

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO.3161 OF 1997**

KENYA POST OFFICE SAVINGS BANK.....PLAINTIFF

VERSUS

ANTONY FRANCIS WAREHAM

T/A A. F. WAREHAM.....1ST DEFENDANT

KIPRONO KITTONY.....2ND DEFENDANT

TAXPAR INVESTMENTS LIMITED.....3RD DEFENDANT

R U L I N G

This application (Notice of Motion dated 20th August, 2004) is essentially for an order for restitution of money paid towards satisfaction of the decree herein which was subsequently set aside by the Court of Appeal following a successful appeal by the judgment debtors. The application is brought under Section 91 of the Civil Procedure Act, Cap. 21 by the 2nd and 3rd Defendants against the Plaintiff. On 28th March, 2000 this court (Commissioner of Assize Ransley, as he then was) entered judgment for the Plaintiff against the 2nd and 3rd Defendants in the sum of Kshs.1,757,263/00 plus costs and interest. The 2nd and 3rd Defendants appealed to the Court of Appeal vide Civil Appeal No.48 of 2002. That appeal was heard and judgment delivered on 2nd July 2004. By that judgment the appeal was allowed, the judgment of this court of 28th March 2000 set aside and an order dismissing the Plaintiff's suit with costs substituted.

In the meantime, the 2nd and 3rd Defendants had paid between 25th April, 2001 and 7th March, 2003 a total of Kshs.1,250,000/00 towards the decretal sum adjudged against them. It is restitution of this sum that they seek. The application is opposed by the Plaintiff upon the grounds that the Court of Appeal did not, in effect, order restitution; that this court is in any event functus officio ; that the monies paid by the 2nd and 3rd Defendants to the Plaintiff were reimbursement of the money incurred by the Plaintiff in clearing motor vehicles and other incidental costs which ought to have been borne by the Defendants; that the Applicants are out to unjustly enrich themselves; and that the Applicants sold uncustomed motor vehicles to the Plaintiff in contravention of the Customs and Excise Act, Cap.472.

I have considered the submissions of the learned counsels appearing. The basic facts are not in dispute. These are that there was judgment given by this court to the Plaintiff against the 2nd and 3rd Defendants for Kshs.1,757,263/00 plus costs and interest; that the 2nd and 3rd Defendants appealed against that judgment; and that the appeal was allowed and the judgment of this court set aside and the Plaintiff's suit dismissed with costs. It is apparent from the documents annexed to the supporting affidavit that pending hearing and determination of the appeal the 2nd and 3rd Defendants paid a total of Kshs.1,250,000/00 towards the decretal sum adjudged against them. It is not true, as urged by learned counsel for the Plaintiff, that this sum was not paid towards the decretal sum. The grounds of objection to the application and the learned counsel's arguments were infact a throw-back to the Plaintiff's claim which, as already noted, was dismissed by the Court of Appeal.

So, what should happen to the said sum of Kshs.1,250,000/00 paid by the 2nd and 3rd Defendants towards the decretal sum? Section 91 of the Civil Procedure Act is in the following words:-

“91. (1) 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 to 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; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).”

The 2nd and 3rd Defendants are properly before the court. The statutory provisions quoted give the court the necessary jurisdiction to grant what they seek. The facts of this matter are such that the court would have absolutely no reason to deny them what they seek. I will therefore grant the application. The Plaintiff shall pay to the 2nd and 3rd Defendants by way of restitution the sum of Kshs.1,250,000/00 within six (6) months from the date of delivery of this ruling. In fixing this period I have borne in mind the fact that they paid the same to the Plaintiff over a period of nearly two years. In default of payment as above the 2nd and 3rd Defendants may execute for the same. Costs of the application to the 2nd and 3rd Defendants. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2004

H. P. G. WAWERU

JUDGE