



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

Civil Suit 395 of 2002

AMRUT INVESTMENTS LIMITED.....APPLICANT

VERSUS

SOBHAG H SHAH AND

V GOSWAMI T/A SOBAH H SHAH & GOSWAMI ADVOCATES.....RESPONDENT

R U L I N G

The defendant sought and was granted an order that the plaintiff do provide security for costs within 30 days from 26th March 2004.

The plaintiff failed to comply with that order and the defendant again moved the court seeking the dismissal of the plaintiff's suit for non-compliance of the order of security.

The court on hearing that application made the following order on 14th April 2005.

“That the purported guarantee (security for costs) be re-executed by authorised signatories whose identities are disclosed as currently authorised and be duly stamped before the same is furnished to the Defendant/Applicant and that is to be done within fourteen (14) days and in default this suit shall stand dismissed in terms of the application dated 6th October 2004 and filed on 7th October 2004.”

The defendant by an application dated 6th April 2006 seeks the following order:

“That the plaintiff's suit against the Defendant stands dismissed for non compliance with the order dated 14th day of April 2005 to provide security for costs.”

The defendant submitted that the plaintiff failed to comply with the order of 14th April 2005. That by a letter dated 4th May but received by the defendant's counsel on 24th May 2005, the plaintiff forwarded the bank guarantee duly signed and stamped but that, that service was 40 days after the order of the court and consequently that there was failure to comply. Defence learned counsel Mr Ogonya in support of the application said that court orders are made to be obeyed.

The plaintiff, in reply to that application did not deny that an order was made on 14th April 2005 as stated in the defendant's application. The plaintiff argued that its counsel was under the mistaken belief that the order of 14th April 2005 required the plaintiff to file in court the bank guarantee. That under that mistaken belief the plaintiff laboured to have the court filed traced, which file was not readily available. That the file was finally made available and the bank guarantee was filed on 28th April 2005. Without stating when, the plaintiff's counsel deponed that the defendant had been supplied with a photocopy of a correctly executed and stamped bank guarantee. The plaintiff therefore argued that the defendant did not suffer any prejudice.

There was no denial, by the defendant, that they were served with a copy of the bank guarantee within the stipulated time. The issue that the court ought to determine is whether the receipt of a photocopy of that guarantee satisfied the order of 14th April 2005. By looking at the order of 14th April 2005 the court finds that it was not specified whether the bank guarantee to be supplied to the defendant was supposed to be the original or a copy. I find therefore, that I am unable to state categorically that the plaintiff has failed to comply with the aforesaid order.

When, particularly one considers the amendment made to the Evidence Act, section 65 (5) (b) which made copies of, or secondary documents admissible in evidence one cannot therefore say that the copy of the bank guarantee fails to satisfy the legal requirements of the Law of Evidence. Section 65 (5) (b) provides:

“Notwithstanding anything contained in any other law for the time being in force –

(a)

(b) a facsimile copy of a document or an image of a document derived or captured from the original document;shall if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for purpose of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.”

Consequently in view of the findings herein before the court, without clear indication that only the original bank guarantee was to be provided, cannot grant the very drastic orders sought by the defendant.

The order of this court is that the defendant's chamber summons dated 6th April 2006 is dismissed with costs to the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 25th May 2006.

MARY KASANGO

JUDGE