



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**Civil Appeal 109 of 2006**

**PATRICK NYAKONU OMBATI ..... APPELLANT**

**VERSUS**

**SHASHIKANT B. GADHIA & OTHERS .....**

**RESPONDENT**

***(Appeal from the whole of the Ruling and orders of the Honourable Senior Resident Magistrate in Winam SRMCC Number 148 of 2006)***

**JUDGMENT**

This is an appeal arising from the Ruling and orders of the Senior Resident Magistrate at Winam in SRMCC Number 148 of 2006.

The suit was filed in the court on the 12<sup>th</sup> April 2006 by the plaintiffs who are the respondents herein against the defendant who is the appellant herein.

The respondents claim against the appellant is for the sum of Kshs. 300,900/= which was allegedly withdrawn from a staff saving scheme account at the Credit Bank Ltd Kisumu Branch and deposited into the appellant's personal account at the same Bank.

The appellant was at the material time an Assistant Manager of the said bank while the respondents were part of the bank's staff.

It is the respondent's contention that the appellant failed to refund the claimed amount and has since ceased to be an employee of the Credit Bank Ltd.

The respondents therefore pray for judgment for the amount claimed plus costs and interest.

The appellant's defence is a denial of being indebted to the respondents as claimed and a contention that the alleged staff saving scheme has never existed under the alleged account or any other account. He therefore prays for the dismissal of the suit with costs.

At the time of filing the suit on 12<sup>th</sup> April 2006, the respondents also filed a chamber summons under Order XXXVIII Rules 5 and 6 Civil Procedure Rules and Section 3A of the Civil Procedure Act for the main order that there be attachment before judgment of the appellant's account number 30021018 held at Credit Bank Ltd Kisumu Branch.

The application was premised on the facts that the appellant's place of abode was unknown to the respondents who feared that he intended to leave the jurisdiction of the court thereby obstruct the execution of any decree which may be granted in their favour.

The application was fixed for hearing inter – partes on 26<sup>th</sup> April 2006 and an interim order of attachment of the appellant's material account was granted to the respondent on the same 12<sup>th</sup> April 2006.

On 26<sup>th</sup> April 2006 the application came before the Resident Magistrate at Winam and was stood over to the 23<sup>rd</sup> May 2006 after the appellant's advocate indicated to the court that he had filed a notice of motion dated 25<sup>th</sup> April 2006 seeking to have the respondent's suit dismissed.

The notice of motion was also slated for hearing on the 23<sup>rd</sup> May 2006. On the 23<sup>rd</sup> May 2006 the two applications came before the Senior Resident Magistrate at Winam who ruled that the appellant's application dated 25<sup>th</sup> April 2006 being a preliminary objection to the suit be heard before that of the respondents dated 11<sup>th</sup> April 2006.

The appellant's application dated 25<sup>th</sup> April 2006 was made under Order 1 rule 12 of the Civil Procedure Rules which provides that:-

“12(1) “Where there are more plaintiffs than one any

one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding and in like manner where there are more defendants than one any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.”

12(2) “The authority shall be in writing signed by the party giving it and shall be filed in the case”.

The learned Senior Resident Magistrate after due consideration of the application / preliminary objection delivered a ruling on the 13<sup>th</sup> July 2006 which had the resultant effect of dismissing the objection.

The learned Magistrate noted that the objection was raised prematurely and that in any event, the necessary authority from the plaintiffs had been filed. He further noted that the appellant had not been occasioned any prejudice. He thus ruled that substantive justice reigned supreme over procedural technicalities which are merely a handmaiden of justice and declined to dismiss the respondents' suit against the appellant. The ruling paved way for the hearing of the respondent's application dated 11<sup>th</sup> April 2006 and filed on 12<sup>th</sup> April 2006.

The said application was heard on 31<sup>st</sup> August 2006 and a ruling delivered on the 19<sup>th</sup> September 2006 by the learned Senior Resident Magistrate to the effect that the application was merited.

The learned Senior Resident Magistrate then ordered that the appellant's account number 30021018 held at Credit Bank Ltd Kisumu Branch be attached pending the hearing and determination of the suit.

Being dissatisfied with the said interlocutory order the appellant lodged the present appeal praying that the suit and the respondents' application dated 11<sup>th</sup> April 2006 be dismissed with costs and that Credit Bank Ltd Kisumu Branch be ordered to release Kshs. 300,900/= held by itself pursuant to a court order respecting the appellant's account number 3000211018.

Whilst the prayer to have the application dated 11<sup>th</sup> April 2006 dismissed and the amount of Kshs. 300,900/= released may be proper, the prayer to have the suit dismissed may not be proper considering that the reasons earlier advanced by the appellant to have the suit dismissed were considered and overruled by the trial court in its ruling of the 13<sup>th</sup> July 2006. The appellant cannot purport to re-visit the issue in this appeal which essentially challenges the trial court's ruling of the 19<sup>th</sup> September 2006.

The appellant must appreciate that the appeal is against an interlocutory order and not a final judgment of the court.

The suit is pending for hearing and final disposal. It would not be proper for this court to consider and determine at this stage issues which would invariably feature at the hearing of the suit in the lower court.

The mandate of this court is to consider whether or not the order made by the lower court on the 19<sup>th</sup> September 2006 was proper and lawful.

Be that as it may, the appeal is based on the following grounds viz:-

- (i) That the Honourable Magistrate erred in law and fact in failing to find that the suit did not comply with the provisions of Order 1 Rule 12 of the Civil Procedure Rules hence the application date 11<sup>th</sup> April 2006 could not stand on a suit which is a nullity "ab-initio".
- (ii) That the Honourable Magistrate erred in law and fact in failing to appreciate that the 1<sup>st</sup> respondent Mr. Shashikant B. Gadhia lacked authority and locus standi to plead and act for the rest of the Respondents in bringing the application dated 11<sup>th</sup> April 2006
- (iii) That the Honourable magistrate erred in law and in fact in denying the appellant a chance to show cause why he should furnish security as provided for in law
- (iv) That the learned Magistrate erred in law in ordering the attachment of the Appellant's account number 300-21018 at credit Bank limited Kisumu Branch for Kshs. 300,900/= at the first instance without calling upon and requiring the Appellant to show cause
- (v) The Honourable Magistrate erred in law in failing to follow the laid down procedure in Order XXXVIII Rules 5 and 6 of the Civil procedure Rules, to the Appellant's detriment.
- (vi) The learned Magistrate erred in law and fact in deciding in favour of the Respondents when there was no material evidence placed before the court to exercise its judicial discretion in favour of the Respondents.
- (vii) The learned Magistrate erred in law and fact in failing to appreciate that the supporting affidavit of Shashikant B. Gadhia was insufficient in facts to support the orders sought
- (viii) The learned Magistrate erred in law and fact in holding that the application had merit when it was actually misconceived and wanting both in law and fact

The grounds were argued by Mr. Gichaba on behalf of the appellant and were opposed by M/s Oron on behalf of the respondents. To fortify his arguments, Mr. Gichaba relied on the decisions contained on his list of authorities filed herein on the 24<sup>th</sup> September 2008.

He urged this court to allow the appeal on the basis that the suit is a nullity "ab-initio" in as much as order 1 Rule 12 of the Civil Procedure Rules was not complied with thereby rendering the first respondent's verifying affidavit defective and unable to sustain the suit. He contended that the first respondent did not have the authority to act for the rest of the respondents.

Mr. Gichaba further contended that the provisions of Order 38 Rules 5 and 6 of the Civil Procedure Rules

were not followed by the trial court in that the appellant was not given any opportunity to show cause.

He also contended that the order by the trial court to attach the appellant's account is null and void as the respondents have no justifiable cause of action consideration being given to paragraph three of the plaint.

On her part, M/s Oron argued that grounds one and two of the appeal are misconceived in as much as the issues pertaining to representation raised by the appellant were considered and dismissed by the lower court in its ruling of 13<sup>th</sup> July 2006 and no appeal was preferred in respect thereto.

Further, M/s Oron, argued that the issue relating to the appellant not being given an opportunity to show cause did not arise. She said that this suit involves the transfer of money from an account held by the respondents to that held by the appellant.

She contended that despite the appellant's confirmation that he was not leaving the country, the trial court did not find sufficient grounds to rule in favour of the appellant. She urged this court to dismiss the appeal.

With regard to grounds one and two of the appeal, this court agrees with learned counsel for the respondents that the same are misconceived for reasons already stated hereinabove.

Grounds three to eight of the appeal are the most relevant and essentially an attack on the procedure adopted by the trial court which culminated in the order that the appellant's account number 30021018 at Credit Bank Ltd Kisumu Branch be attached.

The application giving rise to the order is the one dated 11<sup>th</sup> April 2006 made by the respondents under Order 38 Rules 5 and 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Being the first appellate Court, this court is obliged to reconsider the application afresh and arrive at its own conclusions.

The application was for the basic order that the appellant's account number 300021918 held at Credit Bank Ltd Kisumu Branch be attached before judgment.

The grounds in support of the application are that:-

- (i) the defendant's whereabouts are unknown
- (ii) the defendant is feared to be planning to leave the jurisdiction of the court
- (iii) the plaintiffs stand to suffer great prejudice if the application is not allowed

The grounds are enhanced by the facts contained in a supporting affidavit deponed by the first respondent Shashikant B. Gadhia and in opposition thereto, the appellant deponed an affidavit dated 20<sup>th</sup> April 2006 denying the allegations made against himself by the respondents.

Order 38 of the Civil Procedure Rules generally provides for arrest and attachment before judgment.

Rule 5 (1) of the Order provided that:-

"Where at any stage of a suit the court is satisfied by affidavit or otherwise that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him.

- (a) is about to dispose of the whole or any part of his property or
- (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of

the court,

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security”.

Rule 6 (1) provides that:-

“Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required within the time fixed by the court, the court may order that the property specified or such portion thereof as appears sufficient to satisfy the decree which may be passed in the suit, be attached.”

The aforementioned provisions are clear and show that Rule 6 is subject to Rule 5 of the said Order 38.

Rule 5 provides for situations where a defendant may be called upon to furnish security for production of property or value thereof or appear and show cause why he should not furnish security.

Rule 6 provides for the consequences of failing to furnish security or show cause. It also deals with the consequences of successfully showing cause or furnishing security.

The grounds in support of the respondent’s disputed application were grossly incompatible with the requirements of Rule 5 of Order 38 Civil Procedure Rules and more compatible with the requirements of Rule 1 of Order 38 which deals with situations where a defendant may be called upon to furnish security for appearance.

Therefore, considering the grounds alongside the facts contained in the supporting affidavit, of the first respondent, the application dated 11<sup>th</sup> April 2006 was defective and untenable and ought not have been allowed by the trial court.

It was procedurally defective and no attempt was made to inject life into it by necessary amendment.

The trial court failed to grasp the gist of Rule 5 of Order 38 Civil Procedure Rule and misdirected itself when it stated in its ruling of the 19<sup>th</sup> September 2006 that:-

“The plaintiff/applicant herein has specified the particular Account where the defendant deposited the sums of money he withdrew from the savings scheme. He depones that the defendant might withdraw all the money from the said Account and thereby delay the execution of a decree that may be passed against him.

The defendant has not contravened this fact in his replying affidavit.....

This court is satisfied that the defendant may withdraw the money from the said account and thereby prejudice the execution of the decree that may be passed against him”

It is unfortunate that the trial court’s mind was fixated on the money in the appellant’s account such that there was disregard of the fact that the appellant had demonstrated that he was not about to abscond from the local limits of the jurisdiction of the court or even leave the country.

Although the procedure of calling upon the appellant to furnish security or show cause why he would not furnish security was not strictly adhered to by the trial court, it may not be said that the appellant was prejudiced in as much as he was accorded the opportunity to respond to and argue the respondent’s application dated 11<sup>th</sup> April 2006. He was thus accorded the opportunity to show cause.

From all the foregoing, this appeal is merited and is allowed to the extent that the respondents' application dated 11<sup>th</sup> April 2006 is dismissed with costs.

The attachment of the appellant's account number 30021018 held at the Credit Bank Ltd Kisumu Branch is hereby set aside and the amount of Kshs. 300,900/= being a subject of the suit be deposited in court pending the hearing and final disposal of the suit in the lower court.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 18<sup>th</sup> day of November 2008

**J. R. KARANJA**

**JUDGE**

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