



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 59 of 2000

JASSAN KIPTOO KOSGEI

T/A TACHASIS WHOLESALERS PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

On 4th April 2003, this Court delivered a ruling dismissing an Application for Interlocutory Injunction restraining the Defendant, its servants and agents howsoever from offering for sale, selling, transferring, disposing of or in any way alienating or encumbering the properties referred to as “2 (a) – 2 (c)” in the Application, until the final determination of this Suit and ex-parte Injunction granted on 15th May 2002 was discharged.

The Court found that no *prima facie* case had been established as the Chargor was properly served with the required statutory notices. The Court also dismissed the Plaintiff’s claim that the Defendant had admitted receipt of full payment (annexure JKK6Q) saying:-

“Firstly, in the internal communication which was neither addressed to the Plaintiff nor copied to him, there is no account number quoted. Secondly, that 3 years thereafter, he admitted owing the sum of over Kshs. 26,000,000/= and has not demonstrated discharge thereof”.

On 2nd March 2005, the Applicant came back to this Court under “an amended Notice of Motion”. The grounds upon which the Application is brought are set out therein.

Mr. Wagara Counsel for the Plaintiff argued in his submissions that new matters which are substantial and of great importance have been discovered. He argued that the new material could not have been obtained at the time of the Ruling - 4th April 2003. By consent, the Counsels had no objection of me hearing the matter on the basis that I acted for the Defendant while in practice.

Mr. Wagara continued stating that an internal memo dated 5th June 1996 in which the Defendant’s Branch Manager confirmed that the Plaintiff has cleared his debt. He relied on Order 44, Rule 1 as the ground under which the Application can be brought.

Order 44, Rule 1 states:

“1. Discovery of new and important matter or evidence which after exercise of due diligence was not within knowledge or could not be produced at the time the decision was made or

2. *Mistake or error apparent on the face of the records, or*

3. *For any other sufficient reason.*”

I held that the Applicant must state under which heading he will argue this Application. The first two grounds must be specified and particularly set out in the Application.

Mr. Wagara reiterated that these are sufficient reasons for review and that there were materials that were not in the hands of the Applicant when the Application was being considered. He asserted that the letter dated 29th May 2002 was not before the Court. It created new circumstances. In the letter, the Defendant has supposedly admitted that money was misappropriated that the Defendant does not know money lent and amount misappropriated. He stated that the Plaintiff has settled all his account and does not owe money to the Defendant. He argued that the sum have been settled, a fact that was not before the Court when it delivered its ruling on 4th April 2003.

He urged the Court to issue an Injunction on the basis of the new material discovered and review the orders granted on 4th April 2003.

Mr. Kuloba Advocate who appeared for the Defendant opposed the Application and submitted that the Plaintiff has failed to disclose any sufficient ground that would necessitate review of the Court's previous orders.

On the alleged discovery of new matter or evidence, Mr. Kuloba submitted that the evidence alleged to have been discovered is not new. The Court has already made a finding on the two materials, that is the letter dated 29.5.2002 and the internal memo of 5.1.1996. He reiterated that the Application dated 9.5.02 had annexed to it all the documents that are appearing in this new Application. The learned counsel also submitted that the Plaintiff is not seeking review on the basis of any error on the fact of the record or discovery of new material.

Mr. Kuloba asserted that the Plaintiff admitted his indebtedness to the tune of Kshs. 26,000,000.00/=. No evidence of payment of this amount was provided. He urged the Court to dismiss the Application with costs because the documents being cited were attached to previous Application. He invited the Court to look at the previous Application for Injunctions, the replies and exhibits.

Mr. Kuloba further argued that the letter dated 29.5.02 has been disclosed by the Defendant. It was his contention that the letter had no connection with this case since it refers to counterclaim whereas there is no counterclaim in this case. In any case, he submitted that the case was filed on 9.5.2002 and the letter is dated 29.5.2002. Therefore it cannot be an admission that the debt does not owe. He also reiterated that the letter was privileged because it was a communication between advocate/client and is protected under Section 134 of the Evidence Act, and cannot be admissible in evidence.

I have considered the submissions of both Counsels for the Parties and I have perused the documents on record. The matter was in Court and a ruling was made on 4th April 2003. I am not persuaded that new material has been discovered that was not before the Court on that date. Fundamentally, the letter dated 29.5.2002 on which the Plaintiff places a lot of reliance is privileged communication between the advocate and his client. It is not available for the aid of the Plaintiff.

The Plaintiff had indicated that he owes the Defendant the sum of Kshs. 26 Million and has not provided evidence which would have led me to reasonably arrive at a conclusion that the Plaintiff has settled his accounts. I therefore hold that the Applicant has not satisfied this Court that there is discovery of new and important matter which was not available to them with the exercise of due diligence at the time the Court's earlier ruling was made and delivered.

The upshot of the above is that I respectfully share the sentiments of Justice Tunya and dismiss the Application with costs to the Defendant.

DATED AND SIGNED AT NAIROBI ON THIS 9TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012

F. AZANGALALA
JUDGE

In the presence of: Mr. Ngara for the plaintiff

Ms Khaya for the defendant