



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

Civil Case 1037 of 2000

PETER G. N. NGANGA.....PLAINTIFF

VERSUS

1. STANDARD CHARTERED BANK OF KENYA LTD.....1ST DEFENDANT

2. HARRISON MAINA KARIUKI.....2ND DEFENDANT

RULING

This is an application by the Plaintiff (by notice of motion dated 18th October, 2006) seeking the main order:-

“1. That KShs. 880,000.00 paid in court as a condition for thecourt’s order given on 6th October, 2000 be released to the Plaintiff.

2. -----.

3. -----”

The application is made upon the ground that the said deposit was made as a condition for the orders of stay given on 6th October, 2000, which orders were discharged on 4th December, 2000, and further, that the Plaintiff’s suit against the Defendants having been subsequently discontinued on 1st September, 2001, there are no longer any proceedings herein pending between the parties, and that therefore the money so deposited ought to be refunded to him. There is a supporting affidavit sworn by the Plaintiff.

The 2nd Defendant filed the following grounds of opposition dated 5th December, 2006:-

“1. The orders issued were to subsist till the appeal was heard and determined. The appeal ... is still pending hearing and has not been determined.

2. The Plaintiff withdrew his suit but has not paid any costs to the 2nd Defendant.

3. The 2nd Defendant being the registered proprietor of L.R. No. 9508 was entitled to mesne profits, and the sum was the economic loss occasioned by the Plaintiff.

4. The Plaintiff’s application is made with dirty hands as he filed the suit and then occupied the 2nd Defendant’s property depriving him of the profits thereon.

5. *There is an existing order that no further proceedings should be filed by Plaintiff till the costs are paid to 2nd Defendant, and this application is abuse of the court process.*”

There is no replying affidavit. No papers in response to the application were filed by the 1st Defendant. At the hearing of the application there was no appearance for any of the Defendants.

I have considered the submissions of the learned counsel for the Plaintiff. I have also perused the court record. On 6th October, 2000 the court (Hewett, J.) granted an order for maintenance of the *status quo* pending appeal upon the following conditions:-

(i) *that the suit premises remain with the Plaintiff for his personal occupation and his family as a residential house, and no part thereof may be leased for occupation by anyone else without leave of the court;*

(ii) *that the Plaintiff do pay monthly from 15th October, 2000 either into court or into an account in the joint names of the advocates KShs. 80,000.00 to be held to the order of the court pending judgment in the intended appeal, the said sum being 1% per month of the KShs. 8,000,000/00 expended by the 2nd Defendant in the purchase of the property.*

(iii) *that the Plaintiff shall not make any alterations to the property nor allow the same to fall into disrepair, genuine fair wear and tear excepted;*

(iv) *that the 2nd Defendant may inspect the property himself once a month on the 1st Monday in each calendar month between 10.00a.m. and 12.00 noon for the purposes of verifying the condition thereof;*

(v) *that the matter be mentioned on 6th November, 2000 for purposes of checking progress in the appeal; and*

(vi) *that there be liberty for either party to apply, particularly if any of the above conditions are not complied with.*

It is clear that this order was meant to safeguard the interests of the 2nd Defendant, a purchaser of the suit property who was being denied possession. Perhaps it was meant to be security for any claim for *mesne* profits that the 2nd Defendant might make upon the Plaintiff on account of his continued occupation of the premises. It was not so stated in the order. However, the 2nd Defendant never lodged any counterclaim. I can find on the court record no subsequent claim by him for *mesne* profits.

In the course of time the Plaintiff deposited into court the total sum of KShs. 880,000/00 as follows:-

- KShs. 60,000/00 on 15th September, 2000
- KShs. 720,000/00 on 4th June, 2001
- KShs. 80,000/00 on 2nd July, 2001
- KShs. 20,000/00 on 1st August, 2001

Total KShs. 880,000/00

It is that sum that he wants refunded to him.

On 11th December, 2000, as the Plaintiff had not by that date met the conditions upon which the order for maintenance of the *status quo* of 6th October, 2000 had been made, the court (Hewett, J.) discharged the said order. It is to be noted that the Plaintiff had deposited KShs. 60,000/00 on 15th September, 2000; that was **before** the order of 6th October, 2000 was made. On 7th September, 2001 the Plaintiff discontinued or withdrew his suit against the Defendants. The 1st Defendant's counter-claim remained, and still remains, on record.

Eventually the Plaintiff was evicted from the suit premises on 22nd February, 2002 after resisting for quite some time. In the meantime, as already seen, he had made further deposits making a total of KShs. 880,000/00. He thus deposited the sum of KShs. 820,000/00 **after** the order of 6th October, 2000 had been discharged on 11th December, 2000 and apparently in furtherance of his resistance to his eviction.

On 7th February, 2002 an order based on a consent letter dated 2nd October, 2001 was entered by the Deputy Registrar in the following terms:-

“It is hereby ordered by consent that the monies deposited in court by the Plaintiff herein be released forthwith to M/s Munene & Co. Advocates.”

This consent appears to have been in respect to the 2nd Defendant's taxed costs of the suit in the sum of KShs. 575,000/00 following the discontinuance or withdrawal of the suit against the Defendants by the Plaintiff. As the Plaintiff did not make any separate deposit into court of KShs. 575,000/00, this sum was obviously meant to come from the sum of KShs. 880,000/00 he had already deposited in court.

The Plaintiff subsequently challenged the aforesaid consent order of 7th February, 2002 by notice of motion dated 13th February, 2002 upon the ground that it was entered into by an advocate who was not on record for him. That application was eventually heard on 12th May, 2005 and dismissed with costs (Emukule, J.) on 7th March, 2006. The consent order dated 7th February, 2002, therefore, still remains in place. The only money held to the Plaintiff's credit by the court is thus only KShs. 305,000/00.

In the meantime, by notice of motion dated 8th October, 2001, the 2nd Defendant had sought the following order, *inter alia*:-

“1. -----

2. ***That the sum deposited in this court as mesne profits pursuant to the court orders be paid to the 2nd Defendant forthwith.***

3. -----

5. -----.”

Apart from a preliminary objection raised to the application, which was upheld in part by Mwera, J., this particular prayer has never been heard and disposed off.

The short and long of it all therefore is as follows. All the money deposited in court by the Plaintiff to the tune of KShs. 880,000/00 was not deposited pursuant to any court order. This is because the initial deposit of KShs. 60,000/00, as already seen, was deposited on 15th September, 2000, **prior** to the order of 6th October, 2000. The subsequent deposits amounting to KShs. 820,000/00 were made **after** the order of 6th October, 2000 had been discharged on 11th December, 2000. So, the Plaintiff would, as a matter of right, be entitled to a refund of his money as the deposits into court were made without any order requiring them to be made. However, there is the consent order of 7th February, 2002 by which the sum of KShs. 575,000/00 was to be released to M/s Munene & Co. Advocates. The Plaintiff's application to set aside that order was refused by Emukule, J. on 7th March, 2006. That consent order is thus an

impediment to the release to the Plaintiff of the entire sum deposited by him into court. Only KShs. 305,000/00 is available to him.

I will briefly deal with the objections raised by the 2nd Defendant. The first objection is that the order of 6th October, 2000 was meant to remain in place pending hearing and determination of the Plaintiff's appeal, subject, of course, to the conditions imposed on him in the order. However, the order was on 11th December, 2000 discharged and is no longer in place. The second point taken is that the Plaintiff withdrew his suit and has not paid the 2nd Defendant's costs. As already seen, those costs are taken care of by the consent order of 7th February, 2002. The third objection raised is that the 2nd Defendant is entitled to *mesne* profits, to be paid from the monies deposited in court by the Plaintiff. As already seen, the 2nd Defendant has not made any claim for *mesne* profits. The fourth ground of objection to the application is that it has been brought in bad faith in that the Plaintiff intends to deprive the 2nd Defendant of profits accruing from his property occupied by the Plaintiff. Again, as already seen, the 2nd Defendant has not made any claim for *mesne* profits. But it is clear that by this application the Plaintiff intended to achieve what he did not achieve by his application dated 13th February, 2002 which was dismissed by Emukule, J. on 7th March, 2006. There is thus an element of bad faith. Finally, the 2nd Defendant says that there is an existing order that no further proceedings should be filed by the Plaintiff until he pays the 2nd Defendant's costs herein, and that this application is thus an abuse of the process of the court. No particulars of this alleged order have been given, and I am unable to find it in the court record herein.

In the circumstances, I will allow the application but to the extent only that the sum of KShs. 305,000/00 held by the court to the credit of the Plaintiff be released to him forthwith. There will be no order as to costs. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 15TH DAY OF DECEMBER, 2006.