



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 2717 OF 1991

SIMON IMBAYI LUBIRA.....PLAINTIFF

VERSUS

SOCIETY OF TRANSPORT INTERNATIONAL OF RWANDA.....DEFENDANT

R U L I N G

Before me is a Notice of Motion dated 6th September, 2010 filed by M/s Shapley Barret & Company Advocates for the defendant **SOCIETY OF TRANSPORT INTERNATIONAL OF RWANDA (STIR)**. It was brought under section 3A of the Civil Procedure Act (*Cap 21 Laws of Kenya*).

The prayers in the application are as follows: -

- a. THAT the sum of Kshs. 300,000/- deposited in a call Deposit Account with Messers. Equatorial Commercial Bank Limited by Messers. UAP Provincial Insurance Company Limited through the firm of Messers Shapley Barret & Co. Advocates in accordance with the consent Orders recorded before the Honourable Justice Ouna on 3rd October, 2003 plus interest thereon be released back to the said Advocates for the Defendant, Messrs Shapley Barret & Co. Advocates.***
- b. THAT accordingly, the cheque to be issued by the said Equatorial Commercial Bank Limited pursuant to (a) above be issued in the name of the Defendant's Advocates, Messrs Shapley Barret & Co. Advocates.***
- c. THAT costs hereof be in the cause.***

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn on 6th September, 2010 by JOHN WANANDA Advocate for the defendant applicant. It was deponed in the said affidavit, inter alia, that the applicant was a Rwandese Registered Company which was insured for purposes of the Insurance (*Motor Vehicles 3rd party Risks*) Act, Cap 403 laws of Kenya by Messrs. Soras Insurance Company a Rwandese Insurance Company whose local agent was Messrs UAP Provincial Insurance Company Ltd, that Messrs UAP Provincial Insurance Company Limited instructed Messrs

Shapley Barret & Co. Advocates to act in this suit for the defendant/applicant, that an ex-parte judgment was entered against the defendant on 6th February 2010 by Visram J, and the defendant applied to set aside the said judgment; that on 3rd October 2003 parties agreed before Ouna J, to set aside the ex-parte judgment; that as part of the consent it was agreed that the defendant would deposit the sum of kshs.300,000.00 in a Joint Bank Account, and that in the meantime the plaintiff would file a declaratory suit against UAP Provincial Insurance Company Limited; because there was a dispute as to whether UAP Provincial Insurance Company Limited was the defendants insurer or a mere agent of the defendant's insurer; that the deposit was to operate as a form of security in the event the plaintiff succeeds in the said declaratory, suit and is then unable for execution purposes to trace the assets of the Rwandese Company; that the said amount was deposited through Messrs Shapley Barret & Co. Advocates; that the plaintiff filed the declaratory suit as Milimani CMCC No. 6299 of 2005 and the court on its own motion on 30th October, 2009 dismissed that suit for want of prosecution; and that in view of the dismissal of the declaratory suit there was no longer any basis for continuing or retaining the said deposit with the bank; and that the deposit and interest be released back to the defendant's advocates.

The application does not appear to be opposed. No response was filed to the same. On the hearing, date only Mr. Wananda learned counsel for the applicant/defendant appeared and addressed the court in support of the application. Nobody appeared for the plaintiff/respondent.

I have considered the application, documents filed and the submissions of counsel for the applicant/defendant. This application was brought under section 3a of the Civil Procedure Act (**Cap 21**) which confers on this court in Civil proceeding power to make orders that are in the best interest of justice, and to prevent abuse of the court process. This is a reinstatement of the inherent powers that the court actually already has a court of justice.

The orders to make the deposit were actually make in this very case, and not the Milimani case. The order was made following the filing of an application by counsel for the defendant, as in the present application, dated 25th September, 2003 asking for the following orders.

a) THAT the Honourable court be pleased (sic) or vary the Judgment and orders granted on 6th February, 2002 by the Honourable Justice Visram.

b) THAT there be a stay of execution of the aforesaid orders pending the determination of this application.

c) THAT costs be provided for.

Following the filing of the above application, on 3rd October, 2003 Justice Ouna recorded the following consent orders: -

1. THAT the Defendant/applicant do deposit a sum of Kshs.300,000/- in a joint Account of the Advocates (interest earning) within 30 days from today.

2. THAT in the meantime the Plaintiff/Respondent will apply for a declaratory suit.

According to documents exhibited herein, the amount was so deposited. The declaratory suit was also filed as Chief Magistrate's Milimani Commercial Civil Suit No. 6299 of 2005. On 30th October, 2009, the said suit was dismissed by S N Riechi Chief Magistrate in the following terms: -

"THAT the suit be and is hereby dismissed under Order XVI Rule 6 of the Civil Procedure Rules."

The above dismissal was done because no step had been taken by either party to prosecute the suit for a period of three years.

It has been contended that since the Milimani Suit was dismissed the amount of deposit should be released because the amount of deposit was to protect liability that might arise from that case. I do not agree with that proposition. Firstly, in the Milimani case there is no mention of the deposit money herein in the decision of the learned magistrate. Secondly, the said deposit was made in this present case wherein judgment had already been entered in favour of the plaintiff, with costs, as well as an order for execution issued on 7th February 2002. It was these orders of the learned Judge in the present case, that an application for setting aside and stay of execution was made.

From the record, the consent orders of 3rd October, 2003 did not cover the setting aside of the judgment given herein. That judgment still stands in favour of the plaintiff. The deposit paid was a deposit for security for that judgment which is still standing. In my view, the only way out for the defendant, is to apply for setting aside the judgment or pursue the application filed on same so that the judgment or pursue the application filed on same so that the judgment is set aside, before consideration of the request to release the deposit can be made. This is because there is still a judgment herein in favour of the plaintiff, and the court cannot close its eyes to that effect.

In my view, this application is premature and without merits. I will strike out the same. I will not make any orders as to costs, as the other parties never responded to the application, nor appeared in court at the hearing.

For the above reasons, I strike out the application. I make no orders as to costs. Leave to appeal granted.

Dated and delivered at Nairobi this 9th day of December 2010.

.....
GEORGE DULU
JUDGE