



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 525 OF 2003**

**MURAD EBRAHIM MURAD.....1ST PLAINTIFF**

**HAMIDA MURAD.....2ND PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD..... DEFENDANT**

**R U L I N G**

The Notice of Motion herein dated 13.10.03, seeks orders that:-

- 1. The application be certified urgent and heard exparte in the first instance;**
- 2. a) Pending the interpartes hearing of this application, the exparte orders granted on 19.9.03 be stayed or be held in abeyance until further orders of this court.**  
**b) Alternatively, pending the hearing and determination of this application, the court do stay part of the orders granted on 19.9.03 requiring the Defendants to provide the Plaintiffs with proper and up-to-date statements of accounts reflecting total amount disbursed and paid.**
- 3. Upon interpartes hearing of this application, this court order that the exparte orders granted on 19.9.03 be reviewed.**
- 4. Upon grant of prayer 3 above the court should rehear, interpartes, the Plaintiff's application dated 16.9.03.**
- 5. Upon inter-partes hearing of this application, the court set aside and/or discharge the exparte orders granted on 19.9.03.**
- 6. Costs of this application be borne by the Plaintiffs.**

The application is under Order 44 rule 1 & 2; Order 50 rule 1 of the Civil Procedure Rules; Sections 3, 3A, 63 and 80 of the Civil Procedure Act; and is supported by an affidavit by Elijah Mwangi Njeru of 13/10/03, and further affidavits by Mrs. Florence N. Kimani – the Advances Manager of the Defendant – and is on the grounds that: the application was set for hearing on 19.9.03 but was not listed because of the Plaintiff's failure to pay court adjournment fees; that the advocates of the Plaintiff came back to court under Certificate of Urgency and obtained exparte orders which were neither applied for nor prosecuted; that the Defendant was denied his right to be heard; and that as a result of the above, there is an error apparent on the face of the record. In opposition the Respondent avers that the orders by the Court on

19.9.03, were in order; that the applicant is in contempt of court in failing to obey the court orders of 19.9.03 and that the application is confusing and hence an abuse of the court process. Prayer Nos. 1 and 2(a) are already spent, the same having been dealt with earlier by the court.

Upon thorough perusal of the pleadings herein, and close examination of the annexures herein and listening to Counsel for both parties, I have reached the following findings and conclusions. It is true that the cause list for 19.9.03 did not contain case No. 525 of 2003, and that the same had been scheduled to be heard on that day but was not listed because the Court adjournment fees had not been paid by the Plaintiff. It is also a fact that the matter was coming for mention on the 19.9.03 basically for the extension of earlier interim orders which were due to expire on that date.

I believe the averment by the Defence Counsel that he met with the Counsel for the Plaintiff and because the matter was not listed, another date was to be picked by the parties. But in light of the imminent expiry of the interim orders: injunction – the Plaintiff came back to court in the afternoon of 19.9.03 under Certificate of Urgency. In my view this was unfair on the part of the Plaintiffs who failed to disclose the full facts when they appeared before the court under Certificate of Urgency.

I have also looked at the pleadings very carefully, and it is correct that the court granted orders not prayed for, and that the order regarding provision of up-to date accounts *exparte*, was improper in the circumstances as it has the effect of disposing off the substantive application without giving the Defendant an opportunity to be heard.

From the pleadings in this application, I disagree with the submissions of the Counsel for the respondent that the defendant/Applicant herein is in contempt of court in not supplying the up to date statement of accounts. In my humble view, to have done so, would have defeated the entire purpose and essence of the application whose **interpartes** hearing on the 19.9.03 could not take off because of the fault of the Plaintiffs in not paying the Court Adjournment Fees in time for the matter to be listed.

To turn around in the afternoon of the same day and obtain **exparte** orders as the Plaintiffs did was at least cheeky if not dishonest.

I believe that the Defendant/Applicant moved with speed to obtain stay of execution of the *exparte* orders granted on 19.9.03.

The upshot of all the foregoing is that this Notice of Motion, dated 13.0.03 succeeds and I grant the following orders:

- 1. Prayer Nos. 1 and 2(a) are already spent, the same having been dealt with earlier on by this court.**
- 2. I set aside and discharge the *exparte* orders granted herein on 19.9.03 requiring the Defendant to provide the Plaintiff with proper and up-to-date statements of account pending the *interpartes* hearing and determination of the application dated 16.9.03.**
- 3. The Plaintiffs do pay costs of this application because they are the cause of the failure to list the application for hearing on 19.9.03, by failing or neglecting or both to pay the requisite court adjournment fees on time.**

It is so ordered.

DATED and delivered in Nairobi this 13th day of July, 2004.

**O.K. MUTUNGI**

**JUDGE**

