



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 252 of 2001

SOUTHERN CREDIT BANKING

CORPORATION LIMITED.....PLAINTIFF

- VERSUS -

KIBIC STAR ELECTRO LTD.....1ST DEFENDANT

MR. KANG SUK LEE.....2ND DEFENDANT

MRS. YOUNG SOOK LEE CHO.....3RD DEFENDANT

R U L I N G

1. Before the court is a **Notice of Motion** dated **28th June 2012**. It is premised under the provisions of the law stated therein. The application seeks a stay of execution and a review of my **Ruling** dated **26th June 2012**, specifically on the finding that the orders made by Honourable Justice Havelock on **17th day of February 2012** did not constitute a notice pursuant to **Order 22 Rule 52**.

2. The application first came to court under Certificate of Urgency and I granted temporary relief orders staying the execution of my aforesaid Ruling and stopping the transfer of motor vehicle registration number KBN 106X should a sale by auction have taken place. I also in the body of my Ruling at the *ex-parte* stage noted that I had reason to believe that there could be a good reason for the application.

3. Under **Order 55 Rule 1** any person aggrieved by a decree of the court from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed, and who has discovered new and important matter or evidence can apply for a review of the order or decree. The other ground upon which a review is tenable is where the Applicant contends that the decree arose from a mistake or error apparent on the face of the record. The current application is based on an error apparent on the face of the record.

4. Since I made the Ruling sought to be reviewed, it is clear to me whether or not an error is apparent on the face of the record. I will therefore rely heavily on the said Ruling of **26th June 2012**. At **paragraph 10** of my Ruling I raised two issues for the determination of the application:-

(a) Whether Order 22 Rule 52 and 53 were complied with, and the consequences of non-compliance.

The second issue I raised is not necessary for the determination of this application. At paragraph 11 of the Ruling I analyzed the said **Order 22** and its import. I concluded in the following terms:-

“Clearly, the requirement under Order 22 Rule 52 is mandatory and must be complied with. The only issue in this matter is whether the Objector or the court issued the notice under Rule 52. The Rule refers to notice in writing. The court order dated 17th February 2012 does not, in my view, constitute such notice in writing. The order merely states the nature of the application and the orders that were granted. In my view, the notice required under Rule 52 must be specific, either as part of the Order, or as a penal notice under the Order, or a completely separate written notice. The service of the application and the Orders of 17th February 2012 upon the Judgement Creditor did not amount to a notice required under Order Rule 52 of Order 22. Therefore the Judgement Creditor had no obligation to comply thereto.”

I concluded that the Order is mandatory and must be complied with. I then went ahead to say that the court Order of **17th February 2012** does not constitute such a notice in writing. I said that in my view the notice required under **Rule 52** must be specific, either as part of the order, or as a penal notice under the Order, or a completely separate written notice and I concluded that the service of the application and the Orders on **17th February 2012** upon the Judgement Creditor did not amount to a notice required under **Order 22 Rule 52** and therefore the Judgement Creditor had no obligation to comply thereto.

5. In other words, if I had found that the court order dated **17th February 2012** did amount to a notice required under **Order 22 Rule 53**, then the inquiry and the application would succeed at this stage.

6. This is perplexing for me. When I was writing the said Ruling I remember reading and examining the court order dated **17th February 2012** and I did not see the **Order 3** thereof. I read it again and I satisfied myself that it was not there. In my Ruling at **paragraph 11**, I stated thus:-

“The order merely states the nature of the application and the orders that were granted. In my view, the notice required under Rule 52 must be specific, either as part of the Order, or as a penal notice under the order, or as a completely separate, written notice.”

Clearly, I was mistaken. My failure to see **Order 3** of the Court Order dated **17th February 2012** clearly led me to believe that the said order did not amount to a notice. This is an omission which I regret, but is what **Rule 1 order 45** envisages can happen. If I had read the said order of **17th February 2012** correctly, my Ruling would have ended at paragraph 11, and the Applicant would have been 100% successful instead of succeeding halfway. With due respect to both parties in this matter, I allow this application.

7. It was submitted by Mr. Chenge for the Respondent that the subject motor vehicle **KBN 106X** had already been sold by the time the stay orders were served upon the Respondent. Mr. Chenge further submitted that in any event the Applicant had not suffered any prejudice since the sale would only clear the suit debt. Miss Migiro for the Applicant objected to such submission observing that **Rule 12 (f)** of the **Auctioneer Rules** are mandatory, and may not have been observed if it is true that the said motor vehicle had been sold. **Rule 12 (f)** of the **Auctioneer Rules** states that upon receipt of a court warrant or letter of instructions, the auctioneer shall in the case of movable property:-

“arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter”.

Based on above law, M/s Migiro submitted that the purported sale, if at all it took place, was meant to circumvent the orders of this court. She further submitted that the second advertisement was stated to be a second advertisement and was therefore subject to **Rule 12 (f)** aforesaid.

8. I have considered the submission of the parties in this matter. The order of court issued on **28th June 2012** was clear that if any sale had taken place prior to service, then the transfer of the auctioned

property was stayed pending orders from this court. While there have been submissions that a sale may have taken place, there are no submissions on whether or not a transfer was effected. We are all entitled at this stage to believe in the security offered by that court order.

9. I therefore confirm **prayers 2 and 3** of the application dated **28th June 2012**, raise and set aside the attachment of motor vehicle registration number **KBN 106X**.

Each party shall bear own costs.
It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF JULY 2012.

E. K. O. OGOLA

JUDGE
PRESENT:

Chenge for the Plaintiff

Odera for the Objector

Teresia – Court clerk