REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 323 of 2003

CHAUDRI AND ASSOCIATES …….....…….……PLAINTIFF

VERSUS

DUBAI BANK KENYA LIMITED…….....……DEFENDANT

RULING

The plaintiff in this mater obtained judgement against the defendant for kshs 4, 587, 741 plus V.A.T of kshs 825, 973. 38.

The defendant filed a notice of appeal against that judgment then sought stay pending appeal. Conditional stay was granted on the basis that the defendant would deposit the decretal amount into an interest earning joint account. Account in the joint names of the plaintiff's advocates A.H. Malik & Co. advocates, and in the defendant's advocate's name Makhecha & co. advocates. By consent of the parties the parties agreed to deposit kshs 5, 620, 466. 75 to be deposited in a joint interest earning account of the parties advocates at Trans National Bank Limited, City branch.

The parties advocates jointly wrote to Trans National Bank Limited by a letter dated 24th July 2004 whereby they indicated the authorised signatories of that account from both firms of advocates.

At the court of appeal the appellant was represented by the firm of Ms Maobe & Kiplagat advocates instead of Makchecha advocates and the respondent were represented by the same counsel who represented them in the High Court, that is A.H. Malik & co advocates.

The parties consented to mark the appeal as settled with no orders as to costs.

Having so consented the firms of A.H. Malik and Maobe & Kiplagat advocates consented to the withdrawal of the amount deposited with Trans-National Bank Limited and the amount to be split as follows; kshs 2, 939, 986.17 in favour of Maobe & Kiplagat Advocates and kshs 2, 939, 986. 17 in favour of A.H. Malik. On the basis of that agreement the Trans National bank was instructed by the firm of A.H. Malik to draw cheques accordingly.

On those cheques being drawn and paid, the firm of Makhecha & co. advocates queried the release of the deposited funds without their authority and instructions. Once that query was raised the bank reopened the account and deposited funds therein and made a demand to A.H. Malik for return of the funds.

The said demand being made the plaintiff made an application seeking the following orders:

· That the bank account Number 01400800 at Stanbic Bank Limited, Kenyatta Avenue Branch, in the name of Maobe & Kiplagat advocates be frozen to the extent of kshs 2939, 986. 15 pending further

orders of this Honourable court.

· That in the alternative and without prejudice to the foregoing the defendant/judgement debtors advocate Maobe & Kiplagat be ordered to return the sum of kshs 2, 939, 986. 15 to the Trans-National Bank Limited.

· That in the alternative the defendants advocate Maobe & Kiplagat advocates do made restitution under the indemnity to the plaintiff's advocates in the sum of kshs 2, 939, 986.15.

Before the application could be heard preliminary objections were raised by the firm of Maobe & Kiplagat and by Makhecha & Co. advocates.

The application is under sections 3A and 91 of the Civil Procedure Act.

Maobe & Kiplagat objected to the application on the basis that the appeal had been marked as settled with no orders as to cost and unless the plaintiff sought to vary or set aside that consent the present application could not proceed.

Section 91 (1) provides:

"**Where and in so far as a decree is varied or reversed, the court of first instance shall on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed…….**"

Section 91 (2) further states that that no suit should be instituted for restitution where relief can be obtained under section 91 (1).

Maobe & Kiplagat, through their counsel argued that that section was not available to the plaintiff since there was no variation or reversal of decree by a party entitled to such variation that is the litigating parties.

Makhecha & Co advocate's objection was on the basis that the claim for refund or restitution does not involve the plaintiff and defendant. That the action is between A.H. Malik & Maobe & Kiplagat.

Plaintiff's counsel responded and said in regard to the first objection that the objection, even if successful would not result in the striking out of the application because the plaintiff additionally relied on section 3A of the Civil Procure Act, to which no objection was raised on Section 91 plaintiff argued that it was wide enough to cover even the circumstances of this case.

On the objection of Makhecha & Co, plaintiff submitted that Maobe & Kiplagat has locus in this matter since they were defendant's counsels in the court of appeal.

I have considered the arguments before me. Indeed I do accept the arguments raised by Maobe & Kiplagat in regard to section 91. In my view section 91 relates to a situation where an appeal set aside or varies the terms of the judgement of the original court and were payment or interest had been exchanged in terms of that judgement. Under section 91 the party who has paid or parted with an interest can apply for restitution in terms of the appeal. That does not apply here and that point is well taken. But having found so that does not do away with the plaintiff's application because the plaintiff has also relied on section 3A.

The objection by Makhecha & Co. fails because in order for the court to accept that the action against Maobe & Kiplagat is non suited the defendant would have to bring evidence before court to state that they were not represented by Maobe & Kiplagat. That would essentially make that firm to be a stranger in this matter. In the absence of such evidence the objection is not well taken and is rejected.

I do accept the submissions of the plaintiff that on the whole the objections raised required the examination and evaluation of intricate evidence and that cannot be done at consideration of a preliminary objection. I do therefore find that the objection fail the test of MUKISA BISCUIT MANUFACTURING CO LTD – V – WEST END DISTRIBUTORS LTD [1969] E.A 696.

I do reject the preliminary objections and the same are dismissed with costs to the plaintiff.

The court having reached that decision finds that in the interest of justice the interim orders issued on 31st May 2006, hereof, ought and are extended until the final determination of the application dated 29th may 2006.

MARY KASANGO

JUDGE

Dated and delivered this 11th July 2006.

MARY KASANGO

JUDGE