

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 11 of 2012

QUINCY MURUNDI MALOBA APPELLANT

V E R S U S

STEPHEN ONYANGO ODEBERO RESPONDENT

R U L I N G

The applicant in his application dated 30.1.2012 is seeking an order of stay of execution of the subordinate court's orders issued on the 20.7.2011 attaching the applicant's wife's salary in fulfillment of execution of the judgment of the court pending the determination of this appeal. The application is supported by the applicant's affidavit sworn on the same date. The respondent filed a replying affidavit sworn on the 28.4.2012.

The respondent cross-examined the applicant on the affidavit during the hearing of the application. Thereafter parties agreed to rely on their respective documents. I have gone through the entire file including the proceedings before the subordinate court. The dispute on the side of the respondent is that he loaned the applicant some money. The loan amount was deposited in a Kenya Commercial Bank Kengeleni Branch (Mombasa) account number **1110637624** in the name of **DEE NETWORK SERVICES**. The respondent filed the suit and obtained an ex-parte judgment. In the process of execution the applicant was committed to civil jail. While in prison the applicant's wife recorded a consent in court whereby the decretal sum was to be paid by installments. That consent led to the release of the applicant from civil jail. Upon his release the applicant informed the court that he had not instructed his advocate or his wife to enter into that consent. The applicant's main argument is that he is not the defendant in the suit. The trial court resolved on the issue as to whether the applicant is the defendant or not and concluded that the applicant is the proper defendant. His main argument is that his name is **QUINCY MURUNDI MALOBA** while the defendant is **QUINTOS MURUNDI T/A DEE NETWORK SERVICES**. The applicant contends that he has never been the proprietor of Dee Network Services. The summons were left at the door of his house in Nairobi and upon receiving it he wrote a letter to the court dated 16.8.2010 indicating that he is not the defendant and has never operated the said bank account in Mombasa.

On his part the respondent contends that the applicant is indeed the proper defendant. He deposited in the said account a total of KShs.239,800/=. He has known the applicant for over ten years as they come from the same area at home. He identified the applicant in court as well as when he lent him the money. The applicant's wife voluntarily entered into the consent. There was no coercion. The wife defaulted and her salary was attached.

It is unfortunate that the application for stay of execution has taken over one year to be finalized yet the proceedings have already been typed. Since the applicant maintains that he is not the defendant in the suit and had not instructed his wife to enter into the consent, I do find that it will be unfair to allow the applicant's wife's salary to be attached. I do find that all the issues being raised can be deliberated upon during the hearing of the appeal. It has taken over one year and the interim orders of stay have been in place. I do grant the application dated 30.1.2012 in terms of prayer 2. I do further order that the applicant's advocate file his record of appeal within 45 days hereof and thereafter the appeal shall be set for hearing. Each party shall meet his own costs of this application.

Delivered, dated and signed at Kakamega this 2nd day of May 2013

SAID J. CHITEMBWE

JUDGE