



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

MISCELLANEOUS CIVIL CASE 599 OF 1992

KENYA REINSURANCE CORPORATIONAPPLICANT

V E R S U S

R. M. MUTISO (carrying on business as

MUTISO & COMPANY)RESPONDENT

R U L I N G

It appears that the original court record herein had been irretrievably lost by 7th June, 2000. On that date an application was made by the Applicant by **chamber summons dated 15th May, 2000** for reconstruction of the court record. That application, it appears, was allowed on 27th October, 2003 and the court file reconstructed. The written record of the court now before the court starts on 24th June, 2003.

What I gather from the available record is that the suit herein sought **enforcement of a professional undertaking by the Respondent who was an advocate**. It would appear that on **29th September, 1993** a settlement of the matter was recorded by way of a consent order, except for the issue of costs and interest. The order was recorded by Shields, J. The consent was apparently presented to the judge orally. It also appears that on **26th January, 1994** another consent order was recorded settling the matter of costs and interest. A final decree was extracted and apparently issued. That final decree was as follows:-

“1. That the Respondent do pay to the Applicant interest on the outstanding amount in respect of the undertaking.

2. That the Respondent do pay to the Applicant the costs of the suit to be taxed and certified by the taxing officer of this court.”

Those costs were eventually taxed on 7th March, 2005.

It appears that the Applicant moved to execute the preliminary decree that was based on the consent order of 27th September, 1993. That provoked an application by the Respondent by **chamber summons**

dated 20th May, 2005 seeking the setting aside of that order and stay of execution pending disposal of the application. But the main complaint in the said application relates to the taxation of costs of 7th March, 2005. The application, which was opposed by the Applicant by a replying affidavit filed on 20th June, 2005, is still pending disposal. The replying affidavit is sworn by one **ESTHER MUKENYI NDOSI**, an advocate in the firm representing the Applicant.

The parties have now come to court seeking settlement of the terms of the preliminary decree based on the consent order recorded by Shields, J on 29th September, 1993. They were unable to agree on its terms. With loss of the original court record, there is no court record of the consent order recorded by Shields, J against which the preliminary decree can be compared. However, it is deponed as follows in certain paragraphs in the aforesaid affidavit of Esther Mukenyi Ndosi:-

- “3. This case relates to Nairobi/Block 93/1039 over which the plaintiff had a charge which was discharged on the professional undertaking of the defendant to pay redemption monies, the loan recovery charges, fees for approval of discharge and handling charges to the plaintiff.**
- 4. In a professional undertaking contained in the letter of 11th May, 1990 written and signed on behalf of Hamilton Harrison & Mathews advocates for the plaintiff and confirmed by Mutiso & Company Advocates by letter of 22nd May, 1990, the defendant undertook to pay the redemption monies, the loan recovery charges, fees for approval of discharge and handling charges within 60 days from the date of the letter dated 11th May, 1990. Further the defendant undertook to pay any amounts outstanding payable within 7 days of the registration of the discharge. Copies of the undertaking are at page 1 to 3 of the exhibit.**
- 5. The security and title documents were released to the defendant by my employer’s letter of the 31st August, 1990 (page 4 of the exhibit).**
- 6. The defendant’s client had a charge over Nairobi/Block 93/1039 registered in favour of Kenya National Assurance Limited on 6th December 1990 (page 5 of the exhibit) but the outstanding monies were not paid within 7 days as undertaken despite the reminders sent by my employer on the 18th March 1999 and 18th April 1999. (pages 6 to 7 of the exhibit).**
- 7. By letters dated 3rd March and 19th May 1992 the respondent was informed by my employer of the intention to file suit to enforce his professional undertaking. (Pages 8 and 9 of the exhibit).**
- 8. The present suit was brought by way of originating summons filed on 14th July 1992. (Pages 10 to 21 of the exhibit).**
- 9. My employers also commenced proceedings before the Law Society Disciplinary Committee. The defendant admitted before the Disciplinary Committee his failure to honour the professional undertaking in his letter dated 28th July 1992. (Page 22 of the exhibit). Further correspondence and notes in respect of the matter before the Disciplinary Committee are at page 23 to 35 of the exhibit. I have confirmed from the record maintained by my employer that the defendant was found guilty by the Disciplinary Committee and fined KShs. 1,500.**
- 10. By letter dated 20th September 1993 the defendant proposed to make payment by instalments to clear the amount owing under his undertaking. (Page 36 of the exhibit).**
- 11. A consent judgment was entered before the High Court on 29th September 1993 in which the defendant consented to pay Shs. 50,000/= on or before 30th November 1993 and thereafter Shs. 25,000/= on the last day of every succeeding month until payment in full and the issue of costs and interest reserved. At page 37 and 38 of the exhibit is a draft of the preliminary decree which was sent to the defendant on 6th September 1996 (page 39 of the exhibit).**

12. This matter was in court on the 26th January 1994 when judgment on interest and costs was given. A copy of the final decree is at page 40 and 41 of the exhibit.

13. Pursuant to the preliminary and final decree the following payments were made by the defendant at irregular intervals.....

19. The court file went missing and was reconstructed by the court order of the 27th October 2003 and a further order made that the bill of costs be taxed afresh because the bill which had previously been taxed had been taxed in the absence of the respondent who did not attend court.”

There is no supplementary affidavit filed by the Respondent in response to the replying affidavit. More particularly, all the matters deponed to in the afore-quoted paragraphs of the affidavit of **ESTHER MUKENYI NDOSI** have not been controverted in any way. Paragraph 11 of the said affidavit is of particular interest in the matter of settlement of the terms of the preliminary decree. It has not been controverted by the Respondent that on 29th September, 1993 a consent order was recorded by Shields, J. It has also not been controverted that by that consent order the Defendant consented to pay KShs. 50,000/00 on or before 30th December, 1993 and thereafter KShs. 25,000/00 on the last day of every succeeding month until payment in full of the sum undertaken in the professional undertaking sought to be enforced by the suit. Further, it is not controverted that the issue of costs and interest was reserved and subsequently settled by a further consent order recorded on 26th January, 1994. The final decree extracted and issued upon that further consent order was apparently never challenged.

In these circumstances, it cannot be in doubt at all that a consent order was entered on 29th September, 1993 upon the terms set out in paragraph 11 aforesaid of the affidavit of **ESTHER MUKENYI NDOSI**. A preliminary decree ought therefore to be extracted in those terms, notwithstanding that the original consent order as recorded by Shields, J is no longer available.

I will therefore settle the terms of the preliminary decree upon the consent order of 29th September, 1993 as drawn in the draft preliminary decree annexed to the aforesaid affidavit of **ESTHER MUKENYI NDOSI**. Parties will bear their own costs of this settlement. There will be orders accordingly.

DATED AT NAIROBI THIS 16TH DAY OF JUNE, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 26TH DAY OF JUNE, 2009