



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 463 of 2007

DR. JOHN KARUNGAI NYAMU & ANO.....PLAINTIFF

VERSUS

MUU & ASSOCIATES ADVCOATES.....DEFENDANS

RULING

Application dated the 9/10/2009 is brought under **Section 3A 63C and e and 80 Civil Procedure Act. Order XLIV rules 192 and Order L. rule 1 Civil Procedure Code.**

Orders sought are

- (1) A restraining order against the plaintiff from executing the security guarantee issued by the applicant and filed on 1/10/2009 pursuant to court order issued on 29/9/2009.
- (2) That this court do review its orders made on 29/9/2009.
- (3) Order discharging the surety/guarantor for the defendant with respect to the court order made on 29/9/2009 and deed of surety, revoked forthwith and the plaintiff be directed to pursue defendant for their claims.

The grounds on which application are stated:-

- (1) There was an error on the face of record. No judgment has been entered against defendant and no decree has been issued. The order dated 29/9/2009 should be vacated.
- (2) That there are material developments making compliance impossible.
- (3) The deed is at variance with the court order and should be revoked. The deed appears to be judgment and deed imposes additional obligations over the court order.
- (4) This application has been brought without delay and there is sufficient reason to review orders.

(5) The guarantor is willing to comply with orders of court.

The second plaintiff has sworn a replying affidavit on her behalf and on behalf of first plaintiff, her husband. She agrees that the defendant was arrested for failure to obey court order made on 29/9/2008 after he was found guilty of contempt of court dated 12/3/2008 and was arrested and brought to court by court bailiff. He was also accompanied by his father who agreed to be surety/guarantor for him.

It was the guarantor's own consent and willingness to become surety/guarantor, that the court made the order dated 29/9/09 for his son. Then the defendant admitted the dispute was in regard of Kshs.2,000,000/=. The matters state in paragraph 8(a), (b), (c) of the supporting affidavit was a private conversation between father and son not part of court proceedings.

The guarantor executed the deed freely unconditionally to support his son in his predicament. The guarantor, the father earns a substantial income of Kshs.203,425/= and he can afford to stand for his son. It is to be remembered that dispute is that the defendant advocate appropriated the plaintiff money entrusted to him in relationship of client and advocate.

The defendant admitted the sum of Kshs.2,000,000/= as due to the defendants in presence of his father and the court. That debt is no longer open to hearing. There was an order by Lesiit Judge for some money to be deposited in court by defendant being due to the plaintiff. Defendant failed to pay. When the defendant appeared in court with his father he admitted that the money subject of contempt proceedings was paid but a sum of Kshs.2,000,000/= was outstanding and it was ordered that his father do guarantee payment of that money.

It is not correct to say there was no order for repayment and himself and his father agreed voluntarily to pay the money outstanding. As it was at hand, the father agreed to sign guarantee/surety and to pay Kshs.100,000/=.

Upon considering the matter, I find no reason to grant orders sought. The requirements of Order 44 are not complied with to warrant making orders for review.

The deed of guarantee is in accordance with the court order and the guarantor ought to comply with the same. I have noted the authorities cited.

The application is dismissed with costs to the plaintiffs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day of November, 2009.

JOYCE N. KHAMINWA

JUDGE