



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Case 61 of 2001

KURSHBIKAUR HARJEET SINGH
CHNDHA (*suing as the legal administrator of the estate of HARJEET SINGH CHARAN SINGH CHANDHA*).....**PLAINTIFF**

-VERSUS-

AMARJIT SINGH SAGOO **1ST DEFENDANT**
PREMIER DIARY LTD **2ND DEFENDANT**

RULING

There are two applications before court dated 12th December, 2009 and 24th December, 2009.

The application dated 12th December, 2009 is a Notice of Motion filed pursuant to Order XXXIX, rules 1, 2, & 3 of the Civil Procedure Rules. The application seeks for 3 orders, first prayer an injunctive orders against the plaintiff and her counsel, **Gichaba & Co. Advocate**, restraining them from withdrawing and/or interfering with the sum of Ksh 6,805,000/= together with interest thereon paid into the account of the said law firm by Prime Bank Ltd, Kenindia House Nairobi. The second prayer seeks to set aside the ex parte order made on the 7th of December, 2009 by the deputy registrar, directing that the sum of Ksh 6,805,000/= be paid out to the plaintiff's counsel, the third prayer seeks for refund of the said sum of Kshs 6, 805,000/= together with interest from the said law firm of **Gichaba & Co. Advocates**. The application was supported by the affidavit of **Walter Amoko Advocate**.

On the 14th of December, 2009 the court granted the first prayer.

The plaintiff opposed the application and in opposition filed a replying affidavit on the 16th of December, 2009 and a Notice of Motion dated 24th December, 2009 pursuant to Order XXXIX rule 4, Order L rules 1, 2 & 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks also to set aside the order issued on the 14th of December, 2009. The application was supported by the affidavit of **Wesley Robinson Gichaba Advocate** and on the grounds on the face of the application.

The 2nd defendant's Counsel **Mr. Oraro** and **Mr. Amoko** contend that the order issued by the deputy registrar on the 7th of December, 2009 is a nullity and ought to be set aside and monies released pursuant to the said order refunded for the following reasons:-

§ By a consent order, the parties to the suit agreed that the 2nd defendant deposits the sum of Ksh 6,805,000 in a joint account in the names of the counsel on record for the plaintiff and the 2nd defendant pending determination of the intended appeal. That the consent order did not provide for the release of the sums to any one of the parties but each was at liberty to apply.

§ Although the first appeal was struck out on the 17th of July, 2009 the 2nd defendant applied for extension of time within which to file a fresh appeal which leave was granted on 4th of December, 2009 in the presence of the plaintiff's and 2nd defendant's counsel. In granting the extension the Court of Appeal took cognizant of the fact that the 2nd defendant had deposited the decretal sum mentioned above in a joint account.

§ That without notice to the 2nd defendant's counsel the plaintiff's counsel wrote a letter to the Registrar High Court Kisumu and appeared before a Deputy Registrar in the absence of the defence counsel seeking to have the monies in the joint account released to him. The Deputy Registrar granted a mandatory order releasing the amount to the said plaintiff's counsel exparte.

§ The plaintiff's counsel extracted an order where he inserted a penal notice and served Prime Bank Ltd and in compliance with the Court Order bank released the sum of Ksh 7,458,512.15 to **Gichaba & Co. Advocates**.

§ The plaintiff's counsel has not served the letter seeking for the release of the monies or the Court Order upon the defence to date.

§ The defence counsel also took issue with the plaintiff's counsel's physical act of withdrawing Ksh 5,000,000/= cash from his law firm account and personally depositing the same in his client's account.

§ That the registrar did not act within the powers donated by S. 38, Order 21 rule 7(2) and Order XLVIII of the Civil Procedure Act and Rules. And no application was placed before the said deputy registrar under any other relevant sections of the law, to warrant the orders she issued.

It is also the contention of the 2nd defendant that since the decree had issued more than a year before, the plaintiff to serve a notice to show cause upon the defendants which was not done. Further since the consent order staying the proceedings pending appeal which had not been set aside, it remains in force to date. The defence submitted that therefore the order by the registrar was irregularly obtained, a nullity, and ought to be set aside.

Defence Counsel also urged the court to compel the plaintiff's counsel to refund the money.

The 2nd defendant's counsel relied on the following authorities:-

1. **Shariff Abdi Hassan –VS- Madhif Jama**

Adan, Civil Appeal No. 121 of 2005.

2. **Govindji Popatlal Madhavji –VS- Masser Ali Bhai & another (1960) E. A 167.**

3. **Macjoy –VS- United Africa Co. Ltd**

(1969) 3. All E. R. 1169.

4. **National Bank of Kenya Ltd –VS-**

Wilson Ndolo Ayah (unrepresented)

Civil Appeal No. 119 of 2002

On his part the plaintiff's counsel in opposed the application and canvassed for the setting aside of the order of 14th December, 2009, on the follow grounds:-

§ That by writing the letter to the registrar the plaintiff rightly moved the court in seeking for the release of the funds.

§ The Deputy Registrar has powers under Order XLVII rule 1 to grant the Order sought in the plaintiff's counsel's letter, since the money placed in the joint account was intended to await the out come of the appeal and as the same was struck out there was need to have the monies released as the money in the joint account was not to await just any other appeal.

§ Upon receipt of the funds the plaintiff's counsel acted in on his client's instructions on how to disburse the same and if he is to account this he ought to do to his client and no more.

§ By the time the order was issued on the 14th of December, 2009, He had already released the funds and there was nothing to injunct.

Plaintiff's counsel urged the court that in the circumstances the 2nd defendant's application amounts to an abuse of the court process, the said order be set aside and counsel allowed to access his account.

Having considered the submission by learned counsel for the parties and authorities cited the court has summarized the issues for consideration as follows:-

1. **Whether the court was properly moved by the plaintiff.**

2. **Whether the registrar had the mandate/power to order for the release of the monies pursuant to the letter written by the plaintiff's counsel?**

3. **If the answer to (2) above is negative, is the order a nullity?**

4. **Can this court order the plaintiff's counsel to refund the said sums?**

The facts of the suit relevant to this application are not disputed and may be summarized as follows.

That on the 25th of September, 2007 the court entered judgment as against the defendants jointly and severally for the sum of Kshs 6,805,000, costs and interest. Thereafter on the 20th of October, 2007 the 1st defendant filed for a stay of execution pending an intended appeal. On the 6th of August, 2008 all the parties to the suit i.e.the plaintiff through **Gichaba & Co. Advocates**, the 1st defendant through **Ochieng, Onyango and Co. Advocates** and the 2nd defendant through **Inamdar & Inamdar Advocates** filed a consent which read as follows:-

“The parties hereto would be grateful if the following consent order was recorded in this matter.

By consent:-

1. **There be a stay of execution of judgment and decree of the High Court of Kenya at Kisumu (Warsame, J) dated 18th September, 2007 and delivered by Mugo, J on 20th September pending the hearing and determination of the defendants' intended appeals on the following conditions.**

a) **The 2nd defendant to deposit the sum of Ksh 6,805,000/= in an interest earning account with Prime Bank Ltd in the joint names of the plaintiff's and 2nd defendants' respective advocates within 45 days of filing of this consent.**

b) **The 1st and 2nd defendants to pay to the plaintiff her taxed costs of Ksh 489,699.20/= within 14 days of filing of this consent.**

2. **In the event that the above mentioned conditions are not complied with, the aforesaid stay of execution shall automatically lapse and the plaintiff shall be at liberty to execute.**

3. **Liberty to apply.”**

The 2nd defendant proceeded to file an appeal and on the 17th of October, 2008 the plaintiff filed a motion seeking to have the appeal struck off. The application was heard and granted and the appeal was struck off on the 17th of July, 2009. On the 30th of July, 2009 the 2nd defendant lodged a motion seeking for extension of time to file its notice of appeal out of time in **Civil Application No. NAI 249 OF 2009**, the same was heard by **Tunoi, J.** who delivered his ruling on the 4th of December, 2009 granting the orders of the extension and directing that the record of appeal be lodged within 14 days from the date the notice of appeal is lodged. On the same Friday the 4th of December, 2009, the plaintiff's advocate wrote a letter to the Registrar seeking to have the sum of Ksh 6,805,000/- in the joint account be released to him as the appeal the basis upon which the sums were deposited as security had been disposed off.

Following the said letter, the plaintiff's counsel appeared before **Mrs Onginjo** Deputy Registrar on 7th of December, 2009 and the said deputy registrar made an ex-parte order releasing the sums as requested in the said letter. The plaintiff's counsel thereafter extracted the order with a penal notice inserted on the same. The said order and the penal notice was served upon Prime bank whom in compliance released the funds to the plaintiff's counsel. All this was done without the consent and knowledge of the 2nd defendant or his counsel.

On receipt of the funds the plaintiff's counsel personally withdrew a sum of Ksh 5,000,000/= on or about 14th of December and personally deposited the same in his client's account.

The bank later informed the 2nd defendant's counsel and on learning of the transfer of the funds from the joint account the 2nd defendant's counsel obtained an injunction restraining the plaintiff's counsel by themselves or their agent from withdrawing or paying out and or in any manner interfering with the sum of Ksh 6,805,000/= and interest. The plaintiff's counsel on receiving the said orders filed the second application in reaction to the said order seeking to have the said order aside.

Counsel for the plaintiff and the 2nd defendant appear to have been present in the Court appeal when the court granted the order for extension to file a fresh appeal. In allowing the extension of time, **Tunoi J.** considered that their was money being held in a joint account pending appeal and stated thus:-

“On the question of prejudice, I have been informed by the counsels for the parties the decretal sums has been paid to both counsels to hold in a joint account. Assuming therefore that the intended appeal is prosecuted and disposed of expeditiously, there is no conceivable prejudice on the part of the respondent.”

I do agree with the 2nd defendant's counsel that the money in the joint account indeed influenced the Court of Appeal's decision. It is not clear whether the letter to the registrar was written before or after the Court of Appeal decision, although both happened on the same day, however it matters not as the plaintiff's counsel did not appear before the Deputy Registrar until 3 days later On the 7th of December, 2009 and did not disclose, the issuance of the order of extension in the nature issued by **Tunoi, J.**

Even then it appears strange that neither the deputy registrar nor the plaintiff's counsel, assuming that they both believed that it was in order to have the monies released through a letter, bothered to have the 2nd defendant's counsel served with notice to appear before the registrar as a party interested in the matter, before such an amount was released exparte. On the part of the plaintiff's counsel his actions and conduct namely:-

§ not disclosing to the Deputy Registrar the order of extension,

§ extracting an order with a penal notice which was not part of the order issued by the deputy registrar on 7th December, 2009,

§ failing to serve the letter and the order upon the 2nd defendant

§ his insistence that the appeal on whose basis the money was being held was struck out knowing very well that consent letter simply mentioned an intended appeal,

appears to be not only mischievous but dishonest and if one was to follow the reasoning of the plaintiff's counsel, one would have expected him to seek for the release immediately after the first appeal was struck off and not when the time was extended for another appeal be filed.

The involvement of the opposing side is fundamental unless an application is ex parte in nature and the deputy registrar ought to have ensured that there was representation from the other side, secondly, the powers of the registrar are donated by Order XLVIII. The said Order is very specific as to what the registrar may do. Order XLVIII Rule 2A mandates the registrar to record orders but only orders by consent and reduced in writing. The order does not donate such power and the deputy registrar acted outside her mandate in granting the orders her action was definitely **ultra vires**. This court has no choice, but to find that the order is a nullity and must be set aside **ex debito justitiae**.

In the case of **Govindji Popatlal Madhavji -VS- Nasser Alibhai and Another** Civil Case No. 284 of 1954 where the registrar issued orders for execution without notice to the other side, the court found that such a discretion is vested in the court and the deputy registrar in dispensing with the notice acted **ultra vires** and the order was a nullity. In deciding the case **Edmund J.** adopted with approval the principles laid down by Lord Greene MR. at Pg 113 in the case of **Cray VS Kanseen** (1943) 1 A. E at 108as follows;-

“The cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it

set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order assuming that the appeal is made in proper time, would not be competent.

The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity or whether it was something worse which could give the defendant the right to have the order set aside. In my opinion it is beyond question that failure to serve process where service of process is required is a failure which goes to the root of our conceptions of proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental act, is an argument which in my opinion, cannot be sustained ---“

On the other hand, if indeed the plaintiff's counsel wanted a quick way of having the funds released He could have formally moved the court (the High Court). Although Order XX1 of the civil Procedure rules sets out an elaborate process of execution, the plaintiff could have sought the discretion of the court not to serve the notice, under Order XXI Rule 18 (2).

The plaintiff's counsel was not candid in his representation before the registrar, he knew very well the sentiments of Tunoi J, he also clearly knew that the consent order did not refer to a particular appeal and better that as extension was given meaning that there was an intention by the 2nd defendant to appeal. Despite all this, he sneaked to court behind the 2nd defendant's back, obtained an ex parte order, personally withdrew and banked the funds in his client's account. His actions were obviously not in good faith and definitely his conduct wanting as counsel, and an officer of this court. His actions may be construed as an attempt to defeat the ends of justice. This court frowns at the actions and conduct of the plaintiff's counsel

Having made a finding that, the order of the deputy registrar was a nullity, the same must be set aside, which I hereby do and it follows therefore that all other consequential orders and actions thereof are a nullity. And, in the exercise of the inherent power, donated by Section 1(a) (b) and 3 of the Civil Procedure Act, and for purposes of ensuring that substantive justice is achieved at the end of the day. the court hereby grants prayer 4 of the 2nd defendant's application dated 12th December, 2009 to the effect the **M/s Gichaba & Co. Advocates** do forthwith refund and/or repays the sum of Ksh 7,458,572.15 into the joint account of **Inamdar & Inamdar Advocates & Gichaba & Co. Advocates**, at Prime Bank Limited, Kenindia House Branch Nairobi within the next seven (7) days of the date hereof pending the pending appeal herein. In the meantime awaiting the payment of the said sum in to the joint account, the injunction issued by this court on the 14th of December remains in force. The second application dated the 24th December, 2009 is hereby dismissed. The costs of the two applications are awarded to the 2nd defendant.

DATED AND DELIVERED IN KISUMU ON 23.04.2010.

ALI-ARONI

JUDGE

In the presence of:

Mr Okero h/b for Mr. Amoko for plaintiff

Mr Gichaba present for defendants

AAA/hao