

REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

Civil Appeal 23 of 2003

**BENSON MUTUTA WAFULA.....APPELLANT
VERSUS
MICHAEL NDIEMA KIPSANG.....RESPONDENT**

R U L I N G

The application for determination is dated 4.5.2004 seeking orders of stay of execution of the decree in SPMCC 481/01 pending outcome of the appeal. It is based on grounds that the appellant deposited a bankers cheque No. 621686 of Kshs.150,000/= with the respondents advocates which was acknowledged by the respondents advocate issuing a receipt. The application is also supported by the affidavit of the applicant Benson M. Wafula the defendant in SPMCC 481/01. Exparte judgement was entered against the applicant and a conditional order of stay was granted in this court's ruling of 31.7.2003 whereby the applicant was ordered to avail Kshs.150,000/= for deposit in an interest earning account in the joint names of the counsels in a sound financial institution within 60 days of 31.7.2003. The applicant obtained a bankers cheque of the same amount and deposited with respondent's advocates who issued receipts and he was surprised when auctioneers were sent to attach his goods.

The application was opposed and a replying affidavit was sworn by the plaintiffrespondent Michael Kipsang who depones that the applicant did not comply with the orders of the court that the Kshs.150,000/= be deposited in a joint interest earning account of both counsels and the time to deposit the cheque expired on 31.9.203 and that instead the applicants counsel deposited the cheque with respondent's counsels contrary to the court's order. It is the respondents contention that it was upon the applicants counsel to go ahead and open an account with a sound financial institution and that failure to comply renders the order of the court discharged.

I have scanned the ruling of the court dated 31.7.2003. The court ordered that a security of Kshs.150,000/= be provided and I quote.

“the said amount is to be deposited in an interest earning account in the joint names of counsels of both parties in any sound financial institution within 60 days from the reading of the ruling.”

60 days within which the money was to be deposited was to lapse on 30.9.2003. The applicant does not say exactly when they took the money to respondents advocate but the receipt issued by the respondents counsel reads 26.9.2003. It was about 4 days before the time of depositing the money lapsed.

A perusal of the ruling of 31.7.2003 shows that the money was to be deposited in a joint account of both counsels. It means that both counsels had to co-operate, come together and agree on the sound financial institution in which to open the account. There was no indication that money was to be deposited with respondent's counsel's office or that either of the counsels was to open an account. They had to do it jointly.

Who was to initiate the procedure? Obviously it must have been the applicant. It was the applicant to avail the money within the 60 days. It is then they would approach the respondent's counsel to ask what bank and when to open the account. The depositing of money with respondents counsel was not part of the courts ruling.

The applicant has not shown that they approached respondent's counsel to open an account and she refused. If she had refused they would have moved the court to vary the order. In the circumstances, I do

find that the applicant failed to take steps to have the order complied with. The respondent had nothing to lose if deposit was not made but had everything to gain. It was the applicant who did not act diligently and failed to comply with courts order and cannot shift blame. He has not asked for variation of the court's order of 31.7.2003 or extension of time within which to make the deposit. Consequently I find no merit in the application for stay one having been made already by the court on terms which were neglected.

The application dated 4.5.2004 lacks merit and it is dismissed with costs to the respondent.

Dated, read and delivered at Machakos this 13 day of July 2004.

R. WENDOH

JUDGE