



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 498 OF 2008

JAMES GACHAU KIRATHE.....APPELLANT

VERSUS

MOHAMUD SHEIKH HUSSEIN.....RESPONDENT

RULING

1. James Gachau Kirathe, the Appellant/Applicant, took out the motion dated 4th June 2012 in which he prayed for the following orders inter alia.

1. THAT an order of committal to prison be made against Mr. Muhamud Sheikh Hussein, the Respondent herein, for a term of six (6) months and/or attachment of his assets for disobeying this honourable court's order of 17.12.2010 requiring him to, inter alia, deposit a sum of kshs.3,440,000/= in a joint interest earning account or alternatively that he provides security for the said sum by way of a bank guarantee from a reputable bank.

2. THAT costs of this application be provided for.

3. THAT such other and/or further relief be granted as this honourable court may deem fit and just to grant.

2. The motion is supported by an affidavit and a further affidavit both sworn by James Gachau Kirathe. When served with the motion, Mohamed Sheikh Hussein, the Respondent herein filed a replying and a further affidavit he swore to oppose the motion.

3. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. Mr. Kimondo, learned advocate for the Appellant/Applicant argued that on 17.12.2010 this court made an order directing the Respondent to deposit a sum of kshs.3,440,000/= in a joint interest earning account or in the alternative to provide a bank guarantee from a reputable bank. The learned advocate further stated that the Respondent has blatantly refused to comply with court order despite having been served with the court order with a notice of penal consequences. For this reason the Appellant urged this court to issue the orders to protect its dignity and also to compel the Respondent to purge the contempt.

4. The Respondent on the other hand beseeched this court not to grant the orders because he had complied with the orders by providing a bank guarantee from Dubai Bank of (K) Ltd. Mr. Kinaro learned advocate for the Respondent urged this court to find that the Respondent had no intention to defy the court order. The learned advocate further pointed out that after obtaining the bank guarantee a joint valuation was

undertaken and submitted in court. In a response to Mr. Kinaro's arguments Mr. Kimondo, pointed out that the Appellant only came to know about the existence of the bank guarantee when the motion, the subject matter of this ruling was filed. Mr. Kimondo further argued that Dubai Bank (K) Ltd is not a reputable bank and in any case it is now under receivership. He also contended that the guarantee was to last for one year and that period has lapsed. Mr. Kinaro in response to Mr. Kimondo allegation that Dubai Bank (K) Ltd is not a reputable, stated that by the time of giving the guarantee the bank was in a reputable bank.

5. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival oral submission of learned counsels. It is not in dispute that the Respondent was ordered to deposit the sum of kshs.3,440,000/= in an interest earning account or in the alternative to provide a security for the said sum by way of a bank guarantee from a reputable bank. The question which must be answered is whether the Respondent complied with the aforesaid order? The Respondent expressly stated that he opted to provide a bank guarantee instead of making a cash deposit. The Appellant has disputed this assertion by alleging that the Respondent merely flashed out the bank guarantee only when he was served with this motion, the subject matter of this ruling. The authenticity of the guarantee is also in doubt. It is also pointed out that the bank guarantee's period has lapsed. I have perused the copy of the bank guarantee attached to the replying affidavit of Mohamed Sheikh Hussein.

6. The same is addressed to Mr. James Gachau Kirathe, the Appellant/Applicant and is dated 18.10.2011 and was received by the firm of Hassan Bulle & Co Advocates on 19.10.2011. The same clearly shows it would expire on 18th October 2012. The same shows it was signed by the Authorised signatory and it is on the letter head of Dubai Bank with its stamp. The motion dated 4th June 2012 was filed on the same date. By the time of filing this motion, the aforesaid bank guarantee was still in existence. This court has been urged to find that the bank guarantee is not authentic because the authorised signatory is not named. With great respect, I do not think this court is competent enough to make such a determination. On the face of it the letter head of Dubai Bank (K) Ltd and it even has the bank official stamp. It may require some evidence to f from those experts dealing with bank guarantees to determine the genuinity of the document. For now it is prima facie a genuine bank guarantee. This court has also been told that the bank which provided the bank guarantee is not a reputable bank. It is an herculian task for this court to determine whether or not Dubai Bank (K) Ltd was reputable at the time of providing the bank guarantee. There was need for the Appellant/Applicant to lay evidence establish this allegation. In the further affidavit, the Appellant has presented this court copies of Kenya gazette notices showing that Dubai Bank (K) Ltd was placed under receivership on 14.08.2015. There is no evidence to show that Dubai Bank (K) Ltd was not a reputable bank before then.

7. There is an allegation that the Respondent did not provide the aforesaid bank guarantee to the Appellant before the filing of the motion.

8. It is clear from the correspondences annexed to the affidavit of James Gachau Kirathe that the Respondent was reluctant to forward to the Appellant's advocate the bank guarantee. I do not understand why it was so difficult to do so. I will as of now refrain from making inferences that the Respondent did not possess any bank guarantee at the time. It is the Respondent's conduct which forced the Appellant to make the current application.

9. In the circumstances I will deny the Respondent costs of the motion.

10. In the end, I find the motion to be without merit. It is dismissed but with costs to the Appellant/Applicant.

Dated, Signed and Delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent