



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 326 OF 2007**

**SAGANA (TWO THOUSAND AND TWO) CHEMIST. .... APPELLANT**

**VERSUS**

**EUROPA HEALTH CARE LIMITED. .... 1<sup>ST</sup> RESPONDENT**

**SAGANA CHEMIST LIMITED. .... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

By a Notice of Motion dated 14<sup>th</sup> September, 2015 and filed on the 16<sup>th</sup> September, 2015, 1<sup>st</sup> Respondent/Applicant seeks orders inter alia that: -

- 1) The security deposited in court in the sum of Ksh.76,820/- be released to the 1<sup>st</sup> Respondent.
- 2) The costs of the Application be provided for.

The same is brought under Sections 3A, 63 of the Civil Procedure Act and Orders 22 and 41 of the Civil Procedure Rules.

It is premised on the ground that the Appellant's Appeal against the 1<sup>st</sup> Respondent was withdrawn on the 12<sup>th</sup> November, 2013 and on the annexed affidavit of Isaac Onyango sworn on the 14<sup>th</sup> September, 2015.

The Appellant herein filed this appeal against the Respondents in the year 2007 and on the 12<sup>th</sup> November, 2013, the Appeal was withdrawn vide a withdrawal notice dated the 4<sup>th</sup> day of November, 2013.

The Appeal herein arises from a ruling in Civil Suit No. 2975 of 2005 at the Resident's Magistrate's court at Nairobi by Miss E N Maina.

The Plaintiff by the 2<sup>nd</sup> Respondent was filed on the 3<sup>rd</sup> July, 2015 against the 2<sup>nd</sup> Respondent, Sagana Chemists wherein the Plaintiff was claiming a sum of Ksh.41,337.32 cents being the balance upon drugs and other pharmaceutical products delivered to the 2<sup>nd</sup> Respondents by the 1<sup>st</sup> Respondent on diverse dated between 24<sup>th</sup> September, 2002 and 17<sup>th</sup> November, 2002.

The 2<sup>nd</sup> Respondent filed a defence on the 5<sup>th</sup> January, 2006. In the said defence, the 2<sup>nd</sup> Respondent

denies owing the 1<sup>st</sup> Respondent the sums claimed in the plaint.

By way of a Chamber Summons dated 26<sup>th</sup> day of June, 2006 and filed on the 27<sup>th</sup> June, 2006, the first Respondent sought to strike out the 2<sup>nd</sup> Respondents defence for being scandalous, frivolous and vexatious and that the same was purely meant to prejudice embarrass and delay the fair trial before the lower court.

Though the application was opposed vide a replying affidavit filed in court on the 22<sup>nd</sup> August, 2006, the learned magistrate Miss E N Maina (as she then was) allowed the Application on the 1<sup>st</sup> December, 2006 and entered judgment for the 1<sup>st</sup> Respondent as prayed in the plaint.

On the 14<sup>th</sup> December, 2006, the Appellant herein filed a Chamber Summons by way of Objection proceedings alleging that the goods attached in execution of the decree issued by the lower court in CMCC No. 5975 of 2005 belongs to it and not to the 2<sup>nd</sup> Respondent who was the Defendant in the lower court. The Appellant, therefore, sought to have the attachment in respect of the goods raised. The learned magistrate dismissed the objector's Application on 13<sup>th</sup> April, 2007 for the reason that ownership of the goods was not proved.

It is the dismissal of that Application that prompted the Appellant (Objector) to file the Appeal herein but since an Appeal does not operate as a stay, the Appellant moved the court by way of a Notice of Motion dated 11<sup>th</sup> May, 2007 seeking for a stay of execution of the Ruling delivered on the 13<sup>th</sup> April 2007 pending the hearing and determination of the Appeal.

The said Application was heard and granted on condition that the Appellant do deposit the decretal sum of Ksh.76,820/- which included costs and interest in court which order the Appellant duly complied with.

Thereafter, the Appellant did not bother to prosecute the Appeal prompting the first Respondent to file a Notice of Motion dated 28<sup>th</sup> May, 2013 seeking the dismissal of appeal but while the same was pending hearing, the Appellant filed a notice of withdrawal of the Appeal on the 12<sup>th</sup> November, 2013.

The 1<sup>st</sup> Respondent has now moved the court to have the sum of Ksh.76,820/- released to it following the withdrawal of the Appeal. The Application is not opposed and when it came up for hearing on the 19<sup>th</sup> November, 2016 it proceeded ex parte.

I have perused the court record and I have carefully considered the Application together with the supporting affidavit. The same is merited as there is no pending Appeal.

In the upshot, the Application is granted as prayed, with costs to the 1<sup>st</sup> Respondent.

Dated, signed and delivered at Nairobi this 4<sup>th</sup> day of February, 2016.

.....

**L NJUGUNA**

**JUDGE**

*In the presence*

..... *for the Appellant*

..... *for the Respondent.*

