



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Misc Application 160 of 2005

Osero & Company Advocates APPELLANTS

VERSUS

Labhsons (K) Limited..... RESPONDENT

JUDGMENT.

The application first came up for hearing on 13th October 2005, before me. On that day, I did certify the application as urgent, but declined to give any ex parte orders. Instead, I directed that the application be heard on 18th October 2005.

When the matter came up on 18th October 2005, the applicant was absent from court. And, whilst the respondent's advocate was present in court, he informed the court that the application itself had not yet been served upon him. Consequently, I did adjourn the matter indefinitely.

Thereafter, the respondent, Labhsons Limited, caused its application dated 22nd August 2005, to be listed for hearing on 3rd November 2005. The court's ruling on that application has some significance on the matter now before me.

In his ruling, the Hon. Waweru J. indicated that on 3rd November 2005, the advocate (who is the applicant herein) sought an adjournment. However, the court declined the plea for adjournment. He then noted that on 26th August 2005, I had ordered that there be a stay of execution. I had also ordered that the attached goods be released to the respondent (who was the applicant's client), provided that the respondent executed a Bank Guarantee for Kshs. 500,000/=.

The Hon. Waweru J. noted, from the court records, that the advocate had challenged the Bank Guarantee which had been filed by his client, on the grounds that the said Bank guarantee was a patent forgery. Indeed, the advocate had filed this application, seeking a review of the orders made on 26th August 2005.

In those circumstances, the Hon. Waweru J. held as follows:.

4. THAT the Honourable court does make such other orders as it may deem fit taking into account the circumstances of the matter.

5. THAT costs of this application be provided for."

First and foremost, it is evident that prayer numbered 1 had already been disposed of by the court, when the matter was certified urgent, and then the applicant was directed to serve it upon the respondent.

Following the applicant's decision to now abandon the prayers for the discharge of the temporary orders for stay of execution dated 26th August 2005, as well as the orders seeking a review of the said orders of 26th August 2005, the only orders then left in the application were for the grant of such orders as the court may deem fit in the circumstances.

In my understanding, the applicant did abandon the only two substantive prayers it was seeking. I say so because, in my view, if an applicant asked the court for nothing more than "such orders as the court may deem appropriate", the said applicant would certainly be deemed to be very vague. It is the kind of prayer which the respondent thereto may find very difficult to respond to, as he would not be in a position to know what exactly the applicant was seeking.

In this case, the applicant explained that he had decided to abandon the two substantive prayers because of the views expressed by the Hon. Waweru J., on the issue of contempt of court.

I have already set out herein the pertinent parts of the ruling by the Hon. Waweru J., which was made on 9th December 2005. To my mind, the views were more likely than not to encourage the applicant to pursue the application dated 13th October 2005. I therefore do not understand why the applicant opted to abandon the substantive prayers in his application.

The applicant then pointed out that on 26th August 2005, this court did grant a stay of execution, which order was to take effect upon the provision, by the respondent, of a Bank Guarantee for Kshs. 500,000/=.

Pursuant to the court order of 26th August 2005, the respondent obtained a document dated 19th September 2005, which was headed "Bank Guarantee." The said document had, on the face of it been executed by the Manager and the Accountant of Barclays Bank of Kenya Limited, Karen Branch.

Immediately upon receipt of the purported bank guarantee, Mr. Lewis Osero advocate talked to Messrs Patrick Kamau and Cyrus Mwangi, who were the branch manager and customer service manager at Barclays Bank, Karen Branch. The two bank officials disowned the purported bank guarantee. Consequently, the applicant wrote to the bank, on 20th September 2005, drawing its attention to the telephone discussions which Mr. Osero had had with the two bank officials. The said letter was copied to the court, as well as to the advocates for the respondent herein.

By the said letter, of 20th September 2005, the applicant informed the bank that the incident of the "forged bank guarantee" had been reported at the Central Police Station.

Thereafter, Barclays Africa Security & Investigative Services issued an undated memo, which was addressed to Mr. Chris Akiwumi, the Senior Legal Counsel at Barclays. By that memo, the Head of Security and Investigations, at Barclays Bank, Mr. G.A. Otieno, indicated as follows:-

"We have looked at the Guarantee in question and confirm that it did not originate from BBK Karen branch. The letter head fonts are totally different from the official letter head template fonts in use at BBK Karen."

The memo also highlighted the specific differences in (i) the fonts used; (ii) the position of the address, in the letter head, and (iii) the absence of the eagle on the forged document. It also made it clear that Barclays Bank did not have any manager by the name Joseph Mwaniki, who had allegedly issued the forged document.

When faced with all this information, Mr. Manvinder Singh Sokhi, who is a director of the

respondent sought to explain that he had not knowingly set out to abuse the process of this court by filing false documents, with a view to misleading the court. He asserts that he was cheated to believe that the forged bank guarantee was authentic.

But the applicant feels that the explanations tendered by the respondent were too far fetched to be true. The applicant expressed the view the respondent must have knowingly been involved in obtaining the forged guarantee. He therefore asked this court to compel Mr. Manvinder Singh Sokhi to present himself in court, for purposes of cross-examination. In answer to that application, the respondent said that it was very strange; as it was neither a dog nor a cat. In the respondent's considered view, the applicant had not moved the court appropriately, if its intention was to slap the respondent with contempt proceedings.

I must say that on that score, I am in agreement with the respondent. The main reason for that is that, (as I had already indicated herein) the applicant has already withdrawn the only two substantive prayers which had remained in his application. However, even if the said prayers had not been abandoned, I hold the view that the applicant had failed to pay heed to any of the rules and regulations which govern the process of proceedings for contempt of court.

In the circumstances, I find that the applicant's application for the cross-examination of Mr. Manvinder Singh Sokhi, is not likely to be of any legal benefit in this application, as it cannot be utilised by the court to mete out appropriate penal sanctions. I therefore decline to compel Mr. Manvinder Singh Sokhi to attend court for cross-examination. In the same vein, as the applicant had already abandoned all the substantive prayers in the application dated 13th October 2005, all that remained was a shell. It cannot form the basis for any further orders. Accordingly, the application is hereby dismissed with costs.

However, I do hereby expressly hold that the dismissal of this application is not a bar to the applicant bringing an appropriate application which might, if proved to the satisfaction of the court, enable the court stamp its authority, by ensuring that its orders are given recognition by being honoured until and unless they are set aside, discharged, varied or reviewed.

Finally, I do hereby direct the court broker who had attached the applicant's goods to file in court, within the next SEVEN (7) days, a report on the status of the execution process. The said report should include information about the particulars of all the goods attached; the identity of the location at which the goods are being held; the cost of the storage to date as well as the rate at which the storage charges continue to be levied; and the auctioneer's charges. Copies of the said report should thereafter be served upon both the parties.

In my considered view the information from the court broker will hereafter enable the court make more informed decisions, in the best interests of both parties. Dated and Delivered at Nairobi, this 25th day of January 2006.

FRED A. OCHIENG JUDGE