



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

**Civil Appeal 279 of 2004**

**J. B. DRILLING CO. LTD.....APPELLANT**

**VERSUS**

**JOHN MIGWI WANJIRU.....RESPONDENT**

**RULING**

The appellant has made an application under the provisions of **Order XLI rule 4(6)** of the **Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act** seeking the orders of this court to restrain the respondent from proclaiming, attaching or howsoever interfering with the appellant's property in execution of the decree in *Nakuru CMCC No. 102 of 2003* pending the hearing and determination of the appeal. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Njuguna Matiri. The application is opposed. The respondent has filed grounds of opposition and a replying affidavit sworn by Nganga Kiarie in opposition to the application.

At the hearing of the application, Mr Matiri learned counsel for the appellant submitted that the trial magistrate had refused to mark the suit as compromised. He submitted that the appellant had paid the sum of Kshs 200,000/= to the respondent which sum the trial magistrate refused to take into account when he assessed the damages to be paid to the respondent. He submitted that the trial magistrate had assessed the damages which was to be paid to the respondent to be Kshs 450,000/=. He submitted that the appellant paid the sum of Kshs 200,000/= directly to the respondent and the balance of Kshs 250,000/= to his advocate on record. He submitted that it was therefore wrong for the respondent to purport to execute for the sum of Kshs 200,000/= which had already been paid to the respondent directly. He urged this court to grant the injunction pending the hearing and determination of the appeal.

Mr. Kiarie, learned counsel for the respondent submitted that the appellant had breached the procedure for settling matters out of court. He submitted that the appellant had attempted to avoid dealing with the advocate for the respondent by purporting to settle the matter directly with the respondent even when he had an advocate on record. He therefore submitted that the only sum which the respondent acknowledged to having received in settlement of the decretal sum was Kshs 250,000/=. He submitted that the balance of Kshs 200,000/= is yet to be paid to the respondent through his advocate. He submitted that the alleged compromise by the appellant's insurance directly with the respondent without the involvement of his counsel was meant to defraud the respondent of the fruits of his judgment. He urged this court therefore to disallow the application.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties to this application. The issue for determination by this court is really whether the appellant paid the respondent the sum of Kshs 200,000/= or not. It is not disputed that the appellant's insurers approached the respondent directly and negotiated with him in the absence of his counsel with a view of settling this matter out of court. The said negotiations resulted into a discharge voucher being signed by the respondent in which he agreed to be paid the sum of Kshs 200,000/= in full and final settlement of his claim.

From the outset, I would state that the procedure adopted by the insurers of the appellant in trying to settle this matter out of court by dealing directly with the respondent who had an advocate on record was unlawful. Once a party has appointed an advocate to act in a matter, there arises a principal and agent relationship. The advocate is the agent of the client. In this case, the purported negotiations by the

appellant's insurers with the respondent when he had an advocate on record who was acting for him in the suit was mischievous and meant to circumvent the laid down procedure which required the appellant's insurance to deal with the advocates of the respondent.

It is not seriously disputed that the respondent was paid the sum of Kshs 200,000/=. There is evidence on record that he was paid the said sum of money in two instalments of Kshs 100,000/= each. The purported settlement was however made before the subordinate court heard and determined the suit and made an award of Kshs 450,000/= to the respondent as general damages. It is conceded by the respondent that the sum of Kshs 250,000/= has been paid to the advocates of the respondent. In the circumstances of this case therefore, the issue that should be determined by this court is whether the payment of the said sum of Kshs 200,000/= directly to the respondent should be considered as part of the payment of the decretal sum that was ordered paid by the subordinate court.

I have evaluated the facts of this case. I hold that the respondent has been paid the sum of Kshs 450,000/=. The sum of Kshs 200,000/= was paid directly to the respondent by the appellant's insurers. Although the manner in which the said payment was made was unprocedural, this court cannot overlook the fact that the respondent received the said sum of Kshs 200,000/=. Mr. Kiarie acknowledged that he had received the sum of Kshs 250,000/= from the appellant. In the circumstances of this case therefore, the complaint made by the appellant that the respondent was purporting to execute against it for the sum of Kshs 200,000/= which sum it had already paid to the respondent has merit. I will therefore allow the application to restrain the respondent from executing for the said sum of Kshs 200,000/= pending the hearing and determination of this appeal.

I however wish to state that the said order of injunction shall not prevent the respondent from executing for the costs which were assessed and found to be due to him. I would further advise the parties to this appeal to sort out the outstanding issues so that an amicable settlement can be recorded settling this matter once and for all. The appellant shall have the costs of this application.

**DATED at NAKURU this 31<sup>st</sup> day of March, 2006.**

**L. KIMARU**

**JUDGE**