



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 93 OF 2011 (O.S.)

KENYA ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JAMES MWATHETHE MULEWA.....1ST DEFENDANT

SHARKAT COMPANY LIMITED.....2ND DEFENDANT

RULING

1. This is a ruling on costs following the withdrawal by the 2nd defendant of an application after hearing on its merits. The background of the application is that the plaintiff obtained interim orders for preservation of property, being parcels of land and money in named bank accounts which it considered were proceeds of corruption by the 1st defendant, pending the hearing of the Originating Summons herein. One of the banks accounts affected was in the name of a company, Sharkat Company Limited, which was not joined as a party or otherwise served with the suit papers.

2. By a Notice of Motion dated 27th November 2014, filed as a miscellaneous application, the 2nd defendant company sought as an aggrieved party that ***‘the Order granted on 15th July 2010 be reviewed in so far as the freezing Order of Account No. 0310411008 held in the name of [the company] at Prime Bank and that the said Prime Bank be directed to release the sum of Ksh.1,278,304.25/- to [the company]’***.

3. In the course of the hearing of the application, on the 9th December 2014, a date which had been taken in court in the presence and consent of counsel for the plaintiff, Mr. Murei, and counsel for the 1st defendant, Ms. Asli, an order was made with consent of the said counsel for Plaintiff and counsel for the applicant, Mr. Gikandi, in the absence of counsel for the 1st defendant, that the Notice of Motion dated 8th April 2011 be heard with prayers nos. 4 and 5 being considered with exception of Account No. 0310411008 and that –

a. Sharkat Co. Ltd is joined as 2nd defendant.

b. The court shall consider the Notice of Motion dated 8th April 2011 together with submissions to be made with respect to the Notice of Motion dated 27th November 2014 by the 2nd defendant.

4. After full hearing of the application dated 27th November 2014 for lifting the freezing order against the account held in the name of the 2nd defendant, Counsel for the 2nd defendant, Mr. Gikandi, applied to withdraw the application stating as follows:

“I pray to withdraw the application having read the documents which I was not privy to. I [make this] request since the Sharkat Co. has not been served with Originating Summons dated 8.4.2011 and the application.”

5. Counsel for the plaintiff, Mr. Murei, did not oppose the withdrawal but sought the payment of costs for his half-day attendance in court during the full argument of the application. Counsel prayed, consequently, and that the exception with respect to the bank account the subject of the application be discharged so that the Notice of Motion dated 8th April 2011 and the freezing orders apply to all the bank accounts.

6. In response to the application for costs, counsel for the 2nd defendant argued that he was only fully able to appreciate the case after seeing the documents presented by the plaintiff in court and having failed to join and serve process on the company in whose name the account in which the frozen funds were held, the plaintiff was not entitled to costs. Counsel submitted:

“Originating Summons filed in 2011. Plaintiff knew that the account in this application was in the name of Sharkat. The plaintiff did not serve the pleadings on Sharkat. The joinder of the 2nd defendant was at the instance of the 2nd defendant. Last week when the matter was before Kasango, J., Mr. Kagucia was present and the date was taken by consent and a replying affidavit was not filed. The documents referred to by the plaintiff were brought to my notice when the application was being argued. I pray that there be no order as to costs. I do not have any objection, for now, for orders against the named account but once we are served with the originating summons we shall serve the papers accordingly.”

7. Ruling on the costs was reserved and, in the meantime, the court directed that –

a. Interim order is extended.

b. Plaintiff to serve the 2nd defendant with the Originating Summons pleadings and affidavits within 7 days.

c. Directions as to hearing date for the Originating Summons to be given on the [ruling date].

d. Mention notice to be served on other respondents.

8. In accordance with section 27 of the Civil Procedure Act, the costs of any suit are in the discretion of the court and the general principle is that ‘**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**’

9. In the application before the court, the following factors bear on the decision of the court on costs:

a. The plaintiff had not served the Originating Summons upon the applicant company which was clearly a necessary party being the company under whose name one of the bank accounts sought to be frozen was held. It is likely that had the company been served with the O. S., the present application would never have been filed.

b. The Plaintiff did not file any replying affidavit to the application (which had been filed as a miscellaneous application) through which the plaintiff’s case could have been disclosed rather than have the counsel for the applicant company learn the plaintiff’s case during argument of the application in court.

c. The Plaintiff's failure to file a replying affidavit to the 2nd defendant company's application dated 27th November 2014, which was conceded together with failure to join and serve the applicant company, may have led the applicant to believe that its application was not opposed and that it could therefore be free to withdraw it without an order as to costs.

10. . Accordingly, for the reasons set out above, I make the following orders on the 2nd Defendant company's Notice of Motion dated 27th November 2014:

a. The Notice of Motion dated 27th November 2014 is withdrawn.

b. There shall be no orders as to costs.

c. For avoidance of doubt, the freezing orders issued previously herein remain in force in respect of all the bank accounts, including the account the subject of the application of 27th November 2014, that is Account No. 0310411008 at Prime Bank Limited, Mombasa, pending the hearing and determination of this suit.

11. The matter shall, on the basis of its urgent nature, proceed to hearing on dates to be fixed on priority basis.

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Robert Bii for Mr. Murei for the Plaintiff

Mr. Wafula for the 1st Defendant

No appearance for the 2nd Defendant

Ms. Linda - Court Assistant.