



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1302 of 1999

JANET K. MUHALI AND JIMMY M. ALUSA

(Suing as the legal Representative Of the Estate of Silas Alusa)
PLAINTIFF/RESPONDENTS

Versus

JOSEPH MBUGUA KIBUYWA 1ST DEFENDANT

SALAMA ROAD CONSTRUCTION 2ND DEFENDANT

KABURU OKELO AND PARTNERS CONSULTING

ENGINEERS LTD 3RD DEFENDANT/APPLICANT

REASONS FOR RULING

On the 19th day of June, 2008 I heard interpartes and dismissed the Plaintiff’s Chamber Summons dated 22nd May, 2008 and said I was to give reasons for that dismissal on 10th July, 2008. Herein under are now the said reasons.

The Applicant in Chamber Summons dated 22nd May, 2008, as already stated, is the Plaintiff. She has already obtained a consent Judgment in this matter against the Respondent dated 19th October, 2004.

The Respondent’s attempt through a Notice of Motion dated 27th March 2008 to obtain a stay of execution of that Judgment failed when I dismissed that Notice of Motion on 16th May, 2008.

The prayers I dismissed in that Notice of Motion were numbers 3,4,5 and 6. Of particular interest in this Plaintiff’s Chamber Summons dated 22nd May, 2008 is prayer number 4 in the Respondent’s aforementioned Notice of Motion dated 27th March, 2008 which stated as follows:

“4. The Applicant do deposit a sum of Kshs.1,615,328/= in an interest earning bank account in the joint names of the Plaintiff’s and Applicant’s Advocates as security for the satisfaction of the judgment in this suit.”

That prayer number 4 is of interest because I have already mentioned it earlier herein as one of the prayers I dismissed in the Notice of Motion dated 27th March, 2008. But at the time I was dismissing that

Notice of Motion on 16th May, 2008, the present Respondent, then as the Applicant in the Notice of Motion, had on 15th April, 2008 deposited in this Court the sum of Kshs.1,615,328/=, not in terms of prayer number 4 in the Notice of Motion, but as a condition for the interim order he obtained from the Duty Judge, Visram J, in terms of prayer number 2 in the Notice of Motion which stated as follows:

“2 Pending the hearing and determination of this application, there be a stay of execution of the decree dated 19.10.2004.”

Prayer number 1 asked for the Notice of Motion to be certified urgent. The Duty Judge granted prayer number 1 and prayer number 2 *ex parte* and the relevant part of his orders as extracted and issued on 2nd April, 2008 read as follows:

“IT IS ORDERED

1. THAT this application be certified urgent.
2. THAT a temporary stay of execution be and is hereby granted for 30 days on condition that Kshs.1,615,328/= is deposited in court within the next 14 days, failing which this order shall lapse.
3. THAT the Application be served forthwith for hearing *inter partes* on the 22nd April, 2008.”

Emphasis in paragraph 2 of the quotation above is mine. What happened means the Duty Judge on 22nd April, 2008 disposed off prayer numbers 1 and 2 in the Notice of Motion. He left prayer numbers 3,4,5 and 6 for the *inter partes* hearing on 22nd April, 2008 and that was the position when the parties appeared before me on that date for the *inter partes* hearing. I gave them another date 5th May, 2008 when I heard them and reserved the ruling to 16th May, 2008 and subsequently delivered that ruling as a scheduled and as I have already stated, I dismissed all the remaining prayers which included prayer number 4 already quoted earlier. For clarity, let me point out that prayer number 3 was simply asking for a stay of execution pending hearing and determination of an appeal in the Court of Appeal. Prayer number 5 asked for the setting aside of the decree so far issued so that a fresh one is drawn, and prayer number 6 was for costs.

All the above having happened, up to the 19th day of June, 2008 when I was hearing and subsequently dismissing Chamber Summons dated 22nd May, 2008 I did understand the aforementioned sum of Kshs.1,615,328/= deposited by the Respondent in court on 15th April 2008 is still in court and that is the sum of money the Plaintiff, as the decree holder in this suit now wants this court give her through this Chamber Summons dated 22nd May, 2008 which gives the date of that deposit as 14th April, 2008 and I have no problem with the date.

Mr. Mutubwa told me that the only prayer he wants granted in the Chamber Summons dated 22nd May, 2008 is prayer number 4. But I must presume that he is also interested in prayer number 5 for any further or other orders and number 6 for costs. Prayers 1,2, and 3 were granted by the Duty Judge that is the certificate of urgency and granting prayer number 3 *ex parte* – being a temporary restraint pending the hearing and determination of the Chamber Summons.

The temporary restraint in prayer number 3 was aimed at preventing the Respondent from withdrawing the money from the court. The restraint was extended until I heard and determined Chamber Summons dated 22nd May, 2008 thereby bringing the purpose for which the Duty Judge granted prayer number 3 to the end. That purpose was terminated by my dismissal of the Chamber Summons.

Likewise the temporary stay the Duty Judge granted in respect of the Notice of Motion dated 27th March, 2008 terminated or expired upon my dismissal of that Notice of Motion on 16th May, 2008.

From what I am saying therefore it is clear that the deposit of the sum of Kshs.1,615,328/= was done

for the sole purpose of securing the temporary (interim) order granted By Justice Visram on 2nd April, 2008 and terminated when I dismissed that Notice of Motion on 16th May, 2008.

Lawfully why should the court keep on holding that deposit to date? Judge Visram's order quoted above did not say anything about payment of that money to the Plaintiff in satisfaction of the decree the Plaintiff holds in this matter against the Respondent Judgment Debtor. That order did not say anything other than securing the temporary order the learned Judge was granting so that, had the Respondent failed to furnish that security, the temporary order the Judge had granted on 2nd April, 2008 for 30 days would have automatically terminated on the 15th day from 2nd April, 2008 because the Respondent had been given 14 days within which to make the deposit from the date 2nd April, 2008. Thus the temporary order would have terminated or lapsed notwithstanding that I could still have heard the Notice of Motion and decided it as I did.

Since that Notice of Motion was for a stay of execution, the duty Judge must have acted under section 3A of the Civil Procedure Act to impose the security while granting a temporary stay just as he would have done had he been granted a temporary injunction under Order XXXIX Rule 2 A (1) of the Civil Procedure Rules which states that:

“The court may be an order grant such injunction, on such terms as to an inquiry as to damages, the duration of the injunction, the keeping account, giving security, or otherwise, as the court thinks fit.”

Thus that money belongs to the Respondent and it is not yet money which can lawfully be referred to as

“a sum of money in satisfaction of the claim or (where several causes of action are joined in one suit) in satisfaction of one or more of the causes of action”.

as stated in Order XXVI Rule 1(1) of the Civil Procedure Rules or any other such rules. Order XXI Rules 2, 47 and 91 of the Civil Procedure Rules do not assist the Applicant even if she combines them with sections 3A and 63 (e) of the Civil Procedure Act bearing in mind that the Order of Justice Visram dated 2nd April, 2008 concerning the deposit of Kshs.1,615,328/= in court is very clear. That order had nothing concerning satisfaction of the decree or the Plaintiff's claim.

For the Applicant –Decree Holder to claim that money, she has to proceed by the correct Procedure of execution proceedings under the correct and relevant provisions of the Civil Procedure Act and its rules. Irregular and/or incorrect procedures are not acceptable however short cut they may be. To-date that sum of Kshs.1,615,328/= belongs to the Respondent who is at liberty to withdraw it bearing in mind that prayer number 4 in the Notice of Motion dated 27th March, 2008 by virtue of which such money could have been deposited by the Respondent in court as security for the satisfaction of the Judgment in this suit was one of the prayers dismissed when that Notice of Motion was finally determined by this court on the 16th day of May, 2008. On the other hand, had prayer 4 been granted, the Decree Holder will still have been required to institute the correct execution proceedings to get the money given to him by the court.

Otherwise the Applicant ought to realize that as the Decree Holder he had furiously opposed the Judgment Debtor's said Notice of Motion dated 27th May, 2008 in its entirety including prayer number 4 in that Notice of Motion. In this her Chamber Summons dated 22nd May, 2008 the Applicant in effect now wants what prayer number 4 in the Notice of Motion wanted to put at her disposal and she refused. She cannot eat her cake and have it.

Those are the reasons why I dismissed the Chamber Summons dated 22nd May, 2008 aforesaid. The reasons have been given and delivered this 10th day of July, 2008.

By 19th June, 2008, it was a space of two months within which I had heard and determined three different and substative interlocutory applications from the same parties who were also raising a number of

preliminary objections, all after determination of the main suit a determination which should have given this court a breathing space to deal with one or two other pending cases. Now new, young and energetic Advocates dealing with the same old and busy Judges in the same old court; a manifestation of wasted young energy and wasted elderly wisdom in these merry-go-round applications with no useful end to the parties and the court even though Advocates may be findings it useful.

Dated and delivered at Nairobi this 10th July, 2008

J.M. KHAMONI

JUDGE

Present

Mr. Mutumbwa for the Applicant

Mr. Ngii for the Respondent

Kabiru Court Clerk