

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2456 OF 1994 (O.S.)

JOHN NJAU NJUGUNA & ANOTHER PLAINTIFFS

VERSUS

RAMESH LILADHAR SHAH DEFENDANT

RULING

This application has been brought under O. L Rule 1 of the Civil Procedure Rules for the following orders:

- ***“1. That the report of Mr. O. N. Koimburi dated 21 st July, 2000 and filed in this court in July 2000 be made part of the judgment of this court; and***
- 2. That a final decree be draw n to reflect the finding contained in the said report.”***

The application is supported by an affidavit sworn on 16.7.2001 by James Kirika, one of the plaintiffs, and is based on the following grounds:-

- “1. That the said report was made pursuant to the orders of this court contained in the decree herein; and***
- 2. That it is necessary that the finding of the said report be made part of judgement to facilitate execution.”***

According to the affidavit in support of the application and the submissions by learned counsel, this court pronounced judgment in the matter on 20.9.1999 and directed that the accounts of the partnership be taken by an independent accountant to be agreed by the parties and in the absence of such agreement to be appointed by the court. Pursuant to that order the parties agreed and appointed M/S O. N. Koimburi to take the partnership accounts. Mr. Koimburi did so and filed his report.

Following the filing of the report, the respondent lodged an application in this court disputing the Report upon which the court on November 2000 made an order directing Mr. Koimburi to take the account once again. The court further ordered that Mr. Koimburi’s fees be paid by the parties with the applicant’s share of the fees coming from the sum of Shs.4,421,578/= which the respondent was ordered to deposit in the joint names of the parties.

The evidence available shows that the respondent failed to comply with the order made in November, 2000. More specifically he failed to make the deposit of Shs.4,421,578/= thereby disabling the applicant from paying his share of Mr. Koimburi’s fees. The failure also has prevented Mr. Koimburi from carrying out the tasks he was required to undertake pursuant to the court order. The respondent also failed to pay his own contribution of Mr. Koimburi’s fees. Furthermore, he failed to extract an order of the court and serve it upon Mr. Koimburi.

All the above facts have emerged from Mr. Kirika’s depositions in his affidavit sworn on 16.7.2001. The facts cannot and indeed have not been challenged, the respondent not having sworn any affidavit in reply thereto. In that connection, it is to be noted that the only affidavit on the matter is one sworn by the respondent’s learned counsel Mr. Mutuli regarding which, it hardly requires to be observed that Mr.

Mutuli, being the respondent's advocate, is wholly unqualified to swear such an affidavit. The affidavit contains contentious matters and is therefore defective and of no assistance to the court.

In the event, what Mr. Kirika states stands unchallenged. On the basis of that evidence, I find that the failure to enforce the court order made in November 2000 has been wholly occasioned or contributed to by the respondent's defiance of the order.

Accordingly, the application is granted and an order made in terms of the prayers sought in the application. The respondent will bear the applicants' costs of this application.

Dated at Nairobi this 7th day of December, 2001.

T. MBALUTO

JUDGE