



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

**AT MOMBASA**

**CIVIL SUIT NO. 104 OF 2009**

BAKARI SAID FAKI .....PLAINTIFF

VERSUS

NANAK TRUCKINGS CO. LTD. ....DEFENDANT

**RULING**

By Way of Notice of Motion application dated the 18th day of February, 2013 and brought under Section 3, 3A of the Civil Procedure Act and order 50 rule 1 of the Civil Procedure Rules, the applicant seeks the interpretation of the order and award under order No. 4 of the Judgment issued on 8th October, 2010 by Hon. Justice Ojwang Vis-a-Vis condition No. 1b on the ruling delivered on the 15th day of July, 2011 by the Judge.

3. That the Court be pleased to set aside, discharge and or vacate the orders of stay of execution against the Defendants issued on 15th day of July, 2011 by the Judge.

4. That the Court do issue Warrants of attachment against the Judgment debtors property.

The grounds are that on the 8th day of October, 2010 Justice Ojwang delivered a Judgment in this suit in favour of the Plaintiff.

Award No. 4 on the Judgment was to the effect that,

***“The Defendant shall pay to the Plaintiff the sum of Ksh. 600,000/= (or in the alternative purchase for the Plaintiff a motorized wheelchair), which shall bear interest at Court rate as from the date hereof”.***

The Defendant/Respondent sought a stay of the Judgment and subsequently, a conditional stay was granted in the ruling delivered on 15th July, 2012.

The condition 1b stipulated that,

***“The appellant shall within thirty (30) days of the date hereof, purchase for the Respondent a motorized wheel chair”.***

It is the contention by Counsel for the Plaintiff that the said condition 1b when read together with the Judgment delivered on 8th October, 2010 by Justice Ojwang clearly indicates that the Defendant herein was under an obligation to purchase a wheel chair for the Plaintiff which would be equivalent to

Ksh.600,000/= or thereabouts, or in the alternative pay the Plaintiff an equivalent sum plus interest thereon from the date of Judgment.

Further that the Defendant has also failed to meet the Advocates fees in full and the Auctioneers costs as per condition 1(c) of the ruling of 15th July, 2011.

In the replying affidavit sworn by Simani Advocate it is deponed that no specifications of the wheel chair were made by the Advocates for the Plaintiff. The Plaintiff himself or the Court.

That numerous efforts were made to have the Plaintiff's Advocate identify a suitable wheel chair for the client but there was no respond to several letters addressed to them.

It is the contention by Counsel that the plaintiff is fixated with imposing conditions and specifications with respect to the wheel chair that were not in the Court order.

Further that a motorized wheel chair has already been purchased and is ready for delivery but the Plaintiff has failed to take delivery as his interest is more in the monetary alternative rather than the motorized wheel chair itself.

In the supplementary affidavit sworn by Mochache Advocate for the Plaintiff its deponed at paragraph 3 that the issue was not about specifications of the wheel chair but a motorized wheel chair which is equivalent to Ksh. 600,000/=. Further that the wheel chair which was being offered by the Defendant was model FS 21 which costs Ksh. 170,000/= and was only suitable for very smooth surfaces.

That a wheel chair model FS 105L was available at Crown Health Care Kenya Ltd. at a cost of or about Ksh. 600,00/=.

This Court is called upon to interpret order No. 4 of the Judgment delivered by Justice Ojwang on the 8th day of October, 2010 as juxtaposed against condition No. 1b on the ruling delivered on 15th July, 2011.

Order No. 4 is to he effect that,

***“The Defendant shall pay to the Plaintiff the sum of Ksh. 600,000/= (or in the alternative, purchase for the Plaintiff a motorized wheel chair) which shall bear interest at Courts rate from the date hereof”.***

The literal interpretation of the above order is that the Defendant was to pay the Plaintiff Ksh. 600,000/= or in the alternative purchase a motorized wheel chair or roughly the same amount. An offer to purchase a motorized wheel chair of the value of Ksh. 170,000/= where there is evidence that one for Ksh. 600,000/= was available, would not be in all fours with the order of the Court.

On 15th July, 2011 Justice Ojwang granted a conditional stay of execution 1b thus,

***“The applicant shall within thirty (30) days of the date hereof, purchase for the Respondent a motorized wheel chair”.***

The interpretation of the above is that the Defended was duty bound to purchase the motorized wheel chair to the Plaintiff within thirty (30) days which wheel chair would be of the equivalent value of Ksh. 600,000/= as envisaged under order No. 4 of the Judgment of 8th October, 2010.

There is no evidence to the effect that the Defendant/ Respondent complied with this condition.

When granting the order for stay of execution the Judge did order that the Defendant do pay according to scale the outstanding Advocates and Auctioneers costs within thirty (30) days of the authorization and authentication of claims if no consent is reached.

There is no evidence of compliance of the said order.

There being no compliance with the orders of the stay granted on 15th July, 2011. The conditional stay of execution is vacated and or set aside with costs to the applicant.

Ruling delivered dated and signed in Open Court this **11th** day of **June, 2014**.

.....

**M. MUYA**

**JUDGE**

**11TH JUNE, 2014**

***In the presence of:-***

Mr. Mutiso holding brief Mochache

No representation for the Respondent

Court clerk Mr. Musundi