellant shall within thirty days cause the matter to be listed before a Judge for directions. It argued that Order 42 Rule 13(4) of the Civil Procedure Rules states that the judge shall not allow a matter to proceed for hearing unless the Record of Appeal has been duly filed. It was categorical that these provisions of the law relating to dismissal could not be read in isolation.

19. It was its contention that directions had to be given before an appeal could be dismissed and pointed out that there was no penalty where an appellant failed to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules. It submitted that there was no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules and that further there was no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to act. It accused the 1st Respondent of trying to embarrass a judicial officer and only using it as a subterfuge to accomplish his ill-motive. It pleaded with this court not to dismiss its appeal under Order 42 Rule 35 (1) of the Civil Procedure Rules.

20. On the issue of the dismissal of the Appeal herein, this court noted that the 1st Respondent had sought that the Appeal be dismissed pending the hearing and determination of his present application. The substantive prayer was in his Notice of Motion application dated 16th April 2020 and filed on 17th April 2020.

21. This court was hesitant to pronounce itself on the dismissal of the Appeal herein as it had the potential of locking out parties from ventilating that said application on merit. This court thus found that it was only prudent to focus on the prayer for the release of the monies.

22. Notably, the Appellant argued that it was willing to pay the decretal sum and to compromise this appeal however its efforts had been frustrated by the 1st Respondent. It did appear to this court that the Appellant was ready and willing to compromise the Appeal herein to the extent of the decretal sum that was ordered in Nyando SPMCC No 69 of 2016 but there was an impasse as it was not willing to pay interest and costs.

23. As the 1st Respondent did not wish to enter into a consent and the Appellant could not purport to want to settle the matter on its own terms, payment of the decretal sum would have to be as per the Certificate of Costs and Decree, if any. This court had power to issue an order to enable it release the monies to the 1st Respondent herein if a consent between it and the 1st Respondent was not forthcoming. As the Appellant could not purport to want to settle the matter and proceed with the Appeal herein simultaneously, this court found it prudent to move the parties from the rut they had found themselves in.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the 1st Respondent's Notice of Motion application dated 18th December 2020 and filed on 22nd December 2020 was partly merited and the same be and is hereby allowed in terms of Prayer No 1 therein. Costs of the present application will be in the cause.

25. For the avoidance of doubt, the Appellant will only pay out the sum that is not in dispute, which is Kshs 2,031,351.70.

26. Parties to exchange Written Submissions on the issue of interest and costs by 12th October 2021 to enable the court give directions on the same.

27. Matter to be mentioned on 12th October 2021 to confirm compliance and/or to give a date for further directions

28. It is so ordered.

DATED and DELIVERED at KISUMU this 24th day of September 2021

J. KAMAU

JUDGE