



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 559 of 1995

RYCE MOTORS LIMITED.....PLAINTIFF

VERSUS

JONATHAN KIPRONO RUTO1ST DEFENDANT

MIDWAY ASSURANCE INTERNATIONAL.....2ND DEFENDANT

RULING

In this matter there is a decree in favour of the 1st Defendant as against the Plaintiff for the principal amount of kshs 7.5 million. The decree was issued after judgment having been entered on the 29th May of 2002. The 1st defendant costs as against the plaintiff are for kshs 110, 245 which were as a result of the taxation by consent of the 23rd of May 2005. The plaintiff by an application dated the 5th of July 2005 sought and obtained stay of execution pending appeal by the court's ruling dated 15th August 2005. That stay was with condition that the plaintiff would deposit in a joint interest earning account the amount of kshs 7.5 million. The plaintiff now moves this court by way of Notice of Motion dated 24th November 2006. The plaintiff seeks the following orders:-

- 1) That the order of this court made on 15th of August 2005 be reviewed.**
- 2) That the said order be revised or set aside with costs to the plaintiff and**
- 3) That the cost of the application be provided.**

What it does seem from the said orders is that the plaintiff seeks to set aside or vacate the ruling in favour of its application for stay. In support of that application the plaintiffs Financial Controller deponed that the stay granted by the ruling of 15th August 2005 stayed the judgment of the Honourable Justice Osiemo which judgment was annexed to the affidavit. The deponent stated that all the parties in this matter and even this Honourable court in making that order proceeded on the basis that there was a valid judgment and decree given by the Honourable Justice Osiemo. The deponent said that it has now come to the plaintiff's knowledge that the judgment of Honourable Justice Osiemo was never pronounced as required under the Law. For that reason the plaintiff said that that judgment is invalid. As a consequence the decree that has been issued in this matter in the plaintiff's view is also invalid and cannot be enforced against the plaintiff. As a consequence of that judgment being invalid the plaintiffs representatives deponed that the order granting a stay of execution of that alleged invalid

judgment is nugatory and ought to be vacated. In oral submissions the plaintiff's counsel said that the stay of execution was granted on the understanding that the judgment hereof was passed on the 29th of May 2002. The plaintiff counsel referred to Section 25 of the Civil Procedure Act which he said required that a court after hearing a case would proceed to pronounce its judgment. In this case plaintiff counsel said that the judgment was not pronounced.

The application was opposed by counsel for the 1st defendant. The counsel swore the affidavit in reply. In the 1st defendant counsel said affidavit he stated that he was of the view that the present application had been made in the guise to set aside the judgment entered in favour of the 1st defendant. He deposed that there is indeed a valid judgment entered by the Honourable Justice Osiemo and that the said judge on being moved by an application on behalf of the plaintiff confirmed that that judgment had been delivered on the 29th of May 2002. The 1st defendant counsel annexed to the affidavit the typed out proceedings which indicated that the Honourable Justice Osiemo on the 25th November 2002 confirmed that the judgment was delivered on the 29th of May 2002. Subsequently he stated that the plaintiff sought leave to file a Notice of Appeal against the said judgment out of time and that application was granted by the Honourable Justice Mwera on 17th December 2002. Thereafter the 1st defendant counsel said that the plaintiff sought to settle this matter. He therefore concluded that for the plaintiff advocate to say that that judgment was not pronounced can only be said that the plaintiff is seeking to re-litigate on this matter afresh. In oral submission the 1st defendant counsel in opposition to the plaintiff application stated that this court has no jurisdiction to challenge the judgment of the Honourable Justice Osiemo. He said that such a jurisdiction is only to be found in the Court of Appeal. The 1st defendant counsel said that the plaintiff has already filed a Notice of Appeal and by that act has indeed commenced an appeal against the judgment in this matter. The 1st defendant counsel said that this court could not grant the review sought by the plaintiff because the plaintiff had failed to satisfy the conditions under Order XLIV Rule 1 in that there had been no new matters or evidence which was not in the knowledge of the plaintiff previously. In this regard he said that the information about the judgment of Honourable Justice Osiemo was always within the plaintiff's knowledge. He stated that because of a judgment which is in the judge's handwriting and which shows the date of its delivery as 17th April 2002 and at the same time the same judgment which was typed showed the date of delivery as 29th of May 2002, the plaintiff had sought by an application for clarification before the Honourable Justice Osiemo that that clarification was given and the judge confirmed the date of delivery as the 29th of May 2002. The 1st defendant counsel said that review could not be granted because there was no mistake or error apparent on the face of the record. He further stated that the plaintiff had failed to show sufficient reason why review should be granted. He said that the plaintiff was mistaken to seek this court to find that the Honourable Justice Osiemo arrived at the wrong decision. He was of the view that such cannot be decided by this court. The 1st defendant also argued that the plaintiff's application is barred by the doctrine of estoppel and Res judicata. He stated so because what the plaintiff seeks is to question the validity or otherwise of the judgment of the Honourable Justice Osiemo.

I have considered the application before me and the submissions and the affidavit on record. What the plaintiff seems to seek from this court is the setting aside or vacation of its order made on the 15th of August 2005. That ruling was as a result of plaintiff's own application for stay pending appeal. The plaintiff now seeks that the orders should be granted because the plaintiff alleges that since the judgment of the Honourable Justice Osiemo has two dates, it cannot therefore be said to have been pronounced and since it was not pronounced there is no valid judgment capable of being stayed. It ought to be noted and it has already been stated by the 1st defendant counsel that the plaintiff's counsel moved this court seeking a clarification on the correct date of the judgment and the Honourable Justice Osiemo on the 25th of November 2002 confirmed that judgment was delivered on 29th of May 2002. I do agree with the 1st defendant

contention that this court has no jurisdiction to sit and decide what has already been decided by the Honourable Justice Osiemo on the correct date of the judgment. This court cannot sit on appeal against the said judge's finding. I must state that I have looked at the two judgments, firstly the one which was handwritten and which indicates the date of delivery as 17th April 2002 and I have also looked at the typed judgment which shows the date of delivery as the 29th of May 2002. It does like at the only judgment of the two that is signed by the judge is the one dated the 29th of May 2002. I do hope that that will put that issue to rest if not the plaintiff's only avenue is the Court of Appeal. What it does seem by the plaintiff's application the plaintiff seeks in a round about way to have the judgment of the Honourable Justice Osiemo vacated. That can only be done by the Court of Appeal. It does seem the plaintiff and it was confirmed through its Advocate that the issue of validity or otherwise of the judgment herein has been raised in the Court of Appeal. If that be so, again the more reason why the plaintiff should move the Court of Appeal. The plaintiff having indeed filed a Notice of Appeal cannot now turn around on the same issue and come to the High Court. That finding is supported by the court of appeal case **KISYA INVESTMENTS LTD – VS – ATTORNEY GENERAL & ANOTHER C.A. NO. 31 OF 1995** where the Court of Appeal in considering whether a party who has filed an appeal could seek a review in the High Court made mention of the rule of the Indian Civil Procedure which is similar to our order XLIV of the Civil Procedure Rules. The Court of Appeal quoted the following portion: -

“Review application should be filed before the appeal is lodged. It if is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending.....review application is incompetent after appeal is preferred”

I find that I am in agreement with the 1st defendant in its submission that the plaintiff's application is caught by the doctrine of estoppel and *res judicata*. This is because the plaintiff previously sought and obtained clarification of the date of judgment. That clarification having been given that issue has already been decided and cannot be re-litigated.

Having considered the plaintiffs application I find that it does not satisfy the order on review because I find that there is no new matter that has been brought before the court and there is no error apparent on the record and much more there is no sufficient reason shown why review should be granted. Indeed, strictly looking at the prayers sought by the plaintiff, one finds that they are not at tandem with the arguments or affidavit in support of the application. The application seeks to vacate or set aside the order granting the plaintiff stay of execution pending appeal. In submissions and by the plaintiff affidavit the plaintiff seeks that over and above the setting aside of the stay orders that the court will rule that there is no judgment in this case. In my mind I am of the view that such an issue does not belong in this court. Indeed considering the application I am tempted to borrow the words of the case **HCC NO. 1189 OF 2000 THE EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK V AFRICAN GREEN FILEDS LTD & 2 OTHERS**, where the Honourable Justice Ringera faced with an application for review stated as follows:

“I am tempted to say that although the plaintiff's application has the face of a review application; it has the heart of an appeal.”

In the final analysis I would say that the plaintiff's Notice of Motion dated 24th November 2006 is without merit and the same is dismissed with costs to the 1st defendant. Orders accordingly.

Dated and delivered this 6th Day of February 2007.

MARY KASANGO

JUDGE