



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KWALE**

**ELC NO. 63 OF 2021 (FORMERLY NO. 315 OF 2008)**

**1. VIPIN MANGANLAL SHAH**

**2. VIJAY LAKHANI.....PLAINTIFFS**

**VERSUS**

**HAMADI MWAKIBIBO JUMA.....DEFENDANT**

**DIRECTIONS**

1. This matter was concluded following a consent order of the parties herein. According to the proceedings and the material placed before me the consent was by way of a letter dated 11<sup>th</sup> June 2010. The consent letter was submitted to the court on 14<sup>th</sup> June 2010. The Court Justice Mohamed Ibrahim as he then was received the letter, directed that it be deemed as duly filed and further made an order that the said consent be adopted and entered as an order of the court. Item No. 3 of the order reads as follows; -

**‘THAT the Plaintiffs do deposit on or before 15<sup>th</sup> August 2010 the amount of Kshs. 13,500,000/= in a joint interest earning deposit account between the parties Advocates pending the final determination in favor of the Plaintiff’s and or Aniket property and Investments Limited of High Court Civil Case No. 211 of 2006 (Seaview Investments Limited Vs Hamadi Juma Mwakibibo & Others) whether in the High Court or on Appeal preferred therefrom whereby the proprietary rights of the said Plaintiffs and or Aniket Property & Investments Limited in respect of Kwale/Diani Beach/203 are upheld and findings of proprietorship made in their favor with finality.’**

2. It is not in dispute that pursuant to the above the said sum was deposited as agreed. Mr. Oddiaga then applied for the order to issue. The Deputy Registrar declined to issue the same and directed that a draft should be served upon the other party for approval before she could sign the decree pursuant thereto. The reasons cited were that she did not have the benefit of the original proceedings. Indeed, the original file went missing and a skeleton file was reconstructed with approval of the court. It is alleged by Mr. Oddiaga that he forwarded the draft to Mr. Kagram who has to date failed to approve the draft for signing by the Deputy Registrar.

3. The file was fixed for mention for directions on 14<sup>th</sup> December 2021, Mr. Kagram sought for time to look at his file as he was not aware of the letter. Mr. Oddiaga clarified that they were not seeking to extract a decree but the consent order which was drafted by M/s A.B. Patel appearing for the Plaintiff. That the consent arose out of execution of a decree of the court. This court directed Mr. Odiaga to re – serve Mr. Kagram with his request. On 20<sup>th</sup> December 2021 Mr. Kagram confirmed that he had seen the request from Mr. Oddiaga. He however pointed that there was a related suit ....HCCC 134 of 2012 pending in Mombasa where the Defendant herein denies that he has instructed Mr. Oddiaga to act for him. Further that the Plaintiffs were deceased and there was need for clarity on how the lawyers would want to proceed.

4. I sought clarification on why Mr. Oddiaga wanted to extract the consent order. It was clarified that the initial court decree was to the effect that some monies were to be paid to the defendant and that he was also one of the defendants together with Mr. Mwakibibo. He informed the court that the Plaintiffs defaulted, execution proceedings commenced, the Plaintiff filed an application for stay of execution but parties recorded the consent, the subject of these directions. According to Mr. Oddiaga this consent was amended and he wanted it issued by the Deputy Registrar. That despite money having been deposited (see para 2 of these directions) he told the court that ‘he could not make any steps without the order’ further that he had filed a suit against M/s AB Patel for the release of the money. He emphasized he needed the order because he was a party. He pointed that HCCC 134 of 2012 had no bearing to the matter before the court, that the representation of Mr. Mwakibibo should not be an issue and he should apply appropriately to act in person. On the death of the Plaintiffs, he stated that there was no proof that they were deceased moreover the fixed deposit has been extended over time and it was not clear who was instructing M/s A.B Patel to extend the facility if the Plaintiffs were deceased.

5. Mr. Kagram stated that the money belongs to Mr. Mwakibibo who denies that Mr. Oddiaga acts for him and that he had already paid him his fees. Mr. Oddiaga wanted the money regardless of what was happening in HCCC 134 of 2012 and urged that the court must deal with the

issue of representation.

6. In view of the foregoing and to enable a better understanding of the issues raised for informed directions I directed the parties to file written submissions.

## **SUBMISSIONS**

7. The Plaintiff filed their submissions on 7<sup>th</sup> February 2022 together with some affidavits. Mr. Oddiaga also filed submissions on 17/01/2022 and responded to the Affidavits as a matter of right though he pointed that parties had only been ordered to file submissions. This court allowed the affidavits in the interest of justice as long as they were going to assist the court in rendering informed directions the matter appearing to be highly contested especially by M/s A.B. Patel.

### **Plaintiff Submissions**

8. It was submitted that the funds were put in the joint account awaiting finalization of cases affecting the parties. That Msa. ELC No. 134 of 2012 was filed when the respondent Hamadi Mwakibibo attempted to subdivide and sell the suit property. Mr. Kagram swore an affidavit filed on 7<sup>th</sup> February 2022 wherein he attached the respondents affidavit sworn on 28/8/2012. In this affidavit the respondent deposed that he had dis-instructed Mr.Oddiaga, paid his fees and attached an RTGS. (the RTGS shows a transfer of Kshs 8million to Ms Stephen Oddiaga & Co. Advocates). Counsel urged that it was important for the court to summon the respondent to confirm if Mr. Oddiaga was still acting for him and before any further steps are taken. It was further submitted that since the funds were awaiting matters that were pending and which arose from the Defendants own wrongful and fraudulent conduct, it was inappropriate to pursue these funds on the part of Mr. Oddiaga. Other documents attached were pleadings in Mombasa HCC 119 of 2018 (Stephen Oddiaga T/A Stephen Oddiaga & Co. Advocates Vs Vikram C. Kanji, Sanjeev Kagram & Ano.)

### **Defendants Submissions**

9. Mr. Oddiaga submitted that the consent dated 11<sup>th</sup> June 2010 the subject of these directions had handwritten amendments made in court by the plaintiffs advocates in the presence of the Defendant Advocate and subsequently handed over to court. To buttress the point that the said consent was adopted as an order of the court, Counsel referred this court to the proceedings of 14<sup>th</sup> June 2010 and emphasized that the order became an order of the court with the said amendments. Mr. Oddiaga urged the court to crosscheck which consent was in the court file and direct further action on it. He pointed that it was by virtue of the consent that the Plaintiff extended the deposit and the account was active and saw no reason why the order should not be released to a party demanding it and there can be no objection to extracting a lawful court order available in the court file. Further his firm in addition to being appointed to act for the 1<sup>st</sup> Defendant was also a party to the suit. That no evidence of withdrawal of instructions had been placed before the court.

10. Mr Oddiaga found it necessary to respond to the affidavit sworn by Mr. Kagram's by his affidavit sworn on 11<sup>th</sup> February 2022 and filed on the same day. He deposed that the issue is not whether the respondent has paid his lawyers fees but was on why the order should not be extracted. That whether he had instructions was immaterial and does not help in addressing why an order entered by consent should not be extracted. Counsel emphasized that all that was needed was for Mr. Kagram to confirm his handwritten amendments and that what was adopted was the particular version. It was alleged that Counsel had circumvented this duty. Counsel also deposed that Civil Suit No. 211 of 2006 is finalized and referred this court to paragraph 11 of the Plaint filed in HCCC No. 134/2012. According to Mr. Oddiaga the consent order subject of these directions was limited to Civil Suit No. 211 of 2006. He also stated that he has pending professional fees with Mr. Mwakibibo in this matter which Mr. Mwakibibo authorized Mr.Kagram to release which he has refused to comply, letters dated 26/2/2009 and 6/3/2009 were annexed in this regard. That there were outstanding fees in other matters against Mr. Mwakibibo all totaling 14,932,424 as at 18/04/2012. He claims a lien on the money in the joint account.

### **Analysis**

11. I have considered the submissions and the material placed before me by way of the affidavits filed which material, I have noted is not new but has been lifted or extracted from the various cases filed or pending in court in respect of *Kwale/Diani Beach/203*. I have also read the pleadings and proceedings in the instant suit No. 315 of 2008.

After considering all the above it is my view that these directions are not just about extraction of the consent order from the consent letter dated 11<sup>th</sup> June 2010 as Mr. Oddiaga would want this court to believe. From the submissions and affidavits filed, clearly it is about the release of the funds held in the joint account herein which Mr. Oddiaga is claiming a lien for outstanding professional fees owed to him by the 1<sup>st</sup> Defendant Mr. Mwakibibo.

12. In view of the foregoing I will not delve much into the consent letter that was adopted since there is largely no dispute as I understand from the submissions. Infact it is the very product of the funds that were deposited into the joint account. Having observed that this issue is about the release of the money in the joint account. This being the case it is not in dispute that Mr. Oddiaga filed Mombasa HCC 119 of 2018 Stephen Oddiaga t/a Stephen Oddiaga & Co. Advocates Vs Sanjeev Khagram t/a A. B. Patel & Patel Advocates where he is seeking for;-

- a. Judgement to be entered for the Plaintiff against the Defendant for Kshs. 23,796,998.36
- b. The Defendant be directed to sign documents releasing the Fixed Deposit amount of Kshs. 23,796,998.36 to the Plaintiff forthwith and unconditionally.
- c. Costs and interest at Court rates from the date of filing this suit until payment in full.

d. The court be pleased to issue any order it thinks fit and fair in the circumstances.

13. The above suit has not been finalized and it is the view of this court that all the issues as to release of the funds should be properly litigated before that forum. While I agree that a party to a suit is entitled to an extract of any order made in the proceedings for now I choose to let matters stand as they are pending the determination of Mombasa HCC 119 of 2018. I see no prejudice that will be occasioned to await this outcome where Mr. Oddiaga has chosen to litigate on the release of the funds which to me is the core issue.

**DELIVERED AND DATED AT KWALE THIS 25<sup>TH</sup> DAY OF MARCH, 2022**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Kagram.....for the Plaintiffs

Mr. Oddiaga..... for the Respondents

Mr. Denis Mwakina.....Court Assistant.