



**REPUBLIC OF KENYA**

**Caneland Limited v Dolphine Holdings Limited & Another**  
**High Court Of Kenya At Nairobi June 29, 2000.**  
**Milimani Commercial Courts**  
**Civil Case No. 1135 Of 1998**

June 29, 2000 T Mbaluto, delivered the following judgment.

The applicant in this matter is Dolphins Holdings Limited against whom the respondent, Caneland Limited has obtained a decree. It has brought this application under Sections 3A and 94 of the Civil Procedure Act and Order XXI, Rules 6, 7, 22 and 70 of the Civil Procedure Rules for the following substantive orders:-

That pending the hearing and determination of this application, the court do order a stay of execution;

- a. That the orders obtained before this court on May 2, 2000 and the purported execution and sale of shares thereof be set aside and cancelled.
- b. That the execution process commenced by the plaintiff/respondent herein be set aside.

The application is stated to be grounded on the following:-

- a. That the application dated April 28, 2000 has never been served upon the 1st defendant.
- b. The purported execution herein has been carried out in contravention of provisions of section 94 of the Civil Procedure Act; and is supported by an affidavit sworn on May 8, 2000 by Mr. Bernard Koyyoko, who is the applicant's learned counsel. The plaintiff/respondent opposes the application and has in that regard filed grounds of opposition detailing the basis of its contentions. Before proceeding to consider the merits of this application, I wish to make some observations which I think should be made at this stage. Firstly, a careful reading of Mr. Koyyoko's affidavit reveals that this application has been prompted by the sale or purported sale by the plaintiff/respondent of shares owned by a company known as Driscoll Investments Limited. The sale of those shares was the subject of another application which was contested between the plaintiff/respondent and the 1st defendant/applicant in which Mr. Koyyoko again represented the 1st defendant/applicant. Mr. Koyyoko has not filed any papers in this matter to show either that Driscoll Investments Limited have instructed him to represent them in these proceedings.

In my view therefore, what Mr. Koyyoko is doing is to prosecute some irregular objection proceedings on behalf of a party who has not formerly been joined in the proceedings. That conduct clearly amounts to abuse of the process of the court and is to be strongly deprecated. Also irregular is the habit which is becoming all too common these days of advocates swearing affidavits on behalf of their clients in contentious matters which practice can lead to the awkward situation whereby an advocate may have to be put in the witness box to be cross-examined in a matter in which he is appearing. That practice should be discouraged.

To revert to the application, the only two grounds on which this application is based are; (a) that the application dated 28.4.2000 has never been served upon the 1st defendant and (b) that the provisions of section 94 of the Civil procedure Act were contravened. As observed by Mr. Kowade for the plaintiff/respondent, these complaints have no substance at all. The record of these proceedings shows that before embarking upon the execution process, learned counsel for the plaintiff/respondent applied to the Deputy Registrar of this court through a letter dated February 18, 2000 seeking certification of the certificate of costs under rule 68A of the Advocates (Remuneration Order) pursuant to which the Deputy Registrar issued a certificate of costs on February 21, 2000.

Similarly, the decree in the matter was approved and issued by the Deputy Registrar on February 16, 2000

after the advocates for the 1st defendant/applicant had failed and/or refused to approve it. Given the above circumstances, the complaints by the 1st defendant about not being served and/or the alleged non-compliance with section 94 of the Civil Procedure Act, which, as the marginal notes shows, relates to execution of decree before costs are ascertained, has no substance at all.

In the course of arguing this application, Mr. Koyyoko urged several matters which are really not a part of his application and, accordingly, which said matters I do not think I am obliged to consider. For the same reason, the authority of *Lakeland Motors Limited v Harbhajan Singh Sembi* (Court of Appeal, Civil Application No. 24 of 1998) which deals with non compliance with rule 12 of the Auctioneers Rules has no relevance to the issues raised in this application.

For the reasons given above, my finding is that this application is wholly misconceived and incompetent. It is for the same reasons dismissed with costs.