



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 4647 OF 1989

GODFREY MWANGI GITAO PLAINTIFF

VERSUS

AMOS GICHOHI NGONJO DEFENDANT

R U L I N G

The history of this case shows that the case was heard in full and judgement entered in favour of the plaintiff against the defendant by Ole Keiwua, J (as he then was).

A decree was drawn up and execution commenced by the defendant paying the decretal amount by instalments.

The parties at some point appeared before the Senior Principal Deputy Registrar, Mr. Njai for Notice to Show Cause, which he heard and wrote a Ruling, unfortunately I am unable to find his Ruling on the court file, but the decree is on the file.

Be that as it may, the advocates submissions show that during the hearing of the notice to show cause application the issue of a receipt of No.A2338 for Kshs.824,760/= came up, as the defendant submitted that this was the receipt by which he paid the balance of the decretal amount and insisted that he had paid everything in full and there was nothing owing to the plaintiff.

At that point, the case was referred to the Hon. Chief Justice Cocker. This was on 16th September, 1997.

The parties recorded consent orders at which the plaintiff's counsel admitted having received Kshs.200,000/= towards the decretal sum by instalments.

The plaintiff's advocates, however, disputed the authenticity of the receipt No.2338 dated 13.12.94 for the sum of Kshs.824,760/= allegedly paid to the plaintiff's advocate. Execution of the decree was stayed, to enable the CID Nairobi to investigate the payment of Kshs.824,760/= vide Receipt No.2338, and send a report to court within 30 days.

The case was mentioned for several years but the report from CID was not forthcoming. On 16th December, 1999, the Hon. chief Justice Chunga directed that the matter be placed before me to hear the issue of the disputed receipt.

Once more the case was mentioned several times until the two advocates eventually agreed to prepare written submissions to enable the court to determine the matter of the contentious receipt.

Before that on 18th February, 2000, I ordered that the process of execution should start. However, there was an application for review of that order and on 15.3.2000, I reviewed my order and set aside the order I made on 18.2.2000 directing that execution should start. It was the prayer for stay of execution which I ordered to be heard inter partes.

The report of the CID first featured in this file with the application dated 22.2.2002 filed by Meenye advocate on 24.2.2002. In fact it was attached to the further affidavit by Mr. Meenye advocate.

The report was again attached to the submissions of Mr. Meenye advocate, dated 29.11.2000, filed in court on 30.11.2000. These were submissions filed to determine the issue of stay of execution of the order by Mr. Njai, granted on 24.7.97 after listening to the parties on proceedings of Notice to show cause, dated 25.11.96.

The CID report is dated 3rd March, 2000. It was addressed to the Hon. the Attorney General, copied to the DPP, the PCIO Nairobi, Mr. Ocharo advocate and the defendant himself, Amos Gichuki Ngonjo.

I have read the submissions of both advocates. Mr. Ocharo's submissions at paragraph 5.02 disputes the report and says it is "inconclusive".

The defendant's advocate relies on the report totally, and from it, submits that the defendant paid the debt in full when he paid cash Kshs.824,760/= for which he was given receipt No.2338.

I have read the report by D.K Cheruiyot for DCIO Central Nairobi.

I noted the following;

1. The number of the receipt in issue was given as No.2336 whereas the receipt is actually No.2338. It is not explained whether this is a deliberate mistake or a typing error.
2. Paragraph five of the report reads, "specimen handwritings were taken from the lawyer and his workers and taken to the document examiner but it brought negative results".
3. Again there is paragraph 6 which shows that the complainant who is the defendant was "**escorted to the lawyers office by IP Grace Sitati so that he was to show or identify the person he had given money but unfortunately he was unable to positively identify any.....**"
4. Fourthly, the same paragraph 6 attempts to show where the plaintiff got the sum of Kshs.824,760/= which he paid he went pay to Ocharo advocate. The relevant portion reads, "**The complainant got the money he paid to the lawyer from Dandora Tanners after supplying hides and skins. The money was paid to him after he had signed a petty cash voucher. It is very unfor tunate we could not trace the duplicates since the company collapsed**".

Despite the above observations, the CID report concludes that "**the receipt in question No.2336 was issued from lawyer Ocharo's office.....**".

I find this report to be biased and deliberately made to suit the defendant. If the handwriting expert's opinion or finding was that it was not in the hands of Mr. Ocharo or any of his employees what is the basis of the conclusion that the receipt was issued by Mr. Ocharo or his employees from his office? Further, the report says that the complainant failed to identify the person he paid money to, when he was taken to Mr. Ocharo's office, during investigations.

The money in question was quite a lot, nearly Kshs. 1 million. How could he pay such a large sum of money and not remember to whom he paid it, and who issued him a receipt.

What about the source of the money? The defendant is said to have got the money from Dandora

Tanneries. There was no evidence that they acknowledge payment by giving the defendant a receipt. What the report talks of is a petty cash voucher which presumably remained in the receipt book and could not be traced because the company had collapsed. How then did the police know that the defendant was paid Kshs.824,760/= by Dandora Tanners?

As I have already said, the CID report is biased, I rule that it has no evidential value in this case. It is not sufficient to show that the defendant paid Kshs.824,760/= to Messrs Ocharo & Co. Advocates, and was issued with receipt No.A2338.

The report does not, in my considered opinion, provide proof for payment by the defendant of Kshs.824,760/= to Messrs Ocharo & co. Advocates, in satisfaction of the decree.

Turning to prayer (2) of the chamber summons application dated 22.2.2000, I proceed to dismiss that prayer with costs to the plaintiff. I am unable to grant an order for stay of execution to Mr. Njai's order, based on the CID's report dated 3rd March, 2000, or other evidence on record.

Dated at Nairobi this 18th day of April, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE