



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CIVIL APPLICATION NO. 115 OF 2019**

**IN THE MATTER OF CIVIL APPLICATION NO. 31 OF 2016**

**AND**

**IN THE MATTER OF CIVIL APPLICATION NO. 59 OF 2018 (UR 37 OF 2018**

**AND**

**IN THE MATTER OF HIGH COURT CIVIL APPLICATION NO. 245 OF 2018**

**JOSEPH MORARA OMOKE.....APPLICANT**

**-VERSUS-**

**GERALD KIMANGA T/A KIMANGA & CO. ADVOCATES.....1<sup>ST</sup> RESPONDENT**

**DIAMOND TRUST BANK LIMITED.....2<sup>ND</sup> RESPONDENT**

**INVESCO ASSURANCE CO. LTD.....3<sup>RD</sup> RESPONDENT**

**MOMANYI AUNGA T/A MOMANYI AUNGA & CO. ADVOCATES.....4<sup>TH</sup> RESPONDENT**

**RULING**

The application before me is dated 5<sup>th</sup> July 2019. The Applicant, **JOSEPH MORARA OMOKE**, has asked the court to review and to set aside the ex parte orders which were issued by the Deputy Registrar on 22<sup>nd</sup> January 2019 in **CIVIL APPLICATION NO. 245 OF 2018**.

1. The second relief sought by the Applicant is that the Respondent, **GERALD KIMANGA** Trading As **KIMANGA & COMPANY ADVOCATES** be compelled to return or to pay to the Applicant, all the amount which was held in the Joint Account No. **5239297001**, at **DIAMOND TRUST BANK**.
2. According to the Applicant, there had been some collusion between the Respondent and **DIAMOND TRUST BANK** (“*the Garnishee*”).
3. The Applicant also expressed the view that the Law Firm of **MOMANYI AUNGA & CO. ADVOCATES** ought to have been made a party to the garnishee proceedings, as they were party to the Joint Account from which the Respondent is said to have obtained the funds which the Applicant believes he is entitled to.
4. The Applicant was of the view that the Respondent was intent on recovering Kshs 1,000,000/= through an ex parte judgment.
5. If the Respondent were to be allowed to use the ex parte route to recover that amount of money, the same would be prejudicial to the parties who would become affected. Therefore, the Applicant submitted that, at the very least, there should have been proceedings for Formal Proof, at which the Respondent would provide evidence to prove its case.
6. It was the Applicant’s case that the doors of justice should not be shut to any litigant who desired to be heard, because every person has the right to have any dispute decided at a fair and public hearing.

7. In this case, the Applicant felt that the Respondent had “sneaked in” the application exparte and at “lightning speed”.
8. Therefore, the Applicant submitted that the whole process through which the Advocate obtained money from the garnishee was not only irregular and unlawful, but also that if the same was left unchecked, it would cause disharmony in the judicial system, especially considering that the Respondent was an officer of the court.
9. Initially, the only parties in the application were the Respondent, **GERALD KIMANGA** and the Applicant, **JOSEPH MORARA OMOKE**.
10. However, when the court pointed out that the application touched on persons who were not parties to the case, the Applicant filed an application seeking to enjoin 3 more Respondents.
11. After giving due consideration to the application for joinder, the court granted leave to the Applicant to enjoin the following 3 parties;
  - (a) ***Diamond Trust Bank Limited;***
  - (b) ***Invesco Assurance Co. Ltd; and***
  - (c) ***Momanyi Aunga, Trading as  
Momanyi Aunga & Co. Advocates.***
12. The Applicant informed the court that on 3<sup>rd</sup> June 2016 the sum of Kshs 1,100,000/= was deposited in a Joint Bank Account at Diamond Trust Bank (*hereinafter “the Bank”*). The said Joint Account was in the name of the two Law Firms of **KIMANGA & COMPANY ADVOCATES** and **MOMANYI AUNGA & COMPANY ADVOCATES**.
13. At the material time M/S Momanyi Aunga & Company Advocates were acting for the Applicant, whilst Kimanga & Company Advocates represented Invesco Assurance Company Limited.
14. Shortly thereafter, the Applicant started acting in person.
15. The Applicant disclosed to this court that he filed **MISC. CAUSE NO. 64 OF 2019**, in which he sought orders to have Gerald Kimanga Advocate and Momanyi Aunga Advocate cited for contempt, because the money in the Joint Account had been withdrawn.
16. Apparently, that case was filed in Kisii.
17. The Applicant wanted the 2 advocates cited for contempt of court because the money from the Joint Account had been withdrawn. According to the Applicant, the Court at Kisii discharged advocate Aunga, whilst advocate Kimanga remained a citee.
18. In the light of that disclosure, it appears that advocate Kimanga is already being required to answer issues pertaining to the same funds which are the subject matter of the current application before me.
19. It is not disclosed by the Applicant why he deemed it necessary to bring this application, when the matter in issue was already in issue before the court at Kisii.
20. The 1<sup>st</sup> Respondent has pointed out that the money was only paid out to him after he had obtained an order from the court.
21. It is indeed correct to say that the 1<sup>st</sup> Respondent made an application for garnishee orders.
22. Although the Applicant has alleged that there was collusion between the bank and the 1<sup>st</sup> Respondent, he failed to provide any evidence of the alleged collusion.
23. According to the 1<sup>st</sup> Respondent, the garnishee orders which he sought and obtained were in respect of a judgment which he had obtained against **INVESCO ASSURANCE COMPANY LIMITED**.
24. In effect, the 1<sup>st</sup> Respondent was supposed to seek the attachment of money belonging to the said Judgment-Debtor, Invesco Assurance Company Limited.
25. The Applicant’s complaint is hinged upon the fact that the money in the Joint Account never belonged to Invesco Assurance Company Limited; and that the 1<sup>st</sup> Respondent was well aware of that fact.
26. As the 1<sup>st</sup> Respondent was one of the 2 joint-holders of the account, I find that he was well aware about the identity of the person or persons to whom the money in the Joint Account belonged.
27. Whether or not the 1<sup>st</sup> Respondent misled the court into granting the garnishee orders, which led to the release of the funds to him, is an

issue which could, in my considered opinion, be only dealt with appropriately in the same case where the orders were made.

28. At the moment, the Applicant appears to have filed a multiplicity of applications, all of which are intended to address the same issue. He has disclosed the following cases;

*(a) Miscellaneous Cause No. 64 of 2019;*

*at Kisii;*

*(b) Civil Appeal No. 31 of 2016, at the*

*Court of Appeal;*

*(c) Civil Application No. 59 of 2018,*

*at the Court of Appeal.*

29. I find that the co-existence of the multiplicity of applications, all of which relate to the same subject matter is an invitation to divergent and possibly inconsistent determinations. And when the said applications are before courts at different levels, such as the High Court and the Court of Appeal, (as in this instance), the court has an obligation to immediately put on hold the proceedings.

30. The Applicant must then make an appropriate election about which application he wishes to move forward.

31. Accordingly, I do hereby decline to make a determination on the substantive issue, because the Applicant has disclosed to this court, (at paragraph 8 of his affidavit sworn on 5<sup>th</sup> July 2019);

***“THAT the amount attached itself is***

***subject of ongoing CIVIL APPEALS CASE***

***NO. 31 OF 2016 and CIVIL APPLICATION***

***NO. 59 OF 2018, at the Court of Appeal.”***

32. But in the event I were to be held to have erred, by declining to make a determination, I would find that the application lacks merit. I so find because the actions about which the Applicant was complaining, emanated from an order made by the court. Therefore, the bank had no option but to comply with the orders when the same were served upon it.

33. Provided that the said orders remained in place, the actions complained about have a foundation on legal authority. Therefore, I decline the Applicant's request.

34. The Applicant will pay to the Respondents, the costs of the application dated 5<sup>th</sup> July 2019.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF MARCH 2021**

**FRED A. OCHIENG**

**JUDGE**