



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 178 OF 2014 (O.S)

KIM JONG KYU APPLICANT

V E R S U S

- 1. HOUSING FINANCE COMPANY LIMITED**
- 2. KANYI J. & COMPANY ADVOCATES**
- 3. KAMOTI & COMPANY ADVOCATES RESPONDENTS**

JUDGMENT

1. The Applicant filed an Originating Summons dated 8th May 2014 and amended on 29th May 2014.
2. By that Originating Summons Applicant seeks the following prayers-
 - **Whether Kanyi J & Co. and Kamoti & Co. Advocates the 2nd and 3rd Defendants hold the money in A/C NO TD 300-0011294 open with the 1st Respondent bank in trust for the Applicant? If yes,**
 - **Whether the Applicant is entitled to disclosure of information on how the interest allegedly earned by the money deposited therein was arrived at?**
 - **Whether the 1st Respondent is legally obligated to provide the Applicant with information regarding the interest it paid its fixed deposit account-holders for the period from 1st January 2010 to 13th February 2014?**
 - **Whether the Applicant is entitled to 17% interest p.a in the amount held in A/C NO TD 300-0011294 in the name of the 2nd and 3rd Defendants?**

BACKGROUND

3. Applicant was granted a stay of execution pending appeal in **Mombasa HCCC No. 335 of 2001** on condition that he deposited Kshs. 6 million in an account in the joint names of the Counsels on record. Applicant was represented by the firm of Kanyi J. & Company Advocates while the other party was

represented by Kamoti & Company Advocates. Both those two firms of Advocates who are the 2nd and 3rd Respondents do not deny Applicant provided the amount of Kshs. 6 million and an account in the joint names of both firms was opened at the 1st Respondent's Bank.

APPLICANT'S CASE

4. That he had to borrow the amount of deposit from his friends who lent him on condition that they would receive the money back from the Applicant and the interest. He further deponed-

- **On the strength of the information given to me by the Respondent I transferred all the monies I had sourced from my preferred Barclays Bank of Kenya to the account opened with 1st Respondent on the 1st Respondent representation that I would get a good interest. Annexed and marked K.J.K. 3 is a true copy of the bank transfer slip.**
- **That the 1st Respondent had promised me that the interest would not be less than 17% p.a..**
- **That I was very surprised when I sought a statement from the bank after I won the appeal and learnt that the entire decretal sum had earned merely one million shillings which translates to merely 1% p.a as opposed to the minimum interest the 1st Respondent had promised me. Annexed and marked K.J.K 4 is a true copy of the statement.**
- **That the 2nd and 3rd Respondents deposited the amount hereto merely as a trustee for me and that being the case the Respondents herein owes me an explanation and/or account of how the interest hereto arrived at.**
- **That from the time I got the heart breaking information, I have made several attempts to get the clarification and/or justification from the 1st Respondent for the inordinately low interest to no avail. Annexed and marked K.J.K. 5 is a true copy of letters attesting to that fact.**
- **That I have been advised further by my advocates on record which information I verily believe to be correct that the 2nd and 3rd Respondents herein hold the account herein in trust for me and that being the beneficiaries of the proceeds therefrom I am entitled to information on how the interest allegedly earned by the amount I deposited through the 2nd and 3rd Respondent has arrived at.**

5. In submission before Court Learned Counsel for Applicant stated that 1st Respondent by a statement attached to the Originating Summons only reflected a total of Kshs. 7 million as the amount due to the Applicant. That accordingly in calculating interest it would seem 1st Respondent gave interest for the amount deposited on behalf of Applicant at the rate of 1% which the Applicant says is too low since the market rate is about 13% and 14%. Counsel finally submitted that the Respondents should account for the interest at 17%.

1ST RESPONDENT'S RESPONSE

6. The 1st Respondent's opposition to this action was firstly that the Originating Summons was incompetent because the trust relied upon by the Applicant was not in a deed as required under Order 37 Rule 1 of the Civil Procedure Rules. Secondly 1st Respondent opposed the action on the ground that Applicant lacked *locus standi*.

7. On the first issue, 1st Respondent relied on the provisions of Order 37 Rule 1 which provides-

- "1. The executors or administrators of a deceased person, or any of them, and the trustees**

under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as *cestui que* trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions.”

A careful reading of that Rule will in my view show that 1st Respondent’s objection on this ground is misplaced. In that Rule the words “**or otherwise**” connote that a trust need not necessarily be in a deed. The cases that 1st Respondent relied upon to support this ground actually do not support it.

8. In the second Ground of Opposition 1st Respondent raised various issues. Firstly 1st Respondent deponed that account No. TD 300-0011294 was opened and operated jointly by the 2nd and 3rd Respondents. That the said account was subject to a written contract dated 6th July 2010 to which Applicant was not privy. That the account opening contract did not indicate that it was for the benefit of the Applicant. Accordingly that the account was not opened or operated by the 2nd and 3rd Respondent as trustees. It was further deponed on behalf of 1st Respondent as follows-

“10. THAT I am informed by the Respondent’s accounts opening agent, one David Lai, which information I verily believe to be true, that he never made any representations to the Applicant as regards the interest rates that would be payable on the account let alone indicate that it would be at the rate of 17% per annum.”

9. Further 1st Respondent deponed that the rate of interest paid to an account is contractual as provided under Section 16A (3) of the Banking Act Cap 488. That Section provides-

“An institution shall, in respect of a seven day call or fixed deposit account, pay interest accruing to the account on agreed contractual terms:

Provided that such interest may be forfeited where the deposit is uplifted before the maturity date.”

It is important to note that the account opened by 2nd and 3rd Respondents is a Fixed Account.

10. Further that the disclosure sought by Applicant cannot be made in view of the provisions of Section 31(2) of Cap 488 which provides-

“(2) Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under this Act and, if he does so, he shall, for the purposes of Section 49, be deemed to have contravened the provisions of this Act.”

11. 1st Respondent submitted and there is merit in that submission that the information Applicant seeks under Article 35(1) of The Constitution of Kenya are misguided because the information does relate to the enforcement of Applicant’s Fundamental Freedoms. Article 35(1) provides-

“(1) Every citizen has the right of access to-

a. information held by the State; and

b. information held by another person and required for the exercise or protection of any right or fundamental freedom.”

12. The other two Respondents other than not denying that an account was opened in their joint names denied Applicant's deposition that he was entitled to any more interest than what he was paid.

ANALYSIS

13. When the Originating Summons came up for hearing, parties sought to rely on affidavit evidence. That was the direction given by the Court. What is clear is that an account was opened by 2nd and 3rd Respondent in the 1st Respondent's Bank and it is not denied the amount in that account was money that was supplied by Applicant in obedience of the Court Order that granted him stay of execution pending appeal. That account however is subject to the account opening contract which account was solely between the Respondents. As correctly stated by 1st Respondent there is no evidence that the said account was opened for the benefit or in trust for Applicant. Applicant was not a party to that contract. He lacks privity to seek to in any way enforce that contract. In this regard I refer to the case **AFRICA EDGE SARI –Vs- SUPINDER SINGH SOIN [2014]eKLR** where it was stated-

“... from Halsbury's Laws of England 4th Edition paragraph 329 as follows:

‘the doctrine of privity of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, parties who are not parties to it. The parties to a contract are those persons who reach agreement’

The Defendant thereafter referred this Court on this point to the cases of MUCHENDU v WAUTA (2003) KLR 419, Alsafr Health Care Ltd v Kam Pharmacy & 2 Ors HCCC No. 261 of 2001 (unreported) as well as Chitty on Contracts paragraph 18-014 which detailed:

‘the doctrine of privity (of contract) means and means only, that a person cannot acquire rights, or be subject to liabilities arising under contract to which he is not a party.’”

14. I find and hold that Applicant was not a party to the contract between the Respondents and was not to benefit from the terms thereof and therefore cannot enforce any term in that contract. It is important to state that looking at that contract there is no provision of the rate of interest applicable to the contract. In any case Applicant has no locus to bring this action.

15. I also make a finding that in view of the provisions of the Banking Act reproduced above the 1st Respondent is estopped from making the disclosure Applicant seeks.

16. This is a case without merit. It is hereby dismissed with costs to the Respondents.

DATED and DELIVERED at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

JUDGE