



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 604 OF 2001

JOSEPH OKOTH WAUDI.....PLAINTIFF

V E R S U S

NATIONAL BANK OF KENYA LTD.....DEFENDANT

R U L I N G

On 5/12/2002 the Plaintiff obtained a stay pending appeal on condition that:-

- (1) the actual appeal must be filed within 60 days from that date
- (2) the applicant shall within the said 60 days deposit a sum of Kshs.500,000/- in a joint interest earning account in any reputable Bank, the account to be operated jointly by advocates of both parties
- (3) in default of orders (1) or (2) above the ordered stay shall be of no effect.

On 24/3/2003 the Plaintiff appeared before court under certificate of urgency seeking orders:

- (1) to confirm that the Plaintiff had complied with the terms of order made on 5/12/02 (mentioned above) and that the ruling of 10/4/2002 was still in force and accordingly sale scheduled for 27/3/2003 be stayed.

The main ground for these orders was that the Plaintiff's suit property was due for sale on 27/3/2003. In support of application aforesaid the Plaintiff swore an affidavit in support in which he said he had complied with court order in that he had filed appeal within 60 days and has deposited Kshs.500,000/- in the bank. In this affidavit the Plaintiff did not mention that the money was lying in a suspense account. However, by application dated 3/2/2003 the Plaintiff sought to be allowed to deposit the money in the account (not open joint account) on the ground that the Defendant's advocate could not be found in Mombasa before expiration of the dead-line for depositing the money as ordered by court.

This is explained in the affidavit of Plaintiff sworn on 31/1/2003. There is no record that this application was heard. However, the affidavit explains well that the money was deposited in a suspense account as far back as February 3rd 2003 with Co-operative Bank of Kenya Ltd., Mombasa Branch. The Defendant now has filed this Notice of Motion seeking a review of the court order made by this court on 24/3/2003 on the grounds:

- (1) that the Plaintiff never deposited the Kshs.500,000/- in a joint account as ordered by Judge on 5/12/2002 and therefore order of stay has lapsed,
- (2) that the orders made on 24/3/03 were made in error or mistake or constituted an error on the face of record.

The application is supported by affidavit of Mr. Mburu Advocate for Plaintiff. The relevant paragraphs show that it is true order for stay was granted to the Plaintiff under certain conditions set out in para.6 thereof. That the Plaintiff did file in Court of Appeal Civil Appeal No.33 of 2003 now pending hearing. Both advocates stated from the bar that the appeal is fixed for 28/1/04 in a few days time. That to-date the Plaintiff has not opened an interest earning joint account in the names of both parties advocates. Evidence from both parties tendered through letters from the bank show that the money is still in suspense account and it is earning no interest.

Therefore no joint interest account has been opened yet. However, Mr. Wameyo for Plaintiff swears and he was cross examined on his affidavit by Mr. Mburu that the money has been in that suspense account because Mr. Mburu has failed to avail himself to go to the bank to make the necessary bank formalities for opening a joint account. It is true that Mr. Mburu has adjourned this application before to enable him to visit the bank but at this hearing he said from the bar that he sent his clerk. He has not gone. Mr. Mburu must have known by letters dated 3rd and 4th March 2003 that the money had been deposited in the account. In his letter dated 5/3/03 he refers to Wameyo's letters and states –

“the documents referred to in letter of 4 th March, i.e. documents showing that the money was deposited as alleged”

After hearing the submissions of both parties and considering the material before the court I am satisfied that Mr. Wameyo is telling the truth. The advocates handed over two letters from the bank dated 17/1/2004 and 24/12/2003 both from the Bank Manager at Mombasa. I believe what the Bank Manager says that the money was deposited on 3/2/2003 and has been lying in a suspense account awaiting formalization of account opening. This Bank Officer is the Manager of the Bank in Mombasa Branch. He has many customers to take care of and I do not see any reason why he should tell untruths concerning bank matters.

I find Mr. Mburu has acted negatively in this matter. The court order stipulated that he would actively take part in the opening and operation of the joint account. That he did nothing about is clear from his affidavit and material on record. He only got concerned when his client arranged for second sale. See his letters of 25/7, 7/8, 20/8. It is alleged that the order made on 24/3/03 was made in error or mistake or non disclosure or misrepresentation. This court does not see any error on the face of the record to warrant a review. The court believed the assertion that the money had been deposited. This evidence was tendered by an advocate of the High Court of Kenya.

He exhibited a document marked “A” cash deposit and the court had no reason to doubt the evidence. I rely on the proviso to rule 2 order 50 Civil Procedure Code and say that if the sale was allowed to proceed the Plaintiff would have suffered serious mischief as he had already been granted stay. Upon considering the material before the court I see no grounds to set aside that order. I also see no ground to review the order as prayed by Defendant. In the circumstances I find no merit in the application and the same is dismissed with costs.

Dated at Mombasa this 20th January, 2004.

JOYCE KHAMINWA

J U D G E

20/1/04

Khaminwa, J.

Esther – Court Clerk

Mr. Songoro – h/b for J.M. Mburu – for Applicant

N/A – for Respondent

Ruling read in open court.

JOYCE KHAMINWA

J U D G E